

Ethically speaking

by Barry Vogel Q.C.

Do not do unto others as Rambo would do unto you

At the risk of being accused of being preoccupied with the subject, I wish to address, yet again, the subject of the deterioration of civility and professionalism between and among lawyers.

This sorry state of affairs is brought to my attention daily in the calls that come to me as Practice Advisor. Lawyers describe to me regularly, conduct that demonstrates rudeness, inflated rhetoric, hostility, and refusal to discuss or consider any position other than that being put forward. Frequently, the language used is antagonistic and unjustifiably aggressive.

At the risk of oversimplifying, I believe what is happening is that lawyers are becoming too quick to identify, at the personal level, with the issues raised by their own clients. And if they are identifying in this way, it is not much of a leap to characterize the lawyer opposite the same way, viz. he or she is personally identified with the client's position. That seems to be justification for lawyers treating one another in the same way that the clients treat one another.

I know that there are a lot of lawyers out there and that practice is becoming increasingly competitive. While that may be an explanation, it is not an excuse for lack of professionalism and courtesy. And it is a mistake to assume that this is taking place only in litigation, where one might argue that the adversary system is more prone to this kind of posturing. The fact is that it is found in all aspects of practice, including the common house deal.

It is axiomatic to restate that a hallmark, an essential of professionalism, is objectivity. The lawyer serves the client best by remaining detached and uninvolved with the animosities and recriminations that frequently exist between the clients. Remaining detached does not mean that a lawyer cannot be a zealous advocate for a client. Strong positions can be advanced without a personal spin directed at the opposite lawyer. In fact, objectively stated arguments are usually more persuasive and effective than personal attacks.

What are the effects of this unprofessional approach to practising law? The most important one, in my opinion, is that it unnecessarily hardens lines and encourages intransigence. I am aware that in the evolution of a dispute between people, hard lines and intransigence are often inevitable. But when

the lawyers become personally involved in this dynamic, the reconsideration and modification of positions, which almost invariably are in the clients' best interests, are frequently delayed, and sometimes forgotten. This almost always causes increased expense and inconvenience to the clients.

Another effect: the experience of practising law is made less enjoyable when lawyers are sniping personally at one another.

I suspect that even the most ardent practitioner of the "Rambo" school does not really enjoy that kind of practice, but feels compelled to do it as a means of self defence or out of a misguided (in my opinion) notion of what this business is all about.

There is yet another negative effect. We all complain about lawyer-bashing on the part of the public. We are all unhappy when we see the evidence, which is everywhere, that a large part of the public has no respect for lawyers. *Why should the public show respect for lawyers when so many lawyers don't show respect for lawyers?*

I urge you to deal with your colleagues in a professional and courteous manner. Most of you do, but the size of the minority that doesn't is much larger than it should be and, regrettably, it appears to be growing at an unfortunate rate.

Keep the personal references and your opinions of the other lawyer out of your dealings with that lawyer, and deal only with the issues and merits of the matters before you. And, just as important, when the other lawyer is coming on like Rambo, as difficult as it may be, try to rise above it; don't give the other lawyer the satisfaction; resist the temptation to respond in kind. Apart from the fact that the other lawyer will probably find such a response disarming, you are better serving your client as a professional.

You may also find that you are reducing the stress level of this business, and, who knows, may be helping to regain some respect for yourself and your colleagues. Rodney Dangerfield will be proud of you.

While the calls to me and the increase in news articles on the subject indicate that I am not the only person concerned with the state of civility among lawyers, I am unsure how pervasive the concern is. Is this a problem that must be dealt with? Is this the way it is going to be in the practice of law, and if you can't take it - get out? Is it somewhere in between? I would appreciate hearing from

you. And if you agree it is a problem and have some suggestions as to how to deal with it, they would be most welcome.

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Advocacy

Continued from page 16

The Brief

In the process of preparation you should organise your brief into an order with which you can become familiar, and which will enable you to quickly identify and locate material within your brief at any time. The physical organisation of the brief is a matter for personal preference but one method, which may appeal, is to have a series of folders or, alternatively, a series of divisions within one folder, for different categories of documents. The divisions or folders may include:

- (a) pleadings, interrogatories and answers thereto, lists of discovery and other court documents;
- (b) the witness statements in alphabetical order;
- (c) expert reports, separated into areas of expertise, then placed in alphabetical order and, for each individual expert, arranged chronologically accompanied by the letter of request;
- (d) important, or what are sometimes described as "critical", documents eg relevant contracts or correspondence and the like;
- (e) discovered documents and other relevant but not vital documents.

In each division the separate items may be tagged for ease of identification and location. The chronology should be kept in a prominent and accessible location eg at the beginning of the division containing the witness statements or in front of the court documents.

When you are familiar with the facts and the law and have identified the issues to be resolved, then you are in a position to undertake what is referred to in the workshops conducted by the Institute of Advocacy as 'Case Analysis'. This will be discussed on another occasion.