

The scarlet opinion

By Kenneth J. Ashman

In Nathaniel Hawthorne's "The Scarlet Letter," Hester Prynne is forced to wear on her dress the letter "A," scarlet in color, for her adulterous affair that produced a child. The letter is a badge of shame for all to see.

Although Hawthorne penned the novel in 1850, and set it in 17th century Puritan New England, his take on punishment is thoroughly modern: He chides public humiliation without condoning the underlying conduct.

The parallel to the scarlet letter in the legal profession is the public admonishment of attorneys in judicial opinions — scarlet opinions. These often take the form of chastising an attorney, in a mixture of sarcasm and scorn, that other lawyers' mailboxes zap from the Internet like frogs feasting on flies.

In one well-worn opinion that made the e-mail rounds, a federal judge chastised both plaintiff and defense counsel for "obviously enter[ing] into a secret pact — complete

with hats, handshakes and cryptic words — to draft their pleadings entirely in crayon on the back side of gravy-stained paper placemats, in the hope that the court would be so charmed by their childlike efforts that their utter dearth of legal authorities in their briefing would go unnoticed." The opinion identified the lawyers by name.

In another instance, a federal judge identified nine attorneys by name because they filed an admittedly absurd motion to strike an opponent's court filing because it came in four minutes and 27 seconds late (with supporting documents trickling in 71 minutes later). Addressing the motion, the court stated:

"Wounded though this court may be by [the opponent's] 4-minute and 27-second dereliction of duty, it will transcend the affront and forgive the tardiness. Indeed, to demonstrate the even-handedness of its magnanimity, the court will allow [the movant] on some future occasion in this case to e-file a motion four minutes and 30 seconds late, with supporting documents to follow up to 72 minutes later."

This author is not altogether above laughing at another's expense, especially when the basis for the court's outrage is justified. But not all scarlet opinions are humorous, and even those that raise the question of the propriety of calling out an attorney's mishaps publicly.

Scarlet opinions, by their nature, include personal gratuitous remarks about an attorney that are tangential to the adjudication of the issue before the court and, therefore, not necessary to its resolution. Scarlet opinions address attorney conduct that, while inappropriate, does not rise to the level of a violation of rule or law.

This issue surfaced recently with the 7th Circuit's order

Kenneth J. Ashman is a member of Ashman Law Offices LLC, a business law and litigation boutique with offices in Chicago, Lincolnshire and New York. He is a frequent publisher and speaker and holds leadership positions with both the Illinois State and American Bar associations. He can be reached at KAshman@AshmanLawOffices.com.

issued on Dec. 2, 2010, in *Thorogood v. Sears, Roebuck and Company*, 2010 WL 4890689 (7th Cir. Dec. 2, 2010) and its decision in the same case issued on Nov. 2, 2010 (found at 624 E3d 842) — both of which offer considerable criticism of class-action attorney Clinton A. Krislov.

This author offers no comment as to the validity of the criticism of Krislov — for purposes of this column assumes it is all warranted. Instead, this column posits that a more appropriate way exists of effectuating the change that this criticism is designed to produce than the publication of it in the court's decisions.

Indeed, at least part of the court's justification of issuing the criticism publicly is that Krislov did not treat the 7th Circuit with much respect either, see 2010 WL 4890689 at *3 ("Well, he doesn't treat us with much respect."), a justification this author finds thin.

The problem with addressing attorneys' misdeeds through scarlet opinions is threefold.

The imbalance of power leaves an attorney with little recourse once his reputation has been smeared, without an effective means to correct the record or explain his or her side of the story.

First, the imbalance of power between an attorney and a judge is manifest, so much so that it is just not a fair fight. The judge will always get the last word and the court's opinion will be disseminated much more broadly than any court filing made by the attorney.

Moreover, the public chastisement of an attorney will undoubtedly have a chilling effect on that lawyer's practice before that judge again (and likely other judges, as well) — perhaps the desired outcome for repeated impertinent sub-

missions, but a loss for the client where an creative claim or defense might exist.

Also, the exercise by the court of the unique power to issue scarlet opinions may erode the view of judges as impartial arbiters of disputes — above the fray of petty personal squabbles.

Finally, the imbalance of power leaves an attorney with little recourse once his reputation has been smeared, without an effective means to correct the record or explain his or her side of the story.

Second, scarlet opinions may run afoul of the spirit, if not the letter, of the Code of Judicial Conduct, the Standards for Professional Conduct within the 7th Federal Judicial Circuit and the principles of the Illinois Supreme Court Commission on Professionalism.

Canon 3(A)(3) of both the Illinois and federal codes provides that, "A judge should be patient, dignified and courteous to ... lawyers," and the 7th Circuit standards commit federal courts within the circuit to refrain from "employ[ing] hostile, demeaning or humiliating words in opinions" and "impugn[ing] the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents."

Moreover, the Illinois Supreme Court established the commission to "promote among the lawyers and judges of Illinois principles of integrity, professionalism and civility" — all of which may be undermined by the use of gratuitous assaults on attorneys in scarlet opinions.

Finally, the issuance of scarlet opinions leads to an irony
Ashman — page 24

Ashman

Continued from page 6

with respect to the confidentiality of proceedings before the Attorney Registration and Disciplinary Commission. Although Illinois judges are not duty-bound to refer attorneys to the ARDC for ethical violations where they have the power to impose appropriate discipline, they should refer conduct that might constitute a crime to the ARDC because it is only through that body that disbarment or suspension can occur.

Since ARDC proceedings are confidential, scarlet opinions necessarily involve conduct that was not referred to the ARDC. Hence, the more serious the potential infraction, the more likely a referral to the ARDC will occur; conversely, the less serious the potential infraction, the more likely it will wind up in a scarlet opinion.

Assuming that there is no actual eth-

ical violation, the public will learn only of the minor misdeeds with the major ones kept confidential.

There is a better way. Courts are in the business of fashioning remedies and they surely have the power to fashion alternatives to the public humiliation that scarlet opinions cause. A court could just as easily order a conference, whether in chambers or even in open court, to reprimand the attorney for the aggrieved conduct, as just one obvious alternative.

As before, this author has no qualms about published decisions that impose sanction or other discipline on attorneys committing violations, but where the criticism of the attorney is not necessary to a ruling on the merits, the better practice is for the court to exercise restraint and stick to the issues at hand.