

Outline "Professionalism and civility: ten reasons to push back against the darkness."
Clifford C. Ross, Salt Lake County District Attorney's Office
Utah Prosecution Council 2017 Spring Conference; Logan, Utah
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"Professionalism and civility- ten reasons to push back against the darkness."

Utah Prosecution Council Spring Conference April 2017; Clifford C. Ross
Deputy Salt Lake County District Attorney; cross@slco.org;
Desk 385-468-7675; Note: These materials are for discussion purposes only
and are not legal advice.

What to expect

Part A -Plain language definitions

**Part B- Ten reasons to avoid the darkness of uncivil and unprofessional
behavior**

**Part C- Focused review and points for the audience to ponder and discuss
Supreme Court Rules of Professional Practice; Chapter 14. Rules Governing
the Utah State Bar; Rule 14-301. Standards of Professionalism and Civility.**

Part A -Plain language definitions

Plain language definition of "dark"

1a : devoid or partially devoid of light : not receiving, reflecting,
transmitting, or radiating light a *dark* room **b** : transmitting only a portion of
light *dark* glasses...

3a : arising from or showing evil traits or desires : EVIL the *dark* powers that
lead to war **b** : DISMAL, GLOOMY had a *dark* view of the future **c** : lacking
knowledge or culture : UNENLIGHTENED a *dark* period in history **d** : relating
to grim or depressing circumstances *dark* humor

4a : not clear to the understanding **b** : not known or explored because of
remoteness the *darkest* reaches of the continent...

6: **SECRET kept his plans *dark*...**

8: closed to the public the theater is *dark* in the summer

<https://www.merriam-webster.com/dictionary/dark>

Plain language definition of "unprofessional"

not exhibiting a courteous, conscientious, or generally businesslike manner in the workplace

not professional *unprofessional* attire *unprofessional* comments

<https://www.merriam-webster.com/dictionary/unprofessional>

Plain language definition of "discourtesy"

1: rudeness

2: a rude act

<https://www.merriam-webster.com/dictionary/discourtesy>

Plain language definition of "uncivil"

1: not civilized : BARBAROUS

2: lacking in courtesy : ILL-MANNERED, IMPOLITE *uncivil* remarks

3: not conducive to civic harmony and welfare

<https://www.merriam-webster.com/dictionary/uncivil>

Analogs to civility from other jurisdictions

[S]everal other states have included references to other definitional analogs to civility, such as courtesy and respect. See ALASKA BAR R. 5, § 3 ("I will be candid, fair and courteous before the court and other attorneys "); Colo. Oath of Admission ("I will treat all persons.. .with fairness, courtesy, respect and honesty"); *Minn. Stat. § 358.07(a)* (providing that attorneys shall conduct themselves "in an upright and courteous manner"); Del. Supr. Ct. R. 54 (requiring attorneys to behave "with all good fidelity as well to the court as

to the client"), and Va. Attorney Oath (requiring attorneys to swear to "courteously demean [themselves] in the practice of law"). Alaska, Colorado, Minnesota, Delaware, and Virginia all include specific references to being courteous, which any dictionary will confirm is the touchstone of civility. See Merriam-Webster (defining "civility" as (2)(a) "civilized conduct; especially: COURTESY, POLITENESS"), available at <http://www.merriam-webster.com/dictionary/civility> (last visited June 25, 2013); BUCK'S (sic) LAW DICTIONARY (9th ed. 2009) (defining "legal etiquette" as "professional courtesy that lawyers have traditionally observed in their professional conduct, shown through civility and a strong sense of honor"). *Donald J. Winder, "Article: Civility Revisited," 26 Utah Bar J. 45, 46-47 (November-December 2013).*

Part B- Ten reasons to avoid the darkness of uncivil and unprofessional behavior

First reason to push back: professional life is better with civility and professionalism

In an effort to enhance both the daily experience of lawyers, and the reputation of the bar as a whole, the Utah Supreme Court has recently joined a growing number of jurisdictions by adopting standards of professionalism and civility applicable to all members of the Bar, and to those lawyers who appear in our courts from other jurisdictions. These standards are not yet mandatory, but the Court anticipates judges throughout the state will begin educating counsel appearing in their courts on these standards when conduct needs improvement. By order dated October 16, 2003, the Utah Supreme Court accepted the report of its Advisory Committee on Professionalism and approved the twenty Standards of Professionalism and Civility recommended in the report. Prior to issuance of the order, the Court had authorized publication of the report on the Utah State Bar's web page and solicited written comments from Bar members.

Justice Michael J. Wilkins, "Views from the Bench: Supreme Court Adopts Professionalism Standard," 16 Utah Bar J. 31 (2003) .

Second reason to push back: we took an oath

Attorney's Oath

"I do solemnly swear that I will support, obey and defend the Constitution of the United States and the Constitution of Utah; that I will discharge the duties of attorney and counselor at law as an officer of the courts of this State with honesty, fidelity, professionalism, and civility; and that I will faithfully observe the Rules of Professional Conduct and the Standards of Professionalism and Civility promulgated by the Supreme Court of the State of Utah." S.C.R.P.P. ; Chapter 13. Rules of Professional Conduct; Preamble: A Lawyer's Responsibilities

Third reason to push back: we are self -regulating and should strive to continue this by maintaining public confidence .

The Utah Constitution grants exclusive power to this court to "govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law"The Utah Constitution grants exclusive power to this court to "govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law" Utah Const. art. VIII, § 4. Pursuant to this authority, the court has promulgated and adopted the Rules of Professional Conduct, to which attorneys admitted to the bar of this state are required to conform their conduct. Violations of the Rules of Professional Conduct are prosecuted by the Utah State Bar through the Office of Professional Conduct (OPC). ... the Bar acts to enforce these rules it is acting as an arm of the Supreme Court.... (citations omitted) *Pendleton v State Bar, 2000 UT 96, ¶ 9.*

Fourth reason to push back: the Utah Supreme Court has directed us

S.C.R.P.P. 14-112. Duties of attorneys and counselors at law.

It is the duty of an attorney to comply with the Rules of Professional Conduct and all other duly approved rules and regulations prescribed by the Board or by the Supreme Court and to pay all required fees.

Fifth reason to push back: the Utah legislature has directed us.

An attorney exercising public prosecutor duties under this chapter:

(1) is a lawyer representing an organization as a client under the Rules of Professional Conduct, Rule 1.13;

(2) represents the state as an organizational client;

(3) is considered the representative of the state; and

(4) is empowered to make commitments for and decisions on behalf of the state. *U.C.A. 17-18a-801(2013) Public prosecutor's ethical duties.*

Sixth reason to push back: civility is no longer aspirational.

Recent cases from Utah courts underscore the growing recognition that the concept of civility is no longer merely aspirational. *See, e.g., Arbogast Family Trust v. River Crossings, LLC, 2010 UT 40, P 43, 238 P.3d 1035, 1043* ("We encourage lawyers and litigants to follow [the Utah Standards of Professionalism and Civility.]); *Featherstone v. Schaerrer, 2001 UT 86, P 16, 34 P.3d 194* ("[C]ourts are endowed with the inherent authority to regulate attorney misconduct."); *Robinson v. Baggett, 2011 UT App 250, P 27 n.14, 263 P.3d 411* (citing the Utah Standards of Professionalism and Civility as authority); *State v. Doyle, 2010 UT App 351, P 12, 245 P.3d 206* (stating conduct of all lawyers "should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms" (citation and internal quotation marks omitted)); *Superior Receivable Servs. v. Pett, 2008 UT App 225, P 12, 191 P.3d 31* (mem.) (citing to Standard 1, Utah

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Standards of Professionalism and Civility while reiterating a previous Utah Supreme Court case holding incivility may warrant sanctions and will often diminish a lawyer's effectiveness); *Advanced Restoration, LLC v. Priskos, 2005 UT App 505, P 37 n.13, 126 P.3d 786* (citing Standard 3, Utah Standards of Professionalism and Civility, that "[d]erogatory references to others or inappropriate language of any kind has no place in an appellate brief (citation and internal quotation marks omitted)). *Donald J. Winder, Article: Civility Revisited , 45 (November/ December 2013)*

Seventh reason to push back: uncivil conduct memorialized in decisional law lasts forever

Although we rule in favor of *Advanced* in this appeal, we are dismayed by the unprofessional and inappropriate language used by *Advanced* in its brief, where it states that both Landlord and Tenant "ought to be ashamed of themselves," and repeatedly refers to opposing counsel's arguments as "revolting," "disingenuous," "nonsensical," "insulting to the intelligence of the Court," "ridiculous," and "reprehensible." ... Additionally, the Standards of Professionalism and Civility, promulgated by the Utah Supreme Court, urge lawyers to "avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries." Utah Standards of Professionalism and Civility... (internal citations omitted) *Advanced Restoration , L.L.C. v Priskos, 2005 UT App 505 , ¶27, n. 13*

More on the seventh reason: uncivil conduct memorialized in decisional law is forever.

We feel it necessary to comment on the briefs in this case. Appellant's counsel has submitted briefs that are replete with pejorative remarks and epithets regarding opposing counsel, the trial court, Dr. Marble, and indirectly, this court. Statements such as Bear River's arguments are "supercilious," "absolutely foolish and asinine," and "ridiculous," that Bear River is "ignorant," that the trial court "ignored . . . every opinion ever written by this court" and "failed to read and comprehend the actual language" of the applicable statute, that Dr. Marble is "notorious" and a "charlatan," and that Dr. Marble's opinion is "inarticulate" and an "absurd

legal opinion" are wholly inappropriate in an appellate brief. Statements implying that small claims judges are not "real judges" and that this court disregards the truth by prefacing an argument with "on the outside chance the truth matters" are likewise inappropriate. Such remarks are merely argumentative and repugnant to fundamental and rudimentary notions of civility and decorum expected of attorneys, and as we have stated before, "derogatory references to others . . . have no place in an appellate brief and [are] of no assistance to this court in attempting to resolve any legitimate issues presented on appeal." (citation omitted) *Prince v Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 62 .

Eighth reason to push back: our reputations among judges are shaped by our civility and professionalism.

***In People v. Whitus*, 209 Cal. App. 4th Supp. 1 ; 146 Cal. Rptr. 3d 823, 2012 Cal. App. LEXIS 958 (2012) defense counsel appealed the trial court's \$750 sanction imposed for counsel's missing a number of scheduled hearings. The appeals court affirmed, took issue with defense counsel's advocacy on appeal, and referred counsel to the state bar for discipline.**

It is not an overstatement to categorize Appellant's oral argument as a parade of insults and affronts. It commenced with his demand that the deputy district attorney be removed from counsel table, and it culminated with his rude insistence that the court "state for the record that this is not a contempt proceeding."....In between, the trial and appellate judges were repeatedly disparaged. (footnote omitted) 209 Cal. App. 4th Supp. at 11-12. More on the eighth reason: our reputations among judges are shaped by our civility and professionalism.

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The appellate division was referred to as "the fox [watching] the hen house." Appellant demanded that each appellate judge disclose for the record whether he had discussed the case with the trial court, saying: "But it's common knowledge in the legal community, and you would be insulting me if you suggested otherwise, for us to believe that you judges don't talk like women in a sewing circle about us lawyers. You do. I know you do." *People v. Whitus*, 209 Cal. App. 4th Supp. 12 (2012)

More on the eighth reason: our reputations among judges are shaped by our civility and professionalism

In response to questions about the adequacy the appellate record, and whether the recorded proceedings (which, as stated, had been provided to Appellant by the trial court) had been transcribed, Appellant stated: "I don't need to give you the universe of evidence in these proceedings. ... You don't need a transcript." In response to a question regarding a case citation from one of the appellate judges, Appellant retorted: "It must have been a while since you read the brief."

In recounting the interactions between the criminal bar and bench, Appellant condescendingly opined: "I see a lot of judges that are really quick to bark at defense attorneys. We're always the fly in the ointment. I don't see judges willing to bark at prosecutors quite so readily. Maybe that's because if you upset them one too many times, they'll get one of their [minions to run against you and unseat you. As, I should add,] Michael Kennedy is now running for judge. I'm sure you've heard." " *People v. Whitus*, 209 Cal. App. 4th Supp. 12 (2012)

Still more on the eighth reason: our reputations among judges are shaped by our civility and professionalism.

Menzies v Galetka, 2006 UT 81 reversed trial court's dismissal of death row inmate's writ petition and held that U.R.Cv.P. 60(b) relief was available because counsel was ineffective. Counsel "willfully disregarded nearly every aspect of Menzies' case." *Id at ¶ 1.*

Justice Wilkins in his concurring opinion conceded that inmate's counsel was ineffective, but wrote:

[Inmate's counsel] a classmate of mine from law school, has, in the past, been a fine lawyer doing an excellent job. His passion about the rights of the accused has resulted in his willingness to be assigned the defense of some truly awful individuals charged with hideous acts. He has been an express believer in the right of all citizens to a vigorous defense against charges of criminal behavior brought by the State. He has, on many occasions, reminded judges and juries of Utah that our joint agreement, embodied in both state and federal constitutions, provides the benefit of the doubt to the accused. Periodically, some of the guilty go free as a result of the high burden we have all imposed upon the State to prove our guilt. This allows us to be more certain that only the guilty are punished. *Id at ¶ 1.*

Ninth reason to push back: judges are fed up and have bared their teeth

As the Court of Appeal explained in *Kim v. Westmoore Partners, Inc., supra, 201 Cal.App.4th at p. 293:*

"Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It is time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. .." (citation omitted)

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The appellate court referred defense counsel to the state bar for disciplinary proceedings in *People v. Whitus*, 209 Cal. App. 4th Supp. 1 ; 146 Cal. Rptr. 3d 823, 2012 Cal. App. LEXIS 958 (2012)

Tenth reason to push back: we must save Alice

On saving Alice

Alice has followed the news from Washington with her parents.

Alice has learned in school that our high government officials are supposed to lead, protect, and care about each and every one of us.

But Alice has watched our high government officials behave like the bullies, haters, fighters at school. Alice has seen what wrong looks like. Alice is now confused, worried, and anxious.

We must show Alice what right looks like in the judicial branch.

Part C- Focused review and points for the audience to ponder and discuss.

Supreme Court Rules of Professional Practice; Chapter 14. Rules Governing the Utah State Bar; Rule 14-301. Standards of Professionalism and Civility.

Rules governing the Utah State Bar; Rule 14-301; Standards of Professionalism and Civility, Preamble: courtesy, integrity, and the truth seeking process

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

Winning is not everything.

State v Doyle, 2010 UT App 351, cert. denied 2011 Lexis 54

***State v Doyle, 2010 UT App 351, cert. denied 2011 Utah LEXIS 54* affirmed defendant's conviction of drug charges following a jury trial and rejected defendant's argument on appeal that the trial court improperly denied defendant's motions to dismiss and to arrest judgment that were based on alleged prosecutorial misconduct and an alleged discovery violation. The court of appeals held that the prosecutor engaged in misconduct. First, the prosecutor knew or should have known that the State's material witness falsely testified at trial that the witness had not received a plea deal and that the prosecutor failed immediately to correct the testimony. Second, the prosecutor asserted a non-meritorious objection to discovery and failed to produce the plea agreement with the material witness. But, the court of appeals held that there was not a reasonable likelihood that the false testimony affected the jury's ultimate verdict and that defendant waived by failing timely to assert objection to the prosecutor's non-production of the plea deal. The court of appeals also held that defense counsel had knowledge of the plea deal before the conclusion of the State's case, had the opportunity to impeach the material witness, and failed timely to raise the State's discovery violation.**

Prosecutors can and must handle the truth.

State v Doyle, 2010 UT App 351, cert. denied 2011 Lexis 54

State v Doyle, 2010 UT App 351, cert. denied 2011 Utah LEXIS 54

For all lawyers, and especially for prosecutors, "conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms . . . [and] we must be mindful of our obligations to the administration of justice, which is a truth-seeking process. *Utah Standards of Professionalism & Civility 14-301.*" *Id. at ¶ 12.*

Prosecutors can lose for winning. *State v Doyle, 2010 UT App 351, cert. denied 2011 Utah LEXIS 54. State v Doyle, 2010 UT App 351, cert. denied 2011 Utah LEXIS 54*

"The trial court concluded that Cuenca believed she had not obtained a deal because she received a five-to-life sentence. *Id. at n.3*

It is particularly troubling that the prosecutor did not remedy Cuenca's misstatement given that the prosecutor at trial was the same prosecutor who entered into the plea agreements with Cuenca. *Id. at n. 4*

Rules governing the Utah State Bar; Rule 14-301; Standards of Professionalism and Civility, Preamble. What wrong looks like.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

Ponder this: Does this apply equally to prosecutor and defense counsel?

Rules governing the Utah State Bar; Rule 14-301; Standards of Professionalism and Civility, Preamble. Courtesy must prevail between the sheep dog and the wolf.

Lawyers should exhibit courtesy, candor and cooperation in dealing with the public and participating in the legal system. The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

Ponder this: What responsibilities do prosecutors have to serve the public by educating the public?

**Rules governing the Utah State Bar; Rule 14-301; Standards of Professionalism and Civility, Preamble.
Our triumphs and tragedies on social media.**

Lawyers should educate themselves on the potential impact of using digital communications and social media, including the possibility that communications intended to be private may be republished or misused. Lawyers should understand that digital communications in some circumstances may have a widespread and lasting impact on their clients, themselves, other lawyers, and the judicial system.

Ponder this: When you share your exploits by social media how many will remember your triumphs and how many will remember your tragedies?

Rules governing the Utah State Bar; Rule 14-301; Standards of Professionalism and Civility, Standard 1. Courtesy to the least deserving.

Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

Ponder this: Are we prosecutors already there? What duty do we have to protect a defendant from ineffective assistance of counsel? See *State v Dautre* 2014 UT App 192

Saving defendant from ineffective assistance of counsel

***State v Dautre, 2014 UT App 192* reversed a conviction of attempted kidnapping following jury trial. A detective testified as a footprint expert that he observed footprints in the melting snow five days after the alleged conduct occurred were made by an adult wearing running shoes striding downhill. The State had failed to give pretrial notice of the detective's expected expert testimony. See *U.C.A. 77-17-3(6), as amended* requiring any party intending to use an expert witness in a felony case to give "notice to the opposing party as soon as practicable but not less than 30 days before trial or 10 days before the hearing." The detective also acted as guide during jury's view of the sledding hill where the alleged kidnapping had occurred. Defendant told the trial judge he wanted to stay behind and not attend the view and defense counsel did not insist that Defendant attend. The court of appeals held that defense counsel's failure to insist that Defendant attend the view was not ineffective because counsel's failure to insist may have been a plausible trial tactic to "advance the legitimate interests of her client. See *Utah Standards of Professionalism & Civility 1.*" However, the court of appeals held that defense counsel's failure to object to the detective's expert opinion based was ineffective. Defense counsel should have objected even if futile based on detective's dual role and lack of notice.**

Rules governing the Utah State Bar; Rule 14-301; Standards of Professionalism and Civility, Standard 1. When may we remove our lawyer's hat.

The need for dignity and professionalism extends beyond the courtroom. Lawyers are expected to refrain from inappropriate language, maliciousness, or insulting behavior in depositions, meetings with opposing counsel and clients, telephone calls, email, and other exchanges. They should use their best efforts to instruct their clients and witnesses to do the same.

Ponder this: When if ever do we remove our lawyer hat?

Rules governing the Utah State Bar; Rule 14-301; Standards of Professionalism and Civility, Standard 3.

Being tough on the issues and nice to the opposition.

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

Ponder this: When and how should you call out defense counsel for violating this standard.

Rules governing the Utah State Bar; Rule 14-301; Standards of Professionalism and Civility, Standard 4. What counts is what your opponent claims not what you would like your opponent to claim.

4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

Ponder this: How much judicial and personal energy should we expend straightening out misstatements of our claims and position?

Rules governing the Utah State Bar; Rule 14-301; Standards of Professionalism and Civility, Standard 6. A deal is a deal even when it hurts

6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

Ponder this: What expected benefit would justify backsliding on our promises and agreements? What are the costs of backsliding?

Rules governing the Utah State Bar; Rule 14-301; Standards of Professionalism and Civility, Standard 7.

The palest ink is better than the best memory.

7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

Ponder this: Are prosecutors and defense counsel achieving accuracy and completeness in handling written plea agreements? Restitution terms?

Rules governing the Utah State Bar; Rule 14-301; Standards of Professionalism and Civility, Standard 8. The judge is counting on the prevailing party to draft an accurate order.

8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

Ponder this: How far should we bend before objecting to the form of our opponent's inaccurate proposed order?

Rules governing the Utah State Bar; Rule 14-301; Standards of Professionalism and Civility, Standard 10. Stipulate but verify.

10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

Ponder this: What quantum of proof and good cause should we have to present to support our requests for stipulations? Is the quantum different for the defense?

Rules governing the Utah State Bar; Rule 14-301; Standards of Professionalism and Civility, Standard 13. Count the days and watch the deadlines but bend to give defendant fair opportunity respond.

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

Ponder this: When does demanding strict deadline compliance justify the risk of causing ineffective assistance of counsel?

Rules governing the Utah State Bar; Rule 14-301; Standards of Professionalism and Civility, Standard 17. Giving and receiving burdensome discovery requests.

17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

Ponder this: Under what circumstances may we reasonably expect a judge to relieve us of production obligations on grounds of harassment or undue burden?

---End---