



Sanctioning Injury Because of Insults

When Unprofessionalism Becomes Sanctionable

By Kim M. Jackson

While some view the tone of discourse in our political culture to be disheartening, many in the legal profession hope to insulate our practice from personal and *ad hominem* attacks among attorneys. Emphasizing the concept of *professionalism* has become the call to arms for protecting our profession from such conduct. Unfortunately, many litigators believe that professionalism ideals are either unenforceable “suggestions” or something to gain an advantage over weaker or less aggressive attorneys. Thus, some attorneys sadly determine that professionalism is not worth practicing.

An attorney striving to behave within an ideal of professionalism often feels that his or her efforts are unrewarding. Many attorneys find that professionalism is not as widely practiced or as understood as they would like. They feel that courts often ignore, or at best are ignorant of, the opponent’s unprofessional conduct. Besides, the attorneys who appreciate and reciprocate for professional adversaries are not the problem.

I am here to proclaim that there is hope for those troubled by the apparent inability to enforce professionalism in the bar. In recent years, many local jurisdictions have included professionalism standards within their local rules. (E.g., U.S.D.C. M.D. Ga. Local Rules, Standards of Conduct A, obligates lawyers to communicate openly and respectfully, respect each other’s schedules, and avoid creating unnecessary animosity or contentiousness.) Also, the Rules of Professional Responsibility include a number of professionalism related standards. As a result, there is now not only awareness of the problems unprofessional conduct causes the justice system, but there is an increasing willingness to regulate and potentially punish the unprofessional litigant.

Various types of unprofessional conduct can catch the attention of the court. Such conduct might include:

1) insulting remarks about opposing counsel; 2) comments that call into question opposing counsel’s fitness as an attorney; 3) threats aimed at opposing counsel; 4) slurs of a discriminatory nature; or 5) unsubstantiated claims against opposing counsel that have defamatory meaning or impugn one’s character. Any one of these breaches may be subject to sanction by a court.

An Eleventh Circuit case recently introduced to me provides a perfect point of discussion. In *Thomas v. Tenecco Packaging Co.*, 293 F.3d 1306 (11th Cir. 2002), the attorney for the plaintiff in a racial discrimination suit was sanctioned for engaging in *all five* of the above examples. The sanction was non-monetary, *i.e.*, the attorney was censured and reprimanded. Whether such a sanction is more costly than a monetary fine probably depends on one’s own view of his or her reputation.

Thomas was an employment racial discrimination lawsuit. The counsel for the plaintiff threw a wide array of personal insults and accusations at the defense attorney. The source of these insults included not only the briefs filed by the attorney, but also came in the form of non-party witness affidavits and declarations (the witnesses were, however, clients of the counsel in related litigation). *Thomas*, at 1316–19. For example, in identifying the “insulting remarks about opposing counsel,” the court identified insulting comments about opposing counsel’s height, hair and his “facial expressions and body language” that “reminded [the witness] of a picture of the Grand Wizard of the KKK.” Counsel’s fitness as an attorney was questioned, and affidavit testimony contained “thinly veiled threats [of bodily injury] aimed at opposing counsel.” One affidavit of a witness included a quote by the plaintiff’s attorney making a racial slur towards the race of opposing counsel. Finally, the filings were inundated with unsubstantiated claims that opposing counsel was a racist. *Thomas*, at 1321.

Although the opposing counsel suggested sanctioning plaintiff’s counsel for unprofessional personal attacks, the request was made half-heartedly within a reply brief. The trial court, however, took the suggestion and ordered the offending attorney to show cause why sanctions should not be entered. After receiving a response filled with personal allegations against the judge and his district, the court entered the sanctions.

Professionalism Is Its Own Carrot. Now Courts Are Using the Stick.



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The Eleventh Circuit provided several points to ponder on the issue of professionalism within litigation. First, the court has the inherent power to sanction conduct within the context of litigation, finding that "because the remarks serve no purpose other than to harass and intimidate opposing counsel [they] are inconsistent with basic rules of professional conduct that apply to [offending counsel]." *Thomas*, at 1322. Second, there are many local and ethical rules that provide ample authority for the position that a lack of professionalism can rise to the level of sanctionable, unethical

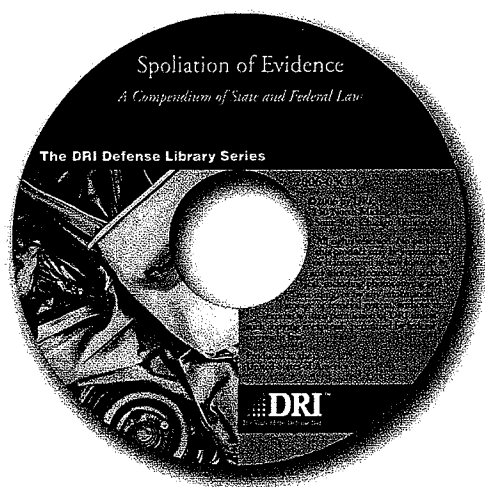
conduct. *Thomas*, at 1323. Third, the attorney cannot hide behind witness statements or affidavits to achieve the *ad hominem* attacks. The court explained that "[a]n attorney should not be an unreflecting conduit through which the opinions or desires of a client or witness are permitted to flow unchecked. *Thomas*, at 1325. As Georgia's ethical rules provide, an attorney has a duty to 'exercise independent professional judgment.'" *Thomas*, at 1327. *Thomas* also included a discussion with citations to many other cases involving sanctioned, unprofessional conduct. *Thomas*, at 1325, fn. 29.

Opinions like *Thomas* are good news for the DRI member reading this article (I am of course safely assuming that DRI members would be on the receiving end of the unprofessional opponent's conduct). *Thomas* provides hope that professionalism is being taken seriously in many of our courts across this country. It also stands for the principal that the attorney on the receiving end of such abuse has a remedy beyond the self satisfaction of being "better than that." Though, I might add, being known as a true professional is reward enough. **FD**

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