

## Sidebar

# Hubris

by **Kenneth P. Nolan**  
Senior Editor

I could never understand how pride could be a sin. And I was taught it was the worst—worse than murder or stealing or gluttony or lust, whatever that was. Adam and Eve's pride got them tossed out of Eden, which I thought was no big deal since paradise sounded pretty boring except for the nude part. Eating fruit in some verdant garden under some dopey tree sounded a bit like hell to me. Now if they were scarfing down a slice at Mom's pizzeria on Prospect Park West after a few hours playing basketball in the schoolyard—that, my good friends, was heaven.

Of course as I've aged and personally experienced all seven cardinal sins, and not only once, I realize what I learned was accurate. Everyone's a little greedy and the whole country is fat, so some sins are, well, accepted. Maybe because I now stop and actually look around the shiny, expensive table at a deposition or about the high-ceilinged, elaborate courtroom, I realize that more actions are taken because of ego, conceit, than any other reason. Insisting on taking the deposition or arguing the motion; hogging the telephone conference; treating associates and staff like crap; refusing to listen; knowing everyone and everything; never, ever being wrong. Now these are not going to land you in Hades for eternity, but they happen all too frequently, demeaning the individual and our profession.

And I wonder whether there's something in the law school water that causes such behavior. After all, we're all pretty bright, or at least good test takers, and compared to the worker in a coal mine in West Virginia or the single mom with two kids living over a bodega in Sunset Park, we've got it pretty good. And many are extremely wealthy. Making millions. And it appears that at least for some, that's not enough. King of the Hill, A-Number-One, Top of the Heap, as Frankie sang. That's what they want, and they'll elbow and scratch and scream and cut corners to get or stay there. As if it matters. As if anyone cares. But obviously they do, and sometimes I cringe at what I see and read.

Now, I ain't no saint. And I have a healthy ego except at golf where I know I stink. I have had my share of vulgar incidents that now shame me. What I dwell on, of course, is the young lawyer who came up to me in court, introduced herself, and said "You probably don't remember me, but my first deposition ever was in your office. Against you. And I didn't know what I was doing and you were nice. You could have killed me but you didn't. Thanks."

*Kenneth P. Nolan, former Editor-in-Chief of LITIGATION, is with the New York City firm of Speiser, Krause, Nolan & Granito.*

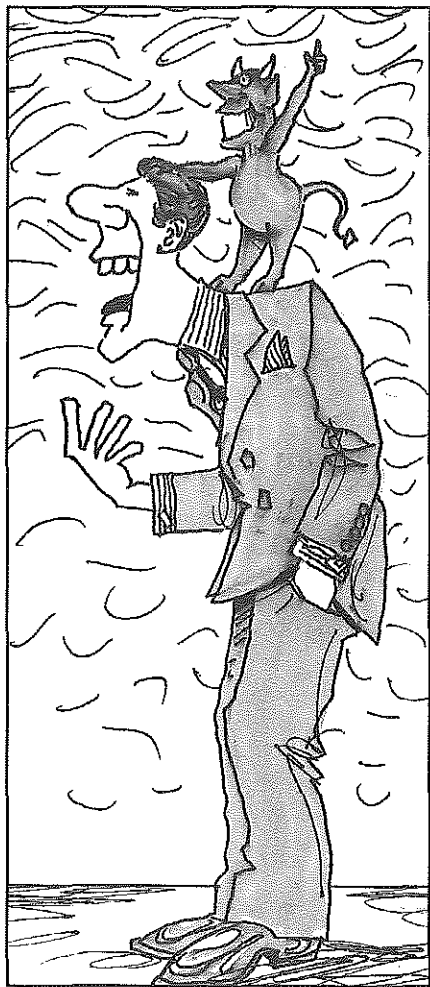
I try to forget the myriad times my voice was harsh or dripped with sarcasm causing untold discomfort and aggravation. Most of us have both experiences, but there's no reason for acting like a maniac. It took me time to learn that, too long.

But what amazes me are not the selfish, offensive actions but how they're not productive. How they discredit the individual and impair the litigation. Insisting that they do everything, be Napoleon, the all-knowing lawyer doesn't add to a lawyer's stature but instead makes him less effective, with reputation diminished, stature lost. And these boorish actions don't compare with the tragedy of gazillionaires Dickie Scruggs, William Lerach, and Mel Weiss. With more money than all but Warren Buffett and glowing media reviews, these successful lawyers thought they were above all, so good and powerful that they succumbed to bribery and cheating not for an extra buck but to be the best, numero uno. Their pride blinded them so they no longer lived in the real world. Through arrogance and skill, they believed they could eat the apple and remain in paradise. A shame.

Now I'm not sure if there's a correlation between talking over people at a deposition and trying to bribe a judge. Of course not. Right? For I write this to warn young, and even old, lawyers to resist the temptation to believe you are unique, that you have unparalleled charm and ability. If so, go find a cure for cancer,

which is devastating my family. But I was taught early and often that Satan is always present, searching for weakness, ready to pounce. I don't believe all that I learned in those simpler times, but temptation exists and must be fought when you know you can make a better argument, do a better cross. But this doesn't give you the right to demean, criticize, laud your accomplishments over others.

Be gracious, even humble. I am litigating a case in Lexington, Kentucky, and am amazed at not only the professionalism of these funny, bright Southern law-



yers, but how they are so understated, polite, ready to accommodate, even though I know they are more accomplished than us big-city loudmouths.

So read and even study those who threw their careers in the gutter because they couldn't suppress the hubris that rose within. Learn from their many errors and realize that they were driven not by a bigger house and boat, but by arrogance and conceit. For they had it all and now have nothing. □

## Opening Statement

(Continued from page 2)

anyone conceived of digital anything, has its flaws as well. So before you dismiss this concept, you owe it to future litigants to think about the potential benefits:

- We would reduce the imposition on juror time and the disruption of their daily lives, making it possible for more people—and more types of people—to serve.
- Fewer people would seek or would need to be excused from jury service because of work obligations, child-care responsibilities, illness, or vacation plans.
- There would be fewer mistrials or reversals for prejudicial error because many would be edited out before the jurors see the DVD.
- Litigants and courts would incur reduced fees and costs for retrials—just edit out the error and, where necessary, edit in the new witness testimony or revised jury instructions—and send it out to a jury for viewing again.
- Witnesses outside the trial court's jurisdiction could testify remotely and their testimony included in the digital record at less cost to the parties and less inconvenience to the witness. This is not unlike video depositions of witnesses outside the subpoena power of the court, except that by making all witness testimony digital, the remote witness appears to the jury to be no different from witnesses appearing in the courtroom.
- There would be less time needed to prepare the appellate record and less cost to the parties. Just send the disk to the appellate court.
- Because jury service would take less time, taxpayers would save money through reduced juror fees.
- Because courtroom time for each trial would be reduced, there likely would be savings through better utilization of courtroom space (i.e., multiple judges sharing a single courtroom rather than each one having an assigned courtroom). Thus, less taxpayer money would be spent on building courtrooms.
- Those who believe public access to

the courts is essential to public confidence and trust in the civil justice system win as well because trials on disk would allow wider public dissemination and viewing by those who otherwise cannot make it to the courtroom and who have an interest in the workings of their courts and judges.

- Finally, the disks also would become a staple of trial training for law students and young litigators who otherwise might wait years to get to the courtroom to see, let alone participate in, a real trial.

Older trial lawyers are learning what the younger crowd already knows: Jurors from Generations X, Y, and Z are beginning to become more prevalent and, before long, will dominate jury pools. Those jurors do not hear and process information in the same way as previous generations. They want instant information and active presentations, and they want to be a part of the process, not merely silent observers.

Okay, therein perhaps is at least one flaw (no doubt many more could be pointed out) in the world of virtual trials. Once the DVD has been recorded and the witnesses have gone home, how does a juror suggest a question he or she would like answered by a witness, as many judges are allowing these days and as the American Jury Project recommended? I don't have the answer for that one. And, yet, as the federal district court judges in the Seventh Circuit have found out, it is an important question.

The American Jury Project's report, *Principles for Juries & Jury Trials*, recommended 19 Principles "that define our fundamental aspirations for the management of the jury system. Each principle is designed to express the best of current-day jury practice in light of existing legal and practical constraints." Principle 13.C states that, "In civil cases, jurors should, ordinarily, be permitted to submit written questions for witnesses." The questions are submitted to the court, which may pose the question or permit a party to do so, after modifying it to eliminate any objectionable material.

Some of these principles, including juror questioning, have had a test drive in the Seventh Circuit, thanks to the leadership of Chief Judge James Holderman of the Northern District of Illinois. Chief Judge Holderman, a participant in the Clifford Symposium, found that younger jurors "do not want to be factual sponges.

(Please turn to page 72)

while the prisoner's attorney, the prosecutor, or both were in other cities. In such cases, a telephone connection between the prisoner and his or her attorney would need to be available for confidential consultations during the hearing. Again, this technique saves the parties and the United States Marshals Service considerable travel costs.

Similarly, my court routinely uses remote interpreters by audioconferencing, with separate phone lines for the interpreter to talk to the non-English speaking defendant or party and to translate over the courtroom audio system when required. We have used audioconferencing of interpreters, arranged online with the telephone interpreting program, for languages for which it is difficult to find a certified interpreter as well as languages, such as Spanish, for which "live" certified interpreters may be more generally available, but not necessarily more available at the time of particular proceedings.

One less familiar "virtual courtroom" method is webcasting. I recently used this method for a claim construction (*Markman*) hearing in a patent case. The parties had agreed that the only evidence that needed to be presented had already been included in the parties' appendices and a joint appendix, and almost all the parts of the three appendices were available to the parties and the court in electronic form. The parties had also exchanged with each other and provided to the court hard copies of their presentation slides for the *Markman* hearing.

Owing to the last-minute notice by the plaintiff of a desire to present materials using PowerPoint via a webcast and some technical difficulties with working out the procedure to surrender "moderator" rights from one party to the other, the parties actually presented separate, simultaneous webcasts, one for the plaintiff's presentation and one for the defendant's presentation, instead of a single webcast. In fact, the parties used different webcast hosts in this case: One used Netspoke and the other used WebEx. The court and the parties each logged in to both webcasts at the beginning of the hearing, then switched between them as the parties made their arguments. The audio portion of the hearing was conducted by telephone conference, set up as part of the plaintiff's webcast login.

Although not as elegant a procedure as a single webcast would likely have

been, the simultaneous webcasts procedure was very effective, eliminated the technical difficulties in the short time available, and proved quite workable. A glitch occurred when the plaintiff "timed out" of the defendant's webcast, but that glitch was quickly remedied by the plaintiff's logging back in. The parties had also taken the precaution of providing the court and each other with copies of their presentation slides by e-mail prior to the hearing, so that even when the plaintiff temporarily lost the defendant's webcast, the plaintiff was able to follow the defendant's presentation by using the hard copy.

After the webcast hearing, I asked the parties to advise me of the amount of fees and expenses that they estimated they had saved by conducting the hearing via webcast instead of in person. The parties estimated that they had each saved in excess of \$7,000 by conducting the half-day hearing by webcast. Those savings included attorneys' fees, airfare, hotel, and meals. Also, while both parties commented that they believed that there was some value in "live" hearings, for example, to gauge the response of the judge to certain arguments and to clarify questions, they both agreed that they got much the same feedback from my questions, conveyed by telephone conference, particularly where they had previously had face-to-face contact with me in prior proceedings. Both agreed that the trade-off of savings versus trying to read the court during the hearing, which was likely to be futile in any event, was well worth it.

When a technologically sophisticated E-Ager juror, like the hypothetical Mrs. Gill described earlier, takes his or her place in the jury box for a trial, that juror increasingly expects visual aids and electronic evidence to enhance the presentation of a case. At the same time, increasing amounts of evidence originate in electronic form, including business and financial records and e-mails. Similarly, evidence that originates in hard-copy form, such as contracts, wills, and medical records, is more easily converted into electronic form. As the artificial distinctions break down between hard copy and electronic evidence, lawyers will be expected to have well-developed skills in effective presentation of electronic evidence. Therefore, attorneys who are adept at presentation of electronic evidence will soon be the norm, not the exception. □

---

## Opening Statement

---

(Continued from page 64)

They want to be interactive."

A self-professed skeptic at the outset, after two years of experimenting with seven of the principles, Chief Judge Holderman now has come to the conclusion that three of the principles proposed by the American Jury Project are imperatives. These include allowing jurors to submit written questions, allowing lawyers to make interim statements to the jury between witnesses, and telling jurors early on what factual issues they will have to decide and what the law is that will govern the decision.

Many times juror questions are relevant and helpful. Even if they are not, Chief Judge Holderman has found that such questions allow him the opportunity to get the jury back on track and allow the attorneys to respond to juror concerns. Interim statements allow lawyers to preview upcoming witnesses (in which case their statements are in the nature of opening statements) or to address the importance of testimony already given by a witness (in which case the statements are more in the nature of closing argument). With early instruction on the issues to be decided and the applicable law, jurors tend to focus sooner and understand the importance of evidence as it is presented.

Implementation of each of the principles is a positive development that will make trials more user friendly for the jurors. Except to the extent the length of trials is shortened, however, none will make it easier for citizens to serve or ease the disruption in the daily lives of those who do serve.

We are—and should be—very cautious when it comes to changing anything to do with jury trials. However, trials are about the delivery of information, both fact and opinion, in oral and visual form, through which we seek to persuade the audience (jurors) to accept our client's version of truth. Just as the many organizations, from the law firms to the news industry, have responded to the digital revolution by moving to blogs, podcasts, and other uses of the Internet to deliver information, so, too, must the bench and bar start thinking about how best to engage and communicate with jurors of the future. □