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IN MEMORIAM: THE NEED FOR CIVILITY IN CIVIL LITIGATION: COMMENCEMENT ADDRESS -- FRANKLIN PIERCE LAW CENTER, 1991

THE HONORABLE HELEN WILSON NIES *

* This article is a reprint of the article entitled "Rambo Lawyering: The Need for Civility in Civil Litigation," first published in IDEA: The Journal of Law and Technology, Vol. 32, No. 1. The article has been edited for this reprint. The IDEA editorial staff has decided to publish this reprint in memory of the late Honorable Helen Wilson Nies. We feel this article reveals a individual whose intellectual abilities are surpassed only by her compassion and vision.

You are entering the legal world at a -- may I use the words -- "challenging time." In the '80's, the practice of law changed dramatically and there is a consensus -- not for the better. There is also a consensus that it must and will change again and you can be a force to make it change for the better. What came to a peak in the '80's is *Rambo* lawyering. What must happen in the '90's is a return to civility in civil litigation. That a change has occurred in the practice of law can no longer be ignored. Lawyers are seen as a problem, not a means to solution of a problem.

At a bar meeting in Minneapolis two weeks earlier, I heard a district court judge speak of the petty "meanness" of lawyers, particularly those who practice patent law. The Seventh Circuit itself, the judges that is, has set up a Committee on Civility. The problem has the attention of the Chief Justice of the United States and the White House.

What do we mean by civility? It means more than good manners or social graces. One meaning might be *professional* conduct in litigation. But then, what does one mean by professional conduct? I think of it as acting as an officer of the court -- which technically you will become -- one who assists the court in learning the truth expeditiously and in reaching a reasonable result.

Older lawyers remember nostalgically back to the time when one could disagree with a colleague without being disagreeable, without personal attacks on an opposing lawyer's integrity; when one could rely

[*186] on the word of a fellow attorney. Oh yes, there was an occasional opposing attorney that you learned not to trust, and there was an opprobrious term for that type: a shyster. Now, it's merely called playing "hard ball." And, it is being played in the highest of legal circles without a blush at acting like *Rambo*. It is as bad, if not worse, in women as in men, who seem afraid that if they are agreeable they will be considered a weak sister.

In hard ball litigation, every request by the other side is opposed with briefs and requests for oral argument, even a request for a two-day extension of time to answer. Discovery requests are made deliberately ambiguous and sweeping, and no matter what compliance is made, there are immediate charges of noncompliance. Depositions are deliberately scheduled at inconvenient times and mail is sent by slow-boat to shorten opponents' time to respond. If even a *minor* motion is lost by an opponent, there is a strident demand for monetary sanctions for a false pleading signed by the lawyer. Litigation over a tort claim or a contract claim or a patent turns into litigation over lawyering. How did this change come about? The causes are numerous.

One reason was prosperity of the economy -- open checkbook litigation -- a form of economic warfare. Make it expensive to litigate and grind the opponent down. Some judges themselves have contributed. Many new judges came on the bench because of the litigation explosion. Particularly, if inexperienced in litigation, they did not know how to control unscrupulous litigation tactics. Also, they cannot tell which side wears the "black hat." And, they are afraid of reversal if they make restrictive rulings -- partly because, increasingly, courts of appeals have been willing to second guess trial courts rather than adhere to the role of an appellate court.

The greatest cause, however, is impersonalness in the practice of law. Law firms changed in the '80's from an identifiable group of individuals who cared for each other and for the reputation of the firm to megafirm businesses with hundreds of unknowns. The bottom line -- the priority -- of the law firms seemed to change from representing the client to making money for the law business. Young lawyers are drafted as foot soldiers to fight discovery wars. What does it matter that you never meet a client, spend long hours pouring over rooms full of documents produced in discovery with only a vague idea of what you are looking for, and no idea of the legal theories of the case. The salaries are irresistible and this drone work is "billable" time which justifies one's salary. Does it have anything to do with why one went to law school? Probably very little.

The very image of the "good" lawyer changed in the '80's, and not just in big firms. One sees that image on TV. Unscrupulousness

[*187] appears to pay off quickly with a big house and a BMW. A need for *civility* never crosses *Rambo's* mind.

We see lack of civility at the appellate level where briefs are directed to alleged misconduct of opposing counsel, not to the merits. A step beyond mere lack of civility appears in distortions of the district courts' opinions, in cropping quotes to effectively change the record, and in deliberate misinterpretation of precedent. Lawyers count on judges being either too busy to catch their misconduct or too inured to such conduct to find it out of line. Officer of the court *indeed*. Lawyers and judges agree that the greatest lack of civility occurs in the discovery process and from the change in Federal rules on sanctions (Rule 11). Both practices stem from good intentions, but that has paved the way to the nether world.

At our Judicial Conference last week, Vice President Quayle spoke of the burden of litigation on U.S. business, a burden which foreign business does not have and which puts us at a competitive disadvantage. He spoke of the need for changes in the discovery system and in punitive damages and of the intention of the administration to propose drastic limitations. He is working with Solicitor General Starr -- the epitome of a "civil" lawyer -- on specific proposals. Mechanical changes no doubt are needed, but I believe another force may be more effective; that force is economic necessity.

Hard ball lawyering is expensive and not necessary to a favorable result. Indeed, one must often vote for a result in a case despite poor legal scholarship or analysis from the "best" of firms. Also speaking at our Judicial Conference last week were house counsel of major corporations: who said that open checkbook litigation is a thing of the past; who question bills for the time of 20 associates and a dozen paralegals; who demand lower litigation costs; and who are taking much work in house to control the expense. Lawyers in private practice will simply have to accept leaner fees which means they will have to be cooperative in order to cut expenses. Lawyers will need good grace from each other.

In addition, a change in perceived values and in role models is needed among young lawyers. The values of professionalism are alive in the bar. There are fine lawyers whose word to another lawyer is an absolute bond, who counsel clients to reasonable settlements, who don't work with an extravagant litigation "team," and who don't run up discovery bills in excess of the value of the case and hope to recoup by sanctions. Such lawyers are there, but not in fashion.

As young students of the law and now graduates, you had to have found the intellectual stimulus of *thinking* about legal theories satisfying. It's fun. It's why I enjoy being a judge. But not all can or want to be judges. You need not lose your enthusiasm for the law or become

[*188] disillusioned if you find that you do not feel comfortable or satisfied when you are asked to play *Rambo* or *Ramba*. It is not the only way. There *are* others who are different and have real pride in their work. If you are dissatisfied in a position, don't dance to anyone else's drumbeat. Set your own. Seek out those lawyers who have a reputation for civility. They will be the honored lawyers of the '90's, as you can be also. Emulate them and support the groups who seek to bring back professionalism: The Bar Associations -- the Inns of Court. Please, please, do so. Your personal choices will make a difference. And you will find more satisfaction in yourself.

I also urge the law schools to add new materials to their course on Ethics. "Ethics and Civility" would be appropriate subject matter. Civility in the conduct of lawyers can make the practice of law more enjoyable and change it back from a trade into an honored profession. Join the movement. The force is with you.

I would like to speak a moment to the young women of the class. In some ways, you have less freedom of choice than I had. I had no role models. You will feel pressured to achieve in your firm or company and don't dare let up, or take time off for raising a family, lest you fall behind your "class." I felt no such pressure. I didn't know about "Super Mom." I took a leave of absence from the government when our first child was born, fully expecting to return within a few months to continue my career. But from the moment I held that little person in my arms, I transformed, to my great surprise, into "Earth Mother." He was so fascinating to me, young Dirk, I didn't want to leave him. And I didn't. And we were young and just barely getting out from under law school debts. Dirk was followed by Nancy; Nancy by Eric. And nine years quickly passed before I considered returning to my "career." I loved those years as a full time homemaker. I love the women friends I made then. I don't say it was better for the children -- it was better for me. As an aside I must say, ignore the propaganda that it is not the quantity of time you spend with your children but the quality of the time. It will only make you feel inadequate when you can't just turn on quality time. I at least found it took a lot of quantity to come up with a quality moment.

If you feel similar "Earth Mother" instincts, and I don't say you have to, don't deprive yourself of the experience. *Enjoy your life*. Don't be forced into the traditional male role if you want something different. Others with reasonable intelligence can fill your job at the firm. Only you can be mother. Above all please don't look down on your sisters who have chosen to be home raising their children full time. One's worth to society does not depend on the title on the door or the size of the paycheck at the end of the week.

[*189] My point in all of my remarks is simple: one's objective should be to make a life, not merely a career.

-- The Honorable Helen Wilson Nies --

(August 7, 1925 - August 7, 1996)