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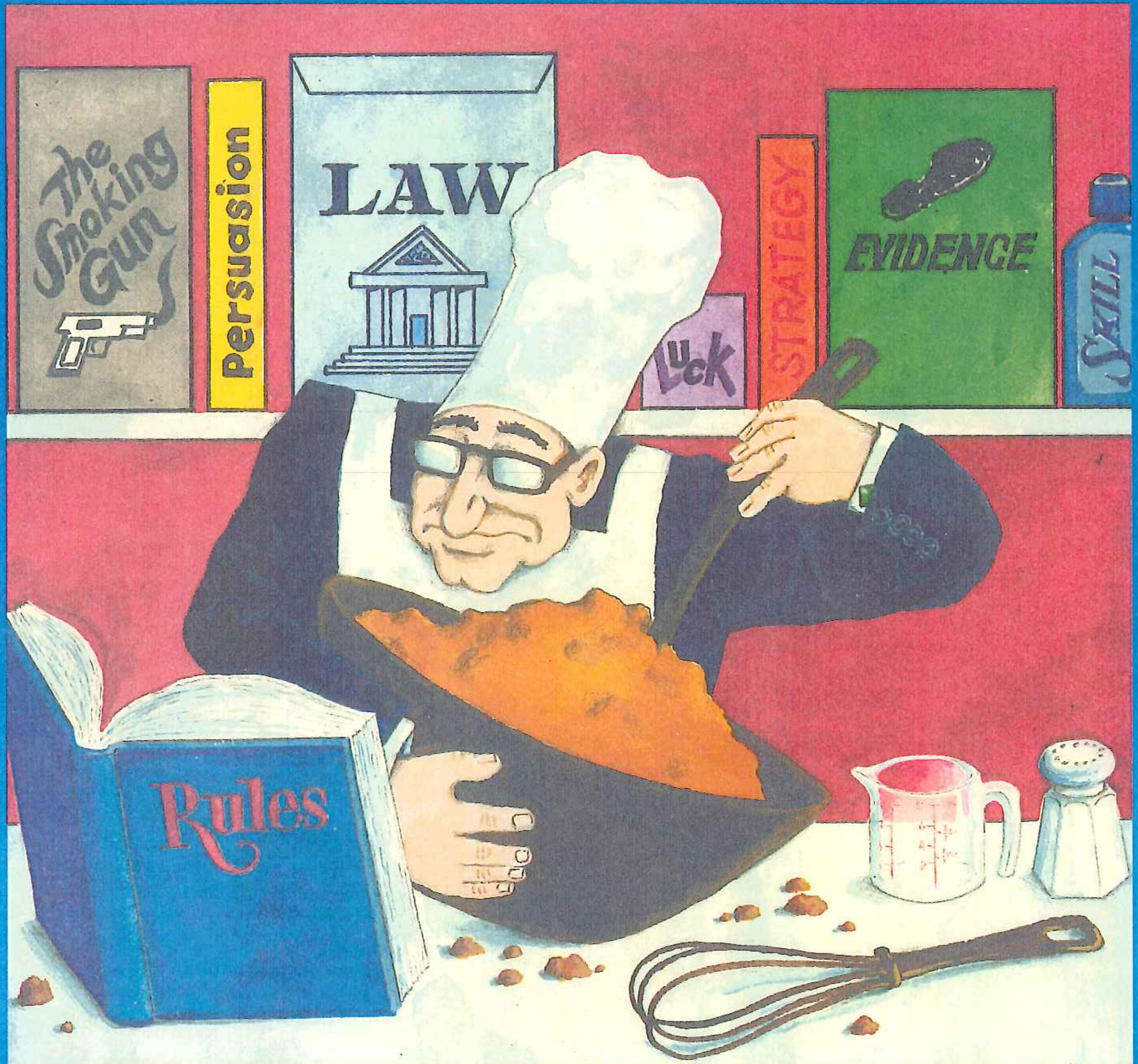

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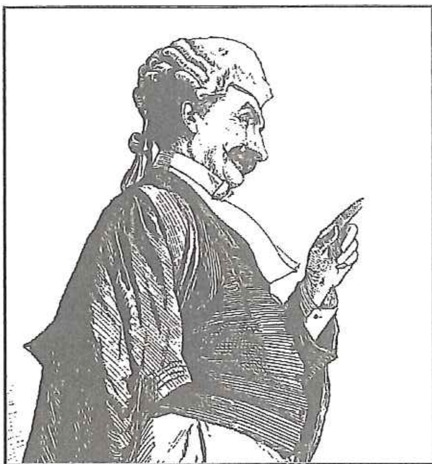

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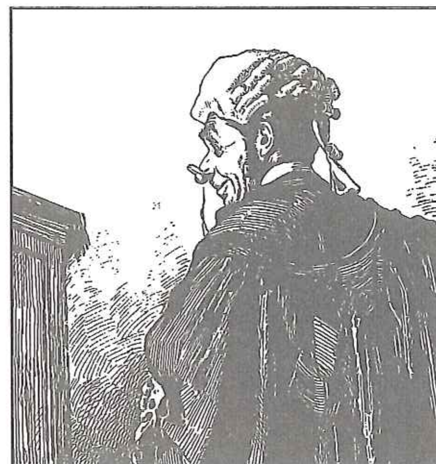

A Rant

by Kenneth P. Nolan

Life is strange most of the time. As I aged, I always assumed I would become a better person, more patient, understanding, accepting of others' flaws without rancor or enmity. Didn't happen. Actually I've become worse if you really must know and I never had the patience of a saint even on my best day. So instead of tuning out my adversary when she takes an untenable position or tells the judge something other than the truth, I silently seethe and eventually explode in a somewhat controlled rage. At least I believe it's controlled.

When younger and my opponent served me with 42 meaningless motions or continually failed to provide the promised discovery, I would shake my head, smile, and perversely enjoy the struggle. Since I was brainwashed at home and school that to be successful you had to work like a mule, I knew I would eventually prevail. "Don't give up, don't ever give up," the late great Jimmy Valvano preached, and it became my mantra. So I chuckled at delay and obfuscation and even the obvious lie. No matter what transpired, I coped and strangely rationalized—Hey they gotta make a living too. Once the judge focused, the foolishness would end and we would proceed to the substance of the case, which the other side was desperate to avoid.

Recently, however, I no longer accept or forgive. I expect honesty and reason, and when it's lacking, I anger, frustrated at the game playing, the childish strategy by defense counsel to delay, hide documents in some insane belief that you will tire, lose your resolve, and just give up.

A good portion of any lawsuit is forcing your opposition to provide information and documents. Yet in most cases you write letter after letter detailing deficiencies, serve myriad motions to compel production, and waste countless hours arguing these issues before frustrated judges. Despite thousands of articles and CLE programs decrying discovery abuses, this behavior, like the cockroach, cannot be exterminated. Despite stronger and more potent poison, these manipulations continue to thrive and seem more prevalent than ever.

Enough of this senseless, unproductive behavior. But this discovery dispute garbage isn't all that bugs me. The list is large and growing. Sure I'll throw you a bone and admit with pride there are many good lawyers who are good people. And fun to have a beer with, discuss the Yankees or Hillary, share a giggle. Maybe it's my lousy disposition but it just seems that certain lawyers' actions and attitudes drive me nuts. They really do.

Unlike Squire Daniher in *The Quiet Man*, I don't keep a list of those who infuriate me. But I take note of actions—silly, vain, deceitful—that exasperate me. And from lawyers who are tops in their field, at least that's what is claimed on their website. So I've decided to write these down not in any perverse hope of changing attitudes, but simply as therapy. Perhaps you will glance in the mirror and see yourself. Naw, most lawyers must own magical mirrors that reflect only brilliance and beauty. Perhaps we should ask Disney for some candid Snow White mirrors that reveal the "fairest fair of all." And for the record, I ain't perfect either. I'm lucky if I make it into purgatory. No way I'm at the pearly gates ten minutes after I buy the Big One.

I can't figure out why I have become so righteous, so quick to judge, but so much of our practice is wasted battling over nonessentials. All in an attempt to avoid the linchpin issues—who was at fault and what damages ensued. So here's the list of my pet peeves. The next time you see me acting in some fashion described below, remind me of this article.

Shut up. On and on they go. You know the ones—they know more law than Cardozo and can't stop interrupting the judge even when she agrees. They monopolize the conference calls, the meetings, the sessions with the client even if tangentially involved. To you their voice is at best ordinary, most likely grating, annoying. But they must love

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the sound since they don't stop talking. Ever.

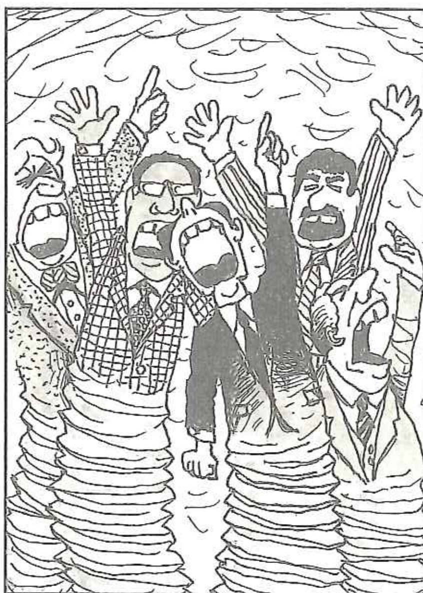
At one time in my practice representing plaintiffs in plane crashes, only a few firms were involved and the time to address the court was divided without hostility. Now, every fender-bender lawyer in the world claims expertise and becomes involved. The first few court conferences are hilarious. Egos run amok. Lawyers leaping up to chime "I agree, Your Honor." "That's correct, Judge." "One minor point, Your Honor," which really means one superfluous and stupid point. *Saturday Night Live* should do a parody.

Inevitably it'll happen. A punch, a tackle. Elbows are sharp and looks are filled with disdain. All because each wishes to be the spokesman (yeah they're all men), the leader, the star. Of what I haven't really figured out, but no point is ever made without five guys popping up like well-dressed jack-in-the-boxes to state the obvious or ridiculous.

And as bad as it is in court, try stomaching these Plaintiffs' Steering Committee meetings and conference calls. I taught at John Jay High School in Brooklyn while attending law school at night. A tough school with kids who hated school. Discipline was near impossible, especially if you taught ninth and tenth grades. Once they reached junior year, all the really bad ones had dropped out. Yet there was more self-control in the worst class at Jay than among this impressive group. We know you're smart, we know you've made a few bucks, but for the love of God, shut your mouth. Especially if you have nothing to say.

Be honest, at least a little. Especially about the case. I don't mind a bit of poker playing. But don't pretend you have four aces when you have a pair of deuces. I'm amazed when at a conference my bright, experienced adversary goes on and on about how my case is worthless, that the law is totally against me and its value is near nil. Not all my cases are slam dunks, but after 30 years, I know value and can always get to a jury where you never know what'll happen.

I don't get it. I recently represented clients who had a zone of danger claim in addition to wrongful death. They were present when their relative was killed. Admittedly, the law is a bit murky and damages difficult to evaluate. During



settlement negotiations, my sophisticated adversary told me these zone of danger claims had zero value. Since I was personally close to my clients, I snapped and was a bit loud. About how absurd such a position was, against the facts and law, unfair, immoral, and all that. Oh yeah, when I get started, I pull out all the stops. I'm not proud of my immature response but it sure did make me feel good. And the judge enjoyed it.

A reasonable position would have included the vague aspects of the law, the lack of any real physical injuries by the survivors, and the fact that the jury could award less than expected. But to argue they deserve zilch is counterproductive, especially when the settlement amount obviously included the zone of danger claims. Who were you trying to impress? The judge? Codefendants?

In another case, the issue was whether the jury could be told of a settlement with the hospital in a med mal case against the doctor who refused to settle. My adversary raised this during a break and told the judge that he had a case directly on point. We adjourned to the judge's chambers where we read the case. I pointed out eight distinctions between the proffered case and the one on trial. It wasn't even close. The judge denied the motion and the jury never learned that the hospital settled. Why pound the table and tell the judge that the case is binding when it's not. I may be a dope but the judge was bright and interested. Even a quick read made it obvious that the case had some similarities but the argument was a stretch at best. Why would a good lawyer damage his credibility with the court when a fair argument would have been more effective? When the judge read the case, he immediately asked, "You say this case is directly on point?" and shrugged his shoulders.

Sure you want to win and obtain the best result for your client, but to demand $5 million on a slip-and-fall with a broken arm is moronic. The result is bye-bye early settlement and another year of litigation where you're lucky to obtain the same number, only after more work and expense.

Be realistic, admit weakness. I recently negotiated a case where the insurance adjuster started to explain how weak my theory was on causation. I stopped him and volunteered that I understood the problem, that I knew the defendant could win on this issue, but it could go either way before a jury. He agreed and seemed relieved at my honesty. We were then able to negotiate a reasonable settlement. It's not brain surgery. You have to have confidence and some ability. The days of asking for the moon are long gone, if they ever existed.

Yet there are still those who hold out in the hope of squeezing a few more dollars from the defendant. And it sometimes occurs. But when you take into account the increased disbursements and the time value of money, you realize that the net result to the client is the same if not less.

Stop talking loud in the hall. In my Brooklyn neighborhood, fistfights were an almost daily occurrence. One guy would instigate, "Hey Tommy, I bet Jimmy could kick the crap outta you." Even if Jimmy and Tommy had no beef, they would often fight just to determine who was tougher. Fights were arranged, my brother is tougher than yours, and the next day these two huge guys would punch each other silly for no rational reason. My classmate, Harold, who eventually joined the Airborne and fought in Vietnam, battled Jesse three or four times one summer just so he could say he could beat him. Harold would lose and, occasionally, badly—busted lips, black eyes, black and blue all over. But in two weeks he'd do it again. And lose again.

The one word that caused the majority of the fights was "chicken." If challenged you had to respond. If you didn't your name was dirt. Sometimes fathers were involved. Go ahead fight him, learn to defend yourself. And take his son to the

other guy's street and supervise a fair fight where no one jumped in. If the kid lost, his father was still proud, hey nothing wrong with getting your ass kicked as long as it's a fair fight.

Of course, I was an observer of that scene. I was small and thin and probably a bit nerdy, well perhaps more than a bit. So I avoided confrontation for I knew that if you challenged, you had to fight. And you could never talk your way out of it.

With law, it's the opposite. Everyone struts like a peacock with feathers in bloom, bragging that they'll try the case if the offer is not this or that . . . I'll kick butt . . . Wait until I cross your client . . . the jury will give me millions . . . I'm a great trial lawyer . . . and you're not.

Don't tell me that you're going to try the case and then fold like a cheap two-dollar suitcase. Don't sing about the millions you've won or the stupendous verdicts and then cry like an infant when the judge sets a trial date. Don't scream that your client has no responsibility, it's the codefendant's fault, and then oppose any reasonable discovery schedule. If you're so certain of victory, move your case to trial.

End the bragging, the needless threats that you'll try the case when you adjourn every deposition. Stop telling the judge you need a trial when you won't provide minimal discovery. Your reputation is made on what you do, not what you say. And if you're new to the case, it becomes fairly obvious who will try a case. If you really want a trial, cooperate. Walk into the ornate and solemn courtroom, sit down quietly, and answer "ready" when the judge asks if you're available to select. Don't "Ahum, ahum, ahummer," like Ralph Kramden on *The Honeymooners*. Don't whine that you can't cause your kid has a soccer game or you have a firm retreat or your dog just had puppies.

"Select or settle," read the sign in the street-wise judge's conference room in the Bronx. No excuses. The single practitioner who sent a law student to the court with an affidavit of some lame excuse was met with the following: "Where's the lawyer who's supposed to try this case?" the judge demanded.

"Here's his affidavit, Your Honor. He needs a two-week adjournment," the young guy stammered.

"What about you? Why can't you try this case?"

"I'm in law school, Judge, St. John's, last year."

"What's your name son?"

"James Savino."

The judge began to write: "Please allow James Savino, law student, to pick a jury," to the smiles of all in the room. And he wasn't kidding. "Have the lawyer here at two o'clock, or you're picking the jury."

Stop being selfish. Even I want nice things—the Mercedes, the summer home on Gardiner's Bay, the ability to pay the outrageous college tuitions, the occasional bottle of Chateau Latour. Even the kids just out of law school earn $160K at the multinational firms. Money is there to be made. It shouldn't be the sole reason to practice law.

I may be somewhat hypocritical in this regard since I've always been a bottom-line guy. But finances weren't the reason I went to law school. Although it was an important aspect of my practice, it wasn't my only focus. For those who have financial success, the progression is to fame. Get your puss on TV, name in the newspaper.

Even though law has evolved from profession to business, do not lose sight that we do good, bring justice once in a while, fairly and equitably. You can still be a hard-ass litigator and be honest, fair. Many of my adversaries are such. They amaze me with their skill and credibility.

Consider your client. What's best for her, not simply what's best for you or the firm. The system. Not perfect of course, but respect the courts and those who try to provide justice. Think not about your schedule but the judge's, the courts', your adversaries'. Not that hard actually.

Success can be measured in different ways. Sure it's nice to have wonderful homes and cars and clothes, but . . . .

End the discovery madness. It's time.

Legal Lore

(Continued from page 56)

Mary II agreed in 1689 to rule as constitutional monarchs.

During this Glorious Revolution, Parliament's authority increased dramatically. The Habeas Corpus Act had been passed in 1679. Parliament passed the 1689 Bill of Rights, limiting the power of the crown. Catholics were barred from the throne. A Toleration Act permitted Nonconformists to hold services, and Catholics were denied freedom of worship but no longer prosecuted. Nonconformists and Catholics were banned from public service. Edwards, *supra*; Thorn, *supra*; N. Cantor, *Imagining the Law* (1997).

William III died in 1702 after he was thrown by his horse, and James II's daughter, Anne, an Anglican, became the final Stuart monarch. At the time of her death in 1714, property owners dominated Parliament, religious fervor had diminished, and the eighteenth century was becoming the Age of Reason. Miller, *supra*.

The eighteenth century also brought the American Revolution. Following the Declaration of Independence in 1776, the nation's founders created a government informed by their knowledge of English history. They protected individual freedom with constitutional safeguards such as habeas corpus and insured the separation of church and state through the Establishment Clause of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the full exercise thereof." The phrase "a hedge or wall of separation" was first used by Roger Williams, founder of Rhode Island colony. It was popularized by Thomas Jefferson. A.R. Amar, *America's Constitution* (2005).

Parliament was a blueprint for the two Houses of Congress. The Constitution stated that the members of Congress would meet annually and be elected for fixed terms and paid from the national treasury. Congress would decide where to locate the permanent national district. The powers of the legislative, executive, and the federal courts were separated into Articles I, II, and III.

English common law contained no mechanism for removing a monarch, but the Constitution provided for a president to be impeached. By a majority vote, the House of Representatives, acting as a special grand jury, could impeach the president "for treason, bribery and other high crimes and misdemeanors." The Senate was empowered to try an impeached defendant with the chief justice presiding. President Andrew Johnson was impeached in 1868 and President William Clinton in 1998, but both were acquitted. Neither was in danger of losing his head.