

Zealotry v. zeal: thoughts about lawyer civility

Celebrating civility

I just returned from a great Indianapolis Bar Association (IBA) luncheon about professionalism and civility. The theme was “Take Opposing Counsel to Lunch,” and one of my frequent opponents was kind enough to invite me. (Civility is one thing; ethical squeamishness is another. I paid for my own lunch.) Two professionalism awards were given out, one to a fine lawyer, Karl Mulvaney of Indianapolis, and one to an excellent judge, John Daniel Tinder, now of the U.S. District Court and a nominee for the Seventh Circuit Court of Appeals, who at this writing has received a favorable vote from the full Senate Judiciary Committee.

Something important happened at the lunch. The IBA unveiled its new Standards of Professionalism. You can access them at: www.indybar.org/pdfs/StandardsofProfessionalism10-07.pdf. Everyone in attendance received an attractive poster displaying the key tenets of the standards under five categories: commitment, character, competence, courtesy and community involvement. This is a great local bar initiative.

Creating a culture of civility



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It's an odd thing, civility. I was recently privy to a post on a legal ethics electronic mailing list that asked how civility standards could be enforced. The answer, I think, is that they can't or, at least, they shouldn't. The Rules of Professional Conduct are meant to be enforced as minimum standards of behavior, but they say precious little about

civility. Civility is part of the culture of law practice that is defined lawyer-by-lawyer, act-by-act. Everything we do as lawyers either adds to a culture that fosters civility or detracts from it.

Our adversarial system and the lawyer's role in it have been criticized in recent years as not being the best way to resolve disputes. Some say incivility is an inevitable byproduct of an adversary system coupled with lawyers whose basic personality type is overwhelmingly competitive, judgmental and independent. I reject that view. But for this discussion I accept that our roles as adversaries often place us in the challenging position of being morally transparent agents for our clients. In that context, acting civilly is not always easy. Others may someday design a kinder and gentler system that is equally effective. Until then, we have to think hard about acting civilly within the system as we find it.

An old debate with new urgency

What's new in the civility debate? Maybe very little. Concerns about incivility go way back: “Counsel has need of learning the ethics of his profession anew if he believes that vituperation and scurrilous insinuation are useful to him or his client in presenting his case.” *Pittsburgh C., C. and St. L. Ry. Co. v. Muncie and P. Traction Co.*, 77 N.E. 941 (Ind. 1906). Since then, the profession has taken on a harder edge as the broader culture has become more mean-spirited, as economic pressures on the bar have become more acute, and as an intense, client-centered ethic has emerged as the dominant model for describing the work of lawyers.

What do I mean by civility? It does not include things like avoiding lying, cheating or stealing. Those types of misconduct (uncivil,

to be sure) are specifically prohibited by the Rules of Professional Conduct. Incivility is conduct that stops short of being so aberrational as to contravene the proscriptions of the Rules of Professional Conduct, but of sufficient gravity that we should be concerned about it. An admittedly fuzzy line divides the two.

It's about more than being nice

Civility has more substance than the bland notion that you ought to be a nice person. Nobody believes that our adversary system will ever be free of conflict. Indeed, the effective practice of law may mean functioning in a way that is not very pleasant. For example, the task of cross-examining a lying witness can be rough stuff. Being a pleasant person is generally a good thing, but focusing on niceness trivializes concerns about civility.

Enhancing effectiveness

Being civil does not mean sacrificing fidelity to the client's cause to some supposed greater good of getting along well with judges, third parties or other lawyers. If our duty of client loyalty compels action, then misplaced concerns about civility should not cause us to pull our punches. So, for example, when faced with unwarranted and unfair badgering by a judge who is hostile to our client's cause, we are duty bound to make a proper record for appellate review. Even then, there is no cause to use uncivil means to seek the rightful ends of our client. We need to be firm and persistent, but not uncivil.

Other professional values, like competence, feed into a discussion about civility. Competence means having the knowledge, skill and ability to be effective advocates. Uncivil tactics are worthy of criticism for lacking in competence.

Take, for example, courtroom demeanor. Before criticizing a lawyer for engaging in personal attacks on a judge, opposing counsel or anyone else who stands in our client's way, we should first ask whether it is the conduct of a competent lawyer. In the passage quoted above, the Supreme Court made this point a century ago; and more recently the Indiana Court of Appeals observed: "[A]ppellate counsel should realize, such petulant grousing has a deleterious effect on the appropriate commentary in such a brief. Material of this nature is akin to static in a radio broadcast. It tends to blot out legitimate argument." *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992). Our own clients are not well served by uncivil advocacy.

Advocates, not actors

Sometimes clients really like it when we scream and yell and act like fools – they think we're doing a great job for them. And after all, isn't client satisfaction important? True, our clients need to know that we are doing a good job for them, but not at the expense of actually doing a good job.

As professionals, our job is to be effective client advocates, not merely to give the superficial impression that we are being effective. We should never allow our interest in pleasing clients to dictate tactics that ultimately detract from their desired outcomes. This does not mean, however, that we should conduct ourselves with opposing counsel in a way that can reasonably be misinterpreted by our clients as an indication of disloyalty.

Can't we all just get along?

There are other reasons why attention to civility is important. First, most clients are involved in legal matters on a one-shot basis.

Lawyers are in it for the long haul. We shouldn't underestimate the profound emotional toll that uncivil conduct imposes on all of us. It is well documented that there is pervasive unhappiness within our profession. Being a lawyer is hard enough work. Why should we go out of our way to make each other's working conditions miserable?

Second, civility and civilization share a common etymological root. An important purpose of our judicial system is to provide a structured and peaceful way to resolve disputes – a better way than hiring thugs to club our opponents' kneecaps. Our justice system should be a paragon of how disputes should be resolved. Civil conduct by advocates models to clients and to society-at-large that disputes can be settled in a calm, reasoned and civilized way.

Not selling out

There are also some illegitimate justifications for civil behavior. A big one is, "you scratch my back, and I'll scratch yours." This may work fine at some level – we call it the Golden Rule. *I should*

contact you to consult your calendar before scheduling a deposition because I want you to extend the same courtesy to me. But it creates a conflict with our role as advocates when we compromise client interests to benefit another lawyer just because we have received a break in the past or hope to catch one in the future.

Awhile back I asked a respected federal court judge about civility. He said that civility is, at bottom, a respect for the time of others – the tribunal, opposing counsel, the opposing party, witnesses and your own client. Tactics that gratuitously impose a time or convenience burden on others have no place in a lawyer's arsenal of weapons.

Conclusion

So invest a little of that precious commodity – time – by having lunch with opposing counsel. When you do, talk about something other than your current case. Get to know him or her as a person. I'll bet it will contribute to a smoother working relationship down the road to everyone's benefit, including your clients'. 🍷