Winning Isn't the Only Thing

Is bar membership a license to abuse others?

By Michael Long

As I listened to a successful Portland litigator in his office overlooking the river, his story was unfortunately all too familiar to me. He was contemplating leaving the practice of law. He was disgusted by how aggressive, uncivil and mean-spirited civil litigation had become. He was tired of opposing counsel threatening ethics complaints as a litigation strategy. He had become disillusioned by the numerous instances of dishonesty or lack of integrity of colleagues. He had earned and enjoyed tremendous professional success over his career, but he had observed a significant deterioration in how colleagues treated participants and one another in the adversarial system. He felt at the breaking point.

During the past decade, the legal profession has publicly acknowledged the decline in professionalism which it has suffered. National, state and local bar associations have created blue ribbon panels to develop policies defining professionalism and sponsored educational programs to disseminate these policies to the membership.

Our state bar has joined in this effort. The Statement of Professionalism adopted by the Oregon State Bar in 1990, and subsequently approved by the supreme court, states:

Bar membership does not permit lawyers to define respect, honesty and integrity differently than the society we are sworn to serve.

> [P]rofessionalism goes beyond observing the legal profession's ethical rules, ... professionalism fosters respect and trust among lawyers and between lawyers and the public."

The statement asks members to:

- Conduct their practice in a courteous, fair, and respectful manner;
- Follow practices and civilities that encourage respect, diligence, candor, punctuality, and trust;
- Refrain from knowingly misstating facts or law, or knowingly causing a person to form a mistaken conclusion of fact or law; and
- Avoid unjust criticism, improper criticism, and personal attacks on opponents, judges and others.

In effect, the statement advocates that members of the OSB choose assertive behavior in representing clients zealously and interacting with others. Assertive behavior enables a person to stand up for herself or himself; express or advocate his or her point of view or exercise personal rights without denying the rights of others. A person choosing to interact with others assertively is able to act in his or her own best interest while simultaneously respecting the rights of others.

In contrast, a person who chooses aggressive behavior in interacting with others, attempts to manipulate, control or impose his or her will upon others. Aggressive behavior denies or fails to respect the rights of others. Examples of aggressive behavior are: attempts to intimidate or humiliate others, sarcasm, demanding threats toward opposing counsel, parties or witnesses, knowingly misstating facts or law and using litigation tactics intended solely to intimidate, delay, harass or drain the financial resources of the opposing party. By, definition, aggressive behavior is abusive toward others.

Those of us who have practiced law know that it is a result-oriented profession. We are introduced to this reality early in law school when we learn that the top 5 to 10 percent of our class will be extended offers to join law review, pursue prestigious clerkships and ultimately be

considered for lucrative legal employment. The remaining 90 percent of the class will not have those same opportunities and will have to professionally fend for themselves.

The emphasis on results continues in law practice. Partnership offers are more likely to be based upon revenue-generating ability or technical expertise, not respectful interpersonal skills. Many clients are not interested in purchasing "professional" services, they are paying for results. I can only recall one client who retained me to handle his divorce and advised me that he just wanted to do what was fair and right. That was early in the case when he was still trying to reconcile with his estranged wife. Once he learned that she had moved in with a lover he was previously unaware of, the gloves came off and he knew exactly what a just and fair property distribution would be.

Consequently, there is tremendous ambivalence within the profession about ideals and principles of "professionalism." Practitioners in the trenches may perceive such principles as restricting or limiting their effectiveness as result-oriented advocates in a world where litigation is war, and all is fair in love and war. The same national, state and local bar associations promoting professionalism are contributing to this ambivalence by promoting advocacy skills CLE programs that encourage or promote behavior that is the antithesis of adopted professionalism statements and policies. An example of such a program is Larry Pozner and Roger Dodd's "Killer Cross-Examination Techniques."

I have had the opportunity to listen to Pozner at the 1994 OSB Annual Meeting in Vancouver, B.C., and to Pozner and Dodd in their 1997 joint seminar in Portland. I was struck by the blatantly aggressive images and approach they promote in teaching specific advocacy skills.

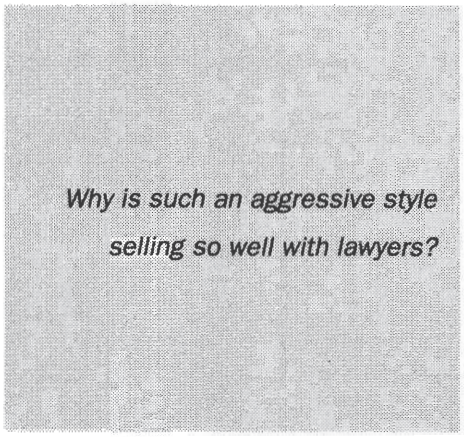
In an OSB-sponsored CLE in 1995, this team titled their seminar, "Powerful Cross-Examination Techniques: How to Dominate A Courtroom." On their return in 1997, they retitled their seminar, "Killer Cross-Examination Techniques." In this seminar they stressed the importance of words in creating an image for the trier of fact. It was clear they were very intentional about the words they chose and the images they painted. Why wasn't "Powerful Cross-Examination Techniques" strong or powerful enough? Why was the preferred image this team decided to paint for the lawyers in attendance "Killer Cross-Examination Techniques"?

This team opened with the premise that it is strategically safer and far more effective to attempt to prevail at trial by focusing upon cross-examining your opponent's witnesses because you can't trust your client to tell an effective story. All too often your clients are not able to learn the story you have expertly assisted them to craft. Consequently, they screw-up and answer truthfully on direct to the detriment of their case.

According to Dodd, neuroscience has identified that people retain information because they see it in their minds or smell it in their minds. When you are called upon to remember something, its like rewinding a videotape; you see a picture of the stored information and fill in the details. When triers of fact are deliberating, they don't remember an attorney's cross-examination questions or a witness' answers, they remember the pictures and images created by the attorney-witness exchange.

Here are some of the images and pictures Pozner chose to illuminate the 1997 CLE with:

- "We are going to use this system (of cross-examination) so we can get out of our chair up to the podium and start landing blows in the first sentence;"
- As a trial lawyer trying a case, you have to say to yourself, "I have the opportunity to beat up the witness who is evading me;"
- "We want to say there is a right and a wrong way to answer questions; let me teach you the right way. The right way: I



will put before you a fact; you will verify that fact; we will then move on. Your role is to say yes. As often as you say yes, things go well. When you say other than yes, I will stop and punish you. We are going to toilet train witnesses just like you do the puppies at home. You are going to roll up a newspaper and hit them on the nose when they give the wrong answer."

▪ After completing your cross examination of a witness, "do not play with the roadkill."

Dodd offered a complementary image: You're driving on a country road at night and a bunny in the road freezes in your headlights. "You do to the witness what you do to the rabbit, you come a little closer, you adjust your wheels, and then run 'em over, whack 'em."

When a lawyer in attendance asked Pozner at what point his aggressive cross-examination style might result in advocacy overkill, Pozner responded emphatically, "There is no overkill. You get a witness down, you kill them ..." "Kill a witness, score the points, but do it in a style that is appropriate to the context."

This presentation team was unapologetic about the Lombardian "winning isn't everything, it is the only thing" philosophy of their seminar. In the 1997 seminar, Pozner stated jokingly, "There is no ethics credit for this lecture." Later in the seminar, Dodd prefaced an example with: "You know what I do to prosecutors, this is probably unethical but I don't care..."

Finally, in summarizing what he hoped the seminar provided to the attending lawyers, Pozner chose to include a quote from Al Capone in his closing statement: "It's easier to get things done with a kind word and a gun than with a kind word alone... You got six more hours of guns now. Take 'em with you and use them on enemies come Monday morning ..."

I do not take issue with many of the actual advocacy techniques these presenters discuss. I believe these techniques can strengthen the advocacy skills of a lawyer practicing our profession in an assertive manner. I do, however, take issue with the aggressive images, approach and style these presenters are consciously choosing to promote. I also take issue with the disparaging, Don Rickles-like humor these presenters chose in interacting with one another during their presentation. Their cutting game of one-upmanship served to accentuate the aggressive approach and style they promoted.

The bar's CLE program department consistently provides an excellent service to bar members by delivering well-organized and well-presented programs of interest to the bar. I assume this program was planned by a committee which no doubt thought they were fulfilling the needs of Oregon trial lawyers. Indeed, according to the promotional materials, Pozner and Dodd are one of America's most popular and "professional" CLE teams. Ninety-eight percent of the OSB registrants of Pozner and Dodd's September 1997 program rated it as meeting or exceeding their expectations.

Why is such an aggressive style selling so well with lawyers? I believe part of the reason is found in one of Pozner's introductory comments: "The first thing to realize is that the goal of the game has everything to do with getting a fact-finder to believe you (the lawyer), not your witness, you! You (the lawyer) are the one testifying in cross examination ..." This statement incorporates and advocates the 'game theory' of litigation.

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The game theory of litigation allows lawyers who adopt it to depersonalize and objectify the litigation process. According to this theory, civil litigation is not a process for resolving conflicts and disputes between real people with feelings, emotions and inalienable rights. According to this theory, criminal litigation is not a process for determining whether an accused has broken society's laws and holding him or her accountable if convicted. According to this theory, civil and criminal litigation are merely mercenary games played by opposing sides in which opposing parties and opposing counsel are labeled as the enemy. It is a game of targets, attacking, defending, controlling, scoring points, wins and losses.

Proponents of the game theory of litigation seem to believe and suggest that respect, honesty, integrity and professional behavior are defined differently for lawyers competing in the game than they are for the rest of society. Consequently, lawyers competing in the game must try to compartmentalize the different parts of their lives. When they are competing in the game, they treat and interact with others in the game differently than they treat and interact with people outside the game. The golden rule, treat others as you would have them treat you, has no place in the game.

Mahatma Ghandi once observed, "One man cannot do right in one department of life whilst he is occupied in doing wrong in any other department. Life is an indivisible whole." Bar membership does not authorize aggressive behavior against others. Bar membership does not permit lawyers to define respect, honesty and integrity differently than the society we are sworn to serve.

The Oregon State Bar and the Oregon Supreme Court have set the professionalism bar high in Oregon. We all know, or know of, lawyers in our communities who are consistently successful in their practices and who also conduct themselves in a manner that is consistent with our bar's statement of professionalism. Accomplishing both tasks simultaneously is a challenge requiring significant self discipline. However, for professionalism in law to improve, we must embrace this standard and this challenge. If members of our profession continue to promote and embrace the Pozner-Dodd advocacy and professionalism paradigm, our profession will continue to earn the contempt and disdain of the society we are sworn to serve. ■

ABOUT THE AUTHOR

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