CARLTON FIELDS

Professionalism: Tips From the Bench

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On Friday, February 27, 2015, we attended a CLE program presented by the St. Petersburg Bar Foundation titled Legendary Lawyers Professionalism Seminar: What Do You Want Your Legacy to Be? The program honored the memory of Michael, J. Keane and Martin E. Rice, along with many other legendary lawyers. That judges take professionalism seriously was manifest in the active participation, as speakers or otherwise, of the following judges:

- *6th Circuit Judge David Demers (retired)*
- *10th Circuit Judge Ralph Artigliere (retired)*
- Sixth Circuit Judge Amy Williams
- Sixth Circuit Judge Stanley Mills
- Sixth Circuit Judge John Schaefer
- Sixth Circuit Judge Frank Quesada
- Sixth Circuit Judge Thomas McGrady
- Sixth Circuit Judge Anthony Rondolino

- Second DCA Judge Morris Silberman

- Sixth Circuit Judge Pamela Campbell

- Sixth Circuit Judge Mark Shames

It is worth a few minutes to read and think about some of our "takeaways"from the seminar, even if these items seem self-evident to you. On ESI (by Judge Ralph Artigliere):

- Understand today's "culture of information" and how it applies to your cases.

- Learn the nomenclature, mechanics, and the continuously developing rules, statutes and ethical opinions concerning ESI.

- Cooperate - this is the key to:

- Keeping ESI discovery costs from spiraling out of control

- Defeating an uncooperative adversary (by juxtaposing your cooperativeness against an uncooperative adversary)

- Remember that Rule 1.010 provides, inter alia, "These rules shall be construed to secure the just, speedy, and inexpensive determination of every action."

- If you are a "doubting Thomas," review *Allied Concrete v. Lester*, 736 S.E. 2d 699 (Va. 2013) (lawyer tagged for $534,000 and five-year suspension after a Facebook "I Love Hot Moms" photo SNAFU)

Conduct that enhances or damages lawyer credibility with the Court (Judges Williams, Mills, Schaefer, Quesada, McGrady, Rondolino):

- Judges have long memories
- Judges talk to one another about their experiences with specific lawyers
- Judges quickly learn which lawyers enter court with dark clouds over their heads

- Judges want to make the right decisions

Specific credibility enhancers:

- Use common sense with the court

- Do your homework for any court appearance
    - Provide hearing material ahead of time (3-4 days)
    - Be competent in the facts and law applicable to your case
    - When faced with controlling case law against your position, acknowledge it and either withdraw your motion/argument (if you were unaware of it before hand) or provide a reasoned, good faith basis for advocating a change in that law
    - Be respectful of the court's need to be even-handed
    - Get to the point quickly – explain the relief you want at the beginning of your argument
    - Have enough copies for everyone (court and counsel should get same thing)
    - Don't raise your voice
    - Don't hog hearing time – recognize the other side is supposed to get half the hearing time
    - Don't disrupt the other side's argument

- Cooperation – which, in the minds of most judges, requires:
    - Communication
    - Candor, not obfuscation
    - Honesty
    - A proportional application of rules
- Be easy to work with – likeable – genuine
- Civility – Civility is easy if you recognize that what we do is way more than just a job
    - If you have to go to court over a discovery dispute:
    - Make sure you are the lawyer who worked hard to resolve as much ahead of time as could be resolved
    - Make sure you've actually talked to the other side (in person or over the phone) and haven't just engaged in email combat
- Chief Judge McGrady's perspective: "Too many discovery disputes could have been resolved if the lawyers would just talk to one another."
- Be forthright in stating, in discovery responses, what you are producing, and produce what you believe would be reasonably requested, even if you object to the rest.

Credibility diminishers:

- Fail to learn your client has no responsive documents until after fighting over objections to the request

- Use repetitive, boilerplate, “general objections” in responding to discovery requests, before then saying, “Subject to and without waiving the foregoing ...”

- Display bad body language – e.g., pouting, scowling or looking like you’ve been shot between the eyes after ruling adverse to your client’s position

- Don’t be sarcastic or condescending in motions for rehearing – judges read those things to see if they missed something that they need to fix

- Complain about high fees when your over-zealous resistance caused the other side to spend more time than should have been necessary (see *State Farm v. Palma* 555 So. 2d 836 (Fla. 1990) ($253,000 fee upheld against insurer who denied a $600 claim))

- Bring emergency motions when no genuine emergency exists

- Say you are unaware of, or be unable to distinguish an opinion that is squarely against the position you are advancing, especially if the Judge is the one who called your attention to it after doing 3 minutes of Westlaw research

- Use a shotgun approach in your papers – e.g., My client was nowhere near that bar when the shooting occurred, but if he was in the bar, he didn’t pull out his gun, but if he did pull out his gun and shoot it, he did so in self-defense, and even then, he was insane when he pulled that trigger.

Discovery abuse – how to minimize disputes and fight back in a professional manner:

- Talk – pick up the phone – better yet speak face to face; avoid long email wars

- Scrutinize – look at your request, spot obviously objectionable aspects, and make them unobjectionable before serving the request.

- Don’t use boilerplate responses/objections – look at federal rules and cases on boilerplate, because Florida regularly follows federal on this and the Sixth Circuit Judges are receptive to following that case law

- Don’t object if your client has no responsive items

- The judge wants to see that:
  - The request was appropriately tailored
  - Objections are specific and appropriate
  - You've made efforts (phone, email, letter) to resolve the issue without involving the court
  - Judges don't like to make lawyers pay money as a sanction (e.g., those lawyers may run for judge), so consider asking for non-monetary sanctions. E.g.:
    - Lawyer has to sign an affidavit that he has read and understands applicable cases and rules
    - Lawyer has to make a CLE video about what constitutes deposition misconduct
    - Judges believe it is important that parties provide full and fair discovery. *See Bainter v. League of Women Voters of Florida*, 150 So. 3d 1115 (Fla. 2014)

57.105:

- Judges are often disgusted with attorneys who characterize everything in terms of an adversary's conduct being frivolous or designed for delay
- Some judges will often sober up a lawyer making such a presentation with a statement like, "These are very serious allegations; do you suggest that I contact The Florida Bar
- about this situation?"
- You likely won't win a 57.105 motion or motion for sanctions and fees the first or second time you address a problem with a court. You will probably need a small stack of
- orders showing you really tried to be reasonable before you can get sanctions or fees.

Revisions to Florida's Oath of Attorney:

- In 2011, the Florida Supreme Court amended the Oath of Attorney to include new language emphasizing the importance of respectful and civil conduct in the practice of law. At the conclusion of the seminar, Judge Campbell administered the Oath to all participants. The new language within the Oath reads:
  - To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in Court, but also in all written and oral communications.

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