

CHAIR'S REPORT



ELIZABETH E. MACK

NOT LONG AGO, I WAS HIRED TO REPRESENT A PARTY IN AN INJUNCTION.

The opposing counsel, B (not his real initial), called me in what was to be our first communication about the matter. There was no “hello”, not a single pleasantry. B instead barked “Let me speak with a real lawyer in your firm. I’ve got nothing to say to you. You’re not a real lawyer.” My mind reeled from this unexpected insult. I collected myself, took a deep breath, and responded: “You aren’t going get any more real than me, B, so deal with me.” B had a single purpose in his disrespectful behavior – to try to win the lawsuit by abusing the other side’s lawyer. In his view, if he threw me off my game, if he undermined me, if I lost my balance, he would have a better chance of a favorable outcome. Undeterred, B never got more pleasant, never treated me with respect, never was courteous. I maintained a professional demeanor throughout, but it challenged every bone in my body not to spit back. At least with respect to our matter, his conduct did not change the outcome. Sadly, his conduct must work in many instances, or it wouldn’t continue to be part of his trial strategy.

My experience with B is by no means isolated. There are plenty of Bs to go around. An opposing counsel called another lawyer I know and railed her with a string of expletives (words not said in polite company or in this kind of publication) after he received a letter from her. The nicest thing he had to say was that she was an “idiot.” What was the letter about? Setting up a deposition of his client—pretty mundane stuff. Not the stuff of angry swear words. But what is?

Abusive conduct takes many forms. It can be as patently uncivilized as in the anecdotes above, and it can be more insidious, as in situations where a lawyer calls for extensive, voluminous discovery, not because her client needs it, but because she knows that she can get it and she knows that it will burden the other side to produce it. One of my colleagues just had that very experience and was plainly told: “We don’t need it, but we are entitled to get it and we want you to have to produce it.”

And a personal pet peeve of mine, but of comparatively minor consequence: not agreeing to extensions of time on day-to-day matters (I don’t mean that folks need to agree to continuances of trials when it’s not in their client’s best interests). I have an easier time getting extensions from New York lawyers than from Texas lawyers. Even if you are not inclined to be nice for the sake of being nice, consider enlightened self-interest: that moment of forethought when you think to yourself, “I may need an extension sometime.” So, go ahead, live a little. Give your opposing counsel that extension. You may need one later. No one is going to think you’re a wimp for behaving in a civil and courteous manner.

The lack of courtesy is one of the most troubling aspects of being a modern day trial lawyer. Consider also that it is the 20th anniversary of *Dondi Properties Corp. v. Commerce Savings and Loan Association*, 121 F.R.D. 284 (N.D. Tex. 1988) (*per curiam*). Signed by every sitting Northern District of Texas judge, *Dondi* set standards for professional conduct for lawyers, introducing the issue in these terms:

We address today a problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants. With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers. Judges and magistrates of this court are required to devote substantial attention to refereeing abusive litigation tactics that range from benign incivility to outright obstruction. Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case: nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive.

121 F.R.D at 286. Every lawyer sworn into the Northern District of Texas or who seeks admission *pro hac vice* must attest that she or he has read the *Dondi* opinion and will comply with it. Never mind that it is from a single federal judicial district: its teachings are just as applicable in any court, whether state or federal, anywhere, anytime.¹

The standards adopted by the Northern District of Texas in *Dondi* are:

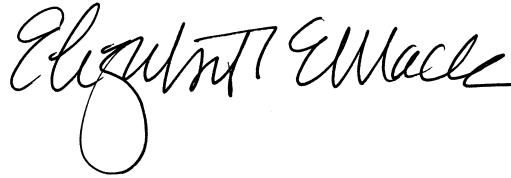
- (A) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.
- (B) A lawyer owes, to the judiciary, candor, diligence, and utmost respect.
- (C) A lawyer owes, to opposing counsel, a duty of courtesy, cooperation, the observance of which is necessary for the efficient administration of our system of justice and respect of the public it serves.
- (D) A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.
- (E) Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.
- (F) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suits with fairness and due consideration.
- (G) In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing lawyers.
- (H) A lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel's client.
- (I) Lawyers will be punctual in communications with others and in honoring scheduled appearances, and will recognize that neglect and tardiness are demeaning to the lawyer and the judicial system.

- (J) If a fellow member of the Bar makes a just request for cooperation, or seeks a scheduling accommodation, a lawyer will not arbitrarily and unreasonably withhold consent.
- (K) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.

121 F.R.D. at 287-88.

In honor of the 20th anniversary of *Dondi*, let's get back to basics. Read *Dondi* for the first time or reread it if you haven't read it in a while. Abide by *Dondi*'s standards in your entire legal practice, not just when you have a case in the Northern District of Texas. Remember that you are in a "learned profession", not a mud-wrestling match. Grant reasonable requests for extensions. Don't create difficulties, particularly not just for the sake of it. Never hide the facts. Four letter words have no place in a professional discussion. Set an example. Treat your opposing counsel the way you want to be treated. And the way you want your son, daughter, mom, or dad to be treated. With respect for each other. With dignity for the profession. With esteem for our system of justice.

¹ The Texas Lawyer's Creed, promulgated by the Texas Supreme Court and the Court of Criminal Appeals on November 7, 1989, requires professionalism in all Texas state courts.



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