NO GOOD DEED GOES UNREWARDED

Why Professional Courtesy Advances Your Client's Cause

by Andra Barmash Greene

I may be the only attorney who hears the words "professional courtesy" and immediately thinks of my mother's funeral. The reason is that back in 1998, I had a case in which my opposing counsel refused to agree to continue a motion hearing so I could attend her funeral in Chicago, 1,700 miles away. It seems unbelievable, but it happened. To make matters worse, the motion the lawyer refused to continue was a motion for attorney's fees for winning an anti-SLAPP motion which dismissed the case, hardly an emergency. But his approach to the litigation was take no prisoners, extend no courtesies, no exceptions. As a consequence, I went straight from the cemetery after the burial to Kinko's to sign and fax a declaration supporting our ex parte request for a continuance that my associate had to argue back in California. (My father could never understand that.) Not surprisingly, the court granted our request for a continuance. After that episode, the tide of the litigation turned decidedly against my opponents, who up to that point had won everything. The Court of Appeal reversed the dismissal, ruling that our client's case could proceed, and when the case returned to the trial court, our client was awarded its attorney's fees. The trial judge said that she never wanted to have a case again where a lawyer was so unprofessional that he would not agree to a continuance due to a death. From then on, our side prevailed on all contested issues and, with the handwriting on the wall, our client received a large settlement. While the case's merits had a great deal to do with the favorable
outcome, I will always believe that my opponent's utter lack of professional courtesy was a significant contributing factor.

This unfortunate episode remains indelibly imprinted on my mind. I have come to believe that engaging in professional courtesy makes sense, for many reasons. I no longer think, "No good deed goes unpunished." To the contrary, the opposite is true. "No good deed goes unrewarded." Extending professional courtesies is a smart litigation strategy. It will advance your client's cause and conserve the client's resources. Often, it is required by ethical rules. I have learned to educate my clients on why professional courtesy is a sound litigation strategy, one worth employing.

What do I mean when I use the phrase "professional courtesy"? It applies to a myriad of behaviors, including being civil in communications, granting appropriate continuances when necessary, cooperating in discovery to the extent possible, admitting what you have to admit and being truthful in papers filed with the court. Professional courtesy does not equal weakness. To the contrary, it is a sensible approach to litigation. But this is an area where clients may need convincing—so I explain that extending professional courtesies makes litigation more manageable, avoids "tit for tat" disputes, pleases the court, is often required by local court rules,1 helps everyone's reputation, and more often than not, saves expenses for the client.

When I explain to clients why professional courtesy is a sound litigation strategy that I encourage them to employ, I always have to make clear what I am not talking about.

Professional courtesy is not about simply rolling over and doing whatever your adversary wants just to be a nice person. Lawyers must advocate zealously for their clients – that is our duty. If your opponent does something and you can take advantage of it ethically, by all means you can and should. Professional courtesy does not equal being soft or letting people off the hook. This point is often the hardest to get across to clients who like fire breathing lawyers – being professional does not mean you are being weak.

In my 31 years of practice, I have seen or experienced a great deal of bad behavior on the part of litigators. (And I am sure that there are cases where my opponents would say the same about me.) The genesis of such conduct comes from a variety of sources: a client's directive, the desire to appear tough, concern about being taken advantage of, or a belief that such a tough guy strategy will force the other side into submission. These motivations are misguided. In the long run, bad behavior is harmful to your client and to the litigation process. When clients tell you to be nasty for nastiness's sake, you must explain the negative consequences that can occur. I have many examples from my own experience and that of others that I use to drive home the point.

I will now discuss areas where issues of professional courtesy and ethical behavior (or lack thereof) frequently arise: communications with adversaries, extensions, discovery, and court filings. I will explain, as I do to my clients, why engaging in professional courtesies and ethical behavior in each of these areas is in your client's best interests. I will also provide pointers on how to convince your clients that this strategy is in their best interests in the long run.

Communications between counsel. I have been practicing law for over three decades. Many people who have been practicing law much longer decry the demise of civility among

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2 The ABA Model Rules of Professional Conduct mention zealous advocacy three times in the "Preamble and Scope" and each reference litigation. See Preamble ¶¶ 2, 8, 9. The first comment to the Duty of Diligence under Model Rule 1.3 explains how a lawyer must act "with zeal in advocacy upon the client's behalf."
members of the bar. I don't know when that era of civility took place, but I have not really seen it in my career. In my experience, lawyers are often rude to each other in correspondence or court filings. The proliferation of email communications has only made it worse. Despite short-lived ego gratification, I do not believe endless nasty correspondence is the proper way to communicate with opposing counsel.

I continue to be surprised at what people put in writing. Don't they know it is likely to end up as an exhibit in a court filing that will not cover them in glory? Two of my favorite pieces of unprofessional correspondence that were sent to me are a copy of someone's middle finger, and a letter I sent to opposing counsel returned to me torn into about 300 pieces. I used to wonder what would possess someone to do that, but now I think I know. I assume that such venomous correspondence was primarily written for the client. Perhaps the lawyer believes the client will read the letter and think, "My lawyer is tough and aggressive." But in my experience, unprofessional communications should be avoided. They do not enhance your client's cause and reflect poorly on you.

I confess that I have succumbed to a client's desire to include language in letters that is, to put it mildly, not the language I would have chosen. When I sign such a letter, of course I own it. I almost lost a client as a result of doing this. Here is what happened. I represented a company in contentious litigation over patent licensing. The general counsel was very aggressive and typically rewrote the letters I sent to opposing counsel to be more accusatory and colorful than I had written. I signed and sent out the revised letters. Ultimately, my client was acquired by a large Fortune 500 company and a new in-house counsel took over the matter.

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3 Perhaps the lawyer believes the client will see this as acting diligently. But, the first comment the Duty of Diligence under ABA Model Rule 1.3 provides is that the duty of diligence "does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."
When we met for the first time, she told me candidly that she had read the case file and she did not believe in sending the kind of letters I had been sending to our adversaries. She said that if that was my style, it might be better for another firm to represent the company going forward. I told her that of course the letters were mine since I signed them, but the reason for the tone was the direction I had received from the previous general counsel. I told her that I was fully comfortable toning down the language, and I hoped that she would give me a chance to work with her. Luckily, she did, and I went on to represent the new company for many years. But it was a sobering reminder of the collateral consequences of communications with opposing counsel that are not civil. I now explain to clients why I don't believe sending nasty grams is worth the price they will pay.

All too often, lawyers engage in endless letter writing battles, which frequently degenerate into name calling and ad hominem attacks. That is bad enough, but what irks me the most is lawyers who try to rewrite history or create fiction in their correspondence. Such tactics have to be addressed, but I do not believe it is productive to sink to that same low level in response. Clients can end up spending a great deal of money on these letters which do little to advance the litigation in a meaningful way. When I find myself in a letter writing battle that is devolving into a "did not, did too" or "I know you are, but what am I," I typically send a letter stating that it is not a productive use of my time or my client's resources to dispute all the inaccuracies in the letter and that I will not be responding further. My lack of response should not be construed as any sort of agreement or admission with the assertions in the letter. The poison pen letters typically stop after that, along with the charges to the client for each piece of correspondence.
When writing emails to anyone, especially opposing counsel, remember that they live forever. They need to be written with as much care as a letter. Moreover, emails are just as likely to be used as exhibits to filings as are letters. Thus, flip or rude remarks should be excised, even if they feel good at the time. I recall an opposing counsel who was especially obnoxious in email correspondence. He also had issues with women lawyers which seemed amplified in emails. During a discovery dispute, he was fond of writing to the "Ladies" (and sprinkling the word "Ladies" throughout his emails) and saying that we were becoming "hysterical' and needed to "calm down and control our emotions." Invariably, we ended up in court. We made sure to attach the "Ladies" emails and quote liberally from them in our briefs. Our female judge was particularly irritated when she read the emails. I will never know if that is why we won the discovery disputes we had, but my opponent did not do himself any favors with such language.

I wish I could create software that would review an email and then send a message such as "Really? You actually want to send this?" It would be helpful. If I have written a harsh email, I make a practice to wait before I send it. More often than not, I tone it down or delete it when I have cooled off. I tell my clients about this practice and explain how emails sent in anger rarely accomplish anything positive for a case. Several have now said they wait before sending an email created when they are mad.

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4 Prejudicial conduct like this may be a violation of Model Rule 8.4. Comment 3 to Model Rule 8.4 provides that "[a] lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice." Furthermore, "[s]ome states explicitly prohibit discriminatory conduct in their disciplinary rules," including California, Colorado, Florida, Illinois, Iowa, Maryland, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Texas, and the District of Columbia. Lisa G. Lerman, Philip G. Shrag, Ethical Problems in the Practice of Law, 86 n.41 (2d ed., Wolters Kluwer 2008).
Extensions. I know clients who direct their lawyers never to give extensions or agree to continuances. I always tell my clients that such a position at the outset of a case is dangerous, because there could come a time when we are the ones who need the extension or continuance. I have rarely had a case where the client did not need some extension from opposing counsel. Unless one has a crystal ball (which I don't), it is impossible to predict how events in the course of litigation will unfold. I explain to my clients that my practice is to give reasonable extensions when doing so does not harm my client's position. (For example, when seeking a TRO, granting an extension is generally not possible.)

Even after my experience with my mother's funeral, I remain surprised by how many lawyers refuse to give routine extensions or extensions necessitated by extenuating circumstances. If the request is reasonable, the court is likely to go along with it, and you have burned a bridge by opposing it. For example, I recall a lawyer who opposed continuing the start of a trial by a few days so that his opposing counsel, an observant Jew, could attend services during the High Holy Days. When presented with the motion for a brief continuance for religious reasons, the court granted it, and expressed concern that the matter was even contested. This summer, I was scheduled for a continued arbitration and a jury trial simultaneously. On top of that, I broke my foot and I could not put any weight on it. I was in a full cast and could only maneuver using a scooter. I asked that the arbitration's continued session (its third session at that) occur after my jury trial was concluded, and that there be some time in between the two actions so that I could deal with my injury. Not only did our arbitration adversaries refuse to agree, in opposing the request, they accused me of exaggerating my injury to gain an advantage. Hardly. I would have much preferred to be trying the case on two feet sans scooter. We obtained the continuance. Ironically, after so vigorously opposing the requested continuance, my
adversaries later wanted to further extend the date for their own convenience. We reached an accommodation without involving the arbitrator but I must admit I took great pleasure in making them sweat a bit by quoting their own vitriolic words back at them.

Of course, professional courtesy in granting extensions should not be limitless. Many lawyers use repeated requests for continuances simply as a tactic to delay an inevitable bad result. When this happens, clients get frustrated and often direct that their lawyer not agree to any further continuances. This makes sense. If someone is using requests for an extension as a litigation tactic, I am the first one to say no. I have found that having previously given extensions enhances my credibility with the court when I oppose a request for yet another continuance.

Sometimes, however, even requests for continuances made by abusers of the system should be honored due to the circumstances. Here is an example. I represented a client who sought to attach $5 million in assets, and it was clear that the writ of attachment would be granted when the petition was heard. Opposing counsel used every trick in the book to delay the attachment hearing. After two months of delay, the hearing date was finally approaching. My opposing counsel called me shortly before the hearing and requested a continuance because his wife had just been diagnosed with breast cancer and had to undergo a mastectomy. My client instructed me to oppose it. I told him that I did not agree, especially knowing our female judge. My client angrily told me I was being had. I explained that we would lose all credibility with the judge if we refused the request. Again, my client was upset with my advice, convinced my

5 Model Rule 3.2 addresses "expediting litigation," providing that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." Comment 1 to this rule explains that "[a]lthough there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates."
opposing counsel was making the story up. I knew that the court would be mad if we refused the request and this could potentially impact the ruling on the writ of attachment. Ultimately, I devised a solution that was beneficial for the client even with the continuance. We entered into a stipulated order with the other side which stated that the hearing date was continued for 10 days and there would be no further continuances. There weren't, and the court granted our writ of attachment.

**Discovery.** Discovery is an area fraught with opportunities for bad behavior and gamesmanship. Much has been written about unethical "Rambo" tactics. Frivolous objections, scheduling games, refusal to produce documents, and refusing to admit what must be admitted are all part of the territory. Discovery fights prolong litigation and add to the expense, often substantially. This is another area where professional courtesy can advance your client's position and save costs, often hundreds of thousands of dollars. It, too, requires client education.

Clients, especially corporate clients, typically hate discovery. They find it intrusive, time-consuming, burdensome and expensive. Discovery is all that and more. As a result, most clients would prefer not to submit to depositions (although they want the other side deposed), answer interrogatories and requests for admissions, or produce documents. Clients are especially loathe to turn over documents that they perceive as sensitive or harmful, understandably worried about how the materials might be used by the other side. There are clients who instruct their attorneys to play hardball in discovery, object to every interrogatory, produce nothing and fight

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tooth and nail over everything. These are also often the same clients who later wonder why their legal bills are so high.

At the outset of a case, I typically explain that being reasonable in discovery makes sense in the long run and will be far less expensive. First, the fact of litigation means that there is a certain amount of discovery to which the other side is entitled. That is part of the process, like it or not. Second, courts hate discovery disputes. Courts do everything to avoid them or to punish those who do not cooperate in discovery.\(^7\) I explain how discovery fights can be expensive and the loser can be subject to sanctions. Sometimes, a court will delegate discovery disputes to a discovery referee, thereby increasing the costs of discovery and typically ensuring that more discovery is ordered, rather than less. I explain that my experience with hardball discovery tactics is that they usually backfire. Discovery is a fact of life, and litigants must engage in it. I also explain that being reasonable in discovery is not equivalent to turning everything over. Where there are reasons to object or limit, we will do so. Where a protective order is appropriate, we will seek one. I also explain that if possible, I would rather work out an issue with opposing counsel than put it in the hands of the court. This could have unintended consequences. But if making or opposing a motion to compel is sound strategy, we do it.

Clients must be educated that being cooperative in discovery does not equate with being weak or a pushover. It can make the litigation easier and less expensive for all sides. Sometimes the parties are reasonable and sometimes they are not.

One area fraught with opportunities for discovery battles is deposition scheduling. What seems easy and straightforward often is not. Everyone wants priority and to set the schedule of depositions for his or her own convenience. So often there is gamesmanship involved and much

\(^7\) Courts have the tools to do so. For example, Federal Rules of Civil Procedure 11, 26, and 37 all contain provisions allowing for discovery sanctions.
letter writing or motion practice about who is deposed and in what order. But eventually, everyone is going to get deposed so if possible, it makes sense to work it out. There are very few judges who look kindly on a motion for a protective order or to compel when the underlying issue is a deposition schedule. Cooperation in scheduling can have numerous benefits. A number of years ago, I had a case where we had 60 depositions to schedule in a short period of time. My opposing counsel was a single father and candidly asked if we could arrange the schedule to coordinate with his custody schedule. I was pleasantly surprised by his recitation of the reason for his request and agreed, since there was not going to be any prejudice to my client as a result of doing that. The depositions all went smoothly, saving time and money for both sides. My opposing counsel was extremely grateful for the extension of this courtesy. A few years after the case resolved, he referred a client to me.

Responses to written discovery frequently result in gamesmanship. I cannot count the number of times I have been the recipient of boilerplate objections that are baseless. Such tactics result in numerous rounds of meeting and conferring and then motions to compel. Typically, we get the discovery, but each side has spent a lot more time and money to get to this inevitable result. When responding to discovery, I encourage clients to respond to questions that must be answered, and make tailored objections to those that are improper or overbroad. Such an approach makes it much easier to oppose a motion to compel and to defend the objections that have been asserted. It also means that discovery sanctions are much less likely to be imposed because the position is defensible. It takes great skill to argue with a straight face that responses consisting entirely of boilerplate objections were made in good faith.

Document production is another area fraught with opportunities for unprofessional behavior. No one likes to turn over documents that are harmful or contain sensitive business
information. Of course, we all know the risks if a client does not do so or if relevant documents are lost or destroyed.  

Since I represent defendants in class actions, I typically represent the side that has hundreds of thousands, if not millions, of pages of documents, much of it stored electronically. I am constantly looking for ways to cooperate with the other side to minimize the scope and cost of such document production. Every case is unique, but I have been successful in suggesting sampling and narrowed key word searches. When the other side is unreasonable and will not work with me, I have had some success in getting the court to shift some or all of the cost of the expanded discovery to the opposing party. I find that I am most likely to get such a motion granted when I can show that I have made efforts to cooperate with the other side before invoking the aid of the court.

Sometimes, however, I find that the "be careful what you wish for" approach is the only thing that works. That strategy means giving the other side literally everything that they have asked for, which means that some poor soul or souls on both sides have to spend weeks in a warehouse or at a computer screen reviewing documents. I recently took this approach in a case where the other side would simply not agree to any sort of limit. They received about 1.5 million pages of documents to review. When they then complained to the judge that we had "buried them" in documents and we should direct them to the relevant ones, the judge had no sympathy.

Candor in Court Filings. When I first began practicing as a lawyer, it never occurred to me that people would not be truthful in court filings. After all, there is an ethical duty of candor

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8 Not only may sanctions be imposed under rules like Federal Rule of Civil Procedure 27, but unlawful obstruction of another party's access to evidence or "unlawfully alter[ing], destroy[ing] or conceal[ing]" evidence violates Model Rule 3.4(a).
to the court. I am older and wiser now, and unfortunately, shading the truth or outright lying happens all the time. A frequent source of lying occurs when lawyers file declarations in court attesting to what was supposedly said between counsel or sequences of events. Typically, the truth comes out and the person who lied loses credibility. While I understand advocacy, misrepresenting the facts is beyond the pale. I will give my opposing counsel the benefit of the doubt at the outset of a case and assume that they are being truthful. When they prove me wrong, I do not trust them again.

It is very frustrating to both clients and counsel when an adversary is untruthful. Clients have a hard time understanding how people can get away with that. Then they ask what is the point if one side is truthful if the other side is not. I tell them that more often than not such lies get exposed and it is hard for a lawyer or party to recover from that blow to credibility. Clients often get impatient as the lies mount up and there is seemingly no consequence for the adversary. But most of the time, such unethical behavior is exposed and punished. Let me give you some examples.

About 14 years ago, I was litigating against an opposing counsel in a $200 million state court breach of contract action. I will call my opposing counsel "Mr. N." Mr. N did not feel constrained by the actual facts or evidence in the case. He would constantly make representations to the court about why certain things in our case had to be scheduled at particular times because of his supposed schedule in a case in federal court where he represented the plaintiff. Our court was very accommodating to his requests. Well, one day, I received a call from the lawyer representing the defendant in the federal case that Mr. N had so frequently mentioned. I had never met this lawyer before, but since we shared the same opposing counsel

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9 See ABA Model Rule 3.3.
(and had the same opinion of him), we formed an instant bond. He asked about dates in our case. It turns out that Mr. N was making representations in the federal case about the schedule in my case that were flat out falsehoods. As we compared notes, we realized that Mr. N had been lying to the court in both cases. We made sure to bring this to the attention of both courts, much to our common opponent's dismay. Mr. N's attempt at schedule manipulation abruptly ended. As a bonus, I became good friends with the defense lawyer in the federal case. He went on to become a justice on the court of appeal.

Making misrepresentations about scheduling matters is bad, but lying about the substance of a case is worse. The potential negative consequences are substantial.10 Two years ago, I represented a defendant in a putative representative action in federal court. The plaintiff asserted a claim under a California statute that required the sending of a letter to a particular government agency as a prerequisite to pursuing that claim. This claim was a dangerous one for our side because it was the claim that could have resulted in the most damages if the plaintiff was successful at trial. We did not receive the letter in the Rule 26 disclosures, nor was the letter produced in discovery, despite a specific request for it. In responding to all of our document requests, the plaintiff only produced 46 pages, all sequentially bates-stamped, and stated repeatedly that these 46 pages were all the documents he had. We met and conferred about it. Nothing was supplemented.

10 Courts may impose a variety of sanctions for such behavior, including monetary sanctions like attorney's fees to opposing counsel, or even dismissal of the action in its entirety. See Zocaras v. Castro, 465 F.3d 479, 481 (11th Cir. 2006) (affirming dismissal of dishonest complaint, stating "'[i]f, as the Bible says, 'an honest answer is like a kiss on the lips,' Proverbs 24:26 (N.I.V.), a pleading founded on a lie is like a kick in the gut.'"); Chambers v. Nasco, Inc., 501 U.S. 32 (1991) (awarding attorney's fees and expenses totaling $996,644.65 where plaintiff intentionally withheld information from the court).
Accordingly, we moved to dismiss that claim shortly before trial since the prerequisite to filing the claim had not been satisfied. Suddenly, the letter (without any bates-stamp) miraculously appeared. We filed a motion in limine to exclude the letter, along with numerous other motions in limine. Opposing counsel, apparently forgetting the discovery responses and 46 pages of documents produced, filed a declaration stating that the letter had been produced in connection with their document production months before. We were able to show that these representations were false. The court excluded the letter and dismissed the claim, with some very harsh words for plaintiff's counsel. The court then proceeded to grant all of our motions in limine. At midnight on the night before the trial on the few remaining claims was to begin, opposing counsel dismissed the case. It was clear that he did not want to face the wrath of the judge.

Being candid, even if it means having to bring bad news to the attention of the court and opposing counsel, makes sense. It is often the only way to preserve your and your client's credibility. While it might be tempting to play ostrich and hope no one finds out, that is a very risky strategy, one I counsel clients against. About five years ago, I represented a defendant in a wage and hour class action. We settled the case for $7.5 million to be paid to the class in three separate installments over an 18 month period. Under the court order approving the settlement, the client was to provide a class list of its employee class members which would be the basis for calculating and making the settlement payments. The client produced a list and the first of the three payments was made. Shortly thereafter, the client brought to our attention that due to a glitch in their computer system, it believed that some people who should have been included in

11 It is also part of the Duty of Candor under ABA Model Rule 3.3(a), which provides that a "lawyer shall not knowingly… (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."
the class were inadvertently left off the list and had never received notice of the action at any time. Alarmed, we had an independent audit conducted. The audit determined that a large number of people had been omitted from the list. We were worried that once the plaintiffs found out about this mistake, they would seek to increase the settlement amount by millions of dollars. There was of course a good chance that no one would ever find out. Nevertheless, we determined that we had no choice but to bring this mistake to the court's and opposing counsel's attention. We did so. The plaintiffs screamed bloody murder and demanded that the settlement amount be increased. They claimed our client had acted intentionally and in bad faith in providing an inaccurate class list and therefore the settlement had to be substantially increased. Much litigation over this issue ensued. However, although the problems were caused by the mistake in the original list, we were always able to point to the fact that we had brought the issue to everyone's attention and were thus acting in good faith. If we were engaged in bad behavior, why would our client have conducted an expensive audit and alerted the court to the problem? This good deed was rewarded. Ultimately, after almost two years of litigation, the court folded the omitted class members into the existing settlement, and our client did not have to pay more money to the class. When the order granting our motion came out, our client thanked us for advising that they come forward with the bad news early on.

Good things happen in cases when lawyers are professionally courteous. Engaging in professional courtesy should be part of your overall litigation strategy. If you do so, you will find that by being professionally courteous, your clients' money is not wasted. You will avoid incurring the wrath of the court. You and your clients can focus on the real objectives of the case. Your reputation will remain intact. You may even find, as I did, that being professionally courteous can lead to more business in the future. When clients understand that professional
courtesy is a sound litigation approach that will save them expense and enhance their position with the court, they may even thank you for suggesting it.\textsuperscript{12}

\textsuperscript{12} The author wishes to thank Lauren Shaw, an associate at Irell & Manella LLP for her assistance in updating this article.