

# **The Myth and Reality of the Zealous Advocate & Why Civility Matters**





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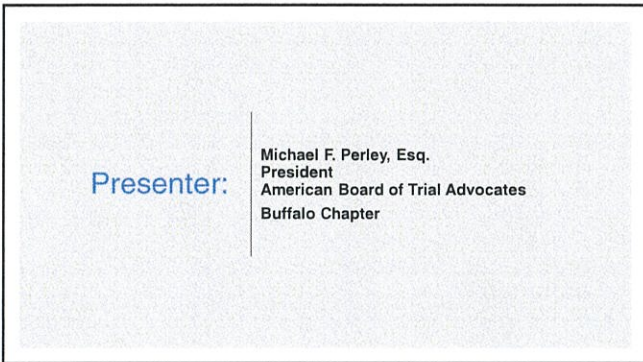
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**The myth of the “zealous advocate.”**

Former CANON 7:  
A LAWYER SHOULD REPRESENT A CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW

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**The myth of the “zealous advocate.”**

Unfortunately, Lawyers stop and the word “ZEALOUSLY” and forget the phrase, “WITHIN THE BOUNDS OF THE LAW”

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**The fallacy of the “zealous advocate.”**

**zeal-ot**  
noun

- A person who is fanatical and uncompromising in pursuit of their religious, political, or other ideals.
- Synonyms: fanatic, extremist, radical, diehard, militant.

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From: \_\_\_\_\_  
Sent: Tuesday, September 30, 2014 3:15 PM  
To: \_\_\_\_\_  
Subject: Re: Response to your email below

Dear Mr. \_\_\_\_\_:

**Bull%\$\*#!** My communications were made in respect to the Mandatory Settlement Conference proceeding. There are numerous and sundry ex parte communications that are permitted between parties to a Mandatory Settlement Conference proceeding except perhaps where the sitting Judge happens also to be the single assignment trial judge, which is not the case

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### Stun gun at deposition

.....opposing counsel, made highly contemptuous statements to the trial judge, and brandished pepper spray and discharged a stun gun at a deposition, conduct described by the trial judge as "the most outrageous behavior that I have ever heard of in my life by an attorney."

- Crawford v. JPMorgan Chase Bank, N.A. (December 9, 2015, 2<sup>nd</sup> District)

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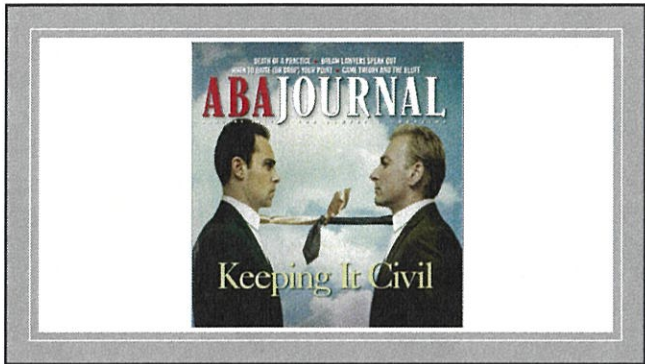
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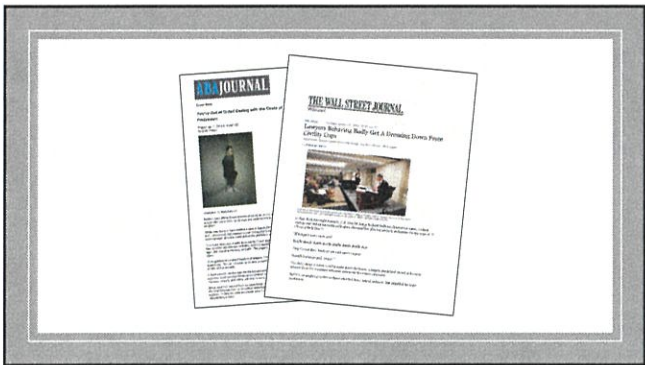
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**RULES OF PROFESSIONAL CONDUCT**

April 1, 2009

**22 N.Y.C.R.R. Part 1200**

**The word "zealous" is eliminated.**

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**RPC 1.1**

**1.1 COMPETENCE**

(a) A lawyer should provide competent representation to a client....

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

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**RPC 1.3**

**1.3 DILIGENCE**

(a) A lawyer shall act with reasonable diligence and promptness in representing a client

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer

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**RPC 3.3**

**3.3 CONDUCT BEFORE A TRIBUNAL**

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

- (1) Fail to comply with known local customs of courtesy or practice....;
- (2) Engage in undignified or discourteous conduct;
- (3) ....;
- (4) Engage in conduct intended to disrupt the tribunal.

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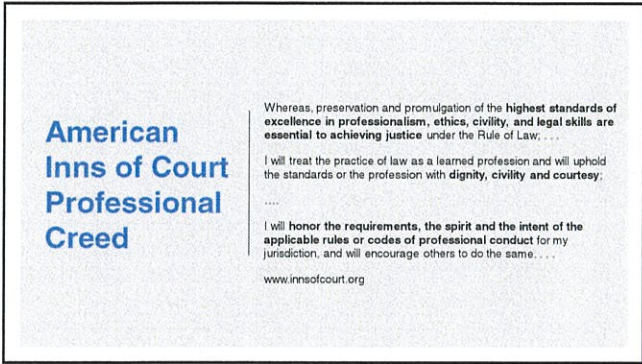
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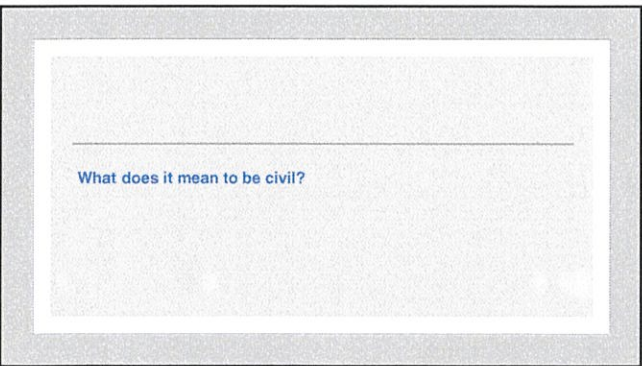
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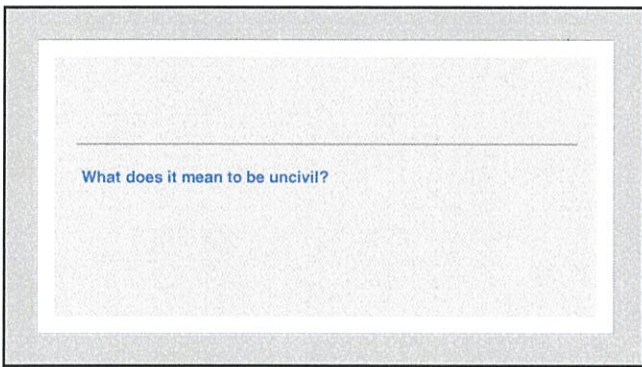
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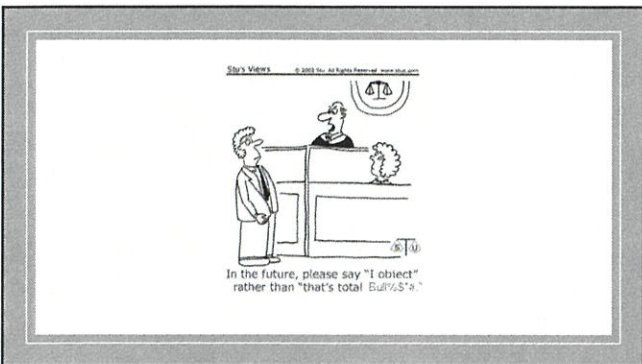
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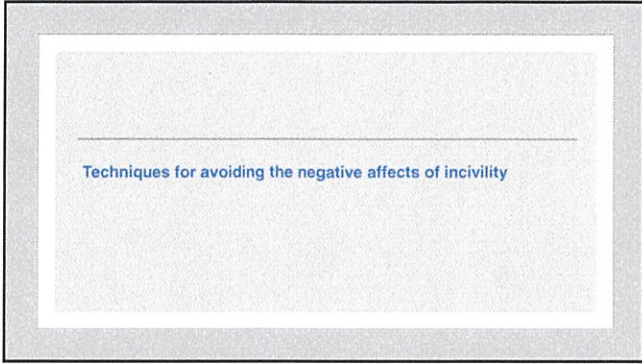
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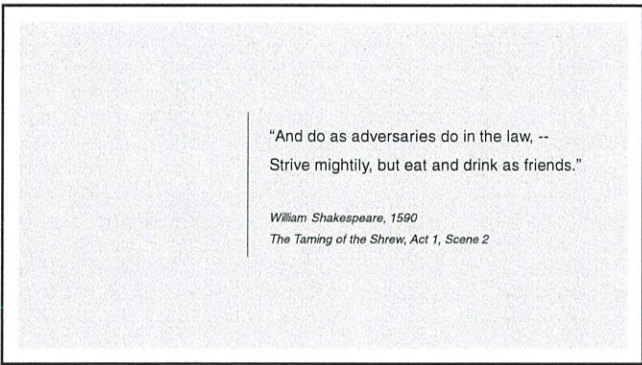
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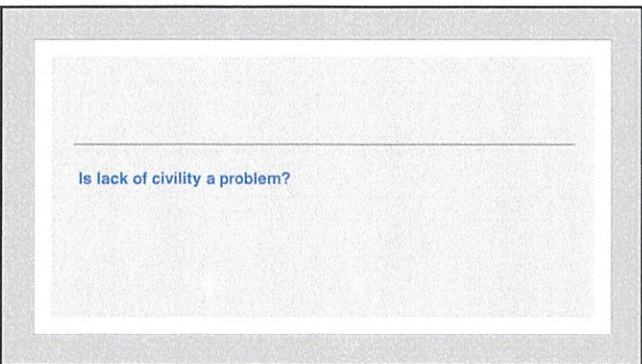
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"Courts have had to urge counsel to **turn down the heat** on their litigation zeitgeist far too often. And while the factual scenarios of these cases differ, **they are all variations on a theme of incivility that the bench has been decrying for decades, with very little success.**

It's gotten so bad the California State Bar amended the oath new attorneys take to add a civility *requirement.*"

*Lasalle v. Vogel (2019) 36 Cal. App.5th 127*

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"Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. ***It's time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions.***"

*Kim v. Westmoore Partners (2011) 201 Cal. App. 4th 267*

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**N.Y.S. Standards of Civility**  
 [Appendix A – Rules of Professional Conduct]

**PREAMBLE**

The New York State Standards of Civility for the legal profession set forth principles of behavior to which the bar, the bench and court employees should aspire. ...They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify ...the Rules of Professional ... Instead they are a set of guidelines intended to encourage lawyers, ...to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course.

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**N.Y.S. Standards of Civility**  
[Appendix A – Rules of Professional Conduct]

**i. Lawyers should be courteous and civil in all professional dealings with other persons.**

A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.

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**N.Y.S. Standards of Civility**  
[Appendix A – Rules of Professional Conduct]

**i. Lawyers should be courteous and civil in all professional dealings with other persons.**

B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony **toward other counsel, parties or witnesses.**

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**N.Y.S. Standards of Civility**  
[Appendix A – Rules of Professional Conduct]

**i. Lawyers should be courteous and civil in all professional dealings with other persons.**

C. Lawyers should require that **persons under their supervision conduct themselves with courtesy and civility.**

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**N.Y.S. Standards of Civility**  
[Appendix A – Rules of Professional Conduct]

VII. In depositions and other proceedings...lawyers should conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect.

B. Lawyers should advise their clients ...of the proper conduct expected of them in court, at depositions...and, to the best of their ability, prevent clients...from causing disorder and disruption.

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What do you do if your client insists that you play "hardball" with opposing counsel?

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**N.Y.S. Standards of Civility**  
[Appendix A – Rules of Professional Conduct]

VI. A lawyer should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.

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**N.Y.S. Standards of Civility**  
 [Appendix A – Rules of Professional Conduct]

**III. A lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of the client's interests.**

A. In the absence of a court order, a lawyer should agree to **reasonable requests** for extensions of time or for waiver of procedural formalities **when the legitimate interests of the client will not be adversely affected.**

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**N.Y.S. Standards of Civility**  
 [Appendix A – Rules of Professional Conduct]

**III. A lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of the client's interests.**

C. A lawyer should not attach **unfair or extraneous conditions to extensions of time.** A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize, and may request, but should not unreasonably insist on, reciprocal scheduling concessions.

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*There is no better guide to professional courtesy than the Golden Rule: you should treat opposing counsel the way you yourself would like to be treated.* Where, as here, there is no indication of bad faith, prejudice, or undue delay, attorneys should not oppose reasonable requests for extensions of time brought by their adversaries. *See* Cal. Attorney Guidelines of Civility & Prof. § 6.

Ahanchian v. Xenon Pictures, Inc. (2010) 624 F.3d 1253

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What do you do if your partner is uncivil and that is what is expected of you?

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**New York State Rules of Professional Conduct**

**Rule 5.2 (a) A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person.**

[1]...For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

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What do you do at a deposition if your opponent improperly objects, coaches the witness, or insults your client?

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10 π **Counsel:** We have sent you offers to settle, you have dragged us through this nonsense,  
 11 you've been sanctioned \$6,000 and yet you keep this nonsense up. Now we'll take a lunch break  
 12 and based on your little preface a minute ago, I'll go through with my client various paragraphs so  
 13 he can come back in here and answer your questions. We are now at lunch.  
 14 Δ **Counsel:** Okay, fine. I would appreciate it if you maintain your professionalism during ---  
 15 π **Counsel:** I cannot because you're an idiot.  
 16 Δ **Counsel:** I share that view of you, based on your statements.  
 17 π **Counsel:** \$6,000 in sanctions for your nonsense of wasting my client's time because you or  
 18 someone in your stupid company --  
 19 Δ **Counsel:** An attorney is entitled to that testimony. I don't know where you went to law  
 20 school.  
 21 π **Counsel:** Pay your damn sanctions.

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**ABOTA Principles of Civility, Integrity and Professionalism** | During a deposition, never engage in conduct which would not be appropriate in the presence of a judge

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What do you do if your client is uncivil to your opponent during a deposition?

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5 Q: How about your own net worth, Mr. Jaques? What is that?  
6 **Defendant's Counsel:** Excuse me. Object also that this is protected by a —  
7 A: Get off my back, you slimy son-of-a-b \_\_\_\_\_.  
8 Q: I beg your pardon, sir?  
9 A: You slimy son-of-a-b \_\_\_\_\_.  
10 Q: You're not going to cuss me, Mr. Defendant.  
11 A: You're a slimy son-of-a-b \_\_\_\_\_.  
12 Q: You can cuss your counsel. You can cuss your client. You can cuss yourself.  
13 You're not going to cuss me. We're stopping right now.  
14 A: You're damn right . . . F\_\_\_\_\_ you, you son-of-a-b \_\_\_\_\_.

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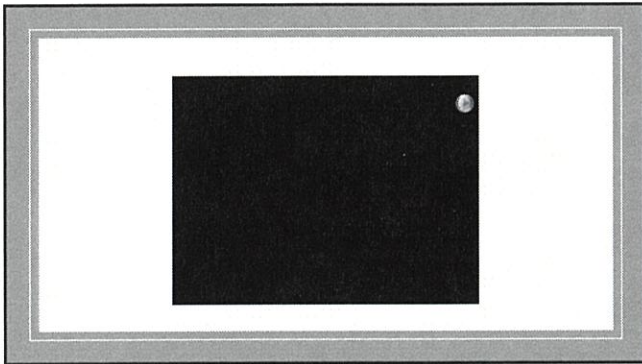
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What should you do if you receive argumentative, nasty emails, letters, or voicemails from your opponent?

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Jason:

I hate your f&#ing existence. What you did to my property was a vicious attack against the sumac cover planted by Irene Paulsen . . .

. . . More importantly, as far as I'm concerned, in the twenty-six years that I have practiced law, I **have never met, in a limited basis, a more despicable self-made f%\$ing slime-bag and I piss on your existence.** What I want to tell you specifically is to **take this letter and jam it up you're a%hole, resulting in severe paper cuts. You are a used condom of the highest order.**

Marvin Jones of Urbana, IL

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**DeRose v. Heurlin (2002)**  
**100 Cal.App.4th 15**

DeRose retained attorney Heurlin to represent him in a dental malpractice claim. Heurlin decided to change lawyers to a firm known as Day & Day and informed Heurlin who filed an attorneys' fee lien of \$22,797. For a period of approximately 3 months, Mr. Day repeatedly wrote Heurlin for his file and an itemization of his lien. Day finally told Heurlin that his lack of cooperation was unprofessional. Heurlin responded with a letter that included the following:

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**DeRose v. Heurlin (2002)**  
**100 Cal.App.4th 15**

"I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit . . . educate yourself about attorney liens and the work product privilege . . . see you in Court."

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**DeRose v. Heurlin (2002)**  
100 Cal.App.4th 15

Day responded in part as follows:

"I do not want your work product. You told me in our telephone conversation your \$20,000 plus lien was incurred obtaining and reviewing medical records. Those records are not work product. I take it from your letter you do not have any such records.

My client has requested an itemization of your lien, and we again respectfully request that itemization. **John, what in the world would prompt you to write a letter like that?** All we wanted was the medical records you told me you reviewed. If you don't have any, all you had to do was say so."

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**Name calling does not work**

\$5,000 sanctions upheld against an attorney for writing a letter to the Court stating that his opponent's manner of practicing law **"indicates that she fits more as a clown in a circus than an attorney in a court of law."**

Note: The same lawyer had been disbarred from the U.S. Supreme Court after filing a petition for certiorari calling the Chief Judge of the Second U.S. Circuit Court of Appeals "Chief Injustice."

*Nachbaur v. American Tansit Insurance Co.*, 752 N.Y.S.2d 605, 2002 N.Y. App. Div. (1st Dept, 2002).

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**ABOTA Principles of Civility, Integrity and Professionalism**

Advance the legitimate interests of my clients, without reflecting ill will they may have for their adversaries, even if called on to do so, and treat all other counsel, parties and witnesses in a courteous manner.

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**ABOTA Principles of Civility, Integrity and Professionalism**

Never, without good cause, attribute to other counsel bad motives or improprieties.

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Civility in the courtroom

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What do you do when your trial judge is uncivil?

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**N.Y.S. Standards of Civility**  
 [Appendix A – Rules of Professional Conduct]

**I. A Judge should be patient, courteous and civil to lawyers, parties and witnesses.**

A. A Judge should maintain control over the proceedings and **insure that they are conducted in a civil manner.**

B. Judges should not employ hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses.

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1 **DEFENSE:** Have you ever heard of The Twilight Zone?  
 2 **A:** Yes sir.  
 3 **Q:** Goes kind of like this, do do, do do.  
 4 **PLAINTIFF:** Your Honor, I would just object. This is argument.  
 5 **COURT:** Your objection's on the record, ma'am.  
 6 **DEFENSE:** You're traveling through another dimension, a dimension not only of sight and  
 7 sound, but of mind, a journey into a woodrout land, whose boundaries are that of  
 8 imagination[-] that's a sign post ahead, your next stop, The Twilight Zone. Do do,  
 9 do do. Do do, do do.  
 10 **COURT:** That was terrible. Get to the question, please.  
 11 **PLAINTIFF:** Noting for the record, counsel was singing The Twilight Zone theme song.

*Haluck v. Ricoh Electronics, Inc.*, (2007) 151 Cal. App. 4th 994

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12 **DEFENSE:** Endless white room with no doors or windows. Is that where you got your idea of  
 13 this white room theory?  
 14 **A:** From where?  
 15 **COURT:** Twilight Zone. That's his question.  
 16 **A:** No sir.  
 17 **DEFENSE:** Do do, do do. Do do, do do.  
 18 **PLAINTIFF:** I request that counsel stop signng. As entertaining as it is for the jury, it's  
 19 mocking of my client and mocking the trial.  
 20 **DEFENSE:** Ever hear of The Twilight Zone, the show?  
 21 **A:** Yes sir.  
 22 **COURT:** For the record, he hit a few notes of The Twilight Zone theme song which I don't  
 23 see as mocking. He was off color [sic].  
 24 **DEFENSE:** I go through life tone deaf and colorblind. This is tough.

*Haluck v. Ricoh Electronics, Inc.*, (2007) 151 Cal. App. 4th 994

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*Haluck v. Ricoh Electronics, Inc. (2007) 151 Cal. App. 4th 994*

We are not persuaded by defendants' assertion that many of the exchanges between the judge and defendants' lawyer, such as the Twilight Zone colloquy, cannot be judicial misconduct because they were made by counsel, not the judge. That misses the point. **Although some of these comments were counsel's, the judge instigated and encouraged many of them. He also allowed, indeed helped create, a circus atmosphere, giving defendants' lawyer free rein to deride and make snide remarks at will and at the expense of plaintiffs and their lawyer.** That was misconduct. (Cal. Code Jud. Ethics, canon 3(B)(3) ["A judge shall require order and decorum in proceedings"].)

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*Haluck v. Ricoh Electronics, Inc. (2007) 151 Cal. App. 4th 994*

The court and defendants' lawyer may just have been having a good time; defendants comment in their brief that the Penal Code reference was "[o]bviously ... a humorous question." **But while humor may have a legitimate place in a trial, it should not be used to belittle litigants or their counsel. Here the judge and defendants' lawyer had fun by making plaintiffs' lawyer the butt of their jokes.** They took turns providing straight lines and punch lines to each other in a way that could only convey to the jury that they were a team and plaintiffs' counsel was an outsider.

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What can happen if you are not civil in the courtroom?

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AUSTIN CHRONICLE – October 13, 2017:

Bombastic DWI attorney **Adam Reposa** is currently in custody of the **Travis County Sheriff's Office**, held in solitary confinement after being found guilty on five charges of contempt of court last month for defying a court order issued in March by County Judge **Nancy Hohengarten**. (She found him to be both defiant and disrespectful to the gathered jury and the court.) On Sept. 20, Reposa was sentenced to 180 days in jail by Hon. **Paul Davis**, the retired judge of the 200th District Court brought back to oversee the case. His attorneys filed a motion requesting a personal recognizance, which Davis denied on Oct. 2.

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**“Zealous Advocate” redefined**

**zeal-ous**  
adjective

Fervent, ardent, passionate, impassioned, devout, devoted, committed, dedicated, enthusiastic, eager, keen, avid, vigorous, energetic.

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Questions?

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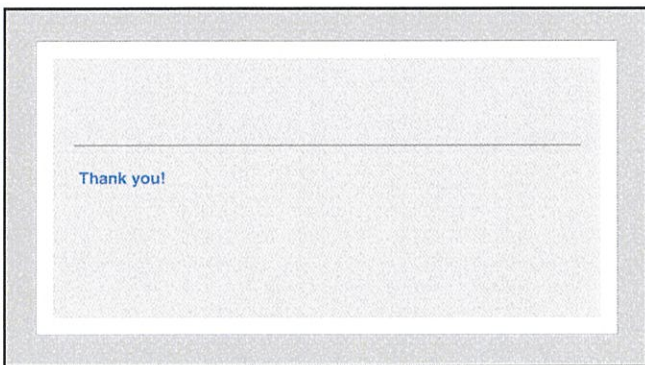
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