

## AN OPEN PALM HOLDS MORE SAND THAN A CLOSED FIST

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What is the biggest problem in litigation ethics or professionalism among lawyers today? And, more important, what is the solution to that problem? The lack of courtesy and the overreaction to discourtesy that are endemic to the general population, in which everyone I know has either experienced road rage or, at least been the target of it, is also manifested by lawyers in their practice of law. Our adversarial justice system magnifies every rudeness by one of us against another until lawyers sometimes find themselves at each others' throats without any idea of how they got there.

Anyone in Florida who sees my name on one of these essays will assume that I am here to tout the merits of the Florida Inns of Court. And I would do so except that the program is now so well known across the country that such an essay would be redundant. Nevertheless, I must (summarily) suggest that the Inns are the most positive and successful (to date) solution to the problem, for the following reasons.

American Inns of Court are the fastest growing legal movement in the United States. Today, there are well over three hundred Inns across the country. American Inns are patterned after the English

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\* © 1998, Joryn Jenkins. All rights reserved. The Author has chaired a grievance committee of The Florida Bar and sat for years on the Committee on Professional Ethics. She has served as Editor in Chief of both *The Bench*, the publication of the American Inns of Court, and *The Federal Lawyer*, the magazine of the Federal Bar Association. She has been selected by her peers as a "Leading Florida Attorney," is AV-rated by Martindale-Hubbell, and was the recipient of the 1997 President's Award of the Federal Bar Association.

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Inns of Court, which originated in 1292, when King Edward I directed his chief justice to satisfy a growing need for skilled advocates at the Royal Court at Westminster. The English Inns emphasized the value of learning the craft of lawyering from those individuals already established in the profession. Their collegial environment (breaking bread) fostered common goals and nurtured professional ideals and ethics.

In 1977, Chief Justice Warren E. Burger spent two weeks in England as a member of the Anglo-American Exchange. He was particularly impressed by the collegial approach of the English Inns and by the way the Inns passed on to new lawyers the standards of decorum, civility, ethics, and professionalism necessary for a properly functioning bar. Following his return, Chief Justice Burger authorized a pilot program that could be adapted to the realities of practice in the United States.<sup>1</sup>

Former Solicitor General Rex Lee and Senior United States District Judge A. Sherman Christensen founded the first American Inn in 1980. The Inn was affiliated with the school of law at Brigham Young University in Provo, Utah. The number of American Inns increased slowly at first, but the growth of the movement accelerated in 1985, when the American Inns of Court Foundation was established.

American Inns are designed to improve the skills, the professionalism, and the legal ethics with which the bench and the bar perform their functions. Inns help lawyers become more effective advocates, with a keener ethical awareness, by providing them the opportunity to learn side-by-side with the most experienced judges and lawyers in their communities. Inn objectives are as follows:

1. To establish a society of judges, lawyers, legal educators, law students, and others to promote excellence in legal advocacy in accordance with the Professional Creed of the American Inns of Court;
2. To foster greater understanding of and appreciation for the adversary system of dispute resolution in American law, with particular emphasis on ethics, civility, professionalism, and legal skills;
3. To provide significant education experiences that will im-

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1. See PAUL E. PIXTON, *THE AMERICAN INNS OF COURT — RECLAIMING A NOBLE PROFESSION* 42 (1977).

prove and enhance the abilities of lawyers as counselors and advocates and of judges as adjudicators and judicial administrators;

4. To promote interaction and collegiality among all legal professionals to minimize misapprehensions, misconceptions, and failures of communication that obstruct the effective practice of law;
5. To facilitate the development of law students, recent law school graduates, and less experienced lawyers as skilled participants in the American court system;
6. To preserve and transmit ethical values from one generation of legal professionals to the next; and
7. To build upon the genius and strengths of the common law and the English Inns of Court and to renew and inspire joy and zest in legal advocacy as a service worthy of constant effort and learning.

The Inn program is the heart of the monthly meetings. At each meeting, usually after breaking bread, a group of members (the "pupillage") puts on a program, which involves practical legal skills with an emphasis on ethics, civility, and professionalism in lawyering. A program is generally a demonstration or a presentation of principles, skills, techniques, and relationships involved in trial or appellate proceedings or in activities preliminary to courtroom appearances, although there is no set format. The program also incorporates opportunities for critique and discussion.

The most important aspect of the presentation is creativity and originality. Programs are prepared by the pupillage teams, usually one team per monthly program. It is not necessary for every pupillage member to have a speaking role in the program, although everyone in the pupillage usually has a contribution, whether it is research, writing, design, or demonstration, to ensure that the program is instructive and interesting.

Program assignments are prepared by the programming committee during the summer before the Inn year. Although the general topics are usually assigned, the format is not. Panel discussions, demonstrations, game-show formats, skits, or small-group discussion are ways in which a program can be presented. Some of the most memorable programs have been those involving frank and spirited disagreements among Inn members. Humor is also an effective teaching tool.

Audience participation is very important. Whatever the format, the pupillage should allow for discussion at least every ten minutes or so, usually by a “freeze-frame” technique to stop the action periodically, to permit other Inn members to make comments or to ask questions.

Another crucial aspect of the Inn's focus is the monthly pupillage meetings. The meetings take place at lunch, at breakfast, or after work, both in preparation for that pupillage's demonstration, and simply to encourage the relationships that develop among the pupillage's members.

The Inns have spawned yet another idea for discouraging discourtesy. When I was a full-time law professor, I taught trial practice, creditor's rights, and appellate practice. I also taught a (non-credit) poetry writing seminar. Other lawyers would ask me what possible benefit a course on poetry could be to law students. The answer is not difficult. Like successful poets, the most effective lawyers not only communicate well through the written word, but they are also among the most creative of us. Further evidence of that truism is the newly created Peer Review Program of my local bar association.

In December 1991, in Tampa, Florida, the Hillsborough County Bar Association (HCBA) adopted the Standards of Professional Courtesy (the Standards).<sup>2</sup> These conventions were similar in intent to proposed standards for civility recently proposed in many local bars. One would think that they would be essentially aspirational in nature, in large part because of the difficulty inherited in enforcing gray (i.e., not black and white) guidelines; however, these were very directive, with specific instructions about what conduct would be considered acceptable to the local bar and judiciary.

In December 1996, the HCBA went one step further and resolved to create a voluntary Peer Review Program, in an effort to ensure the efficacy of the Standards. In part, the idea arose out of the Inns of Court concept of receiving congenial and constructive advice over dinner (or any “breaking of bread”). This was far less intimidating and more effective in promoting professionalism and civility

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2. Hillsborough County Standards of Professional Courtesy (1991) (copy on file with author, the Hillsborough County Bar Association, and the *Stetson Law Review*). The Standards are also available at Stetson University College of Law, The Florida Institute for Litigation Ethics (last modified Nov. 17, 1998) <<http://www.law.stetson.edu/litethics>>.

than Rambo-like responses and “take-no-prisoners” tactics. Tampa, at that time, already had four Inns of Court, all of which received more applicants than they could conveniently accept for membership each year. The Peer Review Panel was to consist of a local group of luminaries in the local bar who would agree to meet with certain lawyers practicing in the community who were referred to the Program. The complaints, criticisms, or gripes leveled against them regarding their lack of professionalism could be discussed in an informal, nonpunitive environment. Thus, the HCBA hoped to engender resolutions to behavior which, although not egregious enough to invoke formal disciplinary process, nevertheless fell below the high standards expected of attorneys appearing in the courts of Hillsborough County.

On September 4, 1997, after the matter was brought to the attention of the judges of the Thirteenth Judicial Circuit, the Chief Judge entered Administrative Order S-29-97-104, applauding and endorsing the HCBA's efforts to increase the sensitivity of local lawyers to professionalism and civility issues.<sup>3</sup> The Administrative Order required the judges of the circuit to actively participate in the Program, both as panelists and in referring improper conduct to the Peer Review Panel for resolution.

The Peer Review Program's internal operating procedures were considered long and hard. Eventually, the decision was made to establish a committee of as many as fifty volunteer lawyers and judges, five of whom were to constitute the executive board, selected by the Chief Judge of the Circuit, the President of the HCBA, and the Chair of the Professional Conduct Committee. The executive board would appoint the remaining reviewing members of the committee.

Reviewing members act in panels of three, one of whom is chair. The screening attorney serves as liaison between the panel and the referring attorney, and makes the determination whether the matter is appropriate for peer review. The panel chair is responsible for contact between the panel and the screening attorney or the executive board, and for arranging meetings between the panel and the referred party.

The procedure established is relatively simple, in order to en-

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3. Administrative Order S-29-97-104 (1997) (copy on file with author, the Hillsborough County Bar Association, and the *Stetson Law Review*).

courage participation in the program. First, a referring party contacts the HCBA office to determine the identity of the screening attorney. The referring party then contacts the screening attorney, who conducts an interview to determine the nature of the conduct. The screening attorney determines whether the matter is appropriate to refer to the board, considering both the nature of the conduct complained of and the viability of the referring party's complaint. Once the board determines that peer review is appropriate, the board selects a review panel and designates a chair. The chair conducts a conflict check for all three panelists. Once a panel is seated, the board provides all pertinent background to the chair, who then assumes responsibility for conducting the peer review.

Of course, conflicts of interest must be resolved before any review. A conflict arises when, among other things, a member of the review panel is currently involved in a matter, either litigious or transactional, in which the referred attorney is an opposing attorney. When a conflict exists, the board will remove the conflicting panelist and appoint an alternate. Involvement in a matter between the referring party or referred attorney or his or her firm and a panelist's firm, however, is not automatically considered a conflict and may be waived by the referral and the referring party.

The chair schedules a meeting between the panel and the referred lawyer. The locus of the meeting is not defined; anyplace in which all participants feel comfortable is the key. Discussion of the unprofessional conduct is informal; the primary focus is on educating the referred lawyer. The consultation should include recommendations from the panelists of alternate means of dealing with the situation, should it recur.

The function of the Peer Review Committee is to provide a confidential service to attorneys and judges in resolving problems created by unprofessional conduct. Therefore, by execution of the Peer Review Submission Agreement, participants agree that the activities of the committee are immune from prosecution for, among other things, libel or slander. Meetings between the panel and the referred party are confidential. The identity of the referring party also may not be disclosed. There are no written records, other than statistical, maintained by the committee.

What kind of faux pas should be referred to the peer review panel? Suppose a judge complains that the lawyers in his courtroom were arguing with each other instead of addressing the court, and

were accusing each other of lying and other egregious behavior. Both attorneys should be referred to the peer review panel. Suppose a lawyer files a pleading with a certificate of service attesting that she mailed the pleading on a certain date. The envelope makes it clear that she did not. She should be referred to the panel. Lastly, suppose an attorney schedules a hearing without clearing the time on opposing counsel's calendar first. He should be referred to the panel. These are unprofessional actions that could be rectified with the proper counseling.

I am honored to have been chosen to serve on this Peer Review Committee. Sometimes "an open palm holds more sand than a closed fist."<sup>4</sup> Having witnessed the profound success of the American Inns of Court, I have high hopes for the efficacy of this enterprising program and look forward to benefitting from my own participation. I recommend creative concepts for dealing with the disheartening impact on our practice of law's pervasive lack of courtesy and of community, and the daunting isolation which contributes to the nearly universal attitude that everything is disposable, even our professional relationships.<sup>5</sup>

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4. Ancient Japanese Adage.

5. For further information regarding the Peer Review Program, you may contact William Kalish, Chair, Hillsborough County Bar Association, Peer Review Program, at (813) 222-8700, or care of Kalish & Ward, P.O. Box 71, Tampa, Florida 33602-5155.