

# Accountability and the Rambo Attorney



s a father of a seven and a ten-year-old boy, I have had a lot of pleasure watching them grow up and play together. How-

ever, it seems every day one or both children get into a disagreement over some issue or toy. The disagreement soon accelerates to loud words which translate to "I am right and you are wrong," "You are stupid," and "You are ugly," to boot. Since neither of my children is an adherent of the philosophy of the late Mahatma Gandhi, this now escalates to use of fists, kicks, or thrown objects (usually using one of their least favorite toys). Threats and tears soon follow with the speediest child (in my house—the youngest) rushing to the side of the least lucky parent. Our youngest tells his story of his unwarranted beating and demands that his older brother either be put to death or exiled to the Mojave Desert. By then the eldest child appears and pleads his case with a very loud voice and tears. He asserts that his brother has lied and should be burned at the stake as a betrayer to the rule of fraternity between brothers.

During this situation I am trying to remember each and every parental book I have read over ten years, wishing I had at least two on hand—to cover my ears. What happened to the list of civility rules we had proclaimed? Why aren't they working? Why did my children not meet and confer and solve all of their disputes? Why can they not act more appropriately and deal with each other without my involvement? Why are they acting just like I did with my sibling? What am I to do as a parent? Why do I feel like I am a Superior Court Judge?

In litigation how often have you witnessed a situation escalate, and then find that you are reenacting the above scene before a judge? We have all read numerous articles on the "Rambo" lawyer and bullying tactics. Many civility codes and studies by bar associations have sought to change on-going obnoxious behavior by certain attorneys. I have not noticed that anything has improved. Rather, it has become worse in most cases and Courtrooms. In fact technology has made matters worse with email and faxes

whereby unreasonable demands can occur at any time of the day, coupled with the temptation to react immediately in kind.

Only when there is accountability for one's actions do I see bullying tactics reduced. Without accountability, all of the civility guidelines in the world are worthless.

## Aspects of Accountability

Accountability has several aspects. The first aspect is being accountable to the Court. A judge needs to take immediate control of the situation with all of the tools that are available. A judge cannot expect that the attorneys will magically solve the problems when it is obvious that they cannot. I have seen several Judges remedy the situation with swift and firm action. I have seen a judicial officer being adamant that he would not hear or tolerate personal attacks on counsel. Another Judge made it clear that he knew the attorneys and trusted at least one of their representations of a series of telephone calls. I have seen a judge be very firm with sanctions as to a discovery motion that put a stop to game playing between the attorneys. For a more detailed discussion see the *ABA Journal*, April 2008, "Incivility" by Michael B. Keating, pp. 55-56. Basically a judge must take a firm hand to demand that the attorneys be accountable for their actions and to be prepared to issue sanctions if they break the rules.

## Community Reputation

The second aspect is one's reputation in the community and among peers. If you practice before the same judges and attorneys in relatively small numbers then you have experienced this type of accountability. Judges who are in the Criminal and Probate Courts have stated how professional the attorneys are and that the "Rambo" attorney rarely appears and is dealt with promptly. One of the reasons is the attorneys' ability to obtain business referrals and success before the

Court based upon their behavior and reputation. This lesson should be extended beyond the specialized bars by creating a stronger community between litigators and the Court. One of the best ways to do this is to join an Inn of Court, which is a gathering of judges, experienced attorneys and young attorneys who meet at least once a month to discuss and present issues regarding litigation in an informal and interactive setting. I have been a member of an Inn of Court where I made many friends with judges, older and younger attorneys—some of whom are the top litigators in our community. By participating in this fraternity/sorority of attorneys, one would think twice before taking improper or bullying tactics against fellow members. We need more Inns of Courts and the Beverly Hills Bar Association should sponsor one in conjunction with the Litigation Section.

*"Our law schools teach ethics, but not how to act as an attorney..."*

*Teaching the concept of proper "manners" as a litigator would be helpful."*

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own resolutions which have been approved by the Conference, and we focus attention on one or more resolutions when we meet with legislators during Sacramento Day.

### **BHBA's Own Resolutions**

Late in 2007 and early in 2008, the ResCom formulated three resolutions which were approved by the BHBA Board, submitted to the Conference, and will be debated in Monterey. None of these goes beyond the concerns of our profession, but at least one has attracted a fair amount of attention and debate.

First is a resolution which deals with waiver of the attorney-client privilege (addressing inadvertent disclosures, the scope of any waiver and disclosures under a protective order which treats the disclosure as a non-waiver.) Second is a resolution which clears up the law of summary adjudication and makes it possible to streamline trials by getting rid of one or more erroneous theories, or one or more unsupported claims, even if they are stacked among a laundry list of claims.

Third and most challenging is a resolution which challenges the Los Angeles Superior Court's administration of its pro

bono panel of mediators and would require that mediators be paid for their work—particularly in resolving cases with high values in dispute. This "ADR resolution" would require the parties to an action, who are not ordered by the court to mediation, to share the costs of mediation as agreed upon by the parties rather than have access to free mediation services. It also provides that if parties lack the means to share in the cost of mediation, mediation services may be provided on a pro bono or modest means basis.

The BHBA's ADR resolution was the product of numerous drafts, meetings and even a mediation among those with conflicting points of view. It has attracted the opposition of the Los Angeles Superior Court (which wishes to preserve its pro bono mediation panel unchanged), the scrutiny of the State Bar ADR Committee, and the attention of the Southern California Mediation Association. It also prompted a May article in the *L.A. Daily Journal*.

### **Other Bar Association Resolutions**

Among the more controversial resolutions from other bar associations which

will be debated in Monterey are: (a) a proposal by the San Diego Bar Association to permit the California Supreme Court to transfer death penalty appeals to the Court of Appeal, (b) a proposal of the National Lawyers' Guild to abolish the crime of conspiracy, and (c) a resolution by the San Fernando Valley Bar Association to require employers to provide paid time off to sick or injured employees and those caring for immediate family members. There will also be the perennial topics of legalizing prostitution, broadening transgender rights, and eliminating the death penalty.

### **Join Us**

ResCom is free—Section dues do not apply. You can join by contacting Cindy Vezina at [cvezina@bhba.org](mailto:cvezina@bhba.org). For more information, contact Chair Howard Fredman at [hsflawyer@aol.com](mailto:hsflawyer@aol.com) or 310 226 6796.

*Howard Fredman is the 2007-08 BHBA Resolutions Committee Chair. His business litigation and mediation practice is based in Century City, CA.*

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