

## **INTRODUCTION TO PROFESSIONALISM VIGNETTES**

The professionalism vignettes included in this booklet were designed and produced to assist lawyers, judges and law professors in the teaching of professionalism. Each vignette has been crafted to present one or more professionalism issues that are encountered by lawyers and judges in offices, conference rooms and courtrooms. In all cases the vignettes were designed to provoke interactive discussion.

In this teaching manual we suggest methods for the use of the vignettes as teaching tools. They are not self-contained instructions. Instead they are designed for use as a part of a discussion or seminar session where the audience and instructor engage in a collective back-and-forth regarding the various professionalism issues implicated in each vignette.

There are 34 vignettes, none of which are more than a few minutes long. Each vignette contains a synopsis of the scene, timing, presentation tips and discussion points. This teaching manual is by no means an exhaustive list of the issues presented. Facilitators and audience members are encouraged to broaden the discussion points and provoke participation.

The facilitator should foster an atmosphere of comfort and candidness. In learning situations, no answer is a bad answer and a facilitator should encourage audience members to speak openly and candidly, without fear of being judged by others.

## **DEFINING PROFESSIONALISM**

Professionalism is conduct reflecting the values embodied in the Colorado Attorney Oath of Admission, the Colorado Principles of Professionalism, and the Colorado Rules of Professional Conduct. These values require attorneys always to act competently, civilly, and with integrity and to commit themselves to the public good and to furthering the interests of justice.

*-Adopted by the CBA\DBA Professionalism Coordinating Council*

## **RESOURCES**

Additional information can be found at the Colorado Bar Association Professionalism Coordinating Counsel's website:

<http://www.cobar.org/For-Members/Committees/Professionalism-Coordinating-Council>

## **Vignette #21: The Screaming Brief Part 1**

**Synopsis:** Defense counsel's brief is short on substance and filled with vitriol, personal attacks, and insults. The Assistant DA responds in kind. Its time to fight fire with fire!

**Timing:** 1:20 (stop at 00:32 and ask audience how they think she responds?)

**Presentation:** This vignette is part I of II and is primarily intended for use in seminars focused on legal professionalism and ethics. It is particularly valuable if presented by a judicial officer (as that is the audience for such legal briefs and other filings).

### **Discussion Points:**

#### **Major Discussion Points:**

- Is this appropriate advocacy, Why or Why not?
- Is there anything wrong with employing aggressive tactics? How should the DA have responded?
- What is the court likely to think of these tactics?

#### **Additional Discussion Points:**

- Can unprofessionalism undercut persuasion?
- When opposing counsel does something that makes you angry, what are strategies that can be employed to ensure the response is professional and courteous?
- Do we have an obligation to control impulsive and emotional statements.
- How does this behavior affect the client's interests?
- How may this affect a lawyer's credibility and reputation with judges and other lawyers?

## Vignette #22: The Screaming Brief Part 2

**Synopsis:** As seen in the prior vignette, defense counsel's brief is short on substance and filled with vitriol, personal attacks, and insults. However this time, DA's mentor suggests a professional pause.

**Timing:** 1:26 (stop at 01:22 to keep questions up on screen)

**Presentation:** This vignette is primarily intended for use in seminars focused on legal professionalism and ethics and is particularly valuable if presented by a judicial officer (as that is the audience for such legal briefs and other filings).

### Discussion Points:

#### Major Discussion Points:

- Was the DA's advice the best advice?
- What are some other possible responses?
- What could DA1 have done if she didn't have a mentor like DA2?

#### Additional Discussion Points:

- How important is it to remember your audience for both briefs and documents that could be filed with the Court at some point in the case?
- If a second set of eyes isn't available, what else can be done to ensure appropriate tone?
- Are there ways to use the other side's personal attacks against them in a way that doesn't put you in the gutter as well? *See* Bryan A. Garner, *The Winning Brief*, Chapter 72, "Counter the Rambo Writer with the deflating opener." ("[C]ollect the worst rhetorical outbursts from your opponent, recite them in summary form—not characterizing them too much, but quoting them word for word—and then move above and beyond.")

## **Vignette #23: Judicial Temperament**

**Synopsis:** One attorney is at the podium giving his closing statement at trial, while behind him opposing counsel is making disruptive comments, eventually making a heated objection. The first attorney turns around to personally respond to the objection with “give it a rest.”

**Presentation:** Vignettes numbers 23 and 24 are meant to be tailored to the audience—an audience of judges will have their own ideas about judicial temperament. An audience of just attorneys or a mix of judges and lawyers can expand the discussion from multiple perspectives.

**Timing:** 3:05 (stop at 1:11 for first discussion, at 3:01 for second discussion)

### **Discussion Points:**

#### **First Part Major Discussion Points:**

- What should the responding lawyer have done when the objection was made?
- What could/should the lawyers have done after the judge reprimanded them?

#### **Second Part Major Discussion Points:**

- How was the Judge’s approach improved in this scene?
- What are some tips or recommendations that you would offer the lawyers to avoid this behavior in the future?

#### **Additional Discussion Points:**

- If audience is judges:
  1. What techniques do you utilize to control your courtroom?
  2. When was the best point to stop this exchange between attorneys?
- If audience is attorneys:
  1. If this happened behind you during opening argument, how should you react?
  2. Do you want a judge to control the courtroom or is it preferable to let things be handled by counsel?
  3. How does this affect the client’s interests?
  4. How may this impact the lawyer’s credibility with the judge and jury?

## **Vignette #24: Passive Judge**

**Synopsis:** A younger attorney is giving her closing statement at trial using inflammatory language and personal attacks on opposing counsel. Trial judge interrupts her to ask her position on a case cited by the other attorney in his brief. Younger attorney says she has not had time to read that case.

**Presentation:** Vignettes numbers 23 and 24 are meant to be tailored to the audience—an audience of judges will have their own ideas about judicial temperament. An audience of just attorneys or a mix of judges and lawyers can expand the discussion from multiple perspectives.

**Timing:** 3:34 (stop at 1:30 for Part 1 discussion, at 3:30 for Part 2 discussion)

### **Discussion Points:**

#### **First Part Major Discussion Points:**

- What could the judge have done here to manage her courtroom?
- What are the pros and cons of the judge's approach?

#### **Second Part Major Discussion Points:**

- Was the judge's response appropriate?
- Are there risks to the judge manager her courtroom this way?

### **Additional Discussion Points**

- What should a judge do when counsel is unprepared?
- Should opposing counsel do anything in this situation? If so, what?
- What tools are available to judges to curb inflammatory remarks and conduct and to deal with unprepared lawyers?

## **Vignette #25: Starting Off on the Wrong Foot Part I**

**Synopsis:** This is a two-part vignette (together with Vignette No. 26) with a pause for discussion between parts. In Part 1, the Public Defender telephones the DA to discuss an upcoming preliminary hearing and about the case more generally. The conversation devolves into a debate over who will prevail in court, with each attorney making statements disparaging of the other.

**Timing:** 1:10

**Presentation:** After viewing Part 1, the facilitator may ask the audience what they have observed and what each side's reasonable expectations should be given the nature of their discussion. After viewing Part 2, ask what occurred during the conversation to de-escalate the confrontation. Open-ended questions help stimulate the discussion.

### **Discussion Points:**

#### **Major Discussion Points:**

- Where did this go wrong?
- What words were used that should be avoided to not aggravate the situation?
- What if the PD's client was advocating a more aggressive approach?
- How should the DA have responded?

#### **Additional Discussion Points:**

- What are the implications for the PD's client from this kind of dispute?
- How may such episodes influence a lawyer's credibility and reputation in the legal community?
- Should a lawyer "seek first to understand" (i.e., try to determine why opposing counsel is behaving in a certain way *before* reacting)?

## **Vignette #26: Starting Off on the Wrong Foot Part 2**

**Synopsis:** This is a two-part vignette with a pause for discussion between parts. In Part 1, the Public Defender telephones the DA to discuss an upcoming preliminary hearing and about the case more generally. The conversation devolves into a debate over who will prevail in court, with each attorney making statements disparaging of the other. In Part 2, the PD begins the conversation with a less aggressive style and the DA pauses before reacting to the PD's opening remarks.

**Timing:** 1:25

**Presentation:** After viewing Part 1, the facilitator may ask the audience what they have observed and what each side's reasonable expectations should be given the nature of their discussion. After viewing Part 2, ask what occurred during the conversation to de-escalate the confrontation. Open-ended questions help stimulate the discussion.

### **Discussion Points:**

#### **Major Discussion Points:**

- Was this the DA's best response?
- How else might this situation have been defused?

#### **Additional Discussion Points:**

- Comparing each attorney's listening skills between parts I and II, how did the difference in tone and use of words shape the direction of the conversation?
- Was it effective advocacy?
- What can attorneys do to manage preconceptions where counsel share a prior (and perhaps negative) work history?

## Vignette #27: Social Media Part 1

**Synopsis:** A client in a domestic matter wishes to downplay her financial position so that she may minimize any spousal support she must pay to her ex-spouse. The problem is that the client has made numerous Facebook posts reflecting her lavish, high-income lifestyle. The client then suggests that she go online and delete the posts “so no one has access” to them.

**Timing:** 1:53 (stop at 1:42 for discussion)

**Presentation:** This vignette is presented together with vignette number 28 with a discussion in between them. Together they raise issues of ethics and professionalism and duties to preserve evidence. As facilitator, you will want to keep the discussion focused on the professional concerns, though you may also want to touch on the ethical and evidentiary issues for additional context.

### Discussion Points:

#### Major Discussion Points:

- Is this the right approach? Why not?
- What might the attorney have done differently?
- What if the clients follows the attorney’s advice?
- What if the lawyer is a junior associate and the client questions his or her advice?

#### Additional Discussion Points:

- What if the attorney had disagreed with the client’s suggestion? How should that be voiced?
- What if you’re a junior associate and your senior partner tells you to counsel a client in this manner?
- What if the client comes to you and says your associate has rendered such advice?
- As this is spoliation of evidence, for further study see “Preservation of Social Media in a Family Law Context,” Massaro, Statfield, *The Colorado Lawyer*, Vol. 44 No. 5, p. 45 *May 2015*



## Vignette #28: Social Media Part 2

**Synopsis:** A client in a domestic matter wishes to downplay her financial position so that she may minimize any spousal support she must pay to her ex-spouse. The problem is that the client has made numerous Facebook posts reflecting her lavish, high-income lifestyle. The client then suggests that she go online and delete the posts “so no one has access” to them. In the second part of the vignette it is helpful to emphasize the difference in the lawyer’s approach.

**Timing:** 1:38 (stop at 1:28 for discussion to keep questions on screen)

**Presentation:** This vignette is presented together with vignette number 27 with a discussion in between them. Together they raise issues of ethics and professionalism and duties to preserve evidence. As facilitator, you will want to keep the discussion focused on the professional concerns, though you may also want to touch on the ethical and evidentiary issues for additional context. Part 2 (this video) provides one “right way” to advise a client under such circumstances.

### Discussion Points:

#### Major Discussion Points:

- Was this the appropriate approach? Can you think of others?
- How else might this situation have been defused?

#### Additional Discussion Points:

- Is there risk in the attorney’s language that “as an attorney, I cannot *advise* you to delete the posts, because *that* would be unethical for me...”? Is there a better or different way to convey such advice?
- What happens if the client refuses to follow the advice and deletes the existing posts? What are some issues that the client and the attorney may have to face down the line?
- Should attorneys be concerned about their own postings on social media?

## **Vignette #29: Communication Differences Part 1**

**Synopsis:** This vignette should be presented with vignette 30 with a discussion in between the two vignettes. Two attorneys trade passive aggressive emails regarding discovery with aggressive language, unreasonable and nebulous demands, and escalated defensive responses.

**Timing:** 1:29 (stop at 1:28 for discussion to keep questions on screen)

**Presentation:** This vignette is presented together with vignette number 30 with a discussion in between. As facilitator, focus on getting the audience to explore what went wrong in the conversation and what could have been done to avoid such results. After viewing Part 2 (vignette no. 30, which is a marked improvement over Part 1) the discussion should focus both on what was improved as well as on what could have been made even better.

### **Discussion Points:**

#### **Major Discussion Points:**

- How did using email get this off track?
- What could lawyer 1 have done differently?
- How should lawyer 2 have responded?

#### **Additional Discussion Points:**

- Did attorney 1 use threatening language? If so, did it achieve the attorney's goal of obtaining the missing discovery?
- What are the dangers of using email to communicate with opposing counsel?
- Would Barb have had better results if she had specified the discovery that was supposedly missing?
- Would a "professional pause" have helped either or both attorneys?

## **Vignette #30: Communication Differences Part 2**

**Synopsis:** This vignette should be presented with vignette 29 with a discussion in between the two vignettes. An attorney has just received a passive aggressive email attacking her client's discovery response or lack thereof. As the receiving attorney begins her email counterattack, she pauses, picks up the telephone and calmly discusses the discovery issue with opposing counsel and proceeds toward a resolution.

**Timing:** 1:41 (stop at 1:31 for discussion to keep questions on screen)

**Presentation:** This vignette is presented together with vignette number 29 with a discussion in between. As facilitator, focus on getting the audience to explore what went wrong in the conversation and what could have been done to avoid such a discussion. After viewing Part 2 (this vignette, which is an improvement over Part 1 (vignette 29)) the discussion should focus both on what was improved as well as on what could have been made even better.

### **Discussion Points:**

#### **Major Discussion Points:**

- Are there other approaches that might have worked here?
- What if lawyer 1 did not accept the olive branch?
- What can lawyer 2 have done to improve their interaction?

#### **Additional Discussion Points:**

- Is there any downside to lawyer 2's approach?
- Did the issue really get resolved? Show vs. Tell: Would the issue have been resolved had lawyer 1 "shown" lawyer 2 what discovery was still needed (by specifying the requests that remained outstanding) instead of by simply "telling" (stating that discovery remained outstanding without any indication of what was specifically deficient).
- Did either attorney's approach advance their respective client's interests?

## **Vignette #31: Unrepresented Party Transaction - Part I**

**Synopsis:** This a two-part vignette. Part 1 consists of two scenes. A business owner wants his attorney to draft a short contract selling his business to a long time employee who will not be represented by an attorney. The attorney attempts to render advice but relents when the client insists. After the contract is signed, the buyer wants to sue.

**Time:** 3:40 minutes (stop at 3:31 to keep questions on the screen)

**Presentation:** The facilitator should play the entirety of vignette number 31 before pausing to discuss the issues raised by the client's demands and the lawyer's advice.

### **Discussion Points:**

#### **Major Discussion Points:**

- How can the lawyer control the client in circumstances like these (i.e. when the client wants a quick deal with low fees?)
- What are some other options the lawyer could have proposed to satisfy the client?

#### **Additional Discussion Points:**

- Did the lawyer advance the best interests of the client?
- Does a lawyer's duty of professionalism extend to unrepresented third parties? (*See* Principle of Professionalism No. IX).
- What are some of the ethical implications of the attorney's approach?

## **Vignette #32: Unrepresented Party Transaction - Part II**

**Synopsis:** This is Part 2 of the unrepresented party transaction vignette and should be shown in conjunction with Vignette No. 31 following a discussion on Part 1. In this part, the business owner meets with his attorney to draft a short contract to sell his business. The attorney explains the risks of the approach and provides assurances to the client to keep the attorney fees reasonable. The client agrees to the attorney's recommendations.

**Time:** 2:34 minutes (stop at 2:02 to keep questions on screen)

**Presentation:** The facilitator should play and discuss the issues and implications involved in Vignette No. 31 before showing and discussing Vignette No. 32.

### **Discussion Points:**

#### **Major Discussion Points:**

- What if the client had not agreed with the lawyer's advice?
- What made this approach successful for the lawyer?
- What other techniques can the lawyer use to have a respectful client relationship?

#### **Additional Discussion Points:**

- Was the attorney required to advise the unrepresented buy to hire an attorney? (*See Principle of Professionalism No. IX*).
- What if both the non-client buyer and the seller, who was a client, approached the attorney jointly about joint representation?
- Does the attorney's approach advance or interfere with the client's best interests?

## **Vignette #33: Professionalism in Transactional Deals Part 1**

**Synopsis:** Gloria wants Earnest to provide redline edits to a transactional agreement the two are drafting for their respective clients. The problem is that she sent a non-editable .pdf to opposing counsel.

**Timing:** 1:19 (pause at 1:14 to keep the questions on screen)

**Presentation:** This vignette (when combined with vignette no. 34) is a quick study on a problem that arises frequently in transactional drafting and when parties must submit joint filings to the Court (or when drafting settlement agreements). It is generally helpful to touch base early on with opposing counsel to discuss which side will take the laboring oar on a first draft and the file format to be used when editing is anticipated.

### **Discussion Points:**

#### **Major Discussion Points:**

- What about Gloria's conduct was improper or unprofessional? Why or why not?
- How about Earnest's response? How could this problem have been avoided?

#### **Additional Discussion Points:**

- When drafting documents for a transaction (or even court documents that will be jointly filed), does it make sense early on in the process to send .pdfs as opposed to editable documents?
- If you've inadvertently sent a document in a format that cannot be edited, is it appropriate to ask for redline changes?
- Would a call between counsel held earlier in the process, where counsel exchange introductions and discuss the file format of any drafts to be exchanged, have helped here?
- How does the tone a lawyer take affect the outcome or result?

## **Vignette #34: Professionalism in Transactional Deals Part 2**

**Synopsis:** This is the follow up conversation to Part 1 of this vignette and thus needs to be played following a discussion of Part 1. The attorney that initiated the draft of the Sales Agreement calls the other attorney, is very cordial, thanks him for redlined revisions, indicates that they revisions are acceptable and requests a final version from the other attorney. They agree to set up a closing.

**Timing:** 38 seconds

**Presentation:** The facilitator should play Vignette 33 first and pause for discussion.

### **Discussion Points:**

#### **Major Discussion Points:**

- How could the attorneys have concluded the deal for their clients more quickly?

#### **Additional Discussion Points:**

- Would it have helped for the revising attorney to have sent both a “redline” and “clean” version of the draft?
- Should the attorney who accepted the changes have simply prepared the final version herself, rather than asking the other lawyer to do so?
- Is either approach more or less professional?