
FROM THE BENCH: LESSONS DISCOVERED ALONG THE WAY

JEFFREY COLE
AUTHOR

In the tradition of Judges Kennelly and Gettleman from the Northern District of Illinois, newly appointed Judge Jeffrey Cole stresses the need for practitioners to act like professionals. Judge Cole's advice comes from observations and realizations of his first months on the bench: Remember to be clear, concise, respectful, patient, tolerant, honest, and dignified-- remember to do everything else too.

From the Bench

Lessons Discovered Along the Way or Almost All We Ever Really Needed to Know, We Did Learn in Kindergarten

Years ago—more than I care to remember—I read Harlan Phillips’s *Felix Frankfurter Reminisces* (1960). Shazaam! (To borrow one of Judge Kozinski’s favorite expressions.) I knew I wanted to be a federal judge. But I’d also wanted to be Mickey Mantle. I had, however, read the Holmes-Laski letters and knew such tidbits as John Marshall’s having been Adams’s second choice and the effect the appointment of William Johnson had on Marshall’s control of the Supreme Court. See Donald Morgan, *Justice William Johnson* (1954). But so did a lot of other people, and the queue hoping for a glimmer of some sort of recognition was long indeed. Even Scott Turow, who admitted at one time to wanting to be a federal judge more than anything, had to “settle” for another vocation.

In May 2005, I was appointed by the judges in the U.S. District Court for the Northern District of Illinois in Chicago as a U.S. magistrate judge. Most of my reactions to this appointment and the changes in my perspective are intensely personal and of no real interest to anyone but me. There are some, however, that I would like to share because they may be of help in the way you deal with judges. Mine is not the first such endeavor. The most famous of the lawyer-turned-judge

by Jeffrey Cole

Magistrate Judge
U.S. District Court
Northern District of Illinois

articles is Henry Friendly’s, given at a symposium honoring the fortieth anniversary of Cardozo’s delivery of the Storrs lectures. Judge Friendly chose as his title “Reactions of a Lawyer-Newly-Become-Judge.” In the article, he said what struck him most on becoming a judge was the enormous change in the effect of the simple act of signing his name, something he had done thousands of times without any great consequence attaching to it. Now, suddenly, the whole power of the United States would be brought forth if necessary to carry out his will. Of course, that was just the springboard for a characteristically brilliant discussion of a number of topics, including the ultimate wisdom of having a judiciary largely staffed by non-specialized judges even in a time of increasing technological complexity. 71 *YALE L.J.* 218 (1961).

Much more recently—and much more practically—Judge Robert W. Gettleman and Judge Matthew F. Kennelly of the district court in Chicago have written about their transitions from lawyer to

judge. Judge Gettleman’s theme was “we can do better.” He reluctantly expressed dismay at finding himself joining what he believed to be the large majority of judges who regard lawyers as “far-too-often disrespectful, presumptuous, tardy, verbose, and generally ineffective.” In an attempt to prevent himself “from becoming one of those crotchety, overly skeptical judges before whom lawyers dread to appear,” Judge Gettleman took the opportunity to share his thoughts with the bar and suggested “some ways that we, as professionals, can do better in the world of litigation.” R.W. Gettleman, “We Can Do Better,” 25 *LITIGATION* at 3 (Summer 1999).

Judge Kennelly, while not “subscribing to a barbarians-at-the-gate view of the state of the legal profession,” concluded that “there is clearly room for improvement in several key areas.” M.F. Kennelly, “From Lawyer to Judge,” 27 *LITIGATION* at 3 (Summer 2001). For Judge Kennelly, no less than for Judge Gettleman, civility was a significant problem, although their views differed somewhat on its extent. Judge Kennelly was happy to report that while handling 800 cases since his appointment, he could count on two hands (with several unused fingers) the number of cases in

which he observed conduct that would genuinely be considered uncivil. His experience stemmed from his very realistic and absolutely correct view that good manners can be ensured only by making clear to lawyers that bad behavior is unacceptable and therefore ineffective.

Judges Kennelly and Gettleman were dismayed at the quality of the briefs submitted to them, the pettiness that manifested itself in needless discovery disputes, the lack of candor and civility, and the failure of lawyers to consider settlement at early stages of the case. Both articles contained a number of useful tips on how to be more effective advocates, including some “do nots.” I should like to pick up where they left off, mindful that what follows is not necessarily new or fresh—the topic (like the current author) has inherent limitations. Nonetheless, since the problems persist, there is value in repetition, and a difference in emphasis and accent might bring the issue into different relief.

In what follows, I do not mean to be preachy, for “few things are more futile than trying to make people good by preaching at them. Life, not the parson, teaches conduct.” Richard Posner, *Overcoming Law* 95 (1995). And some of what follows you already know, not only from long years of practice but from life itself: Play fair; don’t hit people; say you are sorry when you hurt somebody; live a balanced life; clean up your own mess. R. Fulghum, *All I Really Need to Know I Learned in Kindergarten: Uncommon Thoughts on Common Things* (1993). Other, more specialized lessons learned along the way may be instructive, coming from someone who so recently became a judge after many years as a lawyer.

Three things—all interrelated—have struck me most forcefully almost from the first day I held court. First, what seems so pellucidly clear from an advocate’s perspective suddenly becomes gauzy when considered from the vantage point of a judge. Second, judges have an endless workload, and the shortness of life imposes constraints on the amount of time that a judge has to devote to a given problem. Third, there is a necessarily symbiotic relationship between judges and lawyers. The truth, whether one openly admits it or not, is that judicial accuracy for most judges in any given case—and especially over time—is affected by the quality of the presenta-

tions of the lawyers in the case. Brandeis said it best: “A judge rarely performs his functions adequately unless the case before him is adequately presented.” “The Living Law,” 10 *Ill. L. Rev.* 461, 470 (1916). See also Holmes, “The Law,” in *Collected Speeches* 16 (1931) (“Shall I ask what a court will be, unaided? The law is made by the Bar, even more than by the bench.”).

If lawyers approached cases with a recognition of their indispensability to the decision-making process, I am confident that the clarity, conciseness, and comprehensiveness of both written and oral presentations would be substantially better than many think they are. Indeed, one of the most frequently expressed complaints—and one that has been leveled for many years—is the quality of briefing. True enough, quality, like beauty, may lie in the eye of the beholder and, thus, what may to any particular judge seem inadequate may be close to perfection for another. But given the persistency of the complaints and the eminence of the complainants, there must be something to them. The late Karl Llewellyn has recounted how every one of his many law professor friends who became judges agreed that “the general run of briefs which has come before his court—with of course many gratifying exceptions—seems to him barely and scraggly passable, or else inadequate or worse.” *The Common Law Tradition: Deciding Appeals* 30 (1960).

Professor Llewellyn’s own endeavors convinced him, much to his amazement and some dismay, about “the frequency with which the relevant briefs miss or obscure telling points, choose foreseeably losing ground, or mismanage promising positions.” *Id.* Judge Friendly and Judge Posner have expressed the same views. See Friendly, “The Common Law Tradition: Deciding Appeals,” in *Benchmarks*, 34, 39 (1967); Jeffrey Cole, “Economics of Law: An Interview With Judge Posner,” 22 *LITIGATION* at 23, 31 (Fall 1995). So has Judge Gettleman, who said that he has seen “some of the most astonishingly incompetent writing imaginable.” 25 *LITIGATION, supra*, at 3, 62.

The point of all this is not to be gratuitously critical but to underscore the need for lawyers to take the time to help the court decide the case properly—namely, in their favor. If the court is misled by an opponent’s briefs, it’s time to reexamine the clarity, conciseness, and comprehen-

siveness of your own presentation. Underinclusive presentations or presentations that rely on irrelevant cases shift the responsibility to the court to do the lawyer’s work and to explicate the arguments that the briefs have left undeveloped. That’s a risky business, for it presupposes a judge who, in fact, understands the contours of your argument, and who won’t resort to the rule that superficial, skeletal, and unsupported arguments will be deemed waived or forfeited. *United States v. Cusimano*, 148 F.3d 824, 828 n.2 (7th Cir. 1998). In practice, most judges subscribe to the philosophy that they are not like pigs hunting for truffles buried in the briefs, *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991), and it is not their responsibility to research and construct the parties’ arguments. *United States v. Lanzotti*, 199 F.3d 954, 960 (7th Cir. 1999).

Three thoughts about the structure of briefs and memoranda. The first relates to summaries of the argument. Of course, in briefs in the courts of appeals, a summary of argument is required by the Federal Rules of Appellate Procedure. There is no comparable requirement in the district court in most places. As a lawyer, I found the inclusion of summaries formulaic. But of course, I knew the case. A few months as a judge have shown me how indispensable such summaries are. Judges, unlike the lawyers, don’t know the case, and a summary is a wonderful device to educate the judge. Without one, the judge’s task is made appreciably more difficult.

Of even greater importance is a comprehensive factual presentation. Even so gifted and self-sufficient a judge as Richard Posner has said that one of the great failings in briefs is the assumption by the lawyers of too much factual knowledge on the part of the judges, and has stressed the necessity for counsel to educate the judges about the underlying facts of the case. See 22 *LITIGATION, supra*, at 31. Judge Aldisert concurs: A good legal argument, he has said, may be perfected in an afternoon, while a good statement of facts may take entire days, even weeks, to complete, since “[c]ases turn far more frequently on their facts than they do on the law.” Ruggero J. Aldisert, *Winning on Appeal* 158 (1992).

And yet, in too many of the cases that I have seen even in the short time I have been a judge, not enough attention is paid to careful factual development.

Indeed, I can think of several cases in which the final result differed from my initial impression once the facts were fully explored. The problem was that neither side had bothered much with the underlying facts, and I was forced to find them on my own. Ultimately, the accuracy of the decisional process in these cases may have been better served by the equally underinclusive presentations. But that's not the point, and I readily concede that perhaps because I didn't have the requisite input, I may well have overlooked something that might have changed the outcome had it been brought to my attention.

Finally, there is the matter of case selection and usage. In this regard, what I have seen is either unnecessary, lengthy string-citing of cases standing for propositions that either are not disputed or are indisputable, or reliance on inapplicable cases. It's unnecessary and distracting to articulate a proposition and then string-cite numerous cases, all containing parentheticals with virtually identical quotations. The larger and the more substantive problem is the citation of cases that, upon even superficial analysis, don't support the propositions for which they are cited, or do so only by excising the language from the informing context of the opinion. "Judges expect their pronouncements to be read in context," *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005), and taking sentences out of context is not helpful to a judge who is genuinely looking to the briefs for assistance. Cf. *Cohens v. Virginia*, 19 U.S. 264, 399 (1821) (Marshall, C. J.); *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 808 (7th Cir. 2005).

A few months ago I was presented with a case that vividly illustrates the point I am trying to make. The plaintiff had filed a civil rights suit alleging unlawful discrimination. The defendant-municipality filed a one-page motion to dismiss for want of subject matter jurisdiction on the grounds that the plaintiff, in an earlier bout of litigation as part of the settlement, had agreed to arbitrate any future claims of discrimination. No case was cited, and the provision in the earlier settlement agreement was, as it turned out, badly misquoted in the motion. The plaintiff's response was little better. It cited only one case to support the proposition that a party in civil rights litigation cannot waive legal fees. The case was not explained, and there was only the *ipse dixit* that the earlier settle-

ment agreement prohibited an award of fees in arbitration—a construction that was anything but self-evident.

Incredibly, the one-and-one-half-page reply brief ignored the lone case cited by the defendant—a tactic that serves no useful purpose. *Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750, 753 (7th Cir. 1988). Instead, the reply brief string-cited four cases for a proposition that was not in dispute. Ignored was the fact that there were three separate opinions in the case on which the plaintiff relied, and only one was remotely supportive of the argument. One of the other opinions was a dissent based on jurisdictional grounds, while the third was based on a concession by the parties. Had the defendant's lawyer done the most minimal of research, he would have found an Eleventh Circuit case holding that the single case relied on by the plaintiff had not decided the issue. Llewellyn has said that "skill of counsel, where found on one side only, terrifyingly weights the scales of judgment." *The Common Law Tradition, supra*, at 130-31. Where found on neither side, the adversary system, with all its obvious benefits, ceases to exist.

Another deficiency that I have seen frequently and one that many judges have expressed concerns about relates to motions for summary judgment. The threshold concern involves the indiscriminate filing of motions for summary judgment that should never have been filed in the first place. See Milton Shadur, "Trials or Tribulations (Rule 56 Style)?" 29 LITIGATION at 5 (Winter 2003). Then there is the matter of the parties' non-compliance with the requirements established by local rules for the format of the motion. Our Local Rule 56.1—which has counterparts in almost every district—contains very precise provisions for setting forth contested and uncontested facts, with citations to the record, which more often than not is quite voluminous. Noncompliance with these provisions makes proper adjudication exceedingly difficult and results in needless expenditures of judicial time. The motions are often slapped together, fail to cite supporting record evidence, and fail even to *point out the specific* portion of the depositions to which they refer.

One particularly troublesome approach is to refer the reader from one paragraph in a statement of uncontested facts to another and another before actually indi-

cating the portion of the record upon which it relies. Indeed, one is tempted to conclude, as did Judge Friendly, that at times counsel seem to be playing a deliberate game to make it hard for the judge to find the portions on the record upon which they relied. See Friendly, "The Common Law Tradition," *supra*, at 34, 39. For example, in a recent case, in responding to a simple assertion of fact, the response stated that it "incorporates its response to nos. 30, 31, 47, and 52." At number 30 the response further referred me to its statement of facts at paragraphs 35-39. Its response to number 31 sent me back to its statement-of-facts paragraphs 35-39 and to paragraphs 23-24. Curiously, the response to number 47 referred to responses 30 and 31, which again led a further step back to statement-of-facts paragraphs 35-39 and 23-24. Finally, as its response to paragraph 52, the response incorporated its response to paragraph 14. At the end of the labyrinth there may have been a response, but it certainly was not the concise response that our local rules, and I suspect local rules throughout the country, demand. This kind of approach is counterproductive. The easier you make it for the judge, the greater your chances of winning. Simplifying the job of the judge is not an end in itself; it is the means to achieving a favorable outcome for your client.

My purpose is not to be critical of lawyers and to lament poor performance. Quite the contrary. My reaction to the lawyers I have seen has been overwhelmingly positive on a personal level. Almost all have been cooperative, civil, and prompt and have exhibited those general character traits that make for overwhelmingly pleasant day-to-day relations. Rather, my purpose is to try to point out those mistakes that can easily be rectified to substantially increase the chances of your prevailing. Given the necessarily limited time that judges have, they cannot always make sense out of and recraft an opaque presentation. The answer is really simple: Take the time to prepare, whether it be an oral argument or a brief, so that it is intelligible and concise and says what you want to say—and says it directly. As Judge Randolph of the D.C. Circuit has stressed: "If no one understands what you are saying, you lose." Indirection may be fine in jury trials, where the technique is to make the jury think that they, not you, drew certain

inferences or came to certain conclusions. In a trial there is time to reinforce your message in subtle ways. The method of persuading a judge is altogether different. The judge may not agree ultimately with your conclusions, but if they are not articulated with clarity, they may elude any consideration.

One of the things Robert Fulghum assures us everyone learned in kindergarten was how to “look.” Indeed, it is the first word we learned in that book about Dick and Jane, and it is, he says, the biggest word of all, for everything you need to know is there somewhere. The corollary for lawyers in trying to persuade a judge in oral argument is, “Listen!” In those cases in which I have had oral argument—the practice in our court generally discourages oral presentations—I have been struck by the unwillingness of lawyers to listen to the questions that are asked. Not that I hadn’t seen this as a lawyer, but the impact is very different now that I am asking the questions and trying to work through a problem. Some lawyers seem to resent any interruption and are often unwilling to deal directly with the questions that are asked. I think a slightly greater willingness to listen would go a long way toward effective communication. Steve Shapiro, perhaps the preeminent appellate advocate practicing today, has said that you should not be troubled by questions from the bench but should view them as an indicator of what is troubling to a judge, and as an opportunity to persuade. See Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, Kenneth S. Geller, *Supreme Court Practice* 710-11 (8th ed. 2002). See also J. Cole, “An Interview With Steve Shapiro,” 23 LITIGATION 19 (Winter 1997); John K. Larkins Jr., “Oral Argument on Motions,” 23 LITIGATION 16, 18 (Winter 1997). The more nonsensical or misguided the question from the bench, the more important it is that the question be answered so that the court’s misapprehensions are dispelled.

I have seen exhibited by some judges (of course none in this district) a general annoyance with tardiness, and some lawyers seem to always be late or, worse, chronically absent. “What?” you say. “This is not high school where it is important to get to the next class before the bell rings. So long as you get there reasonably close to the time the case is called, what’s the difference?”

Depending on the judge, there may be none. But take the measure of the person who will decide your case, and if that person’s particular idiosyncrasy is a preoccupation with punctuality, you can either be resentful and stubborn or you can be resentful and compliant. I suggest the latter. It costs nothing and it’s risk-free. Being punctual, like being clear and concise and respectful and dignified, is all a part of effective and skillful advocacy. Judges really do remember things like this. Punctuality and consistent attendance at court hearings, even ones that do not seem to count for much, subtly convey to the court that you care about the case and the process. Beyond the symbolism, the judge gets to know you.

If you think that judges remember the names of the hundreds of lawyers who appear before them during the course of even a several-month period, I can assure you they don’t. A friend of mine here on the district court once said to me that he had absolutely no difficulty in remembering the name of every lawyer who appeared before him. I expressed amazement and great admiration, because I was not able to do that, as hard as I tried. When I asked how he did it, he said, “Oh, it’s easy, everyone is named ‘Counsel.’”

Punctuality has a substantive side as well. Protracted discovery—is there any other kind—“the bane of modern litigation,” *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 542 (7th Cir. 2000) (Posner, J.), inevitably results in constant and often complicated squabbles. When you are getting the big stall and all efforts to resolve the dispute have failed, file the appropriate motion to compel—and, most importantly, do it promptly: “Defer no time, delays have dangerous ends.” *Henry VI*, pt. I, act III, sc. ii. The Seventh Circuit is partial to *Twelfth Night*. See *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 775 (7th Cir. 1995) (“In delays there lies no plenty.”). The point is the same; delays need not be deliberate to adversely affect your ability to get the discovery to which you’re entitled. Even inadvertent delays can lead to undesired results. See, e.g., *Brosted v. Unum Life Ins. Co. of America*, 421 F.3d 459 (7th Cir. 2005). If a party has unduly delayed in filing a motion to compel discovery, a court may conclude the motion is untimely, regardless of its merit. See discussion and authorities collected in *In re Sulfuric Acid Antitrust Litig.*, 230 F.R.D. 527, 533 (N.D. Ill. 2005); *In re Sulfuric*

Acid Antitrust Litig., 231 F.R.D. 331 (N. D. Ill. 2005). While you don’t want to head into court on every minor matter, you run a significant risk by opting to do nothing rather than risk the possibility of the judge’s displeasure at a motion that you know to be significant but that may strike the judge as much ado about nothing.

I am pleased to report that the problems of lack of candor and incivility have been literally nonexistent in my courtroom from the beginning. I attribute that to the real decency of the lawyers in the cases that have randomly come to me. But lack of candor and incivility in varying forms continue to be of concern to bench and bar alike. As more and more lawyers come on the scene, and as what Holmes called “the greedy watch for clients” becomes ever more competitive, the problem has become all the more acute. But it’s not new. Distrust of lawyers has been almost an institution in this country since the Colonists arrived. The Revolution saw things go from bad to worse. See *Faretta v. California*, 422 U.S. 806, 826-827 (1975); “Symposium on Public Mistrust of the Law,” 66 *U. Cin. L. Rev.* (1998). By the time of the Civil War, Lincoln would lament that most people thought lawyers were less than honest, and Justice Wayne referred to the “already too prevalent impression that [law] is not practiced with all the forbearances of the strictest honesty, or of the highest moral principle.” *Laflin v. Harrington*, 66 U.S. 326, 339 (1861). Even the “lawyer-statesman”—that iconic figure to whom we all are supposed to aspire—is probably a myth. Stuart Speiser, “Sarbanes-Oxley and the Myth of the Lawyer-Statesman,” 32 LITIGATION at 5 (Fall 2005).

On November 17, 1921, Learned Hand, then a young district judge, addressed the Bar Association of the City of New York. His speech was entitled “The Deficiencies of Trials to Reach the Heart of the Matter.” See *Lectures on Legal Topics* 89 (MacMillan Co. 1926) 105. It has become a classic. Its importance lies not in its lambent prose but in its recognition that the problems are of ancient vintage and will never be cured by appeals to good faith and invocation of noble sentiments:

The truth is that no rules in the end will help us. We shall succeed in making our results conform with

our professions only by a change of heart in ourselves. It is hard to expect lawyers who are half litigants to forgo the advantages which come from obscuring the case and supporting contentions which they know to be false. . . . It is important . . . that we should realize the price we pay for it, the atmosphere of contention over trifles, the unwillingness to concede what ought to be conceded and to proceed to the things which matter. Courts have fallen out of repute; many of you avoid them whenever you can, and rightly. About trials hangs a suspicion of trickery and a sense of a result depending upon cajolery or worse. I wish I could say that it was all unmerited. After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.

Id. at 104-05.

Surely, you say, 85 years of exhortations to be better and the formation of commissions on civility must have had an ameliorative effect. Apparently not. If Judge Weinstein is right, we appear to be in a continued downward spiral. He has concluded that never in our country's history have lawyers been held in such disesteem as they are today. *Blue Cross and Blue Shield of New Jersey v. Philip Morris Inc.*, 53 F. Supp. 2d 338, 345 (E.D.N.Y. 1999). Three years later, Bob Clifford sponsored, on behalf of the Section of Litigation, empirical research that revealed that "the negative perceptions of lawyers run deep and wide." Robert A. Clifford, *Now More Than Ever*, 28 LITIGATION at 1, 2 (Spring 2002).

I do not pretend to have the answer. While Judge Hand thought that much of the problem is inherent in the human condition and will persist as long as the need for litigation itself endures, he conceded that judges were to blame in part by allowing misbehavior. *Cf. Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984) (recognizing the inadequacy of oversight of discovery by trial courts). The late Hubert Will, one of the great district judges in the country, observed in an interview shortly before his death that, while codes of conduct had a limited role to play, "[p]art of the answer is more judicial involvement. We should no longer be

willing just to sit up there, and when somebody commits a foul, call foul and give the other side two free throws. Judges need almost to treat it personally." 20 LITIGATION at 26, 29 (Fall 1993).

But in the final analysis, the bar must look to itself, for, as Judge Hand said—asking his audience for forgiveness—"you cannot . . . make a silk purse out of a sow's ear":

Because, gentlemen, it is not merely in the making of laws that law resides. You can have the wisdom of a Solon and there will be anarchy no less, if you rule a people in whose hearts there is no regard for the laws they make. . . . Without a bar which is willing to co-operate, a bench more virtuous and wise than any we are ever to get would do very little. We must not expect too much from formal changes; we may put our finger on this or on that which may be amended, and if it is done, it may help, but the fundamentals lie elsewhere. You get out of a community what there is in it, out of a bar, which now at any rate is nearly a cross-section of that community, what the character and capacity of that bar contains, and neither laws nor principalities nor powers will in the end help you one jot or tittle.

L. Hand, "Deficiencies of Trials," *supra*, at 105-06.

For those who might find all this a bit too ethereal and who believe that the practice of law is, at least in part, a business, my only response is that good behavior is good business. Credibility counts for much, and once reputation is undermined, it is very difficult to restore—and not only with the judge who has been hoodwinked. As Judge Kennelly has said, judges do talk about lawyers who have misbehaved. 27 LITIGATION, *supra*, at 5. Candor and civility are contagious and, in their own way, seductive. Juries respond favorably. So too do opponents—at least, most do. Beyond maximizing the chances for a favorable outcome, conducting yourself with basic decency will enrich your life immeasurably. Thus, when your counterpart calls and wants additional time to respond to a pleading or motion, agree, as long as the request is reasonable. Nothing is more certain to create ill will with most judges than to bicker over whether a request for 30 days should be

cut to 21 or a request for 21 days should be cut to 11. Judge Shadur has found the practice so annoying that he has actually entered sanctions against lawyers who needlessly make things difficult. *See Regional Transp. Auth. v. Grumman Flexible Corp.*, 532 F. Supp. 665 (N.D. Ill. 1982).

In large cities, relations among lawyers are often less collegial than in areas where the bar is smaller. In the former, a practice has developed of lawyers referring to one another not by name but as "counsel" or "my opponent." It's done at depositions and in court. This depersonalization does not advance a party's case one whit and is not conducive to collegiality. Some lawyers don't care, but a good many are offended. People have names. Why not use them? Steve Shapiro tells the story of an argument in the Supreme Court in which a lawyer argued, "my opponent says . . ." Justice Scalia interrupted him and said: "He is not your opponent. He is your friend." Shapiro reports that he has found referring to your adversary by name or the phrase "my friend" or "my brother/sister" can change the whole atmosphere of the courtroom and can create goodwill. The case suddenly becomes an interesting, friendly debate among colleagues at the bar—as it should be.

In both written and oral presentations, don't dissimulate; acknowledge and admit what needs to be admitted and move on. It's not only the honorable thing to do; it's the smart thing. If it is necessary to be evasive and cunning and to have to pretend that arguments that are decisive against you don't exist, then perhaps the motion should not have been brought or the argument made. But what do you do when, despite having played by all the rules and having submitted brilliant and comprehensive briefs, the judge still doesn't get it and not only rules the wrong way but makes a serious mistake in the process? The answer is simple: You seek reconsideration.

Justice Stevens, in a recent bar association speech, equated a dissenting judge addressing bar associations with petitions for rehearing. Each, he said, serves the same therapeutic purpose: "[A]s a substitute for more aggressive forms of civil disobedience, [they are] a futile but non-violent form of protest that seldom does any harm." Not everyone has this benign view of motions for reconsideration. There is a school of thought that

counsels against such motions on the grounds not only of futility but also of substantial risk of offending the judge.

Like all general propositions, this one has limited utility. It is certainly true that, for a variety of psychological reasons and because of sound institutional considerations, there is a natural tendency for judges to view motions for reconsideration with a measure of skepticism. Indeed, everyone knows the old maxim that motions for reconsideration are viewed unfavorably. But they can serve a valuable function. Judges are not omniscient, and even the most gifted make mistakes. See, e.g., *Willy v. Coastal Corp.*, 503 U.S. 131, 139 (1992); *Marek v. Chesny*, 473 U.S. 1 (1985) (Rehnquist, J., concurring); *Tome v. United States*, 513 U.S. 150, 167 (1995) (Scalia, J., concurring in part and concurring in the judgment). In deciding whether to seek reconsideration, the first step is to determine whether there is really a blunder or just a difference of opinion on the part of the court. If the former, is the mistake sufficiently significant that it requires correction? If the answer is in the affirmative, then by all means file the motion. Don't be timid; one can "criticize even what one reveres." Holmes, "The Path of the Law," 10 *Harv. L. Rev.* 457, 473 (1897).

How to pitch the motion is a subject onto itself. But here is what not to do: Don't tell the court how dumb it is, expressing incredulity that it could have reached the result that it did, and then assure the court that unless all is made well, the court has committed reversible error—which you will appeal as promptly as circumstances will allow, slyly hinting at Rule 54(b). There is no surer way to have the petition denied on the spot. Approach the task in the same way

that you would approach any other delicate situation involving telling people they have made a mistake and they ought to change their minds. If you think that the judge has acted out of peevishness or bias or some other unjudicial motivation, restrict your impulse to say so. Judges, like everyone else, have egos, *Haley v. Ohio*, 332 U.S. 596, 602 (1948) (Frankfurter, J., concurring); Cardozo, *The Nature of the Judicial Process*, 167-68 (1921), and although willing to admit a mistake, they do not appreciate "having their noses rubbed in [it]." Aldisert, *Winning on Appeal*, *supra*, at 273.

Lest you think that I am simply being overly protective of my new colleagues or engaging in anticipatory prophylaxis and that no one would really engage in such a frontal assault, let me assure you that more lawyers take this approach than you can imagine. Here is a classic example: In *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370 (1986), *cert. denied*, 480 U.S. 934 (1987), Judge Posner, speaking for a unanimous panel, reversed the judgment in an antitrust case. Since a lot of money was involved, the plaintiff filed a motion for rehearing, charging that the panel considered the relevant Supreme Court decision trumped by a ten-year-old book written by Judge Posner, a book not cited or mentioned by the parties or in the panel's unanimous decision. The petition suggested that the decision was a sneaky end-run, affected by making findings of fact at the appellate level.

The per curiam denial of the petition dealt with the legalities. But Judge Flaum and Judge Bauer went on to write a separate opinion, and they did so because of the "inappropriate tone of the petition for rehearing." Judge Flaum began by acknowledging that a court in any given opinion can make a mistake

on either the law or the facts. But, he said, to state, as does the petition for rehearing, that a judge of this court has seized an opportunity to preempt a ruling of the U.S. Supreme Court and to emasculate its principles while purporting to give the case careful and respectful consideration was beyond the bounds of acceptable, aggressive appellate advocacy. Equally distressing was the petition's charge that the panel's opinion engaged "in rampant de novo fact finding, ignored or misstated uncontested facts, and treated other factual issues as questions of law to be redecided on appeal." Judge Flaum and Judge Bauer emphasized that this sort of approach "constitutes neither respectful nor responsible pleading." *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 802 F.2d 217, 219 (1986).

When all is said and done, it is not perhaps too far from the truth that much of what we need to know to be effective lawyers and decent people, we really did learn in kindergarten: Patience, tolerance, and honesty are but a few of the lessons not to be forgotten. Another is Fulghum's charming suggestion that when you go out in the world, hold hands and stick together. Before you reject out of hand the symbolism sought to be conveyed, I ask you to recall—and to take to heart—the not very different advice that Larry Fox, former Chair of the Section of Litigation, gave in these very pages to his intensely competitive colleagues at the bar: Take care of each other. "[I]f we cure the ills in our own houses then work on our relationships with . . . judges, and opposing counsel, there is no limit to the success we can achieve." Lawrence J. Fox, "Take Care of Each Other," 22 *LITIGATION* at 1, 71 (Fall 1995). □

From the Bench: Lessons Discovered Along the Way

**First published in Vol. 32, No. 3, Spring 2006 of *Litigation*,
a publication of the Section of Litigation.**

About the Section of Litigation

The Section of Litigation, the largest specialty section of the American Bar Association, is dedicated to helping litigators become more effective advocates for their clients. The Section is a legal publisher, a provider of CLE programming, a source of news and analysis, and a strong national voice in discussions concerning the profession. Simply put, the Section helps lawyers be better lawyers.

<http://www.abanet.org/litigation/home.html>

About ABA Publishing

ABA Publishing is a division of the American Bar Association (ABA), responsible for providing professional publishing guidance to both the association and its members. Our legal publications support professional excellence and greater understanding of the law. We publish approximately 100 law books per year as well as approximately 75+ magazines, newsletters, and journals in numerous specialized areas of the law.

Our law books provide the best practice tips and pointers, sample forms and language, and professional legal guidance from experienced practitioners and are available in a variety of formats, including print, PDF, audio, and CD-ROM. Our authors and editors are outstanding professionals who are active in their fields. Experts rigorously review our products to ensure the highest quality information and presentation.

Articles

Individual articles are available as PDF downloads at www.abanet.org/abastore/index.cfm

For customer service, call 1-312-285-2221

Monday–Friday, 7:30–5:00 CST