

# MassDLA

Newsletter

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## **Message from the President: Anthony J. Sbarra, Jr.**

### **ZEALOUS ADVOCACY AND CIVILITY ARE NOT MUTUALLY EXCLUSIVE**

We all strive to be zealous advocates. We search for every legitimate advantage and leverage all of them in any way we ethically can to further the interests of our clients. We want to win and try very hard to do so. This is how our adversarial system works now and has always worked. Being zealous, however, does not mean that we cannot be civil, professional and good sports. In my years, I have encountered extraordinary examples of such commendable behavior from opponents. Here are a few examples.

As a very young, inexperienced and nervous associate, I was given the assignment of taking the deposition of a plaintiff in a personal injury case. As I prepared, my boss informed me that opposing counsel was a friend of his and, more disturbingly, on the short list of lawyers that he would hire if need be. I began the deposition with the typical background questions. The plaintiff was a professor at a local university and had little patience with me. When I asked about his high school education he became exasperated and asked his attorney if I was entitled to ask about such things. His attorney, clearly sympathizing with my plight responded "He can ask you where you were when President Kennedy was shot, please answer his questions."

Another time I was about to make the first settlement offer on a serious case. The offer was too low, and I knew it. Nevertheless, I made the call to opposing counsel. Sensing my apprehension, he stated simply "I have been taught never to be insulted by someone who is offering me money."

In another case, I retained a world renowned but semi-retired neurosurgeon as an expert. He held the title "chairman emeritus" of a local teaching hospital at the time of his deposition. When asked about this, he said, facetiously, that it meant he had been "put out to pasture." Plaintiff's counsel used this testimony as grounds to exclude him, arguing that he was no longer qualified given his testimonial "admissions." The expert had, in fact, given two additional pages of deposition testimony explaining his attempt at humor and firmly establishing his bone fides. This testimony was omitted from the plaintiff's court pleadings. I called opposing counsel, expecting to receive either an excuse or an argument that the omission was not material. Instead, the attorney immediately apologized and offered to take any steps necessary to not only withdraw the motion she had filed, but to make sure that no one saw it, including the trial judge.

On another occasion the evidence, closings and charge concluded in a trial and the jury was deliberating. During deliberations and before the verdict, my gracious opponent made a point to come over to my client and his insurer. He spoke directly to them in my presence and complimented the manner in which the case was tried.

All of the attorneys from these examples are or were tremendously successful. In fact, some of them are icons in our legal community. It is no coincidence that this is so. Their gestures illustrate what is best about us as attorneys. We can and should learn from them.