

CIVILITY

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My topic is Civility - you got a problem with that Buddy? Unfortunately, the lack of civility in our society and in our profession is not a laughing matter.

"We are suffused with embarrassment in this country about the decline of morality and look for reasons in our government, our churches, our economists, our media. But among the most potent reasons must be the failure of many leaders of the legal profession to accept their role as law enforcers - to act as the keepers of their clients' conscience." 1/

In a system fixated on winning, civility has become a meaningless issue, discarded, not even debated, by whoever is left standing. I am not going to discuss ethics today, nor will I discuss professionalism. Ethical decisions are often made alone -made between you and your conscience. No one ever knows about them. Civility is different - it's how you treat others. A civil and courteous lawyer may, unbeknownst to you, be unethical. And the converse is also true; an ethical lawyer may be very rude, contentious and lacking in civility.

Professionalism is a larger category. It includes civility, ethics, being well prepared, and doing pro bono work.

Why do we confuse professionalism, ethics and civility? First, because they often overlap. Second, because even though these three qualities are distinct, there is a tendency for the lawyer to rate similarly in all categories. There is a tendency for linking. I will get back to the issue of linking of traits later. Suffice it to say that most of the time ethical lawyers are civil and professional. Unfortunately, some lawyers are not ethical, not civil, nor professional. Ethics and professionalism are very important, but in this short time that I have to speak, I'm not going to attempt to cover ethics or professionalism.

What is civility? Or, rather what was civility? As Trial Magazine in 1991 stated, "Whatever happened to civility? If you're under 50 you're probably running for the dictionary." 2/

Civility is courtesy, dignity, decency and kindness. It has been defined in the Virginia Bar Association's Creed as follows:

"Courtesy is neither a relic of the past nor a sign of less than fully committed advocacy. Courtesy is simply the mechanism by which lawyers can deal with daily conflict without damaging their relationships with their fellow lawyers and their own well being". 3/

Civility is not inconsistent with zealous advocacy. You can be civil while you're aggressive, upset, angry and intimidating; you're just not allowed to be rude. Unfortunately, some lawyers and the public don't understand the differences.

A Colorado lawyer recently explained why he stopped practicing law:

"I was tired of the deceit. I was tired of the chicanery. But most of all, I was tired of the misery my job caused other people. Many attorneys believe that 'zealously representing their clients' means pushing all rules of ethics and decency to the limit". 4/

The civility problem is not new. It has a long history:

"An attorney was disbarred in 1883 for conduct unbecoming an attorney when he joined a mob to remove a prisoner from jail and hang him from an oak tree in front of the courthouse. In 1884, a lawyer was held in contempt of court for threatening the examiner during a deposition with an open knife and using insulting and indecent language. A year later - 1885 – a federal court remarked that lawyers entering the "temple of justice" armed with pistols should be found guilty of contempt of court and disbarred. More recent examples of lawyers and incivility include threatening or using physical violence on opposing counsel, personal attacks on opposing counsel instead of legal arguments disparaging jurors, exchanging invectives and displaying "contentious, abusive, obstructive scurrilous, and insulting conduct."5/

I'm sure you have all heard and read a great deal about civility. But we always assume it's "the other lawyers" who are causing the problem and therefore it's the other lawyers, not us, who have the ability to solve the problem. The sad truth is that we, or at least some of us, just might be part of the problem.

"Interestingly, the anguish about the current state of affairs is not over the behavior of a few disreputable lawyers who abuse litigation practices in ways that respectable lawyers from white-shoe firms would not. Rather, the concern is that, like Pogo, big – city commercial litigators have met the enemy in themselves - litigators from the great national law firms are now perceived as very much a part of the problem. 6/

Secondly, even if its not our fault, or your individual fault, it will become our fault if we sit idly by and let this travesty occur. I heard the introduction of our new members this morning and it was obvious that they are achievers, or perhaps over-achievers. They are movers and shakers; they are the people who can move mountains in the court systems and in society. With all of this talent, with all of this power, if we fail to act, we will be responsible. We will be responsible for the destruction of our noble profession.

"The most frightening measure of what the legal professional has lost is that most Americans do not even remember the trust that society once placed in its lawyers. If a new Alexis de Tocqueville came to America today to study its laws and customs he could never come up with the idea that the lawyers were the country's natural aristocracy. Lawyers blame the law schools, the law schools blame the lawyers, the judges blame the lawyers, the lawyers say the clients (or their sense that they must go the limit for their clients) made them do it. Others blame the culture: It's a jungle out there; ethical standards are down wherever you look. Wall Street brokers who hold themselves out as agents trade for their own account to their clients' disadvantage. Even the clergy seem more prone to scandal than they used to be. Why single out lawyers for the loss of ethical fibre at a time when ethical decline is so widespread? "Because lawyers are supposed to be the custodians of a community's legal and ethical sense." 7/

It makes no difference that it is a societal ill - that it's not unique to our profession, that everyone is rude. There's rudeness in kindergarten; there's rudeness in ACLF's. Everything has changed. If you went to a tennis match 30 years ago, there was dead silence and absolute civility by the participants and the spectators. Chris Everett and Arthur Ashe and the audience behaved perfectly. Have you been to a match recently? It's a jungle out there. Likewise, the practice of law has been described as hockey while wearing suits.

What can we do about this? What can we do about incivility? It's time to stop merely defining the problem and blaming others. I want to discuss with you how we, not the others, not the judges, not the law schools, not the bad lawyers - but how we, you and I, can help solve the problem.

I suggest that there are nine ways that you can improve the environment of civility and if you will do any one, or a few of these, we can start to turn the tide.

1. LAW SCHOOLS. Stop merely (and uselessly) blaming them. Change the law schools. Go to your friendly deans and, professors and persuade them, pressure them, bribe them with strings on your gifts and bequests. Tell them not just to teach advocacy, but to teach civility, and while they're at it, have them practice what they preach. A Federal Bar Association study panel concluded

"that the law school experience plays a large role in fostering an atmosphere that promotes a lack of civility. On this score, the panel noted that the competitive nature of the law school experience, in which class standing and grades are all-important when it comes to landing a good job upon graduation, often influences the young lawyers approach to practice. Moreover, the Socratic Method employed in legal education often results in the disparagement of the student by the professor. This has the unfortunate consequence of motivating the young law graduate to engage in interpersonal relations that may be aimed at disparaging others". 8/

Get the law schools to make some changes.

II. JUDGES. Again, don't just blame them: work with them, change them and educate them. There are two ways that judges affect civility. First, they are role models. Unfortunately, some judges are rude - not nearly as many as rude lawyers, but there are some. Judges who are rude to lawyers, witnesses, jurists and everyone else. Don't cover for them. Tell them that you will not accept their incivility. Don't let an Emperor's Clothes mentality permit you to tolerate rude behavior by-judges. Everyone around a rude judge becomes rude in court and out of court.

"...courts are respected if they are respectable. Society allocates decisional authority and its functions to the authorities that it accepts. Etiquette is a bridge to acceptance". 9/

The second way in which judges can affect us is by enforcing the rules and aspirations of the bar. Let that wonderful, tolerant, decent judge know that you want him to be tough and intolerant of rudeness. He or she must exercise a greater degree of judicial control and leadership.

"The- profession's success in reorienting itself to the principles of etiquette and decorum depends not only upon individual observance of those principles, but also upon each judge's commitment to upholding, as an exercise of judicial authority, the principles articulated in the Lawyers's Code. A Judge's failure to insist upon compliance with the letter and spirit of the behavioral standards governing litigation erodes society's respect for, and confidence in, the law." 10/

III. Be a Role Model. Don't just talk about it, live it. Be a role model. Be civil. Don't compromise your integrity by stooping-to the dirty tactics of your opponent. Don't become one of them. As a successful leader of the bar, you already are a role model, whether you like it or not. You're in a unique situation; young lawyers are watching you. As President Lincoln- advised: "As a peace maker, the lawyer has a superior opportunity of being a good man.". If you want to eliminate rudeness, be gentle. And while you are engaged in this task of being a role model, you are fulfilling a prerequisite of another role - being a mentor. It's rough to be a mentor if you often challenge your opponent to fist fights. Being a mentor and being a role model go together. The influence that we have on the young members of the bar is immeasurable. Twenty years ago I was working for Walter Beckham and Bill Hicks. I can tell you from my personal experience that you learn from such role models.

IV. Mentor. This is the most important thing you can do. And it has wonderful effects. Teach. Preach. Be a mentor. At a panel discussion in 1990, a former practicing lawyer, who became Dean of Notre Dame Law School, told the panel that

"When I graduated from law school twentynine years ago, people learned to practice law at the feet of a master. Lawyers would take you under their wing, either within your firm or, in my case, at a government agency and later at a law firm. Even if you went into sole practice, there was someone in town to mentor to you and teach the practice of law. Inevitably, what also was taught was professionalism ... Somewhere along the line in the last thirty years, however, lawyering became more expensive. Overhead skyrocketed, reflecting huge increases in the costs of associates salaries and training, office space, libraries, computers, and so on. Efficiency became a priority, and the mentoring system broke down. The seniors were pressured to increase their billable hours and could no longer afford to spend time with the young people coming in. In the meantime, no one was teaching practice or, incidentally, professionalism... ."11/

There are three stages in your professional life: You learn, you do, you pay back. You should role model in your firm, or outside your firm. Pick one or more young lawyers and start teaching them, or showing them, not just evidence and advocacy, but civility. It may be time-consuming, but it's worthwhile. Think about the legends who mentored you - realize how warmly you feel when you think about them. It would be nice to give someone else the privilege of feeling that way about you.

I'd like you all to think real hard before you select the person or persons that you want to be your protege. The normal tendency is to select someone like yourself, someone from your background, someone who went to the same or similar school, someone who plays the same sports, someone who can carry you as a golf or tennis partner. That person, it is clear, is wonderful: just like you. But I'd like you to reconsider. That person needs you, but there are others who need you even more. Others who are different than you are. I'd like you to consider

mentoring a female. I'm not just saying that to curry favor with our wonderful women members and guests, (although I need all the points I can score). In fact, my personal opinion is that women lawyers need more mentoring in civility than do male lawyers. Judges and opposing counsel and clients have made it difficult, if not impossible, for young women to be competitive, aggressive and assertive without being called ugly names. It's frustrating to attempt to be a zealous advocate if you're female. Women need your help; they need your guidance. And one way in -which you'll be a great help is if you will let your buddies, the friendly judges, and your opposing counsel, know that this young lady is your student, your project, your protege. They just might look at her differently and treat her differently. They just might put on rose-colored glasses and let her work her way through these difficulties while gaining her confidence. It would be a great help to a segment of the, bar that we have not treated fairly. I also suggest that in addition to women, you select other minorities to mentor.

IV. Listen to Your Conscience. When there are disagreements between your conscience and your client, always obey your conscience. Remember that the conflict is between the clients, not the lawyers. You, and only you, not your clients, are responsible for your behavior.

"As the competition for clients grows even keener ... the more willing some members of the profession are to rise, or actually fall, to the client's expectation of appropriate professional behavior. In other words, in many cases it is simply a fear that we will lose our clients if we are not as ruthless and hostile as they expect, that causes us to resort to extremes." 12/

Lowering ourselves to our clients' expectations, has achieved new highs, or lows.

In Coconut Grove, a suburb of Miami, Florida, a lawyer last year took out a \$5400.00 billboard ad which said, "We Kick Buff". It shows a lawyer in a suit with a briefcase in his hand booting someone's backside. When interviewed by the media, the lawyer explained what he believed clients really want:

"They're not looking for a guy who coaches Little League. They don't want a wimp. They want a lawyer who means business, an animal who's going to get the job done, whatever it takes - as long as it's legal. I'm an honest lawyer. I just don't take crap." 13/

Do you realize how appalling this is? Is there anyone here who considers himself "an animal"? Who would be proud of being described as "an animal"? I guarantee you that most of the great advocates in this country have coached little league.

VI Socialize. One of our problems is that the bar is getting too large and we don't know each other. That has materially added to the civility problem. It seems that the civility problem is always caused by the "out of townner" or "the other guy."

"As the size of the bar increases, the more likely it is that a lawyer will never meet up with any given adversary in a second case. Without the fear of running into the same person twice, the fear of retaliation - of being subjected to the same type of offensive conduct that you are giving out - is eliminated. And with it, a major incentive for being civil and professional is gone. That's a sad commentary, but there is a certain truth to it.

Another explanation, which really consists of several combined into one, is what I call the decline in socialization among members of the bar. Attorneys no longer spend the social time with one another that they used to." 14/

One Federal Bar Journal reports:

"In the Seventh Circuit's urban courtrooms, trial lawyers no longer appear frequently against the same opponent or before the same judge, thereby reducing opportunities for building mutual respect and learning the ethics of an honored profession from seasoned hands. Today's metropolitan lawyer may deal with a particular lawyer, law firm, or judge only once in his or her career. thus, the incentive to retain cordial relationships often dies because the relationship is not likely to become an on-going one". 15/

Please socialize and tell everyone in your firm to socialize. Go to Bar luncheons, committee meetings, judicial receptions, and the like. Make the bar a kinder group by knowing each other. It boils down to one simple concept - it's easier to be nasty to a stranger than to a friend.

VII. SPREAD THE WORD. Brand -bad lawyers. Gossip. And if the bar is too large, and we do not have a sufficient degree of social and professional interchange, you have to spread the word as to who the bad lawyers are. Make hit lists. Warn your friends. Tell your friends who to watch out for. Don't tolerate the Rambos - brand them!!!

"If we as a profession tolerate such an incivility attitude among some of our practitioners, we cannot expect greater respect from the public." 16/

VIII. ORGANIZATIONS. Join organizations that foster and teach civility. There are many of them in your community. I specifically refer you to the Inns of Court. Membership in the Inns of Court is a great opportunity to teach without the responsibilities of direct mentoring. You can reach 15 or 20 young lawyers in your community by working at the Inns of Court or any similar organization.

IX. WIN. Last, and hopefully not too difficult for all of you, be civil and win. Show them that civility and professionalism and success are not mutually exclusive concepts. Actually, they are linked. Civil lawyers are winners.

"The lesson here is that there is a Gresham's Law in litigation. Bad tactics that work drive out honorable tactics that work. The only solution for the legal system is to try to see to it that bad tactics don't work". 17/

Show everyone that civility is the trademark of a winner. Every time that you make uncivil lawyers lose, you score a big victory for civility. Every time an abrasive, abusive, hostile, harassing, combative, discourteous, hardball, win-at-all-costs, take no prisoners, scorched. earth, Rambo lawyer, loses, it's a great day for civility. So if you don't have the drive or the ego to win for your client and for yourself, do it for the cause.. Winning, and winning the right way, is a great motivation for others to be civil.

CONCLUSION

If we follow some or all of these nine ideas, or any others that you have, what will be the result? It will be a nicer profession for our firms, our friends, our children and our grandchildren. Just as important, it will be nicer for us. If you spend a lot of your time being abused and harassed by Rambos, it sucks the joy out of practicing law.

"The problem with incivility in the legal profession is a love disorder, not a result of working too many hours. Listen to some of the other symptoms that are clustered nearby: the sense that loyalty is eroding within firms; the growth of a sick individuality that says we have to look out for number one because there is no security in relationships; a lingering feeling of emptiness despite material success; -the break-up of long-standing partnerships. All of these things have to do with what Sam Keen calls "a deficiency of passions". So what to do. Obviously a code of civility cannot rekindle our capacities to love. Rather, we turn to our symptoms for guidance. Incivility itself is pointing the way by directing us to citizenship and householding. The legal profession is suffering from a lack of oxygen, it needs air to fuel the combustion hidden in its heart. The outward move of reconnecting ourselves with the world can provide this missing component. Societal concerns, family affairs, matters of the heart - these are the places to turn. We can't expect to do it all at once. Little things work best, like listening to a spouse, or calling up a friend just to say hello, or spending some time with our dreams." 18/

Or, if I may add, coaching little league.

I'd like to thank you for electing me as your Dean. The largest responsibility, of being Dean is to prepare and deliver this address. For one year I have devoted one to three hours every week to researching this topic. It has been the most enjoyable and educational assignment I've undertaken in decades. I thank you for giving me this opportunity

I appreciate the support that I hope to receive from those of you who agree with my presentation. If any of you disagree, I'll be pleased to step outside with you, and we'll settle this like real men.

1/ Sol M. Linowitz, "The Betrayed Profession, p. 228.

2/ April 1991 issue of Trial Magazine, Vol. 39, No. 5, p. 321

3/ The Virginia Bar Association Creed.

4/ Sam Benson "Why I Quit Practicing Law", Newsweek, November 4, 1991, p. 10.

5/ 46 SMU L. Rev. 199,*206. January/February 1994, Craig Enoch. Incivility in the Legal System? Maybe it's the Rules.

6/ 94 Colum.L. Rev. 509,*SII. March, 1994, Ronald Gilson and Robert Mnookin; Disputing Through Agents: Cooperation and Conflict

7/ Sol M. Linowitz "The Betrayed Profession", p. 208

8/ Federal Bar News & Journal, June, 1992, Volume 39, No. 5., P. 3002.

9/ 50 Md. L. Rev. 945, -962, Summer, 1991, Catherine Theresa Clarke, Missed Manners in Courtroom Decorum.

10/ Nov., 1995 New York Bar Association. Committee on the Profession

11/ Sol M. Linowitz "The Betrayed Profession", p. 128

12/ New York State Bar Journal, January 1996, Vol. 68, No. 1, p. 10, Louis P. DiLorenzo, Civility and Professionalism.

13/ The Miami Herald, April 5,1995, p. 2B

14/ New York State Bar Journal, Vol. 68, No. 1, p. 9, January, 1996, Louis P. DiLorenzo, Civility and Professionalism.

15/ Federal Bar News & Journal June 1992, Volume 39, No. 5, p. 304, Hon. Marvin Aspen

16/ Fr hm T Rev 949, *952, Justice Warren Berger, March 1995.

17/ ABA Journal, January 1996, p. 8, Vincent Cox, Letter to the Editor.

18/ The Florida Bar News August 15, 1994, Stresslines, Benjamin Sells