

# Chapter 3

## CIVILITY AS THE CORE OF PROFESSIONALISM

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Civil behavior is a core element of attorney professionalism. As the guardians of the Rule of Law that defines the American social and political fabric, lawyers should embody civility in all they do. Not only do lawyers serve as representatives of their clients, they serve as officers of the legal system and public citizens having special responsibility for the quality of justice. To fulfill these overarching and overlapping roles, lawyers must make civility their professional standard and ideal.

### **I. What Exactly Is “Civility”?**

Let’s do what all good lawyers do—agree first on the definitions. The concept of civility is broad. The French and Latin etymologies of the word suggest, roughly, “relating to citizens.” In its earliest use, the term

referred to being a good citizen, that is, exhibiting good behavior for the good of a community. The early Greeks thought that civility was both a private virtue and a public necessity, which functioned to hold the state together. Some writers equate civility with respect. So, civility is a behavioral code of decency or respect that is the hallmark of living as citizens in the same state.

It may also be useful at the outset to dispense with some widely held misconceptions about civility, likening it to: (1) agreement, (2) the absence of criticism, (3) liking a person, and (4) good manners. These are all myths.

*Civility is not the same as agreement.* Just as disagreement does not equate to incivility, the presence of civility does not mean the absence of disagreement. In fact, underlying the codes of civility is the assumption that people will disagree. The democratic process thrives on dialogue and dialogue *requires* disagreement. Civil dialogue over differences is democracy's true engine. Individuals must disagree in order to debate, debate in order to decide, and decide in order to move. Professor Stephen Carter of Yale Law School has stated, in one of his many writings on civility, "[a] nation where everybody agrees is not a nation of civility but a nation without diversity, waiting to die."

*Civility is not the same as liking someone.* It is a myth that civility is more possible in small communities where everyone knows each other. The duty to be civil toward others does not depend on liking the other person. It doesn't even necessarily require knowing the other person. Civility compels us to show respect even for strangers who may be sharing our space, whether in the public square, in the office, in the courtroom, or in cyberspace.

*Civility is not the absence of criticism.* Respect for the other person or party may in fact call for criticism. For example, a professor who fails to point out an error in a student's research paper is not being civil—he isn't doing his job. And a law firm partner who fails to point out an error in a young lawyer's brief isn't being civil—she isn't doing her job.

*Civility should not be equated with politeness or manners alone.* Although impoliteness is almost always uncivil, good manners alone are not a mark of civility. Politely refusing to serve someone at a lunch counter on the

basis of skin color, or cordially informing a law graduate that the firm does not hire women, is not civil behavior.

Civility is a code of decency that characterizes a civilized society. But how is that code reflected in the practice of law?

## **II. Civil Conduct as a Condition of Lawyer Licensing**

A civility imperative permeates bar admission standards. The legal profession is largely self-governing, with ultimate authority over the profession resting with the courts in nearly all states. Courts typically set the standards for who becomes admitted to practice in a state and prescribe the ethical obligations that lawyers are bound, by their oath, to fulfill.

Candidates for bar admission in every state must satisfy the board of bar admissions that they are of good moral character and general fitness to practice law. The state licensing authority's committee on character and fitness will recommend admission only where the applicant's record demonstrates that he or she meets basic eligibility requirements for the practice of law and justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. Those eligibility requirements typically require applicants to demonstrate exemplary conduct that reflects well on the profession. Representative language in the Illinois bar application, for example, requires every applicant to "conduct oneself with respect for and in accordance with the law and Rules of Professional Conduct, the ability to conduct oneself diligently and reliably in fulfilling all obligations to clients, attorneys, courts, creditors, and others and to conduct oneself in a manner that engenders respect for the law and the profession."

Capacity to act in a manner that engenders respect for the law and the profession—in other words, civility—is a requirement for receiving a law license and, in some jurisdictions, for retaining the privilege of practicing law. It follows that aspiring and practicing lawyers should be disabused of the notion that effective representation ever requires or justifies incivility.

## **III. Beyond Client Representation: Lawyer as Public Citizen**

Notions of a lawyer's core civility duty also are rooted in ethical principles informing and defining the practice of law. Those principles, having

evolved over the centuries to lend moral structure and a higher purpose to a life in the law today, speak plainly to a lawyer's dual duties as officer of the legal system and public citizen, beyond the role client advocate. At the very top of the lawyer's code of ethics—in the Preamble to the Model Rules of Professional Conduct—we read of those larger civic duties binding every practicing lawyer.

Civility concepts suffuse the hortatory language of the Preamble. For example, the Preamble makes clear that even in client dealings, counsel is expected to show respect for the legal system in his or her role as advisor, negotiator or evaluator (Preamble Cmt. 5). The Preamble also states that “as a public citizen having special responsibility for the quality of justice,” a lawyer should seek improvement of the law, access to justice and the administration of justice, cultivate knowledge of the law beyond its use for clients and further the public's understanding of and confidence in the rule of law and the justice system (Preamble Cmt. 6).

#### **IV. Tension Between Zealous Advocacy and Civility**

Living the role of lawyer means carefully balancing duties to client, the legal system, and the lawyer's own interest. Lawyers should resolve conflicts inherent in those duties through the exercise of discretion and judgment “while maintaining a professional, courteous, and *civil attitude* toward all persons involved in the legal system” (Preamble Cmt. 9, emphasis added).

Even for the most ethically conscientious lawyers, there is seemingly ubiquitous tension between the duty of zealous advocacy and the duty to conduct oneself civilly at all times. Model Rule 1.2 compels zealous advocacy, and Comment 1 to the Rule speaks to the depth of that duty, noting that a lawyer

should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to a lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. (Rule 1.2 Cmt. 1)

The distorted image in popular culture of lawyer as a zealot, both partisan and combative, would seem to preclude civil behavior as the preferred approach to legal practice. Not so. That same comment goes on to explain:

A lawyer is not bound, however, to press for every advantage that might be realized for a client. . . . The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect. (Rule 1.3 Cmt. 1)

Thus, there are firm limits to the lawyer's duty to act with zeal in advocacy, but the precise location of those limits is not always easy to discern. Therein lies the tension. Appropriate zeal, however, never extends to offensive tactics or treating people with discourtesy or disrespect.

The individual lawyer is the guardian of the tone of interactions that will serve both the client and the legal system well. Clients may not understand these limits. Many clients in fact are under the misconception that because they hired the lawyer, they have the power to dictate that lawyer's conduct. It falls to the lawyer, then, to manage and correct that expectation, whenever needed, and to let the client know the lawyer is more than a "hired gun." In practice, that often means refusing a client's demand to act uncivilly or to engage in sharp or unethical practices with other parties in a case or matter.

The rules themselves make it clear, of course, that the lawyer is not just a hired gun. Model Rule 1.16(b)(4) of the ABA Model Rules of Professional Conduct provides that a lawyer may withdraw if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has fundamental disagreement, and Rule 3.1 provides that a lawyer cannot abuse legal procedure by *frivolously* bringing or defending a proceeding, or asserting or defending an issue. Egregious forms of uncivil behavior in a court proceeding also may constitute conduct prejudicial to the administration of justice, within the meaning of Rule 8.4(d).

## V. The Problem of Declining Civility in the Legal Profession

Civility, then, is a central pillar deeply anchored in the ethical and public-service bedrock of the American legal profession. Like the work of vandals in ancient temples, however, substantial evidence points to a steady rise in

*incivility* within the American bar. It is problematic to pin down the incidence of incivility and unprofessional conduct because incivility, without some associated violation of the ethical rules, historically has not been prosecuted by the regulatory authorities. Thus there is no good systemic data on incivility's prevalence. There have been countless writings, however, about widespread and growing dissatisfaction among judges and established lawyers who bemoan what they see as the gradual degradation of the practice of law, from a vocation graced by congenial professional relationships to one stigmatized by abrasive dog-eat-dog confrontations.

Discussion of the problem tends to dwell on two areas: (1) examples of lawyers behaving horribly, from which most of us easily distinguish ourselves; and (2) possible causes and justifications of that behavior—rather than possible solutions. Traditional media and social media carry countless accounts of lawyers screaming, using expletives, or otherwise being uncivil. Lawyers who reflect on the trend generally pin the cause on any of a combination of factors, including the influence of outrageous media portrayals; inexperienced lawyers who increasingly start their own law practices without adequate mentoring; and the impact of modern technology that isolates lawyers and others behind their computers, providing anonymous platforms for digital expression.

The scattered data that is available tends to confirm that uncivil lawyer conduct is pervasive. A 2007 survey done by the Illinois Supreme Court Commission on Professionalism, for example, took a close look at specific behaviors of attorneys across the state and concluded that the vast majority of practicing lawyers experience unprofessional behavior by fellow members of the bar. Over the prior year, 71 percent had reported experiencing rudeness—described as sarcasm, condescending comments, swearing, or inappropriate interruption. An even higher percentage of respondents reported being the victim of a complex of more specific behaviors loosely described as “strategic incivility,” reflecting a perception that opposing counsel strategically employed uncivil behaviors in an attempt to gain the upper hand, typically in litigation. The complained-of conduct included, for example, deliberate misrepresentation of facts, not agreeing to reasonable requests for accommodation, indiscriminate or frivolous use of pleadings, and inflammatory writing in briefs or motions.

*“There is a general view that zealous representation means doing whatever it takes (legally) to win or promote a client’s position.”*

—Respondent to Illinois Supreme Commission on  
Professionalism Survey

Whatever the causes, the first step toward a real remedy to the incivility pandemic is recognition of the deeply destructive impact of uncivil conduct on individual lawyers who engage in it, on those subjected to it, on the bar as a whole, and ultimately on the American system of justice. It begins with recognition that civility is, and must be, the cornerstone of legal practice.

## **VI. Benefits of Civility**

Aside from the most obvious reasons that lawyers should act civilly—that is, that the profession requires it of them and it’s just the right thing to do—a number of tangible benefits accrue from civil conduct in terms of reputational gain and career damage avoidance, as well as strategic advantage in a lawyer’s engagement (See the accompanying Chapter 4, by Peter R. Jarvis and Katie M. Lachter, *The Practical Case for Civility*, page 49. ).

Lawyers who behave with civility also report higher personal and professional rewards. Conversely, lawyer job dissatisfaction is often correlated with unprofessional behavior by opposing counsel. In the 2007 Survey on Professionalism of the Illinois Supreme Court Commission, 95 percent of the respondents reported that the consequences of incivility made the practice of law less satisfying.

Other research shows that lawyers are more than twice as likely as the general population to suffer from mental illness and substance abuse. Law can be a high-pressure occupation, and it appears that needless stress is added by uncivil behavior directed to counsel. “Needless” is used as a descriptor here because the consequences of incivility, as acknowledged by over 92 percent of the survey respondents, often add nothing to the pursuit of justice or to service of client interests. Consequences include making it more difficult to resolve our clients’ matters, increasing the cost to our clients, and undermining public confidence in the justice system.

They are the exact *opposite* of the goals we should strive to accomplish as lawyers.

Moreover, judges are not fond of being asked to decide disputes between opposing counsel extraneous to deciding the merits of the respective clients' case. Judges will tell you that mediating bickering between counsel is the least tasteful part of their job. Even if a judge avoids wading into a dispute between counsel, the fact that a lawyer was disrespectful or used bad behavior cannot help but register on the judge's consciousness. Then, if there is a close call on a motion or other issue, and the judge has a choice between ruling in favor of the client whose lawyer was civil and professional or in favor of the client whose lawyer has been a troublemaker, the Judges-Are-Human rule may well control. Similarly, juries also report being negatively affected by rude behavior exhibited by trial attorneys. In sum, lawyer conduct can and does affect the results lawyers deliver to their clients, and ultimately the success of their practices.

It naturally follows that a lawyer's reputation for professional conduct is part and parcel of her reputation for excellence in practice. Before the advent of the Internet, evaluations of attorneys were conducted and disseminated largely by and for lawyers and published yearly in books with entries listing an attorney's achievements by name, geographic region, and specialty. Now, any person who has contact with an attorney may rate and comment on the attorney's performance and professionalism on websites devoted to rating and ranking attorneys or through general social media channels. It is well worth noting that in the realm of the Internet, one uncivil outburst may haunt an attorney for years; and reputations may be built and destroyed quickly. (See 12, Reputation, by Avarita L. Hanson, page 151). Even a cursory search of some of these websites shows that clients regularly comment (especially if they are displeased) about an attorney's communication style and respect for her clients and the system of justice.

Not surprisingly, research shows that clients evaluate a lawyer who exhibits civility and professionalism as a more effective lawyer. If clients evaluate their lawyers as being effective, they stay with them; if they see their lawyers as ineffective, they will go elsewhere for legal services,

particularly in a climate in which the supply of lawyers exceeds the demand for legal services.

Moreover, recent law firm industry research shows that the vast majority of clients would consider switching law firms if another law firm could deliver better services or results and, similarly, that superior service, in which relationship abilities are central, increases client retention rates by about one third. The research also found that effective client service and positive relationships, in turn, increase profit to the lawyers by about the same rate.

### **VII. Bad Behavior / Bad Consequences**

Historically, incivility *per se* has by and large not been prosecuted by attorney regulatory authorities, but the tide seems to be turning. Since 2010, several attorneys have been suspended by their states' high courts for uncivil conduct implicating a lawyer's duty to uphold the administration of justice and other ethics rules.

The Supreme Court of South Carolina has disciplined several attorneys for incivility, citing not only ethics rules but that state's Lawyer's Oath, taken upon admission to the bar. The oath contains a pledge of civility. In *In the Matter of William Gary White III*, the lawyer had sent a letter to his client, a church, which had received a notice from the town manager regarding compliance with zoning laws. The town manager was copied on the lawyer's letter. The letter questioned whether the town manager had a soul, said the town manager had no brain, and characterized the leadership of the town as pagans and insane and pigheaded.

The court found that respondent White had sent the letter as a calculated tactic to intimidate and insult his opponents, violating his obligation to behave in a civilized and professional manner. In imposing a ninety day suspension, the court noted that "the legal profession is one of advocacy; however, Respondent's role as an advocate would have been better served by zealously arguing his client's position, not making personal attacks . . . and Respondent's conduct in this matter reflects poorly on himself as a member of the legal profession and reflects negatively upon the profession as a whole."

In Illinois, respondent Melvin Hoffman was prosecuted by disciplinary authorities for oral and written statements made to judges and an attorney. His offensive statements included calling a judge a “narcissistic, maniacal, mental case,” who “should not be on the bench.” In an administrative proceeding before the Illinois Department of Children and Family Services, Hoffman’s comments included saying that “this is a kangaroo court”; that the judge was “an advocate and adversary to my position in everything that’s done here”; that he would be “embarrassed to have to take such jobs [as Administrative Law Judge]”; and that the proceeding was “no more a fair hearing than they had in Russia when they were operating under the Soviet system.” Hoffman also was charged with saying to another attorney in a courtroom that the attorney was “unethical” and “you must be from a Jewish firm.” The Illinois Supreme Court upheld the findings that the lawyer violated various ethical rules, including Illinois Rule 8.4(a) (modeled after the corresponding ABA Model Rule), prohibiting conduct prejudicial to the administration of justice, and suspended Hoffman for six months and until further order of court.

Outside of the courtroom, much of the uncivil arrow-slinging between counsel historically has occurred during discovery disputes in litigation. However, the growing influence of technology in litigation, with its potential for marshaling exponentially more information and data at trial than ever, and the commensurate need to control and limit that information to what is relevant and manageable, suggests courts will grow even less tolerant of lawyers trying to manipulate the pre-trial fact discovery process or engaging in endless, contentious discovery disputes. Moreover, while never wise or virtuous, it is no longer profitable to play “hide the ball” in litigation as clients are demanding better results at reduced costs.

### **VIII. Movement Toward Systemic Solutions to Incivility**

There have been programmatic efforts, largely led by judges, to address and curb spreading incivility in the legal profession. In 1996, the Conference of Chief Justices adopted a resolution calling for the courts of the highest jurisdiction in each state to take a leadership role in evaluating the contemporary needs of the legal community with respect to lawyer professionalism. In response, the supreme courts of fourteen states have

established commissions on professionalism to promote principles of professionalism and civility throughout their states.

Many more states have, either through their supreme courts or bar associations, formed committees that have studied professionalism issues and formulated principles articulating the aspirational or ideal behavior the lawyers should strive to exhibit. These professionalism codes nearly all state at the outset that they do not form the basis of discipline but are provided as guidance—attorneys and judges should strive to embody professionalism above the floor of acceptable conduct that is memorialized in the attorney rules of ethics. They also typically echo a theme found in the Preamble to the Model Rules of Professional Conduct: that lawyers have an obligation to improve the administration of justice.

In 2004, a relatively aggressive stance was taken by the Supreme Court of South Carolina. The South Carolina high court amended the oath attorneys take upon admission to the bar to include a pledge of civility and courtesy to judges and court personnel and the language “to opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.” It also amended the disciplinary rules to provide that a violation of the civility oath could be grounds for discipline. In 2011, the Supreme Court of Florida added a similar pledge to that state’s oath of admission to the bar.

Some jurisdictions, in states including New Jersey, Illinois, Georgia, Florida, Arizona, and North Carolina, have taken the voluntary aspirational codes further and have adopted an intermediary or peer review system to mediate complaints against lawyers or judges who do not abide by the aspirational code. Because compliance with the mechanism, like the aspirational code, is voluntary, the success of these mechanisms has been inconsistent. It can be challenging to implement an enforcement mechanism in a way that inspires voluntary compliance with an aspirational code without straying into the area of attorney discipline.

Without question, the most effective ways of addressing incivility entail bringing lawyers together for training and mentoring. The American Inns of Court, modeled after the apprenticeship training programs of barristers in England, brings seasoned and newer attorneys together into small groups to study, present, and discuss some of the pressing issues facing

the profession. Through specialized bar associations and other organizations, educational efforts bringing together both prosecutors and defenders are lauded as successful vehicles for airing diverse perspectives in a way that promotes civility.

### **IX. Conclusion: A Time to Recommit to Civility**

The needed rebirth of civility, at a critical juncture in the evolution of the legal profession, should be seen by lawyers not as pain, but as gain. As the research conclusively bears out, (1) civil lawyers are more effective and achieve better outcomes; (2) civil lawyers build better reputations; (3) civility breeds job satisfaction; and (4) incivility may invite attorney discipline. The rapid changes that technology and globalization are bringing to the practice of law make civil behavior more important than ever. Those two monumental change agents introduce conditions clearly conducive to conduct unbecoming a legal professional, that is, more stress, the dehumanizing effect of electronic interfaces, inexorable pressure to compete or perish, the demands of information overload, and incessant pressure to behave more “like a business” and less like a legal professional in the traditional sense. In the face of all that, one might ask, why bother trying? The answer—again besides the obvious: that the profession requires us to be civil, and it is simply the right thing to do—ultimately speaks to the challenge to preserve a great profession, and that level of professionalism among lawyers that the larger American society requires in order to survive as a civil society bound to the Rule of Law.

### **Sources/Reading**

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