SETTING THE PRIORITIES: ETHICS OVER EXPEDIENCY*

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I hate to sound like a curmudgeon, but one of the worst things that ever happened to litigation ethics — no, ethics in general — was the recent emphasis on professionalism. Beyond good manners and avoiding temper tantrums, no one knows what professionalism means; but more importantly, the attention it has garnered has diverted our attention from the fact that the basic ethics rules are being violated far too often and with impunity. To me, the profession cannot afford to dwell on the professionalism issue until we get our ethical house in order. Devoting attention to professionalism is like worrying about whether we are going to serve Sevruga or Beluga when we do not yet have any green vegetables or milk.

When I think of ethics and litigation, I think of two particular areas in which ethical lapses abound. The first, and more important, relates to the discovery process. When it comes to pleadings, motions, trials, and appeals, the ethics of our profession is adequate, if not exemplary. In these activities — conducted in the open, scrutinized by the bench and opposing counsel, and in a context where the favor of judge and jury is sought — by and large, the ethical mandates are followed. Where credibility is largely rewarded, lawyers earn respect and approval. But discovery — even the word makes it sound like a game of hide and seek — is a different arena altogether. Perhaps it is because too few cases go to trial and too many of us litigators (as opposed to trial lawyers) only get to show our stuff in this phase of the battle. For whatever reason, discovery brings out the worst in us.

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Production of documents, where delay is epidemic, is time-consuming, expensive beyond measure, and grudging at best. Objections, as frivolous as they are expansive, are the required response to requests so broad they require emptying warehouses. Yet, the practice of seeking too much is itself a response required by everyone's distrust that if they do not ask for everything *and* the kitchen sink, opposing counsel will use that lapse as a basis for withholding the smoking gun documents. Blame can be placed wherever you choose to punctuate this vicious cycle, but there is more than enough blame for everyone.

If document production is a shame, depositions are a scandal. Except for those depositions that are videotaped, seen by judge and jury, and therefore become more like a trial, the interminable length ("Let's turn to Exhibit 473."), the pedantic parsing of questions ("What do you mean by meeting?"), and the endless coaching of witnesses ("I object. The witness earlier testified. . . ."), distort a process that is designed to elicit information fairly and efficiently, which is a pity.

The idea of discovery is enlightening — no surprises at trial and each side can know what the witnesses will say and what the documents will show. Perhaps we might effectively take the discovery process out of the partisans' hands, leaving lawyers to try the case after a neutral party has supervised what I would rename "pre-trial disclosure," which would be one set of facts and two able advocates trying to persuade the neutral party to reach a result.

I know this idea is heretical and would cause the entire litigation establishment to collapse, but I am afraid lawyers have done a terrible job as guardians of the discovery process and have distorted it beyond recognition. Clients hate it, judges hate it and refuse to supervise it, and we will lose it unless we regain the ethical high ground and follow Rules 3.1,[1] 3.2,[2] 3.3,[3] 3.4,[4] 4.1,[5] and 8.4,[6] which are

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1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1995) (indicating that a lawyer shall not assert an issue or defend a proceeding unless a basis exists that is not frivolous, which includes an argument made in good faith for an extension, modification, or reversal of existing law).

2. *Id*. Rule 3.2 (noting that a lawyer must make reasonable attempts to expedite litigation based on the client's interests).

3. *Id*. Rule 3.3 (instructing that a lawyer must display candor toward the tribunal and shall not knowingly make false statements of material fact or law).

4. *Id*. Rule 3.4 (making it illegal for a lawyer to falsify evidence, destroy or conceal a document having evidentiary value, or prevent another party from accessing evi-

clear ethical mandates violated every time a lawyer plays discovery games.

The second area is narrower, but just as volatile. The systematic efforts by the Department of Justice to undermine Model Rule 4.2[7] requirements that prohibit contacts with represented persons[8] are a national disgrace that should outrage the legal community and, more importantly, the client community.

The principle behind Rule 4.2 is clear. A client who has hired or been appointed a lawyer, in a matter, should have all contacts from all other lawyers come through the client's lawyer.[9] Thus, a client is entitled to the full protection retaining a lawyer will afford and avoids the overreaching that would result if the client had to deal directly with one trained in the law.

Whatever force the purpose of this Rule has as a general proposition, it is multiplied ten-fold in the situation in which the lawyer on the other side represents the majesty and power of the federal government. One cannot imagine a situation in which the need to be protected by one's lawyer would be any greater. Yet, citing the expediency of the needs of law enforcement, the United States Justice Department, from Thornburgh to Reno, has sought to avoid Rule 4.2's prohibitions.[10]

I am the first to admit that law enforcement would be more efficient if Rule 4.2 could be ignored, and if, Assistant U.S. Attorneys could, by right, visit clients with a sharp rap on the door at 1:00 a.m. Flashing a badge would undoubtedly produce a torrent of

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dence).

5. *Id*. Rule 4.1 (specifying that when representing a client, an attorney shall not knowingly make false statements of material fact or fail to disclose material facts to a third person).

6. *Id*. Rule 8.4 (evidencing that a lawyer who violates or attempts to violate the *Model Rules of Professional Conduct*, commits a criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer and, among other things, engages in dishonest conduct, will be guilty of professional misconduct).

7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1995) (showing that a lawyer shall not discuss the subject of representation with a person who the lawyer knows is represented by another lawyer in the matter, unless the lawyer has the other lawyer's consent).

8. *See id*.

9. *See id*.

10. *See* Richard M. Zanfardino, *Leveling the Playing Field for Federal Prosecutors or an End "Around Ethics"? An Evaluation of the Thornburgh Memorandum and the Reno Rule*, 43 NAVAL L. REV. 137, 141–43 (1996).

information, and perhaps a confession or two. Additionally, law enforcement would be more efficient if we repealed the Fourth Amendment or eliminated the need to give *Miranda* warnings[11] before arrest. However, we have decided some values are more important than efficiency. After all, Mussolini did make the trains run on time. Rule 4.2's values are as important as any; values that should not be triggered by filing a complaint or returning an indictment, but as soon as the lawyer comes on the scene.

It may be that, at the end of this battle, the courts will conclude the Justice Department has a basis for exempting its lawyers from the ambit of Rule 4.2. But before the Justice Department spends one more day pursuing a power grab that undermines the time-honored concept of state regulation of lawyers and destroys Rule 4.2's important client protection, the Justice Department should take one giant step backward. It should recognize the important values it threatens to tear asunder and decide that whatever accomplishments it achieves by end-running the lawyers are so tainted that they should be abandoned. Ethics over expediency — we should not hold our collective breath, but maybe, just maybe, the powers that be will see this light.

11. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966).