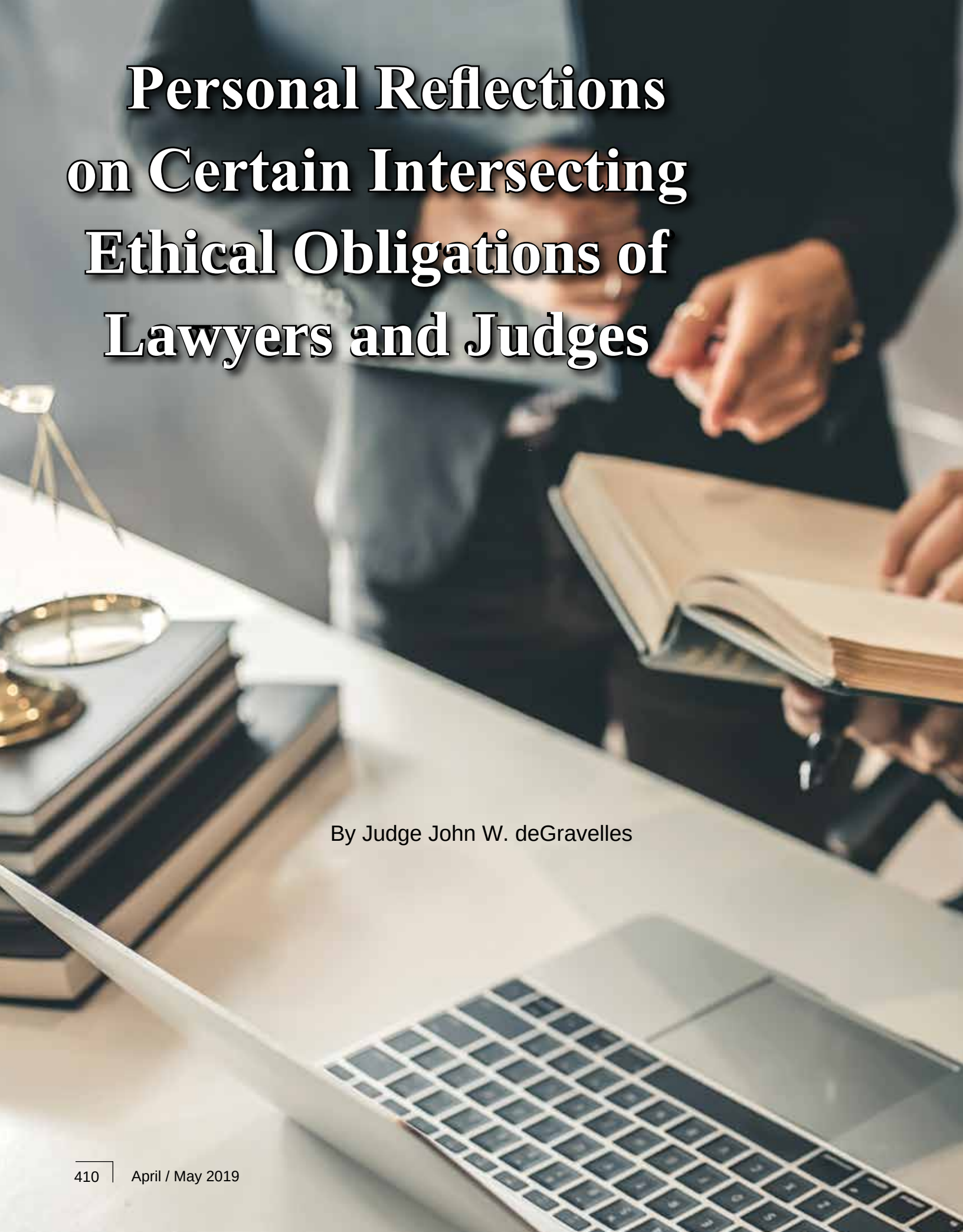
Personal Reflections on Certain Intersecting Ethical Obligations of Lawyers and Judges



By Judge John W. deGravelles

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The federal court in which I practiced as a young lawyer was not a kind, gentle or forgiving place. As I approached the federal courthouse, even on some benign and unimportant matter, my stomach would churn and my palms would sweat. The judges seemed unnecessarily hostile and antagonistic, even when all "t's" were crossed and "i's" dotted. I felt my battle as a litigator was as much against the court as it was against my opponent.

My experience in state court was usually much different. Judges were generally friendly and accommodating. They went about their business of deciding issues and cases with no apparent hostility towards lawyers. Quite the opposite. So it was no surprise that when efforts were made to change Louisiana's judicial selection system from elected to appointed judges, I instinctively reacted against it. When asked to debate the issue in public fora, I always began by quoting Lord Acton: "Power tends to corrupt. Absolute power corrupts absolutely." Thus, I argued, lifetime appointments with little or no mechanism for accountability bred judges who were arrogant, rude and had no empathy for the demands made on busy law practitioners.

It is not without a certain irony, therefore, that after 39 years as a civil litigator, I was appointed for life to my present position. After confirmation, recalling my many days in the trenches, I vowed that I would never acquire that dreaded disease, "robe-itis," defined quite accurately as "an affliction suffered by some robed judges [who] assume a god-like attitude and power, forgetting that he or she is a servant to the law and the facts."[1] Rather, I would model myself on those judges who defied my early experience and treated all before them with dignity, fairness and respect. I would follow the advice of U.S. District Court Judge John L. Kane when he wrote: "The robe is black and unadorned to subordinate the personality of the person wearing it. It is not just a symbol of authority; it is a uniform of anonymity."[2]

This I have tried to do. Since becoming a judge, however, I have learned what Paul Harvey described as "the rest of the story." During my four years on the bench, despite my determination to remain constant to my pledge, I confess my eyes were opened to the kind of conduct that may have caused the judges before whom I practiced to be (putting it quite mildly) . . . grumpy. I have seen lawyer conduct that, while not justifying it, at least explains what I perceived as unnecessary harshness. Let's just say my perspective has broadened.

Judges and lawyers are part of an integrated system carefully designed to achieve justice, but they have very separate roles and goals. Sometimes those roles and goals clash. When they do, abiding by the ethical obligations applying to each profession helps maintain the smooth working of the system. It is the purpose of this article to discuss a few of these intersecting ethical, as well as professional, obligations of lawyers and judges — specifically, some selected instances where the ethical duties of the presiding judge interface with those of the lawyer practicing in his court. In doing this, I will try to alert you to some ethics rules about which you may be unaware, remind you of some rules about which you are likely aware but emphasize their importance and, finally, provide some tips and practical advice regarding ethics, professionalism and practice in federal court.

Judicial Code of Conduct

Members of the federal judicial branch, including judges, clerks of court, other court personnel and public defenders, are bound by the Judicial Code of Conduct. Federal judges are specifically bound by the Code of Conduct for United States Judges. It begins with five straightforward canons:[3]

> Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary.
>
> Canon 2: A Judge Should Avoid Impropriety in All Activities.
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> Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently.
>
> Canon 4: A Judge May Engage in Extrajudicial Activities That Are Consistent with the Obligations of Judicial Office.
>
> Canon 5: A Judge Should Refrain from Political Activity.

Mechanism for Filing Complaints

The perception among some members of the Bar and public is that there is little, if any, accountability for federal judges who engage in unethical or unprofessional conduct. Complaints in the 5th Circuit are filed with the chief judge of the 5th Circuit Court of Appeals.

If a complaint is not dismissed by the chief judge (say, for example, as frivolous), "the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the Judicial Council."[4] The Special Committee consists of "the chief judge and equal numbers of circuit and district judges,"[5] and "[a]ll actions by a special committee must be by vote of a majority of all members of the committee."[6] The Special Committee conducts an investigation it deems appropriate "in light of the allegations of the complaint and its preliminary inquiry," and it may hold hearings to receive evidence or hear argument. Both the subject judge and the complainant have certain rights during the process, including the right to notice and to present or provide evidence. The Special Committee then prepares a "comprehensive report of its investigation, including findings and a recommendation for council action."[7]

Within 21 days of the Special

Committee's report, the subject judge can file a written response to the Judicial Council, which must provide to the subject judge an opportunity to present argument. The Judicial Council may take certain discretionary actions, such as dismissing the complaint, concluding that "appropriate corrective action has been taken," referring the matter to the Judicial Conference with the Judicial Council's recommendation or taking remedial action, such as censuring or reprimanding the judge.[8] But, "[a] judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that: (A) might constitute ground for impeachment; or (B) in the interest of justice, is not amenable to resolution by the judicial council."[9] If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.

In those cases not referred to the Judicial Conference, the Judicial Council's decision may then be appealed to the Committee on Judicial Conduct and Disability, which reviews for "errors of law, clear errors of fact, or abuse of discretion." "Except in extraordinary circumstances, the Committee will not conduct an additional investigation," and, "[t]here is ordinarily no oral argument or appearance before the Committee," though written submissions "may" be allowed. After a decision from the Committee, "[t]he Judicial Conference may, in its sole discretion, review any such Committee decision, but a complainant or subject judge does not have a right to this review. … All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final."[10]

Intersection of Louisiana Rules of Professional Conduct and Federal Practice

The United States District Court for the Middle District of Louisiana adopted as one of its local rules Louisiana's Rules of Professional Conduct:

> This Court adopts the Rules of Professional Conduct of the Louisiana State Bar Association, as . . . may be amended from time to time by the Louisiana Supreme Court.[11] . . . [E]very attorney permitted to practice in this court shall be familiar with these Rules. Willful failure to comply with any one of them . . . shall be cause for such disciplinary action as the court may see fit, after notice and hearing.[12]

This means, in practical terms, that if a lawyer violates an ethical rule while practicing in the Middle District, the court is empowered, even obliged, to take action. Even without this formal adoption of Louisiana's ethical rules, "a federal court has the power to control admission to its bar and to discipline attorneys who appear before it."[13]

But, remember, even if a federal court chooses not to rely on Louisiana's Rules of Professional Conduct, federal courts have other tools at their disposal to ensure ethical and professional conduct, including Federal Rule of Civil Procedure 11, which states, in pertinent part:

> By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

A district court opinion neatly and with uncommon common sense summarizes the essence of Rule 11.

> Think before you speak. Look both ways before you cross the street. Haste makes waste. Measure twice, cut once. Countless maxims underscore a simple truth: action which precedes deliberation is both dangerous and potentially wasteful. The Federal Rules of Civil Procedure codify this truism in Rule 11. At its most basic premise, Rule 11 counsels attorneys to think before they act. Rule 11 requires that attorneys conduct a basic inquiry into the facts and law underlying the case before demanding the resources of other parties and the Court in resolving a dispute.[14]

But the inimitable Yogi Berra may have said it best: "Foresight is always better, afterward."

Courtroom Etiquette

The obligations of the judge and lawyer sometimes arrive on a collision course in the courtroom. A lawyer must not "engage in conduct intended to disrupt a tribunal." While the judge "should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers," the canon also counsels that he or she "should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process."[15] The cited canon recognizes that the court must give attorneys some latitude "consistent with their role in the

adversary process," *i.e.*, the court must understand that lawyers are "not potted plants."[16] Discerning the line where zealous representation becomes disruptive behavior is not always easy. But it is the job of the judge to make that discernment and take the necessary steps to maintain the necessary courtroom decorum.

The Middle District's Local Rules require and prohibit conduct more specific than any of the above-quoted rules, listing 18 separate courtroom mandates. Among those sometimes forgotten by counsel in the heat of battle are "[a] ddress all remarks to the Court, not to opposing counsel," "avoid disparaging personal remarks or acrimony toward opposing counsel and remain wholly detached from any ill feeling between the litigants or the witnesses" and "admonish all persons at counsel table, including the client, . . . the client's representatives, witnesses, friends and family of parties that gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses, or at any other time, are absolutely prohibited."

When this kind of conduct occurs, it is the responsibility of the judge, with or without objection from the opposing lawyer, to correct this conduct. How this is done is obviously the product of the circumstances and the judge's discretion.

Ethics of Motion Practice

Over the course of my 39 years as a litigator, the unmistakable and unfortunate trend has been for judges to supplant juries as the ultimate decision makers in civil cases. Noted procedural scholar Arthur R. Miller decries this development: "[P]rocedural changes . . . have resulted in earlier and earlier disposition of litigation, often eviscerating a citizen's opportunity for a meaningful adjudication on the merits of his or her grievance."[17] The "most unfortunate" result is that "[m]ost courtrooms in federal courthouses are empty much of the time as judges try fewer and fewer cases."[18] The primary procedural change to which Professor Miller refers is the ever-increasing disposition of cases by motion. Whether we like it or not, motion practice consumes the vast majority of the professional lives of both lawyers and judges.

Here I provide a few tips from a former litigator and current judge that I hope will help you avoid a show cause order or at least avoid the judge's ire. First, think before you file. A huge percentage of the hours in a typical day in the life of a judge is spent poring over seemingly endless pages of motions and memoranda. A significant number of these motions have no serious chance of success. Why, you ask, do lawyers file them? Is it ignorance of the issue? Is it the quest for billable hours? Is it to please a demanding client? Is it to harass the lawyer's opponent? This judge doesn't know the answer but can say this with certainty: no good can come of it.

The biggest area of abuse in filing unnecessary and non-meritorious motions, at least in my court, is in the realm of *Daubert*[19] and motions in limine. In almost every case involving experts, all sides challenge their opponent's experts under the *Daubert* rubric. Yet many, if not most, of these motions are not challenging the methodology or foundation used by the expert but are simply challenging the strength of the expert's opinion, a job rightly given to the jury.

As a judge in the Eastern District explained, "Notwithstanding *Daubert*, the Court remains cognizant that 'the rejection of expert testimony is the exception and not the rule.'"[20] The court noted that:

> [I]ts role as a gatekeeper does not replace the traditional adversary system and the place of the jury within the system. . . . As the *Daubert* Court noted, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." . . . The Fifth Circuit has added that, in determining the admissibility of expert testimony, a district court must defer to "'the jury's role as the proper arbiter of disputes between conflicting opinions. As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration."[21]

A second major area of motion abuse is in the area of motions in limine. My complaint is that some lawyers file these reflexively and without thought. A real example follows. In a motion in limine that contained 32 specific requests for the

Court's consideration, and without referring to a specific document or anticipated testimony, one party asked the court to prevent his opponent from "impeach[ing] . . . the plaintiff on any matters which are collateral to this lawsuit and which are not relevant to the claims of plaintiff or defenses alleged by the defendants without first demonstrating to the satisfaction of the Court a predicate for the relevancy of such matters."[22] The Court's ruling summarizes the obvious difficulty with such a request: "The motion is **DENIED**. The Court cannot issue a blanket ruling excluding all such impeachment material without knowing what the material is or the context in which it will be offered. The Court will rule on specific objections to particular impeachment material at trial."[23]

Another obvious matter of importance is the quality of briefing. Because we live in the motion age, lawyers should place special importance on writing effective and persuasive briefs. When I became a federal judge, I expected the quality to be high and, for the most part, my expectations were realized. But some briefs were surprisingly awful. While not rising to the level of an ethical violation, many briefs were, to say the very least, unhelpful.

Another not uncommon abuse is the misciting of cases. The reason lawyers do this may be easier to understand, but not forgive. Lawyers are busy. It may not be intentional deception but rather the path of least resistance. Why not, reasons the lawyer, pull a canned brief from the computer or a brief from an earlier case that involved similar issues? No need, thinks the lawyer, to reinvent the wheel.

This is a serious mistake since the judge and/or his clerk is actually going to read the cases cited. A judge is tempted to call on the Spanish law that once ruled Louisiana where "a lawyer who intentionally miscited the law could be sent to exile, and his property could be confiscated."[24] And while I've cited that passage tongue-in-cheek, the unhappiness that this practice provokes in the judge can only damage your chances and your reputation.

Another understandable but unwise practice is to engage in ad hominem attacks on your opponent in briefing or oral argument. As a practicing lawyer, many times I felt my opponent was engaging in unfair, unprofessional and perhaps even unethical behavior. On occasion, I could not resist the temptation to let the judge know about it in briefing. From my new perspective as a judge, my advice is to resist the temptation. The judge wants simply to solve the legal problem presented in the motion, not referee a fight. If the abuse is serious enough, report it through appropriate channels. If the conduct is sanctionable, file a motion for sanctions. If it isn't, don't make it a part of your argument as it could potentially be grounds for an ethical violation but, even when it isn't, it rarely helps your cause.

Conclusion

Judges and lawyers share the solemn obligation to abide by the obligations set out in their respective ethical codes. While litigating cases will never be easy and without stress for lawyers or judges, following the rules allows lawyers to focus on representing their clients and judges to do their jobs in a respectful and dignified way.

FOOTNOTES

1. *See,* Barry Popik, "Robe-itis," *The Big Apple* (Dec. 9, 2015), *https://www.barrypopik.com/index.php/new_york_city/entry/robeitis*; *see also,* John L. Kane, *"From the Bench: Judicial Diagnosis: Robeitis,"* 34 Litigation 3 (Spring 2008).

2. Kane, *supra* note 1, at 4.

3. Code of Conduct for United States Judges Canon 1-5 (2014).

4. 5th Circuit Judicial Council Rules for Judicial-Conduct and Judicial-Disability Proceedings, § 11(c), (f), available at: *http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/rules/localjudicialmisconductrules.pdf?sfvrsn=8*.

5. *Id.* § 12(a).

6. *Id.* § 12(g).

7. *Id.* § 17.

8. *Id.* § 20(b)(1).

9. *Id.* § 20(b)(2).

10. *Id.* § 21(a), (g).

11. M.D. La. LR 83(b)(6) (2015). The same is true in the Eastern and Western Districts of Louisiana. *See,* W.D. La. 83.2.4 (2016); E.D. La. LR 83.2.3(2014).

12. M.D. La. LR 83(b)(10) (2015).

13. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); *see also,* United States v. Nolen, 472 F.3d 362, 371 (5 Cir. 2006) ("Courts enjoy broad discretion to determine who may practice before them and to regulate conduct of those who do.")

14. Deters v. Davis, Civil Action No. 3:11-02-DCR, (E.D. Ky. June 13, 2011), 2011 WL 2417055.

15. Code of Conduct for United States Judges Canon 3(A)(3) (2014).

16. In 1987, white-collar-criminal defense lawyer Brendan V. Sullivan, defending Oliver North in televised congressional hearings over the Iran-Contra scandal, was admonished for consistently objecting to questions put to his client. He famously responded, "Well, sir, I'm not a potted plant. I'm here as the lawyer. That's my job."

17. Arthur R. Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure," 88 N.Y.U. L. Rev. 268, 306 (2013).

18. *Id*. at 306-07.

19. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

20. Johnson v. Samsung Elecs. Am., Inc., 277 F.R.D. 161, 165 (E.D. La. 2011).

21. *Id.* (quoting Scordill v. Louisville Ladder Group, L.L.C. (E.D.La. Oct. 24, 2003), 2003 WL 22427981 at *3).

22. The case citation is omitted to prevent embarrassment of the lawyer involved.

23. *Id*. A similar request from the same motion asked the court to exclude "[q]uestions calling for privileged information under the attorney and client, physician and patient, psychotherapist and patient, or counselor and client, or marital communications privileges."

24. A.N. Yiannopoulos, *The Civil Codes of Louisiana*, 1 Civ. L. Comment. 1, 7 (2008).

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