

Civility in the Practice of Law: A Young Lawyer's Perspective

by Christopher M. Von Maack

This article seeks to briefly examine the challenge of civility in the practice of law from *one* young lawyer's perspective – mine. From the outset, I believe that civility assists lawyers to resolve disputes more rationally, peacefully, and efficiently. Thus, lawyers should strive to maintain civility in their dealings with others, i.e., clients, counsel, judges, juries, and the public.

As a self-regulated *profession*, I believe that lawyers have an individual and collective role to play in maintaining civility in the practice of law. Undoubtedly, the primary responsibility is on the individual lawyer to act civilly. However, when the individual lawyer falters, other lawyers, e.g., opposing counsel, judges, or the bar, must take some manner of action to maintain civility.

In the individual role, I believe that most new lawyers enter the profession recognizing the purpose and advantages of civility, and intending to be civil. However, at least two forces quickly test the young lawyer's commitment to civility – clients and counsel.

All lawyers enter the practice with the goal of obtaining a successful result for their client. The rub is that, often, a lawyer's uncivil conduct can seemingly advance the client's goal. Moreover, clients sometimes champion uncivil conduct because they feel wronged, and want the party that wronged them to suffer. For example, my client may want me to bury opposing counsel with paper, respond cryptically to discovery requests, or refuse to grant a reasonable extension. Civility advocates pejoratively label such conduct the "scorched-earth" approach.

Despite the ostensible advantages of uncivil lawyering, in my experience, any gains ultimately prove spurious. Indeed, the scorched-earth approach rarely benefits the client's cause and usually drives up costs, ferments ill will between parties and counsel, and inevitably irritates judges. Conversely, when a lawyer behaves civilly, the client is more likely to attain a favorable result more quickly and with less expense.

Furthermore, when a lawyer merely acts as a straw for the client, the lawyer eviscerates the purpose of the advocacy system – to arrive at justice through rational intermediaries. Indeed, "technical and legal tactical issues" are the lawyer's, not the client's, responsibility. Utah R. Prof. Conduct 1.2, cmt. *Scope of Representation*. Thus, a lawyer should determine whether to employ a certain strategy, and not automatically defer to the client. To aid the client's edification, a young lawyer would be well served to follow Standards 2 and 14 of the Utah Standards of Professionalism and Civility, and familiarize the client with the lawyer's and the client's respective roles, at the beginning of the

representation.¹ See Utah Standards of Professionalism & Civility 2 ("Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected."); Utah Standards of Professionalism & Civility 14 ("Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of fact.").

The second force that can test a young lawyer's commitment to civility is the behavior of opposing counsel. A lawyer's relationship with opposing counsel can set the tone for the case. For instance, when my first interaction with opposing counsel is civil, the case tends to go more smoothly for everyone, e.g., extensions are not unreasonably withheld, scheduling orders are stipulated, telephone calls and correspondence are promptly returned. As a result, civil counsel save their clients time and money, and earn appreciation and respect from opposing counsel.

On the other hand, acrimonious counsel waste everyone's time and resources. While some of these lawyers are just cantankerous, others view civility as a sign of weakness. I, however, believe civility is a sign of strength and *confidence*, and incivility an expression of fear and an attempt to distract the other side from the infirmities of their case. Moreover, in the relatively small Utah legal community, lawyers are likely to deal with each other more than once. Thus, civility promotes comity in the bar.

In addition to the pressures of opposing counsel, sometimes young lawyers face pressure to act uncivilly from lawyers on the same side. No doubt, the pressure to behave uncivilly is magnified when the influence comes from a colleague or superior. However, a young lawyer should remember that his or her professional reputation is far more valuable than whatever political capital is gained by conforming to uncivil conduct.

At some point, uncivil conduct necessitates other lawyers to step in

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to maintain rationality, peace, and efficiency in resolving disputes. Because many acts of incivility occur outside the courtroom, when serious uncivil conduct takes place beyond the observation of the court, opposing counsel has the unenviable task of bringing the objectionable conduct to the court's attention. As a young lawyer, alerting the court of a more experienced attorney's uncivil conduct can be an intimidating venture, but failure to do so may only embolden the uncivil lawyer and invite prejudice to the client.

Once properly before a court, judges can be the most potent enforcers of civility. Indeed, to have traction, the standards of civility must have the support of judges. Quoting a commentator, one court observed:

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.

Reuson v. Cinque & Cinque, P.C., 49 F. Supp. 2d 686, 687 n.2 (S.D.N.Y. 1999) (quoting Robert C. Josefsberg, *The Topic Is Civility; You Got a Problem With That?*, 59 Or. St. B. Bull. 19, 23 (Jan. 1999)).

Understandably, many courts are reluctant to deal with "misbehaving" lawyers. However, if more judges required lawyers to adhere to standards of civility, judges would likely encounter fewer situations that required their intervention. I wholeheartedly agree with the observations of one court, which wrote:

The organized bar and the judiciary, in *partnership* with each other, have a responsibility to promote civility in the practice of law and the administration of justice. Uncivil conduct of lawyers or judges impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently. Such conduct may delay or deny justice and diminish the respect for law, which is a cornerstone of our society and our profession.

Alexander v. F.B.I., No. 96-2123, 1999 WL 314170, *2 (D.D.C. May 17, 1999) (emphasis added). Moreover, the Utah Standards of Professionalism and Civility have been adopted by the Utah Supreme Court, and accordingly, warrant some manner of "enforcement."²

Moreover, enforcing civility offers judges an opportunity to mold a lawyer's behavior through wit and wisdom. An experience often recounted by Judge Gregory K. Orme provides one such example: A young lawyer at the time, Mr. Orme asked opposing counsel for a two-day extension to answer a complaint. Mr. Orme explained that he needed the extension because the complaint had just been brought to him, and he needed the extra time to confer with his client so he could respond accurately. Opposing counsel refused. Mr. Orme then prepared and presented an *ex parte* motion for a two-day extension to recently-appointed Judge J. Thomas Greene. Judge Greene explained that it was customary to simply call

opposing counsel and request such an extension. When Mr. Orme explained that he had done just that and been refused, Judge Greene agreed to sign the tendered order granting the two-day extension. But Judge Greene interlineated and initialed a change *sua sponte*, changing 2 days to 30 days. Judge Orme recalls that Judge Greene explained he did not want him to be "unduly rushed" in filing a quality answer. I would be surprised if opposing counsel in that case ever refused a reasonable extension again. Such a discreet and judicious approach to enforcing civility is effective, endearing, and memorable.

Organizations of lawyers also play a role in promoting civility in the practice of law. For its part, the Young Lawyers Division ("YLD") of the Utah State Bar has created a new venue where a young lawyer can access the wisdom of more experienced colleagues — "Mentor On Demand." Launched in 2006, and accessible at no cost 24/7 through the utahbar.org website, Mentor On Demand is an online resource specifically tailored to provide young lawyers with guidance on discrete issues that they may encounter in their practice, including those in the realm of professionalism and civility. Although the YLD plans to continually expand and update the resource, presently, Mentor On Demand consists of approximately twenty-five videotaped presentations from some of Utah's most prominent lawyers, including judges, in-house counsel, solo practitioners, law professors, and firm lawyers.

Promoting, achieving, and maintaining civility in the practice of law requires every lawyer to do his or her part. As a young lawyer, I have an opportunity to take a leading role through approaching the practice of law as a profession, and resisting the temptations to act uncivilly.

1. Notably, the Utah Rules of Professional Conduct and the Standards of Professionalism and Civility are the *minimum* standards of conduct.
2. I place "enforcement" in quotation marks because the Utah Standards of Professionalism and Civility lack an explicit means of enforcement.

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