**Curb Your Enthusiasm:**
**The Ethical Bounds of Zealous Advocacy**

**By Jennifer B. Bechet**

“This is an unfortunate case. A savvy, experienced attorney fought hard for his clients [ ] and won huge awards on their behalf. But somewhere during his overzealous advocacy, he lost it, not the cases, but his integrity, professional decorum, credibility, and respect of the court. His insolent behavior toward several judges [ ] and opposing counsel and other outrageous conduct significantly harmed and obstructed the orderly administration of justice.”

So begins the 48-page opinion recently filed by the State Bar Court of California, which ends with a recommendation of several years’ suspension from the practice of law. Manifested in various forms, overzealous advocacy has resulted in attorney sanction and disciplinary action.

There are those who believe that a lawyer is required to advocate zealously on behalf of clients. Considered by some to be a fundamental principle of lawyering, it is to them the definition of lawyerly excellence. Surprisingly, there is no black letter rule in the Model Rules of Professional Conduct requiring zealous advocacy. Still, some lawyers have tried to play the “zealous advocacy” card to escape the consequences of their misbehavior.

**What Is Zeal?**

Webster’s Dictionary defines “zealous” as “devoted or diligent.” By contrast, the Random House Dictionary defines “zealotry” as “undue or excessive zeal, fanaticism.” When an attorney confuses zeal with zealotry, the effect can be sanction, discipline, suspension, reprimand, or disbarment.

In the context of lawyering, zeal transforms into zealotry when it involves dishonesty, bullying and intimidation, overly aggressive or confrontational style, and rudeness. Some lawyers who have engaged in this style of lawyering

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**The Art of War:**
**Competing as a Minority-Owned Law Firm in the Global Marketplace**

**By Jorge Mestre and Ana Munoz**

“War is a matter of vital importance to the State; the province of life or death; the road to survival or ruin. It is mandatory that it be thoroughly studied.”

—Sun Tzu, *The Art of War*

In today’s increasingly competitive global marketplace, the art of thriving as a minority-owned law firm in a world overpopulated by name-brand rivals relates more than ever to the art of war. Healthy competition is unquestionably a matter of vital importance to the minority-owned law firm; it is, with apologies to Sun Tzu, “the road to survival or ruin.” It is therefore necessary that the minority lawyer wishing to succeed at a time when firms are battling intensely for prime pieces of work study the marketplace thoroughly to determine how to use the firm’s strengths and the rival’s weaknesses to win.

In the first decade of the new millennium, there was much discussion in corporate America regarding the importance of increasing diversity, not only within a company’s ranks, but also among a company’s suppliers of goods and services. One phenomenon that grew in popularity as a result of this push for diversity was the increased desirability of becoming certified—on a local or national level or both—as a minority business enterprise (MBE). The MBE label was perceived as a tool that could be used to open doors for minority-owned businesses to obtain plum contracts from the government or from Fortune 500 companies seeking to diversify their supply base. While getting on the list of certified MBEs is certainly a tool to get more looks from entities that might have otherwise never heard of your minority-owned firm,

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We’ve Got the Momentum!

By Jennifer Borum Bechet, Julie Sneed, and Raymond B. Kim

The Minority Trial Lawyer Committee is gaining momentum on all grounds. Here’s what we’ve been up to.

Increased Membership

We are experiencing a significant increase in membership in the Minority Trial Lawyer Committee. Earlier this year, we embarked on an active membership recruitment drive, and it is paying off. In November 2009, the Minority Trial Lawyer Committee had the largest increase of any committee during that time period. The numbers speak volumes: Minority trial lawyers are learning about the committee, and they are enthusiastic about participating.

Increased Participation in Subcommittees

Minority trial lawyers are increasingly participating in subcommittees. Through the subcommittees, members share and develop useful networks, develop litigation and business development strategies, and promote the invaluable pipeline programs that are important to all of us. If you haven’t signed up already, please do so now. Our very worthwhile subcommittees include the following.

Business Development

The Business Development Subcommittee supports the career growth and success of committee members by providing research on corporate law department diversity expectations of outside counsel, including, for example, diversity criteria related to requests for proposals and evaluation of retained counsel. This subcommittee also facilitates business referrals among committee members through the use of the committee’s discussion group. Contact subcommittee chair Charles E. Griffin at ceg@griffinlawyers.com to participate.

Membership

The Membership Subcommittee communicates with members to inform them of benefits and programs and to seek their feedback. They also plan networking events for committee members and coordinate committee recruitment efforts. Contact subcommittee chair Nikki Odom at nikki.odom@mbtlaw.com to get involved.

Newsletter

The Newsletter Subcommittee publishes the Minority Trial Lawyer newsletter on a quarterly basis and also publishes articles on the committee’s webpage. Contact editor in chief Anna Torres at atorres@powersmcnalis.com to assist with our award-winning newsletter.

Pipeline

The Pipeline Subcommittee coordinates the Committee’s efforts to better prepare minority students—from high school through law school—for a career in the legal profession. This subcommittee promotes existing pipeline diversity programs by working with these programs to identify opportunities for committee members to instruct and mentor student program participants. Contact the committee cochairs to participate in this worthwhile effort.

Programming

The Programming Subcommittee develops programs for ABA CLEs, conferences, and teleconferences of interest to committee members and features committee members as faculty. Contact...
Client Development in the Obama Era

By Charles E. Griffin

From time to time, an event occurs that is so profound that it has an immediate impact on our popular culture. The election of Barack Obama as president of the United States was such an event. Prior to 2008, most Americans never expected to see the election of an African American to the presidency during their lifetime. The election of an African American commander-in-chief has changed how America is viewed by the world and the way many of us view African Americans and other minorities. Historians, social scientists, political scientists, and others will debate the short-term and long-term impact of President Obama’s election for years to come. However, some short-term gains are clear—the first African-American first lady, the first African-American attorney general, and the first Latina Supreme Court justice. These examples—and many other firsts that have occurred since the election—represent a glass ceiling that has been broken by President Obama’s election.

As minority trial lawyers, we have a responsibility to identify and respond to new opportunities in the Obama era. We stand before the bench, the bar, and the public as representatives and spokespeople for our clients and our community. Our role in the jury system is not marginal. Our participation as first-chair lawyers and leading trial advocates can be consequential. Our service as lead advocates, key trial strategists, and primary counsel is anticipated, expected, and demanded. Some unlucky litigants have learned that our absence is noted.

Minority trial lawyers bring their personal history and unique identity to the courtroom. Prospective jurors enter the jury box, armed with their perception of minority trial lawyers as advocates. Television, news reports, and politics influence their perception. The election of the first African-American president of the United States has had a positive impact on juror perceptions of minority trial lawyers and has destroyed any negative stereotypes that minority trial lawyers are only useful in “minority” venues. Our clients will benefit from this positive development.

The challenge we face is to define how to transform the current focus on diversity into opportunity during the Obama era. We have to transform opportunity into immediate client development. We have to transform short-term client development into long-term client relationships. We are committed, we have the skills, and now we have the opportunity. We should rise to the challenge.

The Minority Trial Lawyer Committee will host a panel discussion titled “A Power Shift: Client Development in the Age of Obama” during the upcoming ABA Annual Meeting, which will take place in San Francisco on August 5–8, 2010. This program will feature a panel of speakers who will discuss the challenges we face, the unique opportunities available to us, and the best practices to take advantage of those opportunities. If you are interested in enhancing your client development skills in the Obama era, I urge you to attend.

Charles E. Griffin is a principal in Griffin & Associates of Jackson, Mississippi. His practice areas include complex litigation, commercial litigation, financial services, and insurance litigation. He is chair of the Minority Trial Lawyer Business Development Subcommittee.
Making the Business Case: Flexible Work Arrangements

By Shayana Boyd Davis

This article is the first in a series examining the business implications of the many thought-provoking scenarios that can occur in the legal world. In today’s market, harsh economic realities are paramount in decision makers’ minds. By confronting this issue head-on and coming up with a proactive model, you will develop a plan that ensures mutual success for you and your employer.

The idea of flexible work arrangements is not a novel one in non-legal settings. For some time, employers have offered different hourly schedules, compensation, and telecommuting as just a few options of flexible work arrangements. Most traditional legal employers, e.g., law firms, have been slow to warm to these ideas. Before determining how best to approach your employer, you should first decide whether such an arrangement will work for you, what arrangement will work best, and how best to approach your employer with such a proposal. The following are some tips to help you in this process.

Research your employer’s mission statement and/or long-term strategic plans. The work arrangements you would like to pursue must squarely meet these objectives. Your employer places a great deal of focused attention on developing these ideals. Thus, if you keep them in the forefront of your vision, you will ensure that client needs are a top priority.

Tip: Compile a list of key statistics related to employee satisfaction and the direct relationship to client satisfaction. In other words, if the employee feels more value by receiving an added perk from the employer, this value will tie in directly to the type and level of service provided to clients.

Troubleshoot potential stigmas and concerns upfront. Develop a list of cons that will undoubtedly be a part of your dialogue with your bosses—e.g., availability for clients, in-office time, ability to manage workload—and determine how your proposal will alleviate those concerns.

Tip: Explain that you have contemplated that situations will arise that inevitably veer from your proposed schedule. If this were to occur, you will take appropriate steps to make sure that the situation is handled properly.

Speak to others in your organization to see how best to present your proposal. In doing so, you may be able to generate additional support for your plans.

Tip: Make a cheat sheet of several key points that you wish to cover with different people at your company. Tailor the talking points to areas of interest for your intended listener. Your organization’s human resources contact may be more interested in the statistics about retention, whereas the managing partner may be more interested in profitability statistics.

Develop a formal plan. This step may seem like a no-brainer, but surprisingly, some people think that an informal discussion with your boss is sufficient. A formal plan allows both you and your employer to clearly see what the expectations will be for you in your new role. This plan should include as much specificity as possible, including information about proposed days and times you will work and any salary considerations that need to be addressed.

Tip: Don’t reinvent the wheel. Determine if you can find others with your type of practice who have drafted successful similar proposals. Highlight in your plan the positive impact that flexible work arrangements have on recruiting and retaining a diverse workforce.

Consider and discuss your proposed plan’s impact on others in your organization, including other attorneys and support personnel. If there are circumstances that arise when you are not available, who is going to handle the problem? How will that person or persons deal with any increased responsibilities as a result of your absence?

Tip: Emphasize the shared responsibility involved in your proposal, even during times when you may not be physically in the office.

Create a timetable and mechanism for measuring your performance objectives and your employer’s satisfaction with your success. This step is perhaps the most crucial because it again takes into account your thoughtfulness about the business concerns at play.

Tip: Perhaps a quarterly, semi-annual, and annual review would be helpful. Draft your own measurement scale, including a mechanism for objective feedback from those with whom you work closely. Down the line, you may want to include feedback from clients to determine any impact—positive or negative—of your new arrangement.

In sum, flexible work arrangements can be successfully managed while still providing a benefit to your organization. Legal employers have begun to realize this and, as a result, have become more receptive to alternative work proposals. By taking careful steps to research and prepare for your suggested arrangement, you will have an optimal chance of success with your employer.

Shayana Boyd Davis is with Johnston Barton in Birmingham, Alabama.
Seeking to Expand Access to Justice for All: The Immigration Justice Project of San Diego

BY RAYMOND B. KIM

Justitia, the Roman Goddess of Justice (also known as Lady Justice), is popularly depicted wearing a blindfold to symbolize the impartial administration of justice for all. However, as many judges and lawyers who are actually practicing in the trenches know all too well, the gritty realities of our justice system sometimes fall short of that ideal.

Perhaps nowhere is the challenge greater in making the impartial application of the law a reality than in the immigration adjudication system. In Refugee Roulette: Disparities in Asylum Adjudication, Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag studied an extensive database of information on decisions from all levels of the asylum adjudication process over a six-year period. The results of that research were sobering. The authors found a high degree of inconsistency at all levels that track individual merits decisions. The authors also found that the background experiences of immigration judges led to significant differences in outcomes. However, the single most important determinative factor for the outcome outside the merits of the case itself was legal representation. According to Ramji-Nogales, Schoenholtz, and Schrag, asylum seekers who were represented by counsel were three times more likely to be granted asylum status than applicants representing themselves in pro se.

The American Bar Association’s Immigration Justice Project of San Diego is a pro bono pilot project launched in 2008 pursuant to a seed grant from the ABA Enterprise Fund. The mission of the project is to provide greater access to high-quality pro bono representation for both detained and non-detained individuals in immigration proceedings in San Diego, California. San Diego, with its proximity to the United States–Mexico border, has one of the heaviest immigration dockets in the country. At any given time, more than 1,000 immigrant detainees are housed at the San Diego Correctional Facility awaiting deportation proceedings (also known as removal proceedings) or pursuing appeals from removal orders. In addition, it is estimated that around 30 to 40 percent of the appeals filed each year in the Ninth Circuit Court of Appeals (or around 6,000 cases) are immigration appeals. Thus, the need for quality legal representation in this part of the country is acute.

Volunteer attorneys without a background in immigration law are provided with training opportunities, sample materials, and an experienced immigration attorney mentor.

Unlike criminal defendants, immigrant detainees, as well as non-detainee applicants, have no right to government-funded counsel. As a consequence, many appear in immigration proceedings pro se, substantially reducing their likelihood of success, regardless of the actual merits of their case. Another unfortunate collateral effect of this lack of access to professional legal representation is the rise of a cottage industry of so-called notarios, who prey on immigrant applicants by falsely claiming to be immigration lawyers or specialists. Unable to afford competent counsel, immigrant applicants are particularly susceptible to such scams. Accordingly, not only are immigrant applicants substantially hindered by their inability to consult with qualified counsel, but they are also often financially victimized in the process.

The Immigration Justice Project of San Diego is a collaborative effort of several ABA entities (including the ABA Commission on Immigration, the Standing Committee on Federal Judicial Improvement, the Standing Committee on Pro Bono and Public Service, and the Section of Litigation) along with the Executive Office for Immigration Review, the federal courts, Georgetown University Law Center’s Institute for the Study of International Migration, the American Immigration Lawyers Association, and the private bar. The project provides an opportunity for volunteer attorneys to take pro bono cases at both the immigration court and appellate levels. It also provides an opportunity for law student interns to assist attorneys in screening and interviewing clients, conducting legal research, and drafting and preparing motions and briefs.

Importantly, lack of previous experience in immigration law is not an obstacle to participation. Volunteer attorneys without a background in immigration law are provided with training opportunities, sample materials, and an experienced immigration attorney mentor to ensure that they are equipped to provide their clients with top quality advocacy. In return, lawyers have the opportunity to gain invaluable experience in courtroom and appellate settings and learn more about an important and fascinating area of law. Moreover, participation in the Immigration Justice Project allows lawyers to lend their services in furtherance of individuals in dire need and promote the goals of our legal system generally. Those who wish to connect (or perhaps reconnect) with that spirit of public service that motivated many of us to become lawyers in the first place will be amply rewarded.

One notable feature of the Immigration Justice Project is that the project’s
activities are the subject of a study being conducted by Georgetown University Law Center’s Institute for the Study of International Migration to assess the project’s impact on the immigration and appellate court process. The results of this study will enable researchers to determine the effectiveness of these efforts and come up with workable solutions that may be implemented in other jurisdictions. As such, not only will participation have an immediate and meaningful impact on the lives of immigrant applicants now, but it will also help craft programs that can continue, and perhaps improve upon, these efforts in the future.

To volunteer, or for more information, please contact Elizabeth Sweet, director of the Immigration Justice Project, at sweete@staff.abanet.org. Information is also available on the web at http://new .abanet.org/Immigration/Pages/ ImmigrationJusticeProject.aspx.

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Endnotes
1. 60 St. L. Rev. 295 (2007).
How to Tip the Scales of a Down Economy in Your Favor

By Alemayehu Kassahun

Did you get laid off? Are you worried about getting laid off? Wondering how to keep your firm afloat in these trying times? Feeling the effects of this tumultuous economic climate? As lawyers, from the time we are in law school, we are conditioned to feel as though our jobs define us. What happens when you no longer have that job? How do you cope financially and emotionally?

As we struggle with the changing economic climate, lawyers are going to have to become creative in ways to find work, keep their jobs, and keep their clients. In their book, *How Good Lawyers Survive Bad Times*, Sharon D. Nelson, James A. Calloway, and Ross L. Kodner address some of these very real concerns and provide helpful tips in dealing with and hopefully thriving in the current legal services market.

The authors touch on a variety of ways for lawyers to cope with a job loss or prepare for one that seems to be on the horizon. This book emphasizes adaptation and improvisation to survive the economic downturn. Further, it suggests different ways to utilize the skills you have acquired over the course of your practice, the opportunity to retrain yourself in other thriving practice areas, as well as the possibility of considering less affected regions to practice in.

For lawyers who have lost their jobs after several years of practice, the task of plunging headfirst into a job search can be daunting. Luckily, the authors offer a wide array of tools and techniques to aid in the hunt for employment. The book examines practical approaches to drafting résumés and utilizing the networks (real and virtual) that lawyers have created throughout their careers. Additionally, *How Good Lawyers Survive Bad Times* provides a listing of online resources available to assist the unemployed attorney in finding a new position. Most importantly, the authors stress the importance of keeping your spirit up when you lose your job as well as turning to support groups if needed.

The authors go on to provide key strategies to make your law firm “recession proof.” Maybe not so surprisingly, the authors suggest that some costs should actually be increased in times of economic hardship. The book contains different tips and methods for law firms to collect payments from clients that may not be so willing to fork over the money they owe for legal services that have already been provided. Significantly, the book advises that the longer a bill is overdue, the less likely a lawyer or law firm will get paid in full.

If you are in the unfortunate position of having to lay off employees to keep your practice viable, the authors provide a look at how to assess who is valuable to your firm. The book also suggests that there are alternatives to layoffs that are available. An example of this is firm-wide pay cuts in exchange for Fridays off. If there is no other alternative to layoffs, the most important thing is to be as humane as possible when laying people off. Layoffs can have very negative effects on a firm’s image and morale if not handled with care. Keeping the morale of your office from taking a nosedive is important after a round of layoffs. Keeping employees apprised of a firm’s condition will do wonders in this area.

The authors meticulously but concisely address different ways to monitor both your practice’s finances and your personal finances to make sure that money is not being wasted. Further, the book discusses ways to retain your current clients as well as alternative ways to market in a down economy.

*How Good Lawyers Survive Bad Times* capitalizes on Ross Kodner’s expertise in legal technologies by providing different ways that attorneys can use technology to “shift the Time Bucket” or, in other words, increase the ratio of billable to non-billable time. The book discusses getting the highest Return on Legal Technology Investments, termed ROLTI by the authors. The authors analyze the benefits of going “paper LESS” (a term the book has coined for using less paper), as going paperless is unrealistic in this day and age. There are other more practical benefits aside from the environmental impact and reducing your practice’s carbon footprint. The authors rehash several tips for saving money on technology through the concept of “Tightwad Technology,” which was first presented by Ross Kodner.

Even if your practice is thriving or your job is secure, *How Good Lawyers Survive Bad Times* is a must-read. The authors do a tremendous job of fitting valuable information into a concise and relatively quick read. Any attorney can benefit from the exercises and money-saving solutions. In these times of economic uncertainty, whether looking for a job, retaining customers, marketing a law practice, or just billing hours, who couldn’t stand to be more efficient?

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have suffered the pains of sanction or discipline. For some attorneys who raise it, zealous advocacy has proven an ineffective defense.

**Ain’t Misbehaving, Just Zealous**

For example, the Louisiana Supreme Court reprimanded one attorney who engaged in abrasiveness, bullying, and strident behavior. That attorney had threatened to file a medical malpractice action against two doctors if they issued a medical report that might be detrimental to his client’s case. While admitting the threat, the attorney claimed that he had no intent to harass or intimidate the doctors, but at most was “overzealous in representing poor people in worker’s compensation cases.” For his part, the attorney was found to have violated the Disciplinary Rules in effect at that time in that he had asserted a position he knew would serve merely to harass or maliciously injure the doctors and had engaged in conduct prejudicial to the administration of justice and that adversely reflected on his profession.

The Louisiana Supreme Court was not impressed by the claim of another attorney, who when called on the carpet for his conduct, claimed he was not assertive, aggressive, or in a zealous mode when he threatened and intimidated a justice of the peace and another attorney; rather, he was “emotional [as] lawyers who are on the cusp of litigation sometimes may get.”

If, however, zeallessness is not a black letter requirement of the rules, why do some lawyers ever raise zealous advocacy as an excuse for conduct? The answer may lie in the fact that zealous representation used to be expressly required under the rules governing lawyer conduct.

DR 7-101 of the Code of Professional Responsibility (CPR) was titled “Representing Client Zealously” and provided in relevant part that “(A) A lawyer shall not intentionally: fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101 (B).”

DR 7-101 nevertheless, provided that

A lawyer does not violate this Disciplinary Rule, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process. Further, in his representation, the attorney was allowed to where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client and could refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

Some clients may seek out the meanest, toughest attorney they can find. They may view courtesy or civility toward the opponent as a sign of weakness.

When the Model Rules of Professional Conduct replaced the CPR, the ethical duty of zealous representation was deleted. At present, the lawyer’s duty is to represent the client with “reasonable diligence and promptness.”

The terms “zealously” and “zeal” do not appear in Model Rule 1.3. Still, the concept of zeal survived in the Preamble and the Comment to Rule 1.3 of the Model Rules. The Preamble to the Model Rules lists among the basic principles of lawyering, the lawyer’s obligation “zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.” The Comment to Model Rule provides that

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.

On the other hand, Comment 1.3 states

Clearly, therefore, the Model Rules’ nod to zeal and zealous advocacy cannot countenance zealotry or overzealousness.

**Client as Puppeteer**

While the rules may not demand zeal, clients may. It is likely that courteousness and politeness to opposing counsel and others are not the first attributes that clients seek in an attorney. Some clients may want the exact opposite and seek out the meanest, toughest attorney they can find. They may view courtesy or civility toward the opponent as a sign of weakness. These clients may demand that the attorney be tough. They may demand a Rambo, i.e., an attorney whose arsenal includes intimidation, badging, name calling, brow beating, aggressiveness, rudeness, lies, or sneakiness that may or may not cross the line between ethical and non-ethical behavior.

When a client is paying, the lawyer’s temptation to oblige and assume the role of overzealous advocate may be great. However, the Rules may offer the attorney some solace. Pursuant to Rule 1.2, a lawyer is required to abide by a client’s decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.
However, those requirements are tempered by Rule 1.4, which provides that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. Further, Rule 1.16 provides that a lawyer shall not represent a client if the representation will result in violation of the rules of professional conduct or other law. In such a case, a lawyer must withdraw.

Still, some attorneys may succumb to the pressure to employ Rambo tactics. As the earlier example of the Louisiana attorney who threatened the physicians demonstrates, despite the court’s acknowledgment that the conduct may have been a “hasty and imprudent reaction to pressure from his client,” disciplinary sanctions may still result.

Behavior That Disrupts the Court
Examples abound of instances in which an attorney’s overzealousness manifests as “stubborn, argumentative, sarcastic, and disrespectful” behavior in the courtroom. In one such case, the Hawaii Supreme Court meted out a six-month suspension. Among the attorney’s offending exchanges with the trial court judge was the following exchange, which took place once counsel were directed to approach the bench.

Judge: The next time you’re disrespectful to this witness, I will find you in contempt of court. The next time you’re disrespectful to this Court, I will find you in contempt.

Attorney: Excuse me. Let’s put it on the record so we understand something here. One, I take your comments as a threat.

Judge: You can take it whichever way you want.

Attorney: Just for the record, you’re threatening me? I will conduct myself as I see fit.

Judge: You do not see fit clearly, Mr. [Attorney]. I asked you continuously throughout these proceedings.

Attorney: Excuse me. Can I place myself on the record without being interrupted? Thank you. You look like you’re about to explode.

Judge: I’m not. You’re the one who’s going to suffer the consequences, Mr. [Attorney]. I am telling you, if you continue on like this, you force me to find you in contempt, and I will do so, Mr. [Attorney].

Some attorneys have wrongly assumed that the adversarial system allows for any conduct provided that it is done in the name of zealous representation of the client’s interests.

In the disciplinary proceeding that followed, the Hawaii Supreme Court rejected “the suggestion that a lawyer’s overzealous representation of his client and contemptuous behavior are one and the same.” The ethical bounds of zealous advocacy before a tribunal are discernible. As the Delaware Supreme Court found, zealous advocacy never requires disruptive, disrespectful, degrading or disparaging rhetoric. The use of such rhetoric crosses the line from acceptable forceful advocacy into unethical conduct that violates the Delaware Lawyers’ Rules of Professional Conduct. “Lawyers are not free, like loose cannons, to fire at will upon any target of opportunity which appears on the legal landscape. The practice of law is not and cannot be a free fire zone.”

In this case, among other things, the attorney had suggested in his brief that the trial court might rule on a basis other than the merits of the case. This was found to have impugned the integrity of the tribunal. Further, the attorney’s actions had caused the court to waste judicial resources by striking sua sponte the offensive and sarcastic language in the brief and to write an opinion explaining its actions and was thus disruptive conduct prejudicial to the administration of justice.

“Take No Prisoners” Strategy
While aggressive lawyering is often rewarded, overly aggressive, “scorched earth,” document blizzard strategies may spell trouble for an attorney—despite the zeal that occasioned it. For example, the Ohio Supreme Court suspended for one year a lawyer whose “representation in the underlying cases became a personal crusade no longer driven by his clients’ interests.”

Even respondent realizes now that he lost his objectivity. Thus, despite respondent’s explanations for the claims and arguments he advanced throughout this ordeal and his assurance that he only sought justice for his clients, we view respondent’s “zeal” as blind determination to ruin those he seemed to consider his clients’ oppressors. Drawing the same conclusion, the [intermediate appellate court] declared respondent “an obnoxious litigator bent on abusing the courts to further an illegitimate agenda.”

Criminal Misconduct
From their conduct, it would appear that some attorneys have wrongly assumed that the adversarial system allows for any conduct provided that it is done in the name of zealous representation of the client’s interests. Among the attorneys who have learned such is not the case is the Louisiana criminal defense attorney whose client had claimed to be wrongly accused of the crime. The attorney was so “impressed by his client’s apparent sincerity” that he went so far as to pay an alibi witness to testify falsely on his client’s behalf. The client subsequently confessed to the crime and, in turn, the attorney was convicted of conspiracy to defraud the government among other things. In the disciplinary proceedings that followed the attorney’s release from incarceration, the attorney took the position that in his enthusiasm, he acted...
zealously in the interest of his client as well as out of naïveté or ignorance. However, the Louisiana Supreme Court was not impressed and found that the attorney’s “education and experience in the law was such that his actions cannot be condoned by his purported zealous attitude, naïveté or limited practice or this Court’s compassion for him in his ordeal.” The attorney was disbarred.

A client deserves and should receive the benefit of an attorney’s diligence and devotion to the client’s cause. As several attorneys have found, a lawyer’s misunderstanding of the parameters of “zealous advocacy” may prove to be that lawyer’s undoing.

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Endnotes
are seeking any competitive advantage. It is effort, not money, that will reap big rewards in an increasingly tight economic climate. An increasing number of companies in all industries will increasingly be looking beyond their long-established name-brand players. The idea of strategically choosing which opportunities to pursue at what time may seem like an overly cautious approach. But exercising prudence in ramping up your minority-owned firm can be a key to success.

**Offensive Strategy**

“He who knows when he can fight and when he cannot will be victorious.”

Minority-owned businesses are frequently the brainchildren of highly motivated, entrepreneurial types. Who else, after all, could successfully strike out on their own, competing against long-established name-brand players? Because of the culture of assertiveness among minority business owners, however, the idea of strategically choosing which opportunities to pursue at what time may seem like an overly cautious approach. But exercising prudence in ramping up your minority-owned firm can be a key to success.

**As business across industries becomes more international, the ability to sell native foreign language skills is invaluable.**

Professor Leonard Greenhalgh of the Tuck School of Business at Dartmouth University, in collaboration with the Minority Business Development Agency of the U.S. Department of Commerce, presented a paper at the National Minority Enterprise Development Week 2008 Conference titled “Increasing MBE Competitiveness Through Strategic Alliances.” Professor Greenhalgh discusses a number of concepts essential to the formation of an effective growth strategy for a minority-owned enterprise. The paper operates on the premise that while most MBE owners “spend more time focusing on customer attractiveness than on their capacity to serve their clientele... strategic choices about where the MBE should be positioned in the value chain [should] involve two considerations—how attractive is the customer and how well can the MBE serve the customer’s needs.”

The importance of being able to serve the client effectively is clear. Taking on business beyond the current capacity of your enterprise (or, in the case of legal services, in an area beyond the expertise of your firm) could lead to client dissatisfaction and decreased opportunities in the future. For a small firm, however, all is not lost. As Professor Greenhalgh proposes, and as we know from our own experiences as minority-firm owners, one key to expanding a small firm’s capacity, and thus to expanding the range of services the firm can provide, is forging strategic alliances. Successful rainmakers know that their businesses are only as strong as their relationships. Part of a business strategy is knowing that competition in the legal marketplace is not a zero-sum game. Developing friendships with other attorneys is one obvious business source. Whether these lawyers come from large or small, minority-owned or conventional firms, there are always instances when conflicts will arise or when cases come in that need to be referred out. By strategically sending business to professionals in your network, a minority-firm owner can almost certainly expect reciprocal benefits. The network should not be limited to other lawyers, but should include other professionals who provide services essential to our clients. For example, in the case of commercial litigators, maintaining close relationships with the accounting firms that so often provide services to our clients is important.

**Weaknesses and Strengths**

“Generally, he who occupies the field of battle first and awaits his enemy is at ease; he who comes later to the scene and rushes into the fight is weary.”

Knowing when to pursue a business opportunity and how to pursue it means having an acute awareness of the particular strengths of your firm, as well as the strengths and weaknesses of those competing against you for business. Some of the factors that could be perceived as strengths or weaknesses of a firm relate to firm size, racial or cultural composition of the firm, and the firm’s existing client base. As will be discussed in the next section, whether each of these factors is a strength or a weakness depends upon circumstances, and in many cases, can...
be a matter of opinion—an opinion that you can influence. But the importance of knowing how you are likely perceived in the marketplace and being first “on the field of battle” to frame that perception to your benefit cannot be overstated.

**Maneuver**

“Nothing is more difficult than the art of maneuver. What is difficult about maneuver is to make the devious route the most direct and to turn misfortune to advantage.”

Minority-owned law firms can be vulnerable to perception issues. Because many MBEs are recent start-ups, for example, they may operate with a smaller staff and fewer of the larger firms’ conventional resources, e.g., a large group of paraprofessionals. Also, the cultural divide between minority firms and their clients can lead to misconceptions regarding language ability or business acumen.

Anecdotally, I can add that in building our law firm, I have managed to turn these perceived weaknesses into marketable strengths. For example, having a leaner operation means that the monthly invoice comes without all of the “added fat” that is sometimes seen in large law firm practice. We try and sell the same level of service, which is performed by fewer professionals who give more personal, individualized service to the client.

With regard to cultural or language differences, as business across industries becomes more international, the ability to sell native foreign language skills is invaluable. The ability to confer and correspond with foreign clients or experts in their own language makes cross-border communications exponentially more efficient and effective. In a litigation context, particularly, the ability to work with and understand original documents in a foreign language is also a huge cost-saver for clients. This does not apply only to language skills. The often unspoken reality is that multi-cultural firms are conversant in foreign cultures as well as foreign languages. This proficiency is essential in dealing with business and litigation environments that can often be quite different from the U.S. system that we are familiar with. A clear view into the language and thought processes of other cultures affects the way legal problems are seen and solved. Or, to paraphrase the infinitely more articulate Ludwig Wittgenstein, “If we [speak] a different language, we . . . perceive a somewhat different world.”

**Intelligence Gathering**

“Now the reason the enlightened prince and the wise general conquer the enemy whenever they move and their achievements surpass those of ordinary men is foreknowledge.”

Of course, all the strategy and self-awareness described above will be ineffective if we do not have the benefit of up-to-date, in-depth information about our clients and potential clients and their legal services needs. Obviously in the twenty-first century, there is a wealth of information available online regarding corporations and events affecting those corporations. However, in this area as well, our business networks can provide a valuable offline source of detailed information about what companies could be looking for in relation to the types of services your firm provides.

**Conclusion**

With increased challenges in the legal services environment come increased opportunities for those firms that are willing to put in the extra effort to play their position. By studying themselves and their potential client base and thinking strategically, minority law firms can turn a time of relative drought for top-heavy brand name firms into a time of plenty for the more adaptive, entrepreneurial enterprise.

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subcommittee chair D. Michael Lyles at lylesm@osdgc.osd.mil to participate in this important subcommittee.

You can find out more information about our subcommittees on our website at www.abanet.org/litigation/committees/minority.

Increased Programming
The Minority Trial Lawyer Committee is excited to sponsor and cosponsor a number of important programs and conferences. The Minority Trial Lawyer Committee served as a cosponsor of the 2010 Corporate Counsel CLE Seminar, which was held on February 11–14, 2010, at the Westin Mission Hills Resort in Rancho Mirage, California. We also sponsored a program titled “Employment Law in the Obama Age,” which was held during the seminar. For information concerning the seminar and the committee’s business meeting, which was held during the seminar, please check the Minority Trial Lawyer Committee website.

We are also cosponsoring a number of programs at the Section of Litigation’s Annual Conference, which will be held in New York City from April 21–23, 2010, and the ABA Annual Meeting, which will be held in San Francisco, California from August 5 to 10, 2010. The programs are tentatively titled “A Power Shift: Client Development in the Age of Obama” and “Increasing Diversity on the Federal Bench.” These programs will provide opportunities for our members to gain heightened visibility and to serve as panelists or moderators. For details about the upcoming programs, visit our committee’s webpage.

Increased Networking
We are continuing our tradition of holding Dutch Treat dinners when we meet in person throughout the year. Please plan to network, participate, and attend our events. Join us at the Dutch Treat dinner during the Section of Litigation’s Annual Conference in New York City on April 21, 2010, and the ABA’s Annual Meeting in San Francisco on August 5, 2010. We look forward to seeing you there. Don’t forget your business cards.

Increased Communication
Please continue to review our newsletter and webpage for updated information about the Minority Trial Lawyer Committee. We welcome your ideas for topics for both avenues. Please send ideas for the newsletter to Anna Torres at atorres@powersmcnalis.com and ideas for the webpage to our website editor Denise Zamore at dvz@avhlaw.com.

We look forward to continuing this great momentum. We are committed to it, and we are committed to you.

Minority Trial Lawyer on the Web

View our directories of leadership and subcommittee listings
Find additional resources
View our newsletter archive
Plan to attend committee events

Visit the Section of Litigation Minority Trial Lawyer Committee Website.

www.abanet.org/litigation/committees/minority
ASK A MENTOR

Advice on Growing a Practice Area

Dear Ask a Mentor,

I am an associate at a medium-sized firm in the south. My firm has a well-established and well-respected litigation practice. I am interested in environmental litigation as a practice area. At present, my firm does not do much of this work, but I have worked on a few environmental cases that our firm has undertaken in recent years. Is it realistic to hope that, as I rise through the ranks of the firm, I can develop and grow a practice in an uncharted area, or should I concentrate on those practice areas my firm currently has? What steps can I as an associate take to grow a practice from the ground floor?

G.L., Atlanta, Georgia

Dear G.L.,

Developing a new practice area is an entrepreneurial venture and should be approached as such. Thorough planning and preparation will be key. You will need the firm’s support, and often indulgence, to succeed. As you plan and prepare, consider the following:

1 How does your firm regard entrepreneurship? Have other associates or partners already done what you are proposing to do? Was the venture a success or a failure? Ask individuals who are managing the firm’s current practice areas how they got to that position. Did they develop or grow an existing practice area of the firm? How did they do it? Gather as much background information as you can. This will help you determine how you will present your plan to the firm’s leadership in a way that will be best received.

2 Evaluate whether your proposed practice area is a good fit with your firm’s current practice. If you work at a litigation firm, proposing a new practice area such as trusts and estates will be a more difficult sell to the partners than proposing a practice area that is merely an extension of or similar to work that the firm already does. In your case, your firm is already a litigation firm, so expanding into a different type of litigation will be better received.

3 Evaluate whether your proposed practice area is of interest to your firm’s leadership. Ask a trusted mentor if there has ever been discussion about expanding into that practice area. You mention that your firm currently does some environmental work. Does the firm tolerate the work as a favor to certain valued clients, or is it a practice area that the firm’s leadership has been interested in but lacked an individual with the time and energy to devote to growing that practice area? If it is the latter, your job is to convince them that you are the person who has what it takes to make it happen.

4 Work on establishing yourself as an expert and go-to person in the proposed practice area. Your desire to grow or establish a new practice area will be better received if you are perceived to have what it takes to successfully market the practice. Join professional and industry groups. Seek out speaking or publishing opportunities. Ask to be assigned to all environmental matters that come into the firm. Find an “informant” that can keep you advised anytime a new file comes in so that you can ask to work on it.

5 Continue to hone your skills on the firm’s current work. Assume more responsibility for the work that you are currently handling. You must establish your competence and ability to handle work independently. Managing a practice area requires more than technical legal skills. It requires skills in personal time management, delegation, customer service, staff supervision, work flow management, marketing and client development, and a multitude of other collateral skills. If your firm’s leadership is to trust you to develop a new practice area, they must be confident that you have what it takes to manage the practice and all that it entails.

6 Demonstrate your strong work ethic. Developing a new practice area is not for the faint of heart. It is time consuming and can be frustrating. Show that you can handle the added responsibility and pressure without neglecting your current responsibilities and duties.

7 Develop a business plan. To convince the firm’s leadership that you have what it takes, you will have to present to them a plan they can support. What will it take and how long will it take to develop the practice area and make it a worthwhile investment of the firm’s time and resources? Research the market opportunities for the proposed new practice area. Who will be your clients? How do you intend to get them? What resources in terms of time, money, and other intangibles will you need from the firm to bring the plan to fruition? How long will it take to see results? Propose specific and measurable short-term and medium-term goals for your plan. The more detailed and sound your business plan is, the more likely that the firm’s leadership will view the venture in a positive light.

Developing a new practice area can be both intensely rewarding and incredibly frustrating, often at the same time. Advice and counsel from others who have successfully accomplished what you now seek to do will be incredibly valuable. Success requires a strong stomach, thick skin, eternal optimism, endless patience, the ability to persevere, and an endless supply of strong coffee. Good luck!

Anna D. Torres
Dear G. L.,

Your first step should be to determine why your firm does not do more environmental litigation. Talk to the senior attorneys. There simply may not be enough environmental litigation available to justify a separate practice group. If the work is not there, it is difficult to develop and grow a practice, and you are probably better off concentrating on an existing practice area at your firm.

On the other hand, if the work is available, there are several things you can do to bring the work to your firm. Join an appropriate ABA committee, such as the Section of Litigation’s Environmental Litigation Committee. Committee work will help you to expand your knowledge of environmental litigation and to keep current. Your efforts will enable you to better market yourself and your firm to potential clients. Committee work also provides a way to connect with other lawyers involved in your chosen specialty. Too often lawyers forget that one of the best ways to develop business is to network with other lawyers.

Become involved in non-lawyer activities relevant to your desired practice area, such as environmental groups in your area. This will help you let people know you are available and will provide a good sense of the particular types of environmental litigation you are likely to handle. Finally, seek out and encourage approval and support from your firm. Developing a new practice area requires a lot of time and effort. It will be much easier if you do not try to do it alone.

Leon J. Bechet

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YOU’RE INVITED! 2010 COMMITTEE EXPO

Do you want to get published or blog on a topic related to your area of practice? Are you interested in joining the editorial board of a legal publication? Are you looking for more opportunities to network with your peers and ABA leadership?

Come to the 4th Annual Section of Litigation Committee Expo at the Section Annual Conference in New York City, where you can learn about all of these opportunities available to you and more!

WHAT
Section of Litigation Committee Expo
WHERE
The Hilton New York
WHEN
Thursday, April 22, 2010 • 5:30 p.m. – 6:30 p.m.
REGISTRATION
www.abanet.org/litigation/sectionannual
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