



## Professionalism and Civility in an Adversary System

**Incivility tarnishes the image of our profession and makes practice less rewarding. There are no easy solutions, but we can make – and are making – progress.**

**M**ost of us have firsthand experience with “difficult” lawyers and conduct that would be considered “unprofessional” or “uncivil.” Rambo-style litigation tactics, unreasonable demands, meaningless responses to discovery, threats, bullying, refusal to exchange common scheduling courtesies, and on and on. If we look honestly at ourselves, perhaps we can admit to occasions when we wish we had acted better in the heat of the moment.

Such conduct is not necessarily “unethical” in the sense that it violates the rules of professional conduct. Ethics are minimum rules of conduct by which we must abide under penalty of discipline. Professionalism, on the other hand, is more aspirational. It tells us what we should do, not necessarily because we will be disciplined, but because it is right.

**It is critical for a number of reasons** to curtail uncivil conduct by lawyers. Unprofessional conduct tarnishes our image. It feeds the public perception that lawyers are shrill and dishonest. It reinforces a view that “anything goes” and that aggressive conduct enhances the chances of success. In some cases, it affects the administration of justice and prevents a fair result. The perception that winning at any cost is acceptable can encourage dishonest behavior. And incivility makes our jobs as lawyers and judges unnecessarily stressful and unrewarding, adding to attrition in our profession.

To paraphrase Malcolm Forbes, it is easy to suggest solutions when you don’t know much about the root cause of the problem. So, why does incivility exist? There are several possibilities.

To a degree, it is a natural outgrowth of the adversary system. Pitting litigants against each other through their attorneys creates antagonism – and winners and losers. Lawyers can get caught up in the contest, and there is a temptation to think the end justifies the means.

As part of a self-fulfilling prophecy, the public often regards the most combative lawyer as the best one. Many clients believe that an attorney who fights aggressively over every issue and wears down the other side is the most effective, and look for that kind of “warrior.”

A lawyer’s lack of experience, and economic pressures, can also contribute to the problem. Those of us with well-established practices can often convince clients that unreasonable tactics do not pay, or we can refuse to represent them. But a less established lawyer with student loans and a mortgage to pay, who wants to build a reputation for toughness to attract more clients, might find it harder to say no. Also, a young lawyer asked to go to court or to a deposition may be less likely to know the big picture, and less comfortable agreeing to extend common courtesies for fear from inexperience that it will impair the client’s rights or upset his or her superiors.

**Judges can also encourage less-than-civil conduct.** For example, if a judge is known to apply procedural rules unreasonably – if, say, he or she has a history of reflexively refusing to extend deadlines – attorneys might act less cooperatively with their opposing counsel because they see an advantage for their client.

And then, of course, there are simply “jerks” – lawyers who are born, raised, or trained to be unreasonable, disagreeable, and antagonistic even when it serves no purpose.

Clearly, there is no one simple solution for incivility. There must be a cooperative effort among lawyers, judges, the organized bar, the court system, law schools, and law firms to educate about and police inappropriate behavior.

As Voltaire said, there is no problem that can withstand the assault of

sustained thinking, and the process of finding solutions is proceeding. Faced with increasing concern over incivility, the Illinois Supreme Court, at the urging of now Chief Justice Thomas, convened town hall meetings on professionalism across the state during 2003 and 2004 to gather information. Those meetings resulted in the establishment in 2005 of an Illinois Supreme Court Commission

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on Professionalism, chaired by former ISBA President Cheryl Niro.

The Illinois Supreme Court also imposed minimum continuing legal education requirements, including an ethics component, in 2005. The December 2007 ISBA Midyear Meeting in Chicago featured a conclave, co-sponsored by the Commission on Professionalism, the Illinois Judges Association, and the Chicago Bar Association, to further explore ways to deal with unprofessional and uncivil conduct.

**In May of this year, the ISBA Civil Practice and Procedure Section Council, chaired by Rick Turner of Sycamore, will further the effort by devoting its biennial Allerton House Conference to “Civility Initiatives for Civil Litigation.”**

Our journey of a thousand miles starts with the first step, and we are well on our way to improving our conduct for the betterment of our profession and the administration of justice. ■