

It's Time to Put a "Governor" Back in Our Discourse

BY MURRAY I. WEINER

Older cars used to have a "governor" that prohibited them from reaching excessive speed. Newer cars no longer use this device to control engine speed. Likewise, the "governors" that used to limit discourse in our legal system to what is civil, rational, and reasonable are also gone, or are largely being ignored. These governors serve a critical role. It's time to put them back in place.

Law without Limits

Our inability to place limits on what we are willing to do or say, and the court's unwillingness to call us on it, has fostered a mindset among lawyers that "you can get away with anything, at least for a while." This way of thinking has manifested within the legal profession in two troubling ways.

Frivolous Lawsuits

We see a lack of governors when lawyers and litigants file lawsuits that are frivolous or absurd on their face. The rationale for filing these cases is threefold. The first is "I can, so therefore I will." To prepare a complaint all you need is a computer, a typewriter, or a pen. Everybody has access to one of those. And if you pay the filing fee, the court will accept it.

The second rationale is "Well, let's file it and see what happens!" The filing lawyer knows this isn't the best complaint or claim ever written, or even close, but figures it will cause trouble for the defendant. Since most cases settle, the lawyer reasons, this one likely will too.

The third and most abhorrent rationale for filing such an action is "The court won't do

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anything bad to me anyway." While the courts have tools to keep filings and arguments within a rational boundary, they are infrequently employed, and if employed, they come into play long after the damage is done.

Hollow Arguments

We also see this disregard of limits or norms in the arguments lawyers are willing to make.

Is there any basis for saying, "My third, fourth, fifth, or sixth best argument is . . ."? Of course not. Yet lawyers make these arguments anyway. And while judges don't often buy them, they tolerate such lawyering, rarely if ever openly calling out the lawyer or party who confuses the theoretical with the possible, or better yet the probable, all at great cost to the judicial system and its constituency.

Zealously representing our clients does not mean we have to make absurd or illogical arguments. As lawyers, we should be policing ourselves to act within ethical and reasonable limits and to take positions that have a rational and factual basis for their assertion. Telling a client, "No, I cannot or will not file that case or make that argument or take that position" is apparently a forgotten practice. It is, however, the basis for Colorado Rule of Civil Procedure 11 and similar statutes and rules that attempt to make our system function.

Out-of-Court Behavior

Like the professional conduct rules that address our behavior beyond the legal realm, we also need a "governor" to apply to what we, as lawyers representing the Colorado bar, are willing to say or do outside the legal arena. The first amendment allows for a lot. But I'm not talking about what we can get away with; I'm talking about circumscribing or limiting our speech and actions to what is fact based, reasonable, civil, and doable.

And, as with good legal argument, we must put a "governor" on our statements and actions and limit them to our best argument or, if necessary, our second-best argument. We must eschew the rest because they are not persuasive, they undercut our position, and they go beyond what is civil, right, or productive.

Recommitting to Reason

The lawyering issues discussed above have been building for a long time. However, they have been greatly amplified because we are now rewarded for saying or doing the absurd, and there is little if any risk associated with doing so.

It's time to put a "governor" back in our discourse. Let's stay within the speed limit in the legal arena and elsewhere. As lawyers, we need

to reaffirm our commitment to remain within reasonable bounds, and when we don't, the courts need to quickly and directly administer consequences for not doing so.

The same goes for our political and other speech. There should be no reward for those who stray beyond what is appropriate. And, as lawyers and judges in our community, we need to show the non-legal world that the model

lawyer is not the person who will say or do anything, but the professional who espouses what is reasonable, rationale, and constructive.

In short, the "anything goes" concept must be removed from our thinking. We need to go back to where we once were and put a "governor" on our actions and statements. The well-being of our legal system and our society depends on it. 



Murray I. Weiner is a commercial trial attorney in the Colorado Springs law firm of Mulliken Weiner Berg & Jolivet, P.C. He is a past president of the El Paso County Bar Association and a 1984 graduate of the University of Colorado School of Law.

Coordinating Editor: John Hiski Ridge, john.ridge@outlook.com



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