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## Stemming the Tide of Incivility in the Practice of Law

The levels of hostility and incivility in the practice of law are rising.<sup>1</sup> It is occurring in the courtroom, in depositions, in settlement conferences and on social media. Whether it is abusing procedural processes under the guise of zealous advocacy; yelling over clients, opposing counsel and judges to ensure that your point is heard; sending emails that are discourteous at best, and harassing or discriminatory at worst; or cursing at a volume sufficient to be heard, all of this conduct reflects poorly upon the profession and undermines the public trust in lawyers. In addition, it also directly affects attorney job satisfaction and well-being. Is it possible for a lawyer to be tough and assertive without presenting an offensive or rude demeanor?

Being civil does not suggest weakness or a lack of zealous representation. As Comment [1] to Rule 1.3 of the American Bar Association (“ABA”) Model Rules of Professional Conduct emphasizes, “[a] 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.”<sup>2</sup>

Incivility can take many forms, including refusing to grant an extension to accommodate opposing counsel’s vacation; *ad hominem attacks* in closing arguments; and insults during depositions. Some lawyers believe these tactics demonstrate artful advocacy. Others simply cannot help themselves. Neither is acceptable or helpful to the client. For example, it may incur the anger of a judge and result in negative rulings for the offending lawyer’s client or a legal malpractice action. At a minimum, it will probably increase the cost to the client. It also increases our stress level, has an impact on our health and well-being, and makes the practice of law less meaningful and enjoyable.

As officers of the legal system, attorneys play a special role in the preservation of democratic society. When lawyers engage fairly and with respect for all parties involved, they instill public confidence in the justice system and the rule of law. In the course of representing clients, lawyers serve as advisors, advocates, negotiators, and evaluators. They have a duty to protect and pursue client objectives and in so doing, engage in advocacy and debate. However, pursuant to the Preamble of the ABA Model Rules of Professional Conduct, they must do so “while maintaining a professional, courteous and civil attitude toward all persons in the legal system.”<sup>3</sup> State bar associations, attorney regulation offices and Supreme Court commissions have focused on setting standards for attorney behavior, as well as providing recommendations and possible sanctions when a judge or lawyer behaves in an uncivil manner. However, what can we do, as solo practitioners, law firms and the legal profession as a whole, to minimize the uncivil behavior that has become all too pervasive?

<sup>1</sup> See [Civility in America 2019: Survey on Professionalism: A Study of Illinois Lawyers 2014 and 2019 State of the State Courts Survey](#).

<sup>2</sup> ABA Model Rule 1.3 (2021).

<sup>3</sup> Comment [9] to the Preamble of the ABA Model Rules of Professional Conduct (2021).

### Ethical Point of View

Why does civility matter from an ethical point of view? Again, we look to the Preamble and the ABA Model Rules of Professional Conduct. First, we must look to ABA Model Rules 3.4 and 3.5(d) which discuss how to conduct ourselves before the court and with other parties before the court such as judges, jurors and witnesses.<sup>4</sup> We also have to consider ABA Model Rule 4.4(a) which prohibits using “means that have no substantial purpose other than to embarrass, delay or burden a third person” when representing a client.<sup>5</sup> Lastly, we need to take into account ABA Model Rules 8.2(a), 8.4(d) and 8.4(g) which provide guidance when making statements about judges, making comments that involve fraud, dishonesty, deceit or misrepresentation, or are harassing or discriminatory.<sup>6</sup>

Several examples where a lawyer’s conduct resulted in sanctions imposed upon the lawyer or the client should be noted. In a California case, the Second District Court of Appeals upheld sanctions against a lawyer whose behavior failed to uphold the principles articulated in the ABA Model Rules. In *Crawford v. JP Morgan Chase Bank, N.A.*, 2015 WL 8355515 (Dec. 9, 2015), the offending lawyer threatened opposing counsel at a deposition with pepper spray and a taser, then proceeded to insult the judge at the hearing. In upholding the lower court’s sanctions order, the Court of Appeals stated, “[f]ar from the trial court abusing its discretion, it would have been an abuse of discretion not to impose a terminating sanction.”

An attorney’s conduct does not have to constitute criminal or violent action before it can be considered uncivil and inappropriate. Often, toxic, hostile, harassing or discriminatory behavior directed toward the judge, opposing counsel, court personnel or a party represents inappropriate demeanor. This type of conduct also may result in sanctions. A 2013 decision of the Florida Supreme Court described such a situation. In *Florida Bar v. Norkin*, 2013 BL 302342, Fla., No. SC11-1356 (Oct. 31, 2013), the court suspended an attorney’s license for two years based upon rude conduct, indicating that the case should be studied as “a glaring example of unprofessional behavior.”<sup>7</sup> For example, the attorney, *inter alia*, sent emails to opposing counsel stating (1) that opposing counsel was lying and disingenuous and that his motions were “laughable and scurrilous;”<sup>8</sup> (2) that he would seek sanctions against opposing counsel and advised him to notify his malpractice insurer; and, (3) in the courthouse hallway, the attorney told opposing counsel that he had conversations with other lawyers who stated that opposing counsel

was “underhanded and a scumbag.”<sup>9</sup> The Court concluded that the lawyer violated several Florida Bar Rules of Professional Conduct, including Florida Bar Rule 4–3.5(c)(a lawyer shall not engage in conduct intended to disrupt a tribunal); Rule 4–8.2(a)(a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, or public legal officer); Rule 4–8.4(a)(a lawyer shall not violate or attempt to violate the Rules of Professional Conduct); and Rule 4–8.4(d)(a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage or humiliate other lawyers on any basis). The Court issued a two-year suspension order notwithstanding the recommendation of lower court referee to impose a three-month suspension because of the mitigating factor of the attorney seeking to address his behavior through mental health counseling.

Finally, in 2021, the Illinois Supreme Court recommended a six-month suspension for a Chicago lawyer who insulted an opposing lawyer and then defended his words by pointing to Former President Donald Trump. At issue was the lawyer’s use of “abusive and vulgar language” during a November 2016 deposition that was held two days after Former President Trump was elected. The lawyer also made false or reckless statements when he said the judge who criticized his comments had engaged in “robe rage.”<sup>10</sup>

As Justice Sandra Day O’Connor stated, “[m]ore civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public’s perception of lawyers.”

<sup>4</sup> See ABA Model Rules 3.4 and 3.5(d) (2021).

<sup>5</sup> ABA Model Rule 4.4(a) (2021).

<sup>6</sup> See ABA Model Rules 8.2(a), 8.4(d) & 8.4(g) (2021).

<sup>7</sup> See *Florida Bar v. Norkin*, 2013 BL 302342, Fla., No. SC11-1356, (Oct. 31, 2013).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *In re Charles Cohn*, M.R. 30545, Commission No. 18 PR 109 (February 11, 2021).

### Judicial Perspective

Incivility in the courtroom may negatively influence the judge's view of the lawyer and ultimately, the client's position. Television and the media often provide the public with inaccurate illustrations of what it means to defend a client aggressively and zealously. While most judges may not consciously rule against a client merely because the lawyer fails to observe proper decorum, it will not support the client's cause to incur the judge's wrath against the lawyer. In fact, judges have commented that they are not impressed with personal attacks and insults by the lawyer. Engaging in such conduct may result in developing a negative reputation among the judges in a particular courthouse. In addition, it may result in a legal malpractice claim asserted by a client whose matter was jeopardized by the attorney's conduct. For example, in 2020, two companies that marketed water balloon products filed a legal malpractice suit against their former attorneys asserting that the law firm provided poor advice and pursued unnecessarily aggressive litigation tactics that cost the clients additional financial harm in an intellectual property (patent infringement) matter. The plaintiffs alleged that their former attorneys took "positions and filed excessive and untimely motions and appeals, which was a substantial factor in plaintiffs being assessed with sanctions and enhanced damages, as well as inflating the fees and expenses that the firm billed" to the clients. While the litigation ultimately resulted in a settlement because the plaintiffs could not afford to appeal, the proceeding exemplifies the legal malpractice actions that can arise as a result of attorneys behaving in an uncivil manner.<sup>11</sup> As Justice Sandra Day O'Connor stated, "[m]ore civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers."

Respect is like air. As long as it is present, nobody thinks about it. But if you take it away, it's all that people can think about.

– Joseph Grenny, Kerry Patterson, Ron McMillan, Al Switzler and Emily Gregory, *Crucial Conversations: Tools for Talking When Stakes are High* (2002)

### Sitting on Our Hands

Most of us know unprofessional behavior when we see it. So why do many attorneys remain silent and fail to intervene when faced by this conduct?

#### Unintentional

The practice of law can be demanding, stressful and anxiety producing. We may become burned out, sleep-deprived, or suffer from compassion fatigue as a result of encountering challenging client issues on a daily basis. Being on call 24/7/365, clients' unreasonable expectations and demanding situations in our personal lives exacerbates this condition, and it is easy to unintentionally exhibit rude, insulting and/or petty unprofessional behavior. We are all human, and when opposing counsel rolls her eyes during your closing argument at the end of a long day, it is easy to strike back.

#### Intentional

In addition to the public, some attorneys believe that the most effective way to represent a client's objectives and come out on top is to behave inappropriately. On occasion, manifestations of this behavior include yelling, threatening, condescension and boorish conduct. However, its forms may be more subtle, thus constituting a less aggressive form of intentional conduct. For example, filing frivolous pleadings and discovery, inflammatory writing in briefs or motions, creating unwarranted delays or not agreeing to reasonable requests for accommodation, or deliberate misrepresentation of facts. Some attorneys view rude behavior as part of the adversarial process. With emotion, less reason is brought to bear in client relationships. With less reason, the adversary becomes the enemy and his or her conduct becomes suspect. With the enemy, fairness, respect and objectivity become non-existent. Conversely however, research has shown that business people who treat one another with respect and in good faith do better most of the time.<sup>12</sup> To quote from the best-selling book *Crucial Conversations*, "Respect is like air. As long as it is present, nobody thinks about it. But if you take it away, it's all that people can think about."<sup>13</sup>

<sup>11</sup> See *Telebrands Corp., et al. v. Boies, et al.*, Case No. 2:2020cv06942, USDC NJ (July 7, 2020); <https://dockets.justia.com/docket/new-jersey/njdce/2:2020cv06942/436568>

<sup>12</sup> See Christine Portath and Christine Pearson, *The Price of Incivility*, Harvard Business Review, Jan.-Feb. 2013) <https://hbr.org/2013/01/the-price-of-incivility>

<sup>13</sup> See Joseph Grenny, Kerry Patterson, Ron McMillan, Al Switzler and Emily Gregory, *Crucial Conversations: Tools for Talking When Stakes are High* (2002).

## Pervasive Culture

When the culture of the law firm, corporation, or courthouse permits lawyers to behave in an uncivil manner, leadership models negative behavior. Consequently, individuals are not sanctioned and may be rewarded or ignored, making it difficult for others to speak up in that environment and intimidated by creating an appearance of weakness. Further, no one wants to appear weak when the position of the firm is to support engaging in “hardball” and “scorched earth” tactics. Even if you want to call attention to it, you may believe that it is none of your business or fear reprisal from another attorney. Unfortunately, the uncivil conduct becomes normalized and may become the standard, operating procedure.

## Proactive Steps to Change

### So, how do we fix the situation?

We can and should look inward. The first step involves recognizing the importance of civility in our own behavior. To conclude and recognize that behaving in a civil manner with colleagues and the courts is not simply the right thing to do, but it supports our role as officers of the courts, reinforces a self-regulating profession and professional responsibility, and strengthens public confidence in the justice system and the rule of law.

We can and should confront uncivil behavior directly. When you see something, say something. When you are witness to uncivil behavior, call attention to it and contact resources that may be able to assist. If a lawyer is being abusive toward another lawyer or uses offensive language, respond directly, if possible. State the facts and name what is occurring. Assist the person who was targeted but resist being drawn into a debate with the harasser. It is important to recognize that depending upon the circumstances, a direct response may actually exacerbate the situation and might not always be possible or appropriate. You also may seek to contact others who might be able to assist and document what occurred. Remember, calling it out does not have to be loud or public. A quiet and gentle discussion with a colleague may be more powerful and effective than a voluble public reprisal.

We can and should celebrate civil behavior. While it is important to highlight incivility, it is equally important to identify and encourage appropriate demeanor. A colleague may have handled themselves with dignity, grace, and self-restraint in responding to an abusive attorney or judge. Offer congratulations on the decorum exhibited in the situation. Point it out to others. Who knows? It might actually open further dialogue about civility and the culture of law.

## Conclusion

As John F. Kennedy once said, “...civility is not a sign of weakness.” Each one of us has a role to play and is in a position to stand up for civil and professional conduct in the legal profession. Ceding this responsibility to the attorney regulators or judges through sanctions is not the answer. By looking inward, bringing attention to unprofessional behavior and reinforcing positive conduct, all of us can help to combat the rise of incivility in the profession.

## This article was authored for the benefit of CNA by:

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