



# The Advocate

## MESSAGE FROM THE CHAIR:



Ted Eastmoore

### Mock Trial Judges and Jurors Needed (CLE Credit Given)

We need Judge and Juror participants! Here's the deal. Each year, two of the Trial Lawyers Section's biggest and most worthwhile programs, the Chester Bedell Mock Trial Competition and Teacher's Law School, come together at our January Summit. This year, the two events will

take place on January 17 - 18, 2014, at the Tampa Marriott Waterside, downtown Tampa.

The first event is the annual Chester Bedell Mock Trial Competition which pairs two teams from each of Florida's 12 law schools against each other. Participants, based on a common fact pattern, present a trial... everything from pretrial motions and openings to direct and cross examination and closing. Each round of the competition is presided over by a sitting judge and is scored by five lawyer "jurors." Jurors grade each phase of

the trial and each participant using a point system. After the round, both the presiding judge and the jurors provide helpful feedback to the participants.

Here's the best part. Actually there are two best parts. First, you get to help these young aspiring trial lawyers by grading and providing feedback to them. They all are quite good and many are truly outstanding. Speaking for myself, a trial lawyer for 30 plus years now, I was not as good as these young people when I was their age. Here's the second best

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## Pillow Talk: The Obligations of RPC 1.6

By Jamila Johnson<sup>1</sup>

A man sits in a bar association conference room. It is a Friday afternoon and he is surrounded by model rule books, disciplinary reports, and a thick red textbook sprinkled with wide green Post-its. He unearths a small rectangular piece of paper pressed between the textbook pages, places it on the table and, with three fingers, pushes it forward. On the paper is a black-and-white cartoon of a couple at the dinner table. The cartoon man explains that while he

would like to tell his wife about his day, doing so violates law firm policy. The wife looks appalled.

Talking about one's day does more than potentially violate "law firm policy," it violates the code of professional ethics. This cartoon illustrates one of the principles of confidentiality at the heart of the legal profession. In a time and culture where open communication between significant others is praised, lawyers may need a refresher on the confidentiality obligations that

accompany licensure. It may also be time to talk about whether these obligations are reasonable.

### Thou Shall Not . . .

The sources of lawyer confidentiality are varied. There is the obvious source – the attorney-client privilege – that prevents a lawyer from disclosing statements made by a client in confidence. There are principles of confidentiality that emerge from agency or fiduciary duties that arise depend-

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## CHAIR'S MESSAGE

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part, you get CLE credit for sitting as a juror, one credit hour for each hour you spend at the competition! It is really a bonus as most of us would sit as a service to the bar and these outstanding young folks.

The second event of the TLS January Summit is the Teachers Law School. This program, instituted last year, provides two days of instruction to approximately 80 middle and high school civics teachers on the importance of the Judicial Branch of our government. Speakers include the President of the Florida Bar, a United States District Judge, a Florida Supreme Court Justice, and

many outstanding trial lawyers. The theme is simple, impress upon the teachers that our free and democratic society would not be possible without the courts. In my 30 plus years of bar service, this is the single most significant program I have been a part of. After the program ended last year, all 80 teachers rated the program as 5 star. Some were literally in tears, saying that not only did they learn from outstanding speakers, but they were treated like professionals. They all were energized and pledged to return to class with renewed enthusiasm in teaching civics, especially the importance of the judicial branch. The 80 participating teachers will impact the lives of thousands of students. If they can impress upon them the im-

portance of the role of lawyers in our democratic society, our time is well spent.

This year, the Summit will culminate in the ceremonial courtroom of the Sam Gibbons Federal Courthouse. There, the participants of Teachers Law School will watch the final round of the Mock Trial Competition, presided over by United States District Judge Mary Scriven.

If you would like more information on how you can be a part of either program, please contact our Program Administrator, Eugene Sherman. You can find our contact information on the TLS website: [www.flatls.org](http://www.flatls.org).

*Ted Eastmoore, Chair*

# Humility: A Word of Wisdom for Young Lawyers

By Karen Koehler<sup>2</sup>

Trial lawyers are often perceived by the public as arrogant and phony. One explanation for this social perception is because the art of braggadocio is so prevalent and even sometimes necessary in our profession. Behind the show lie those memories that need to be periodically replayed, so we don't buy into the myth of our professional persona.

For my first solo trial court appearance, I was given a file and told it was a simple entry of an order; I didn't have to do anything other than show up. Unfortunately, I had been set up. The judge was furious about something that had happened previously and gave me a tongue-lashing that seemed to last forever. When it was over, I walked briskly from the courtroom, opposing counsel silently beside me. As we rode down the elevator, tears began to slip out. I was mortified. We walked out the revolving door and as we parted, the lawyer spoke kind words of encouragement.

### LESSONS:

1) An adversary can be compassionate and gracious but still be a worthy

advocate;

2) Always be prepared and know why you have shown up;

3) Tears of humiliation can be suppressed until one escapes from a courtroom.

A year later, I was assigned to defend a product liability case involving DES (drugs given to women that caused birth defects in their

daughters). Depositions were held in big conference rooms. The drug manufacturers' attorneys were seated around the table and again around the perimeter of the room. We all wore suits. The plaintiff's lawyer wore beads and dangling earrings. I didn't have a clue what I was doing.

Questions would be asked and  
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## Save The Dates! Teachers Law School & Mock Trial Competition

January 15 - 18, 2014

The Tampa Marriott Waterside

700 South Florida Avenue

Tampa, FL 33602

(813) 221-4900

**PILLOW TALK**

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ing on the type of work the lawyer is conducting. But frequently misunderstood by attorneys, and the people with the sometimes unfortunate pleasure of loving them, are the ethical duties of silence that accompany RPC 1.6.

RPC 1.6 provides: “A lawyer shall not reveal *information relating to the representation of a client* unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph [b]” (emphasis added). Paragraph (b) provides limited circumstances when disclosure is permitted. For example, disclosure is permitted when a client intends to commit a crime or engage in substantial financial impropriety.

It is hardly a stretch to conclude that many lawyers will never find themselves with an RPC 1.6 exception problem. It is also not a stretch to say that almost all attorneys will find themselves returning home and crawling into bed with someone who will ask, “What were you working on that keep you at the office so late?” Or even more commonly, “Hi, honey. How was work?”

A lawyer committed to following the rules of professional ethics is immediately put in an isolating position. Any information relating to the representation of a client is a disclosure forbidden by RPC 1.6. How can lawyers ever get off their chests the weights of the day with the people in their lives when there are no RPC 1.6 exceptions that allow attorneys to provide a sufficient answer to either question?

Does the information relate to the representation? This appears to be the only test the rules provide. It is a strict liability standard, and cautious attorneys should be mindful of the broad reach of these obligations.

But why does it seem like lawyers are committing violations everywhere from cocktail parties to between the sheets?

**A History Lesson**

The professional restrictions upon lawyers were not always so strict on limiting what a lawyer could talk about with the people in his or her life. Starting in 1917, the ABA Model Canons of Professional Ethics described confidentiality as follows: “it is the duty of a lawyer to preserve his client’s confi-

dences. This duty outlasts the lawyer’s employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information.”

The Canon had no definition for client confidence back then. Therefore, a lawyer might reasonable conclude that some social sharing of information was

not prohibited. At dinner parties, these attorneys may have been more able to discuss their victories.

Subsequently, the ABA Model Code of Professional Responsibility was produced. Canon 4 of the Code stated, “A Lawyer should preserve the confidence and secrets of a client.” The disciplinary rule defined “confidence” as “information protected by the attorney-client privilege under applicable law.” It defined “secret” as “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”

Therefore, under the Code, in a social situation a lawyer might conclude she could make a disclosure if the information was not subject to the attorney-client privilege, the client had not requested nondisclosure, and the lawyer concluded that the disclosure would not be ‘embarrassing’ or ‘likely detrimental’ to the client. Thus, a lawyer could believe she had a measure of discretion in making non-privileged disclosures.

In 1983, the ABA promulgated the ABA Model Rules of Professional Conduct and used the phrase “information relating the representation” for the first time. Comment 19 confirms what is evident – RPC 1.6 is much broader than “confidences” and “secrets.” Most lawyers

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I can’t talk to you!

Pillow Talk –	
Your potential responses to this question: you get home one evening after working quite late. You open the bedroom door and slip into bed. Your significant other rolls over and, half-asleep, asks, “What did you do today?”	
YOU SAY	ENDE’S TAKE
“Good news. I landed Acme as a client. The <i>Coyote v. Acme</i> trial will really help me make partner.”	Probably a violation of RPC 1.6
“We were in trial again. Coyote testified today that he broke both legs using the rocket pack. You should have seen it. The courtroom was packed with people watching us.”	Probably a violation of RPC 1.6
“I took a deposition where I really nailed the coffin shut on the plaintiff’s case.”	Probably a violation of RPC 1.6
“It was just a busy day at work. Go back to sleep.”	No violation. This conservative approach might have adverse personal or social consequences, but it would tend to ensure compliance with RPC 1.6

**PILLOW TALK**

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practicing law today did not learn this RPC 1.6 in law school and in preparation for the bar exam. That may be why there are so many misconceptions.

**Four Common Misconceptions**

There appears to be no shortage of attorneys who routinely tell their significant others and/or children more about what they do than is permitted by the Rules of Professional Conduct. Here are some common misconceptions attorneys have about their duty:

1. "I don't tell my wife anything that isn't available in court records or other public sources."

This is not a valid justification. Just because the information you disclose is otherwise available in court records does not mean that you can talk about it. If it is information that you know because of your representation of a client, it is information that the Rules of Professional Conduct prevent you from discussing with the people in your life.

2. "He is my husband. He couldn't testify about it in court."

While it is great that you have an open relationship with your husband, thinking about your disclosures in this way is inconsistent with the Rules of Professional Conduct. The prohibition of disclosures goes beyond concerns of what may one day be testified to in court. RPC 1.6 centers on something broader – the idea that attorneys should not be discussing any information that is learned through representation. A violation occurs regardless of whether the information can show up in court. With high divorce rates, consider how easy it might be for your spouse to

abuse the trust that you have placed with him/her.

3. "I only talk about my successes; what harm can come from that?"

Behind the former "secrets" language was an understanding that some harm must come from the disclosure. The broader language does not require such harm – it almost implies that the very act of an attorney talking about the work he does is harm in itself. While this may factor into the level of discipline that occurs if a complaint is made to the bar, it is not a defense to a finding that you violated the Rules of Professional Conduct.

4. "I don't say who the client is."

The comments to the rules are meant to guide attorneys. Comment 4 to RPC 1.6 provides that an attorney can talk in hypothetical scenarios as long as there is no way to reasonably decipher who the client is. This may be helpful to an attorney who enjoys posing hypothetical scenarios to his wife over lima beans and macaroni, but most spouses will not long stand for "hypothetical" these days. By their very nature, hypothetical scenarios are "what-if" scenarios and cannot answer the question: "What did you do today?" or "How was work?"

**Does RPC 1.6 Expect Too Much?**

G. Andrew Benjamin, J.D., Ph.D., ABPP, is quite familiar with lawyers and law students. After he received his law degree, he set out to explore the psychology of the profession. He com-

pleted several empirically-based studies on law students and lawyers, and has spent a large part of his career looking at lawyers and their mental health. His research, which has collected data from hundreds of lawyers, leads him to feel very concerned about the impact of the language of RPC 1.6.

"Lawyers are within a profession that suffers greatest from alcoholism and depression when compared with other professions. One-third of actively practicing lawyers suffer from one or both," he explains. While it is not immediately clear what causes the increased problems, there is little doubt that these problems are greater in lawyers than for other professional fields.

"We know being able to express yourself is part of the solution to a very real problem.

**Everyday almost every lawyer faces the prohibition of RPC 1.6.**

Talking about your day is a recommended treatment for stress prevention. It is the way to stay close to your husband or wife, partner, and kids.

It is unreasonable to expect lawyers not to talk, and if lawyers strictly adhered to the RPC, it would lead to greater psychopathology," Benjamin says.

Benjamin believes that depression and addiction in lawyers has a substantial impact on how the justice system functions. The change from a more permissive RPC 1.6 to the very restrictive RPC 1.6 standard that we have today does more than prevent discussions about one's day. If truly followed, it has the potential to exacerbate what he sees as a serious problem impacting the justice system.

**Is This Academic?**

It is somewhat difficult to talk about the extreme restrictions on the private lives of attorneys that RPC 1.6 creates without talking about discipline. In some ways, it seems like the speed limit on an interstate highway; people routinely exceed speed limits, but if you do, you

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## PILLOW TALK

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accept the risk that a police officer has the right to issue you a ticket. The only difference here is that there is practically no patrol. Attorney discipline is primarily complaint-driven. There have very few disciplinary actions taken against lawyers for a violation of RPC 1.6 and the sanction for such violation have routinely involved no more than a reprimand and many times an even lesser sanction. But that does not mean it cannot be worse. It happened in Indiana.

In 2010, the Indiana Supreme Court heard *In re Anonymous*, 932 N.E.2d 671. In that case, an attorney challenged the bar association's attempt to impose a private reprimand. The attorney had disclosed information earned from an organizational client's employee about that employee's marriage to the employee's friend. The attorney meant well -- the disclosure was to a mutual friend for the purposes of getting her support during the divorce. Unbeknownst to the attorney, the employee had already reconciled with her spouse. The employee filed a bar complaint. The attorney did not disclose anything that was not in public records. Indiana Supreme Court affirmed the private reprimand finding "information relating to representation" to be so broad as to prohibit the disclosure. The Court pointed out that the lawyer may have disclosed information that was not in public records, but the court held that it didn't matter because even disclosure of information in a public record violated RPC 1.6.

While this situation rarely plays out in the back pages of the Bar publication, there is certainly risk that accompanies RPC 1.6 violations. But there are also relationship and mental health risks with the isolation that accompanies upholding RPC 1.6. For all those solo practitioners, perhaps there is ethically no one to talk to. For those in firms, the conversation still must cease on your way out the door.

### Endnotes

1 Jamila Johnson is a litigator in the law firm of Schwabe, Williamson & Wyatt. This edited version of the article is reprinted with permission.

## What Can LOMAS Do for You?



LOMAS, or Law Office Management Assistant Service, is a valuable resource not only to partners managing large law firms, but to young lawyers looking to create their own destiny as a solo or small firm practitioner. To read more about the plethora of services offered by LOMAS and how they can help you, [CLICK HERE](#).

## Save the Date

### *Medical Malpractice Seminar*

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**USF Health Continuing Professional Education Center for  
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**A detailed brochure for this course (C1700) will be available  
through The Florida Bar web site ([www.flabar.org/cle](http://www.flabar.org/cle)).**

## HUMILITY

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everyone would have a turn. I always tried to sit at the end of the line. I quaked in fear that I would miss a question or objection or do something wrong. I felt like the phrase “really young dumb attorney” was emblazoned across my forehead.

### LESSONS:

- 4) If you don't know what you're doing, keep quiet, listen, mimic, and try to implement;
- 5) It is possible to appear confident, even when you're not;
- 6) There's something different about the plaintiffs' bar.

I had a mentor for my insurance defense work. My mentor decided I was ready to try my first case. It was a premises liability action and I was prepared to the max (and beyond). I was so nervous. My mentor discussed my need to somehow let the jury know this was my first trial so they wouldn't hold my performance against our client. Eventually it was time for opening statements. I was shaky, scared, and had notes I couldn't read. Lo and behold, as I talked, I began to feel the ground beneath my feet and I became more secure. I was doing it! Just when I was gathering steam, I heard a hissing sound from the defense table. I ignored it and continued. The hissing came again and again. *Don't*

*be sidetracked*, I told myself. Finally I heard my mentor yelling (quietly) in frustration: “Karen, you've got all the names mixed up!” The 12 jurors, judge, bailiff, court reporters, parties, other attorney, and my mentor stared at me. What a dunce. I looked at the jury, smiled sheepishly and said, “You know, this is my very first trial. I'm not nearly as experienced as my opposing counsel. If from time to time, I make a mistake, I apologize. Please bear with me.”

Four days later, the jury came back with a defense verdict.

### LESSONS:

- 8) Jurors appreciate humility and honesty;
- 9) You can't just focus on the presentation; you must notice what is happening in the courtroom;
- 10) It's not whether you might make a mistake in trial, it's simply a question of when you do, are you going to be able to deal with it and move forward?

When I was an older lawyer, smug in my ways, I defended a case where the target defendant was trying to wrongfully implead my client who was a coworker of the injured plaintiff. “You can't sue the coworker,” I explained to the young defense lawyer. It's crystal clear. Duh. The day of the motion hearing, I arrived

at 1 p.m. ready to squish her flat. The courtroom doors were locked. I waited and waited until a terrible thought crossed my mind. *Where was everyone?* I called my office. It was at 11 a.m., not 1 p.m. I'd missed it.

I crumpled down on the bench in the hall and tried to stop hyperventilating. Through a haze of misery, I called my opponent. There was nothing to do but lay my soul bare. I could tell she would have liked to lord it over me, but since I had eaten humble pie, she didn't have the heart. Later, I appealed the court's decision, which the appellate court overturned on an abuse of discretion standard.

### LESSONS:

- 11) If you think you're invincible, you will be unpleasantly surprised;
- 12) Don't get too discouraged when you lose the skirmishes, the thing to do is win the war;
- 13) Learn how to type.

Recently in a small trial, I floated through *voir dire*, I was excellent in opening, and I presented the plaintiff, who was wonderful. The next witness was my client's treating doctor. It was his first time testifying during trial. I figured the jury would like him and be favorably disposed because he was not a professional witness. Wrong.

*continued, next page*

# Save the Date!

Please mark your calendar and don't miss this event!

## Topics In Evidence

March 21, 2014 • Tampa Airport Marriott, Tampa, FL

A detailed brochure for this course (#1682) will be available through

The Florida Bar website ([www.flabar.org/cle](http://www.flabar.org/cle)).

## HUMILITY

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First, he forgot to bring the chart about which he was supposed to testify. I gave him my copies, which he fumbled through, but he still couldn't find anything. When he did, he would lose his place. The injuries were on the left side, but he couldn't find any reference to left-sided injuries. He was sincere, humble, believable, but not persuasive nor authoritative. He was the only care provider who treated my client. The pleasant look on my face grew fixed. I couldn't wait to get him off the stand. I figured out ways to deal with this "slight" setback, mainly having different witnesses (including the defense medical examiner) read the doctor's notes into the record, but the case had suffered a blow.

### LESSONS:

**14)** You can't control everything;

**15)** When things do go sideways, try not to panic or give up;

**16)** Do your best and forgive yourself for not being perfect.

I love helping victims of injustice. One morning, I decided to bring my three girls to court so they could watch me in action. On the way out the door, my 10-year-old looked at me critically and told me my outfit was "okay, but those shoes, Mom!" I trundled my kids down to the Courthouse and as we walked from the parking lot to the entrance, they whined about the smell and marveled that the courthouse was so "ugly." Their favorite part was going through security.

Our case was special set and counsel argued for a good 20 minutes. When it was over, I proudly asked my girls what they thought. "Well," said my oldest, "it wasn't too bad, but I didn't understand a word you said." The six-year-old was the most impressed. "You weren't scared."

### LESSONS:

**17)** Our sense of self-importance is self-imposed;

**18)** Our job is just that.

### Endnotes

<sup>2</sup> Karen Koehler is a partner at Stritmatter Kessler, a plaintiffs' personal injury law firm. She is past president of WSAJ and a recipient of its Trial lawyer of the year award. This edited version of the article is reprinted with permission.

## SAVE THE DATE

### Advanced Trial Advocacy 2014 (C1756)

May 2014

University of Florida - Fredric G. Levin College of Law

Course Classification: Advanced Level

Credits:

39.5 - General Credits

11.0 - Ethics

20.0 - Business Litigation

39.5 - Civil Trial

39.5 - Worker's Compensation

Do you need Certification Credit or Recertification Credit in Civil Trial or Business Litigation? Do you need another trial credit for your recertification? Do You need your general CLE and Ethics Credit?

If you answered "Yes" to any of the these questions,  
The Trial Lawyers Section of The Florida Bar has the answer.

This seminar is a NITA style interactive format with judges and lawyers from around the state. It provides all the required CLE and Ethics credits for the three year cycle and will substitute as one of the trials required for certification and recertification for Civil Trial Certification.

Registration is limited to 56 participants.

## MORE DETAILS COMING SOON!



The Florida Bar Continuing Legal Education Committee and  
the Trial Lawyers Section present

# Annual Civil Trial Update and Board Certification Review Seminar

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: February 17-18, 2014

Tampa Airport Marriott • 4200 George J. Bean Parkway  
Tampa, FL 33607 • (813) 879-5151

Course No. 1654R

This course is designed for two audiences: those who are preparing to take the Board Certification exam for civil trial or business litigation and those who want a refresher course and update on civil trial practice. The course has been approved for 15 hours of CLE certification credit for civil trial and 11.5 business litigation, including 2 hours of ethics credit.

## Monday, February 17, 2014

8:30 a.m. – 8:50 a.m.

### Late Registration

8:50 a.m. – 9:00 a.m.

### Opening Remarks

*Edward K. Cheffy, Naples*

9:00 a.m. – 10:45 a.m.

### Civil Procedure

*Matthew J. Conigliaro, Tampa*

10:45 a.m. – 11:00 a.m.

### Break

11:00 a.m. – 12:15 p.m.

### Trial Skills: Opening and Closing

*F. Gregory Barnhart, West Palm Beach*

12:15 p.m. – 1:30 p.m.

### Lunch (included in registration fee)

*Remarks about the Certification Exam*

*Luncheon Speaker: Representative from Civil Trial Certification Committee*

1:30 p.m. – 3:00 p.m.

### Trial Skills: Preserving the Record for Appeal

*Jack J. Aiello, West Palm Beach*

3:00 p.m. – 3:15 p.m.

### Break

3:15 p.m. – 5:15 p.m.

### Evidence

*Professor Charles Ehrhardt, Tallahassee*

## Tuesday, February 18, 2014

9:00 a.m. – 10:45 a.m.

### Ethics

*Edward K. Cheffy, Naples*

10:45 a.m. – 11:00 a.m.

### Break

11:00 a.m. – 12:15 p.m.

### Recent Developments in Personal Injury and Wrongful Death

*Gary D. Fox, Miami*

12:15 p.m. – 1:15 p.m.

### Lunch (not included in registration fee)

1:15 p.m. – 2:30 p.m.

### Trial Skills: Examination of Witnesses (including Experts, Daubert Motions and Motions in Limine)

*Patricia Lowry, West Palm Beach*

2:30 p.m. – 2:45 p.m.

### Break

2:45 p.m. – 3:45 p.m.

### Recent Developments in Business Litigation

*Darryl Bloodworth, Orlando*

3:45 p.m. – 4:45 p.m.

### Trial Skills: Voir Dire

*William E. Hahn, Tampa*

## CLE CREDITS

### CLER PROGRAM

(Max. Credit: 15.0 hours)

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