

# In Furtherance of Civility



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The legal profession has changed significantly over the last 50 years. When many of us in the Senior Lawyers Conference began practicing law, the legal community in Virginia consisted of a few thousand lawyers, at best, and cases were settled with a handshake. Lawyer advertising was prohibited.<sup>1</sup> Conversely, if today's law graduate decides to take the bar exam in July, he or she will be accompanied by approximately 1,500 other examinees. They will communicate with opposing counsel by e-mail and spend a significant amount of time striving to publicize their abilities in a relatively tight market.<sup>2</sup> These changes foster depersonalization of the profession.<sup>3</sup> At its worst, attorneys have engaged in public and private displays of incivility, causing the public to view our profession as dishonorable.<sup>4</sup> Senior lawyers have the ability and the responsibility to ensure that our profession is an honorable one, well after we retire our shingles. Our charge can be summed up in one word—civility.

One of the best known attempts to address civility was undertaken by President George Washington. He memorialized 110 rules that he titled "Rules of Civility and Decent Behavior in

Company and Conversation." He practiced those rules throughout his life. One could argue that he could have stopped after he wrote his first rule: "Every action done in company ought to be with some sign of respect to those that are present." The remaining rules are variations on that principle.<sup>5</sup>

Many have studied civility in the legal profession. While there may be no uniform definition, numerous organizations adopted the definition as set forth by the Seventh Federal Judicial Circuit in their study entitled, *Proposed Standards for Professional Conduct*.<sup>6</sup> Civility was simply defined as "professional conduct" in legal proceedings.<sup>7</sup>

## Civility as Viewed by the Courts

The importance of civility has also been considered by various factions of the judiciary. One of the most frequently cited passages on civility came from Justice Anthony M. Kennedy as he addressed the ABA annual meeting in 1997: "Civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself. Civility has deep roots

in the idea of respect for the individual," he said. Justice Kennedy noted with dismay that our profession needed an ABA-endorsed model code, and that two prior efforts to ratify a code of civility had failed.<sup>8</sup> Less than one year later, the ABA finally enacted "Guidelines for Litigation Conduct" in an attempt to "elevate the tenor of practice."

The Pennsylvania Supreme Court has undertaken one of the most zealous attempts to propound civility in the law. On December 6, 2000, the court issued a *per curiam* opinion in which it adopted a five-page *Code of Civility*. The preamble to the code reads, in part, that while it does not supercede existing disciplinary codes, "it is expected that judges and lawyers will make a voluntary and mutual commitment to adhere to these principles."

Our own Supreme Court has made no similar sweeping proclamation, but the notions of civility do appear in its opinions. The most recent example is found in *Morrissey v. Virginia State Bar*, 260 Va. 472, 538 S.E.2d 677 (2000). A Richmond attorney had appealed his three-year license suspension. In review-

ing the case, the Court opined that Morrissey's "lack of civility and deplorable conduct during the hearing in the Circuit Court for Chesterfield County alone, would have been sufficient to warrant the imposition of a three-year suspension."<sup>9</sup> *Id.* at 481, 682.

While it is important for a practitioner to be civil in all facets of his practice, a lack of civility is often apparent in divorce and custody cases. We who have practiced in the area of family law have witnessed firsthand the raw emotion that parties display during the course of proceedings. Put yourself in the shoes of the judge—especially a juvenile and domestic relations judge—who, day after day, witnesses families fighting tooth-and-nail for custody and visitation. Many judges do not believe that every case warrants a full assault on the opposing party. After all, the controlling theme for children is to determine what is in their best interests. How can it be in a child's best interests when his parent comes home from court so irate that they spend the rest of the day, the month—or longer—disparaging the other parent? Wouldn't it be better for both the attorney and the client if all parties maintained some semblance of civility? It is the responsibility of the attorney—particularly in situations in which emotions run high—to explain and demonstrate to the client that effective advocacy can take place without the attorney or the client being a pit bull.

## Statistical Reasons for the Increase in Incivility

In undertaking its survey, the Seventh Federal Judicial Circuit determined if attorneys or the judiciary viewed civility as a problem and it identified the factors that contribute to incivility.<sup>10</sup> The initial survey results indicated that, among responding judges, 45% found civility lacking, but that 39% did not. Among responding lawyers, 42% found civility lacking, but 52% did not.<sup>11</sup>

What is remarkable about the results is that, of the attorneys who found that opposing counsel lacked civility, 94% identified discovery as the "breeding ground for conflict."<sup>12</sup> Some 79% thought civility problems arose most frequently in "lawyers' relations among themselves."<sup>13</sup> Next, the committee attempted to categorize the supplemental comments, to iden-

tify the causes of incivility. The committee concluded that there was "no single manifestation of incivility, no single cause, and, therefore, probably no single solution."<sup>14</sup>

Contributing to incivility are:

- The expanding size of the bar;
- Economic competition;
- Discovery;
- Judicial leadership; and
- Time management pressures.

These factors are interrelated. It follows that competition will increase when there are more attorneys in practice. And, the more attorneys who are in practice, the less collegial the bar becomes. In larger cities, attorneys may cross paths only once during their career. Regrettably, some attorneys believe that this gives them *carte blanche* to be overly-adversarial. They believe that there is no incentive to be civil, because there will never be any professional relationship with opposing counsel.

Judicial leadership can quell an attorney's propensity to be uncivil. But just like attorneys, judges are subject to public scrutiny and an official complaint process. Would a judge's attempt to maintain civility be viewed by some as a failure to allow a lawyer to put on his case? Is there a practical way for a judge to monitor discovery more closely to prevent perceived abuses and yet avoid complaints by the bar?

## Possible Solutions to Incivility

There is no simple solution to the lack of civility, but there are organizations whose creeds we must endorse and incorporate into our practices—to lead by example. The Harrisonburg/Rockingham Bar

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Association developed a laudable code of conduct. The Fairfax Bar Association has a creed of professionalism that says that attorneys should be "courteous and civil in all communications with opposing counsel recognizing that the disputes are those

of the clients."<sup>15</sup> Some attorneys have become members of the American Inns of Court, a national organization emphasizing civility training and excellence.<sup>16</sup> The list of organizations that have propounded a creed of professionalism is too lengthy to list here, yet incivility remains.

Attorneys over the age of 55 are encouraged to become active in the Senior Lawyers Conference of the Virginia State Bar. Although the conference was only established in June 2001, there are 8,000 members. Its mission statement mirrors many of the civility creeds adopted by other organizations, to ". . . uphold the honor of the profession of law" and "encourage cordial discourse and interaction" among attorneys.<sup>17</sup>

We may be members of organizations with codes of professionalism, yet none will be effective unless we make them so. We must discourage attorneys who feel they have attained a certain level of success by using guerilla tactics, both in and out of court, and insist on practicing as such.<sup>18</sup> All lawyers, especially senior lawyers, must be mentors. We must not leave our newest generation of lawyers with no moral compass. We must advocate that being civil is not the equivalent of being weak and not a failure to represent our clients zealously.

We must, through our conduct, advance the image of attorneys who are professional and civil, and we must overcome a public perception, which has been shaped in part by media coverage, of the rude, discourteous, abrasive and uncivil behavior of some attorneys. Clients will be surprised and encouraged to learn of the rules, guidelines and principles for attorneys' conduct that are required, promoted

and encouraged by the bar and the judiciary; and to observe the professional and civil conduct by attorneys in their effective representation of clients.

## Conclusion

Justice Potter Stewart once noted the importance of knowing the difference between having the right to do something and doing the right thing.<sup>19</sup> It is unfortunate when lawyers erroneously equate mere compliance with the minimal ethical standards set forth in the Rules of Professional Conduct with moral behavior and civility. The fact that the lawyer complies with the Rules does not necessarily mean that the lawyer has acted morally or with civility. It is not sufficient to comply with the Rules of Professional Conduct. Our goal is higher. We should strive, in Justice Stewart's words, to do the right thing, not merely to know what we have a right to do. In order to restore our profession to the high standard it once enjoyed, law schools, the organized bar, the judiciary and each of us must promote civility and help restore our profession to its former prominence. 🙏

### Endnotes

- \* Vicki L. Weise, an associate with the Roanoke firm of Mundy, Rogers & Firth, provided invaluable assistance with this article.
- 1 Lawyer advertising was prohibited until 1977 when the Supreme Court ruled that lawyer advertising was constitutionally protected speech. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).
- 2 It is acknowledged that approximately half of all law school graduates today are female. The pronoun "he" is used throughout this article solely for simplicity.
- 3 Incivility in legal proceedings is not limited to attorneys. James Traficant, a nonlawyer and longtime Democratic Congressman from Ohio, recently remarked to the House panel investigating him for ethics violations: "I want you to disregard all the opposing counsel has said . . . I think they should be handcuffed to a chain-link fence [and] flogged . . . And if they lie again, I'm going to go over there and kick them in the crotch." Available at [www.directsourceradio.com/links/0718200201on.html](http://www.directsourceradio.com/links/0718200201on.html).
- 4 In the *Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, one judge observed that: "Today our talk is coarse and rude, our entertainment is vulgar and violent, our music is hard and loud . . . our values are superficial. Amid these surrounding none should be surprised that the courtroom is less tranquil." At 5.
- 5 His last rule is also an inclusive theme that we, as lawyers, should aspire to: "Labor to keep

alive in your breast that little celestial fire called conscience."

- 6 In 1989, Chief Judge William Bauer of the Seventh Circuit Court of Appeals appointed a committee to study several aspects of civility within the circuit. In 1992, the Seventh Circuit committee published its findings which have been recognized by the ABA as one of the most extensive studies on civility to date.
- 7 The committee further noted that they "did not limit the term to good manners or social grace." *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit* at 1.
- 8 In responding to the ABA's failure to adopt a code, one author commented that it was tantamount to embracing "New York hardball" as the official standard of practice." Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 Geo. J. Law Legal Ethics, 411, 445 (1988).
- 9 Immediately following the sentencing hearing at which Morrissey's client was sentenced to 25 years in prison, Morrissey stated "that's outrageous, that is absolutely outrageous", approached the bench and further stated "I have never seen a more jaded, more bitter, more angry jurist in my life." *Id.* at 477, 679.
- 10 The Seventh Circuit encompasses the states of Illinois, Indiana and Wisconsin.
- 11 Of the lawyers surveyed, 97% were private practitioners. *Interim Report of the Committee on Civility of the Seventy Federal Judicial Circuit* at 6.
- 12 *Id.* at 7.
- 13 *Id.* at 9.
- 14 *Id.* at 12.
- 15 Fairfax Bar Association Creed of Professionalism, available at [www.fairfaxbar.org/creed.htm](http://www.fairfaxbar.org/creed.htm).
- 16 The Seventh Federal Judicial Circuit Committee recommended that attorneys become active in an Inn as part of a "commitment to the overall enhancement of litigation practice . . .". *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit* at 49.
- 17 Senior Lawyers Conference Mission Statement, available at [www.vsb.org/slc/about/mission.html](http://www.vsb.org/slc/about/mission.html).
- 18 In the *Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, one judge observed that: "today our talk is coarse and rude, our entertainment is vulgar and violent, our music is hard and loud . . . our values are superficial. Amid these surrounding none should be surprised that the courtroom is less tranquil." At 5.
- 19 Columbia University Seminars on Media and Society, *Ethics in America-Preface to Ethics: An Introduction to Ethical Reasoning* (Corporation for Public Broadcasting 1988).



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