Originally published in

New York Law Journal

June 1, 2021

Has 'The Game' Changed?

By Joel Cohen

When the general public refers to conduct that is fair, respectful and polite, we call it "sportsmanlike." Not "lawyerlike." Shouldn't we at the bar do what's necessary to change that?

Yes! The game *has* changed. Old versus new. Yesterday versus today. Rules of engagement versus all-out engagement.

It brings to mind a recent dustup showcasing this issue regarding Tony LaRussa. He's the 76-yearold, now-out-of-retirement, Hall of Fame manager for the Chicago White Sox who publicly reprimanded his player, Yermin Mercedes. It seems that the rookie catcher outright defied his manager's instruction to "take" on a 3-0 pitch count. Instead, Mercedes hit a 47 mph meatball, thrown by a position player who was ostensibly "pitching" (in relief)—for a homerun. This when the White Sox were leading 15-4 in the ninth inning. Consider that: 15-4 in the ninth inning!

LaRussa is old school—his personal ethic commendably demands sportsmanship by his players rather than piling on for the sheer sport of it. Maybe I'm showing my age). LaRussa, surprisingly, though, has himself come under attack, especially from youngbloods. They say he's "out of touch" with how the game has changed. It should be about, they argue, "doing to them before they do to you." *Ya gotta* please the fans at all costs—they want homers. Bat flips, staring down the pitcher while running to first base, celebrating a homerun? Even better.

And they certainly don't want to see your catcher helping the opposing player up after he's been brushed back, especially if the opposing pitcher hit one of your guys in the shoulder with his 100 mph fast ball last inning. Just imagine what Bob Gibson or Juan Marichal would think of—indeed, do about—your batter's willingness to humiliate the home team with a very unsportsmanlike dinger next time at bat.

Okay, that's baseball. But what about litigators—do such evolving baseball mores translate to the legal world? Has the practice of law changed so drastically that the old rules of the road that would preach decency and civility don't apply anymore?

For example, are litigators today too willing to draw first blood, even if their adversaries have been unfailingly courteous? Do they refuse to consent to adjournments requested by their adversaries when there's no adverse consequence to their client in doing so? Are they willing to leak to the press unpleasant and irrelevant rumors about their adversaries in high profile cases, unlike yesterday's lawyers who normally kept their battles in the courtroom or in mano a mano exchanges between them?

Beyond that, do today's litigators, unendingly so, use every possible tactic in a win-at-all-coststrategy? For example, filing baseless, time-consuming, just this side of frivolous, motions, simply because they don't like the cut of the adversary's jib? Or, pertinent here, because their clients insist?

Will they make million page "document dumps" (sometimes containing unidentified *Brady* material)—and, literally, at the last possible (typically Friday evening) moment under the judge's scheduling order—all to keep the opposing attorneys on edge? Are they willing to maintain the harmless lawyer-to-lawyer confidences between adversaries which, in the old days, made litigation combat cordial and efficient? Or do they aimlessly repeat to their client virtually *everything* the adversary says (some of it presumably in confidence), even if personal and irrelevant to the case?

In short, are today's lawyers comfortable following the client's desires to go to the line, or maybe even over it, simply for fear that the client will go elsewhere if his demands are ignored? Put otherwise, has today's litigator abandoned "professional advocacy" norms, and opted instead to be a "businessman," always seeking to maintain his or her reputation for unqualified fierceness in battle? While there is a strong argument to be made, particularly in criminal cases, that zealous advocacy actually requires lawyers to go up to the line, does that mean lawyers should (persistently) employ gratuitously offensive strategies to get the job done? Have many, today, become the Yermin Mercedes of the law game?

And do judges share any responsibility in any of this? Do they make clear at the outset, as did many of yesteryear, that they simply won't tolerate Rambo-like or sharp tactics, inside or outside the courtroom? Meaning, will judges create an atmosphere designed to deter mischief in the case? In court or elsewhere. Easily detectable or not

It's hard to forget Judge Lance Ito of *People v. O.J. Simpson* fame in all of this. Ito addressed the lawyers, as I recall it,1 just before opening arguments, telling them, with the whole world watching, that: he expected great lawyering; he expected that each lawyer would approach the line and undoubtedly cross it sometimes; but when the case was over they would all have dinner together and celebrate their jobs well done.

Imagine that. The judge told them, before combat even began, that he expected that each would try to cross the line, rather than "don't even think about going there." What was he communicating to not only the lawyers in his courtroom, but everywhere? Sort of like telling Yermin Mercedes "Do what works for *you*, *your* stats and *your* fan base. Forget everything else. Nothing else matters." Unsurprising that cameras in the court were at a premium in the wake of what Ito had effectively condoned in his courtroom.

We asked the Honorable Rolando Acosta, the Presiding Justice of the Appellate Division, First Department, for his thoughts on this. The Justice is known not only for the curveballs he occasionally throws litigators arguing before him at 27 Madison Avenue, but for having been *the* premier pitcher in the Ivy League back in his baseball days at Columbia. (No joke. Just ask Ron Darling!)

Justice Acosta says this:

> For the legal profession, as in baseball and society at large, there's a growing mentality that "might makes right." Frankly, that mentality will invariably return us to a Hobbesian state of nature. No one wants to see that. Instead, lawyers and judges must remember that they are part of an ancient, honorable profession—based on principles of fairness and civility. The profession is, frankly, adulterated by the abuse of cleverness.
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> Yes, baseball players, particularly as role models for youngsters, should never lose sight of what it means to be a "good sport." Nonetheless, and while baseball has been an important part of my life, I see the bar as having a much greater duty. We, the bench and bar, must help prevent the further erosion of civility in our society. Lawyers, particularly in litigating, must lead the way.

The PJ has clearly taken it up a notch. It's interesting—when the general public refers to conduct that is fair, respectful and polite, we call it "sportsmanlike." Not "lawyerlike." Not meaning to be preachy here, shouldn't we at the bar do what's necessary to change that? Or is the cynical reader laughing now?

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