Ethics & The Law:
The Ethics of Incivility

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For many lawyers, incivility and "sharp" practices by other lawyers, judges and clients are among the most irksome aspects of the practice of law. Many lawyers believe such behavior is increasingly common and that professionalism among members of the legal profession is declining. This article looks at some ethical issues related to incivility and professionalism, gives some examples of conduct for which lawyers have been sanctioned or disciplined, and raises some questions about possible consequences of both incivility and of mandating civility or professionalism.

Concerns over declining civility and professionalism usually focus on the behavior of other persons, since few lawyers or judges ever perceive themselves as either uncivil or unprofessional. The concerns usually center on either the personality or the "sharp" practices of the offending person.

Few lawyers and judges have never uttered in the heat of argument words which, on reflection, they regretted as intemperate. While lawyers and judges can disagree without being disagreeable, some lawyers and judges are more than just occasionally disagreeable. Some are consistently and almost universally disagreeable, uncivil, impolite, discourteous, acerbic, acrimonious, obstreperous, ill-mannered, antagonistic, surly, ungracious, insolent, rude, boorish, uncouth, insulting, disparaging, malevolent, spiteful, demeaning, vitriolic and rancorous — and sometimes all of these in one short deposition or hearing. They manifest such behavior to other lawyers, judges, witnesses, clients and the public generally. These lawyers might do well to study the 16-year-old George Washington's school transcription exercise, *Rules of Civility and Decent Behavior In Company and Conversation*, and particularly the very first of the 110 rules: "Every action done in company ought to be with some sign of respect to those that are present." The conduct of these lawyers suggests little or no respect for the innate dignity and worth of other persons, although it may be highly attractive to some clients who prize pugnacity over decorum.

There are also lawyers and judges whose behavior, while not personally obnoxious, is consistently less than what most lawyers and judges would reasonably expect from a professional. They refuse to extend normal courtesies and engage in "sharp" practices. They refuse reasonable requests for extensions of time or to stipulate to undisputed facts to avoid needless costs or inconvenience; do not consult with others before scheduling depositions or hearings; fail to provide copies of required documents; intentionally send pleadings or messages at the end of the day or week knowing opposing counsel will not get them until much later, and intentionally schedule matters at times known to be inconvenient to others; send letters "confirming" conversations that do not fairly reflect the conversations; intentionally delay matters; engage in "hardball" or "scorched-earth" litigation regardless of the justice of their client's cause; promise responses or documents that never arrive; and so on.

Lawyers viewed as uncivil or unprofessional often justify their conduct as being mandated by an ethical requirement for "zealous advocacy." They may imply that lawyers bemoaning a lack of civility or professionalism are too thin-skinned and put politeness and political correctness ahead of their ethical obligation to vigorously serve their clients.[1]

The American Bar Association's 1983 Model Rules of Professional Conduct, on which Washington's Rules of Professional Conduct are based, does not mandate "zealous advocacy" or even use the term "zeal." Instead, it requires a lawyer to represent a client "with reasonable diligence and promptness." The official comment to the Model Rule, not adopted by Washington, explains that a "lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf," but that "a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued." As an officer of the court, a lawyer cannot be a mere zealot, but must balance obligations both to the client and to the legal system. See *State v. Richardson*, 514 N.W.2d 573 (MN. Ct. Appeals, 1994). How to properly balance these obligations to the client and the system is often perplexing and underlies much of the concern over civility and professionalism.

The Problem

Although lawyers find declining civility and professionalism in all aspects of the practice of law, concern centers on litigation, particularly in pretrial discovery and depositions. The decline is sometimes attributed to the large increase in the number of lawyers resulting in fierce client competition; the lack of ongoing relationships between lawyers who may never again litigate against one another; changes in law practice making it more a business than a profession; lawyers not wanting to appear to be weak to scarce clients; and a general increase in stress in life exacerbated by increasingly fast technological changes and demands.

The perception of declining civility and professionalism is not unique to Washington lawyers. A report of the Committee on Professionalism in Litigation of the Commercial and Federal Litigation Section of the New York State Bar Association, *Report on Uncivil Conduct in Depositions* (May 9, 1996), observes:

Intolerance for unprofessional and uncivil conduct during the course of depositions is appearing in the courts with more frequency. Litigants and courts alike seem less willing to tolerate such misbehavior. When behavior in a deposition crosses the line from zealous advocacy to uncivil or unprofessional conduct, no one wins. Costs are unnecessarily increased, judicial resources are wasted, the public image of lawyers is diminished, and perhaps most importantly the clients' legitimate interests are far from advanced.

…Counsel should bear in mind that even if court intervention is not sought to curb uncivil conduct occurring during a deposition, the courts could very well act sua sponte….The rationale for such action is that regardless of the abuse to an adversary or witness, such conduct is considered an affront to the judicial system.

The report also quotes *A Report on the Conduct of Depositions,* 131 F.R.D. 613 (1990), by the Federal Bar Council's Committee on Second Circuit Courts, noting that "[d]epositions have often become theaters for posturing and maneuvering rather than efficient vehicles for the discovery of

relevant facts or the perpetuation of testimony." Not surprisingly, the reports conclude that incivility has deleterious consequences on the legal profession and the administration of justice.[2]

The Rules

The Rules of Professional Conduct neither explicitly prohibit incivility nor require lawyers to be civil, let alone be witty, urbane, polished and magnanimous of heart. Indirectly, however, a number of the RPCs and other court rules encourage civility and professionalism.[3]

The RPCs state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. They point the way to the aspiring, but leave it to the individual lawyer to decide to what extent the lawyer's conduct should rise above the minimum. If lawyers are satisfied with merely the minimum, there will inevitably be a decline in professionalism, since by definition professionalism manifests itself by an indi-vidual's dedication and aspiration to go beyond the minimum.

Several RPCs relate indirectly to incivility and limit the permissible scope of a lawyer's personal behavior to others.[4] RPC 3.5(c) prohibits a lawyer from engaging in conduct intended to disrupt a tribunal, and covers conduct within and outside a courtroom. RPC 4.4 prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay or burden a third person. RPC 8.4(d) prohibits a lawyer from engaging in conduct prejudicial to the administration of justice, such as racial slurs, physical attacks, abusive language and the like. Examples of such conduct are given below. In addition, RPC 5.1 and RPC 5.3 make partners and supervisory lawyers vicariously liable, and thus subject to discipline, for certain misconduct of subordinate lawyers and nonlawyer assistants, which could include the disruptive and prejudicial behavior referenced above. RPC 1.1 requires a competent lawyer to exercise the legal skill reasonably necessary for the representation; a lawyer who frustrates the lawful purpose of a deposition by engaging in uncivil or unprofessional conduct could be viewed as lacking the competence required under RPC 1.1. Failure to meet an RPC subjects a lawyer to discipline under Rule 1.1(i) of the Rules for Lawyer Discipline (violation of an RPC), and perhaps also under RLD 1.1(p) (conduct demonstrating unfitness to practice law).

On admission to the Bar, each lawyer takes an oath agreeing to "abstain from offensive personalities." (Admission to Practice Rule 5(d)(7)). This does not require the lawyer to stay away from persons whose personality the lawyer finds offensive. Rather, it requires the lawyer not to engage in conduct which others would reasonably see as demonstrating an "offensive personality." Failure to do so subjects the lawyer to discipline under RLD 1.1(c) (violation of oath), and perhaps also under RLD 1.1(p).

Washington's Superior Court Civil Rule 30(h)(6) mandates a courtroom standard of behavior for lawyers during depositions and is in effect a mandatory, but limited, statewide civility rule. It requires that "All counsel and parties shall conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial." In fact, when the cat is away, the mice play, and without the active presence of a judge some lawyers abuse depositions. If lawyers fully implement the spirit of CR 30(h) at depositions, dissatisfaction with depositions would significantly lessen. Failure to satisfy CR 30 subjects a lawyer to sanctions under CR 37.

Lawyers practicing before the U S. District Court for the Eastern District of Washington are subject to the "civility code" set out in that court's Local Rule 83.1(k). The code attempts to balance lawyers' duty to represent clients with their duty to make the system of justice work. It requires lawyers to "try to act with dignity, integrity and courtesy." Recognizing that some clients equate incivility with prowess and expect lawyers to be merely hired attack dogs, the code requires lawyers to advise their clients "that civility and courtesy are not to be equated with weakness."

Numerous voluntary "civility codes" also attempt to promote civility.[5] Although compliance with such codes is voluntary, a lawyer's conduct inconsistent with such a code may also violate the RPCs or other court rules and subject the lawyer to discipline or court sanctions. Lawyers would do well, in any case, to discuss such codes with their clients, and to adhere, and encourage others to adhere, to such codes. It will enrich their appreciation of the legal profession, set an example for others, better serve the client, and lead to a deeper enjoyment of the practice of law.

Judges, unlike lawyers, are specifically required by rule to be courteous to others. Canon 3(A)(3) of the Code of Judicial Conduct requires that "Judges should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in their official capacity, and should require similar conduct of lawyers, and of the staff, court officials, and others subject to their direction and control." More practically, if judges do not show respect to lawyers and litigants, they are unlikely to receive it, since respect begets respect just as disrespect begets disrespect.

Didn't Your Mother Teach You How to Behave?

The following cases illustrate some problems of incivility and a lack of professionalism.

A lawyer was suspended from the practice of law in *In re Williams*, 414 N.W.2d 394 (MN. 1987) for, among other things, stating at a deposition: "Just get your foul, odious body on the other side," and "Don't use your little sheeny, Hebrew tricks on me." The lawyer unsuccessfully argued he was denied due process because the target of his attacks, who was not disciplined, had responded to his attacks with the statement "You son of a bitch.…Tell the Judge I called him a rotten son of a bitch for calling me a sheeny Hebrew…."

In *Attorney Grievance Commission v. Alison*, 317 Md. 523, 565 A.2d. 660 (1989), the court suspended a lawyer from practice for, among other things, verbally abusing court clerks and engaging in a course of conduct that was rude, vulgar and insulting.

In *Castello v. St. Paul Fire & Marine Ins. Co*., 938 F.2d 776 (7th Cir. 1991), plaintiff's counsel repeatedly directed his client not to answer deposition questions and then claimed harassment when defense counsel demanded responses. At a second deposition the lawyer again objected to the questions, which the court had previously approved, and again directed his client not to answer. The trial court dismissed plaintiff's case with prejudice, and assessed fees and expenses, describing the conduct as "the most outrageous example of evasion and obfuscation that I have seen in years" and "a deliberate frustration of defendant's attempt to secure discovery." The appellate court affirmed.

In *Principe v. Assay Partners, HRO Int'l Ltd*., 154 N.Y. Misc. 2d 702, 586 N.Y. S. 2d 182 (Sup. Ct., N.Y. County, 1992), the court sanctioned a lawyer for repeated objectionable comments to

opposing counsel, including: "I don't have to talk to you, little lady," "Tell that little mouse over there to pipe down," "Be quiet, little girl," and "Go away, little girl."

In *Matter of Schiff,* 190 A.D. 2d 293, 599 N.Y. S.2d 242 (1st Dept. 1993), a lawyer was disciplined for conduct held to reflect adversely on his fitness to practice law, namely, behavior that was "unduly intimidating and abusive" toward opposing counsel, including using "vulgar, obscene and sexist epithets toward her anatomy and gender" during the course of a deposition.

In *Paramount Communications, Inc. v. QVC Network,* Inc., 637 A.2d 34 (Del. 1994), the court sanctioned the deposition misconduct of a Texas lawyer, who, in the court's words, "(a) improperly directed the witness not to answer certain questions; (b) was extraordinarily rude, uncivil, and vulgar; and (c) obstructed the ability of the questioner to elicit testimony to assist the court in this matter." The lawyer's objectionable deposition comments included: "Don't 'Joe' me, asshole…I'm tired of you. You could gag a maggot off a meat wagon."

In *Matter of McClure*, 652 N.E. 2d 863 (Indiana 1995), a lawyer was suspended from practice for deposition misconduct including throwing a soft drink at opposing counsel and grabbing him around the neck and restraining him in his chair. The court found the conduct reflected adversely on his fitness as a lawyer and was prejudicial to the administration of justice.

In *Corsini v. U-Haul Int'l Inc*., 212 N.Y. A.D. 2d 288, 630 N.Y.S.2d 45 (1st Dept. 1995), the court dismissed a lawyer's pro se complaint because of the lawyer's deposition misconduct, which included repeatedly refusing to answer questions, improperly responding to others, and engaging in personal attacks against defense counsel and others, including calling defense counsel "scummy and so slimy," a "slimebag," a "scared little man," and "in the sewer."

In *Grievance Administrator v. Sanford L. Lakin*, No. 96-166-GA (Michigan, October 22, 1997), a lawyer was reprimanded for twice striking opposing counsel during an argument at a deposition.

In *In re Golden*, 496 S.E.2d 619 (S.C. 1998), the court reprimanded a lawyer for, among other things, leaning across a table and pointing at the adverse party while screaming at her: "You are a mean-spirited, vicious witch and I don't like your face and I don't like your voice, and what I want, what I want is to be locked in a room with you naked with a very sharp knife….What we need for her is a big bag to put her in without the mouth cut out." The court found the conduct prejudicial to the administration of justice in violation of RPC 8.4, and agreed with the hearing panel that the lawyer's conduct "exemplifies the worst stereotype of an arrogant, rude and overbearing attorney. It goes beyond tactical aggressiveness to a level of gratuitous insult, intimidation, and degradation of the witness. It is behavior that brings the legal profession into disrepute."

Conclusion

Should consistently disagreeable lawyers or judges be allowed to continue in the profession? Should courts, or the bar on behalf of courts, regulate the degree of permissible nastiness of legal professionals? Should disciplinary counsel become civility/courtesy police? Should only civil or polite or nice people be allowed to be lawyers or judges? Who should set the standards for being a nice person or for being an uncivil one? Should gender, age, cultural, ethnic, and racial differences and sensitivities be considered? If civility standards are mandated, will issues of

civility be litigated as yet another way to delay the litigation and harass the other side? Does a lawyer become uncivil by complaining about incivility? Are civility codes attempts by one group of society to impose their own standards of politeness on others and exclude or control another group?6 Or do such standards instead attempt to recognize the innate dignity and respect each person is entitled to merely because the person is a person?

Concern over declining civility and professionalism is not just a nostalgic yearning for a passing of bygone social graces or outmoded conventions. Rather, civility and professionalism relate to the basic level of trust and respect accorded by one person to another, of the level of confidence a lawyer or a judge can have in the word of another lawyer or a judge. Civility and professionalism form a framework for common expectations of mutual trust, of being treated with dignity, and ultimately set the stage for justice to be done. But are mandatory codes the proper way to assure that? Or do such codes risk silencing the very voices that may be raising, perhaps rudely, an unpopular or minority view that needs to be heard and recognized if justice is to truly exist in our society?

The legal profession has always had room and need for both the polished and the scruffy lawyer. It is a noble profession not because its members are, or may be required to be, polite or civil or politically correct to one another, but because the profession's overriding goal is to make the promise of justice a reality. The preamble to the RPCs reminds us that justice is based on a rule of law grounded in respect for the dignity of the individual. If lawyers truly are guardians of law, then *they* more than others need to embody in their practices and lives that very same respect for the dignity of the individual. Lawyers need to treat one another with dignity and respect because the very purpose of law, and thus the very reason for the legal profession's existence, is to attain respect and protection for the dignity of the individual. Modeling civility and professionalism is an important way for each lawyer and judge to express gratitude to other legal professionals, to honor the innate dignity of one another, and to celebrate the cacophony of justice that is attained through the legal process.

Notes

[1] The concept of "zealous advocacy" is based on the superceded Canon 15 of the ABA's 1908 Canons of Professional Responsibility, which required a lawyer to represent clients with "warm zeal," and Canon 7 of the 1969 Model Code of Professional Responsibility, which required a lawyer to "represent a client zealously within the bounds of the law."

[2] New York sought to deal with incivility and to reaffirm appropriate and necessary standards of civility in the practice of law through the issuance in November, 1995 of a *Final Report of the New York Chief Judge's Committee on the Profession and the Courts* (the "Craco Committee"), which recommended that New York's disciplinary rules be amended to make "gross and persistent" incivility an ethical violation. Washington does not have such a provision. Should it?

[3] At least four methods exist for enforcement of possible civility requirements: disciplinary sanctions, court sanctions, adverse public/professional opinion, and malpractice actions. In practice, disciplinary and court sanctions are rare, malpractice actions are usually inappropriate for resolving civility or professionalism issues, and adverse opinion, although perhaps widespread, is likely ineffective against the worst offenders.

[4] Other RPCs not discussed herein prohibit a lawyer from making false statements, unlawfully obstructing access to evidence, destroying evidence, and so on. Proposed amendments to RPC 8.4 might also limit a lawyer's ability to engage in conduct evidencing a discriminatory bias.

[5] *See*, *e.g.*, the King County Bar Association's "Guidelines on Professional Courtesy", the American Bar Association Section of Litigation's Guidelines for Conduct (http://www.abanet.org/litigation/litnews/practice /guidelines.html) and the New York State Unified Court System's "Standards of Civility" (http://www.nylj.com/links/standard. html). See also Mary Gallagher Dilley, "Courtroom Decorum and Practice Guidelines – Interim Report," *Bar News,* May 1993, p. 39; the WSBA Court Congestion and Improvement Committee's "Courtroom Decorum and Practice Guidelines," *Bar News*, May 1993, p. 41. See also Shawn Otorowski, "Civility and Rule 11," *Bar News*, May 1993, p. 23, which summarizes the findings of the 1992 report of the Ninth Circuit Rule 11 Study Committee regarding courtroom behavior and sanctions.

[6] For an argument that civility codes are a "patrician reaction" by attorneys in a privileged group of large law firms to impose "class" standards on the bar and resist the power shift to other nonprivileged attorneys, see Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 Valparaiso University Law Review 657 (1994). See also, Freedman, "Civility Runs Amok," *Legal Times* (August 14, 1995), arguing that such codes undermine the duty of the attorney to represent the client with zeal by judges tending to enforce them as though they were mandatory despite their acknowledged aspirational nature.