

Professionalism Committee

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Professionalism and the Out-of-Control Client

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We all have a story, in our defense, about how we ended up in family law. All those stories are different. There is, however, a little Atticus Finch in every lawyer who finds his or her way into the practice of family law, whether that happened on purpose or by accident. Most of us were (and hopefully still are) moved on some level by a noble calling to solve family problems and to make the world a better place. Family law is unique. There is conflict as with any other area of the law. However, the conflict is not business; it's personal. The conflict is not with a stranger; it's with a former loved one. We deal with peoples' homes and hearts and children. I doubt any area of the law is as intense.

Most family lawyers temper that Atticus Finch Super-ego with a raging pit bull Id. We like to argue. We like to cross examine. We like to win. That killer instinct is what makes us good advocates and adversaries. The catch is that it can cause an erosion of professionalism and civility. We often forget our manners in the heat of the battle.

We know that we are behaving badly when we write a nasty letter, insult opposing counsel, or overdo a cross examination. It is not so clear when the offense to professionalism and civility is more subtle as in the case of failing to control a client. We can run afoul of our Rules of Professional Conduct by omission as well as by action.

Thanks to a foul-mouthed hothead and his lame duck lawyer from Pennsylvania, we

have a case which perfectly illustrates what can happen when a lawyer does not control a client and why that should be sanctionable conduct. The case is *GMAC Bank v. HTFC Corp.* out of the United States District Court for the Eastern District of Pennsylvania. *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 2008 U.S. Dist. Lexis 15878 (2008). If you have not read it, please do. It's well worth the time.

GMAC Bank v. HTFC Corp

GMAC Bank administers residential mortgage loans. HTFC Corp. takes loan applications and sells residential mortgage loans to lenders, including GMAC Bank. GMAC Bank sued HTFC Corp. for breach of contract, asserting that HTFC Corp. sold GMAC Bank bad loans and refused to buy them back. HTFC Corp. filed a counterclaim asserting tortious interference with contract for improper administration of some of HTFC's loans. GMAC Bank was represented by Robert B. Bodzin. HTFC Corp. was represented by Joseph R. Ziccardi.

The case involves what the Court refers to as "a spectacular failure of the deposition process," which arose when Mr. Bodzin attempted to depose Aaron Wider, the owner and chief executive officer of HTFC Corp. Before the federal trial court were a motion to compel and motions for sanctions against Mr. Wider and Mr. Ziccardi stemming from the deposition failure, which was indeed spectacular.

The Court summarizes Deponent Wider's behavior as follows: "Wider's assault on the deposition proceedings involved three types of inappropriate behavior: 1) engaging in hostile, uncivil, and vulgar conduct; 2) impeding, delaying, and frustrating fair examination; and 3) failing to answer and providing intentionally evasive answers to deposition questions." *Id.* at page 4.

Frankly, that description does not do the

behavior justice. Mr. Wider used the "F" word and variations thereof 73 times. He insulted and taunted Mr. Bodzin. When he was not using profanity in his insults, he was calling Mr. Bodzin a "piece of garbage" and a "joke." *Id.* at page 4. He bragged about dragging the litigation out: "I'll make your life miserable. Trust me. You'll be drinking breakfast, lunch, and dinner every day." *Id.* at page 6. He answered several relevant questions with "none of your business." *Id.* at page 7.

Mr. Wider's behavior was as atrocious as his language was foul. "At multiple points during the deposition, Wider would follow his inappropriate, obstructive, or dilatory remarks with a gleeful smirk directed at his counsel, at the transcriptionist, and even directly at the camera." *Id.* at page 7. Yes, that's right. The whole thing was videotaped. "In fact, after a particularly odious instance of obstruction, Wider would even pat himself on the back, flaunting his exploitation of the deposition process, and asking, 'Isn't the law wonderful?'" *Id.* at page 8.

The Court concluded that 75% of the time spent by GMAC Bank in taking, or attempting to take, Mr. Wider's deposition was wasted. Consequently, the Court ordered Mr. Wider to pay GMAC Bank a sanction in the amount of 75% of the fees incurred in connection with the deposition together with the fees incurred in connection with the motions to compel and for sanctions.

Then the Court turned its attention to Mr. Wider's lawyer, Mr. Ziccardi. The Court found Mr. Ziccardi "persistently failed to intercede" and "sat idly by as a mere spectator." *Id.* at page 13. In his defense, Mr. Ziccardi asserted that he tried to reign in his client off the record. The Court was not persuaded, concluding: "Even if this assertion is to be believed, Mr. Wider's continu-

ing misconduct indicates that whatever efforts Mr. Ziccardi made were woefully ineffectual. In fact, Mr. Ziccardi's meek attempts to intercede and his otherwise silent toleration of Mr. Wider's conduct only emboldened Wider to further flout the procedural rules." *Id.* at page 13.

The Court found that Mr. Ziccardi's conduct was in bad faith. "Given the length of the deposition and the severe, repeated, and pervasive nature of Mr. Wider's misconduct, it is clear that Mr. Ziccardi's failure to intervene was not merely negligent, but rather willful." *Id.* at page 15.

Mr. Ziccardi was not completely passive throughout the deposition. "Ziccardi's bad faith is further revealed by his challenges to opposing counsel to 'file whatever motion you want to file' and his snickering at Wider's abusive conduct." *Id.* at page 15.

The Court sanctioned Mr. Ziccardi by ordering him jointly and severally liable with his client for 75% of the deposition fees as well as the fees incurred in connection with the motions to compel and for sanctions. The Court concluded:

"The nature of Wider's misconduct was so severe and pervasive and his violations of the Federal Rules of Civil Procedure so frequent and blatant, that any reasonable attorney representing Wider would have intervened in an effort to curb Wider's misconduct. Ziccardi's failure to address, then and there, Wider's misconduct could have no other effect but to empower Wider to persist in the behavior. Under these circumstances, the Court equates Ziccardi's silence with endorsement and ratification of Wider's misconduct. This endorsement and ratification by Ziccardi is the functional equivalent of 'advising [Wider's] conduct.'" *Id.* at page 15.

Applying GMAC to Us

This was a Pennsylvania contract case interpreting and applying federal rules, but much can be learned by North Carolina family lawyers. Other than the conflict of interest rules and a requirement for us to be zealous advocates for our clients, many of us know far less about the Rules of Professional Conduct than we do about

the Rules of Evidence and the Rules of Civil Procedure. Perhaps a refresher course is in order...

North Carolina Rules of Professional Conduct¹

A lawyer is a public citizen having special responsibility for the quality of justice. N.C. Rev. R. Prof. Conduct, 0.1 Preamble, Section 1.

A lawyer should demonstrate respect for the legal system and for those who serve it including judges, other lawyers, and public officials. N.C. Rev. R. Prof. Conduct, 0.1 Preamble, Section 5.

A lawyer is also guided by personal conscience. N.C. Rev. R. Prof. Conduct, 0.1 Preamble, Section 10.

Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. N.C. Rev. R. Prof. Conduct, 0.1 Preamble, Section 12.

The basic principles underlying the Rules of Professional Conduct include the lawyer's obligation to zealously 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. N.C. Rev. R. Prof. Conduct, 0.1 Preamble, Section 12.

A lawyer should treat opposing counsel with courtesy and respect. The legal dispute of the client must never become the lawyer's personal dispute with opposing counsel. N.C. Rev. R. Prof. Conduct, 0.1 Preamble, Section 13.

A lawyer should provide zealous but honorable representation without resorting to unfair or offensive tactics. N.C. Rev. R. Prof. Conduct, 0.1 Preamble, Section 13.

The legal system provides a civilized mechanism for resolving disputes but only if the lawyers behave with dignity. N.C. Rev. R. Prof. Conduct, 0.1 Preamble, Section 13.

¹ The North Carolina Rules of Professional Conduct are the property of the North Carolina State Bar.

A lawyer shall not represent a client, or where representation has commenced shall withdraw from the representation, if the client insists upon taking action that the lawyer considers repugnant, imprudent, or contrary to the advice of the lawyer, or with which the lawyer has a fundamental disagreement. N.C. Rev. R. Prof. Conduct, 1.16

A lawyer shall exercise independent, professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to considerations such as moral, economic, social, and political factors that may be relevant. N.C. Rev. R. Prof. Conduct, 2.1.

A lawyer shall not engage in conduct intended to disrupt a tribunal including failing to comply with known local customs of courtesy or practice or engaging in undignified or discourteous conduct that is degrading to the tribunal. N.C. Rev. R. Prof. Conduct, 3.5. The comment to this Rule indicates this Rule specifically applies to depositions.

It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. N.C. Rev. R. Prof. Conduct, 8.4.

Applicable North Carolina Rules and Statutes

The GMAC Court used federal Rule 37 as the hook for implementing the sanctions against Mr. Ziccardi. Rule 37 of the North Carolina Rules of Civil Procedure could certainly be stretched to apply likewise. (I have omitted text of the rule for the sake of brevity.)

In equitable distribution matters, we may also use N.C. Gen. Stat. §50-21(e), which provides:

- (e) Upon motion of either party or upon the court's own initiative, the court shall impose an appropriate sanction on a party when the court finds that:

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- (1) The party has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery pursuant to G.S. 1A-1, Rule 37, or has willfully obstructed or unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding, and
- (2) The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.

Delay consented to by the parties is not grounds for sanctions. The sanction may include an order to pay the other party the amount of the reasonable expenses and damages incurred because of the willful obstruction or unreasonable delay, including a reasonable attorneys' fee, and including appointment by the court, at the offending party's expense, of an accountant, appraiser, or other expert whose services the court finds are necessary to secure in order for the discovery or other equitable distribution proceeding to be timely conducted. N.C.G.S. §50-21(e).

I am not certain about this, but I expect that Ziccardi-like conduct in a deposition could further subject a North Carolina lawyer to criminal contempt. Criminal contempt is defined as willful interference with a court's lawful process. N.C.G.S. 5A-11(a)(3).

Conclusion

The three lessons of Mr. Ziccardi are: 1) We have a duty to ourselves, our clients, our profession, and the legal system to be civil, respectful, and professional; 2) That duty requires that we affirmatively insist and insure that our clients are civil and respectful as well; and 3) We can be sanctioned for failing to control our clients.