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DAVID A. GRENARDO



The High Costs of Incivility

Many law students come to law school after being indoctrinated by television and movies, believing that an effective lawyer must be obstreperous, obnoxious, and rude to be successful. Lawyers, they believe, must fight their opponents on every point at every corner if they want to represent their clients zealously and adequately.

Law students must recognize that incivility by lawyers can lead to significant negative consequences for the client, the attorney herself, and the legal system. Law students must also understand that lawyers can treat opposing counsel with civility while still providing robust, vigorous, and adversarial representation for their clients. This article discusses the importance of civility when practicing law, and the substantial costs of incivility.

Civility is generally defined as treating others with courtesy, dignity, and respect. The terms civility and professionalism, which are sometimes used synonymously in the legal profession, refer to characteristics and conduct that all lawyers should aspire to demonstrate, such as integrity, punctuality, preparedness, accom-

modating opposing counsel through extensions of time to serve discovery or to continue hearings if warranted, and the ability to communicate with others using courtesy and respect in all written and oral communications. Civility and professionalism typically call for higher standards of conduct by attorneys than the rules of professional conduct (or ethical rules) require.

Law students may not realize how much interaction and cooperation between opposing counsel are required in litigation. Discovery involves extensive coordination between the opposing attorneys. For example, opposing counsel must meet and confer if one party believes it has received inadequate discovery responses from the other side. If one attorney believes that she must be obstreperous and fight opposing counsel on every point, rather than cooperate and reach reasonable agreements on discovery disputes, then the parties will likely engage in motion practice on motions to compel and corresponding hearings, which needlessly increase the costs of the case to the clients.

Scheduling of hearings and depositions also requires coordination. For

example, if the parties agree to a court date for a summary judgment motion, but one attorney's father passes away, then that attorney may want a continuance of the hearing date to attend the funeral. If opposing counsel wants to fight on every matter, including this continuance, then the attorney seeking the continuance may need to file a motion to continue, opposing counsel will file an opposition to that motion, a reply will be filed, and then a hearing will be held. This motion practice and hearing will again increase the costs for the clients who must pay the attorneys to draft the briefs and argue them in court instead of filing a joint motion for a continuance or an unopposed motion for a continuance. The court will likely grant the continuance anyway, and opposing counsel may lose favor with the court for opposing such a motion.

Opposing counsel also interact with each other throughout the course of a case at hearings and during settlement negotiations, mediation, depositions, and trial. The practice of law is inherently stressful due to client expectations and the numerous deadlines in a case. If an attorney must also deal

with a disrespectful and rude opposing counsel, then the stress of practicing law will increase that much more.

Creating a respectful and cordial working relationship with opposing counsel will alleviate stress, provide for easier and less costly resolutions of issues on discovery and scheduling, and it may help facilitate smoother settlement negotiations that can resolve the entire case.

Former US Supreme Court Justice Sandra Day O'Connor said the following of civility, "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers."

When lawyers are treating each other poorly and acting outrageously, then the public will rightly look upon the legal profession with disdain and mistrust. For example, in the case of *Bedoya v. Aventura Limousine & Transp. Serv., Inc.*, (861 F. Supp. 2d 1346 (S.D. Fla. 2012)), an attorney in Florida, over opposing counsel's objections, demanded that depositions in the case take place at a noisy Dunkin Donuts. During the depositions, the attorney who demanded these depositions take place at Dunkin Donuts wore short and t-shirts, played the video game Angry Birds, and drew male genitalia. The lawyer's defense of his behavior, which is typical, was that his actions represented zealous advocacy. The court thoroughly disagreed and disqualified the lawyer and his firm from the case for, among other things, his consistent course of disrespectful and unprofessional behavior.

The *ABA Journal* reported a story in July 2012 about a lawsuit filed by an attorney who slapped a prominent partner during a deposition. In New York, Kenechukwu Okoli, a Manhattan lawyer, sued the cochairman of Paul Hastings employment law section, Allen Bloom, after Okoli slapped the Paul Hastings attorney during a deposition. Okoli claims that Bloom ran up to Okoli's face wagging his finger and shouting, and spittle from Bloom's mouth landed on Okoli's face, all of which Okoli believed justified

his slapping of Bloom. After slapping Bloom, Okoli sued Bloom for one million dollars for assault by spittle and slander based on an allegation that the Paul Hastings' attorney called Okoli uncivilized, ignorant, and incompetent.

When the public hears of these examples of incivility by attorneys

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who are the representatives of the legal system, how could the public not lose confidence in the legal system, and how could a reasonable person maintain a positive perception of lawyers?

In actual practice, uncivil behavior by attorneys can result in extraordinary costs. Besides the costs already discussed—increased costs for clients, increased stress for lawyers, and an increased negative public perception of lawyers—there are several other significant costs of incivility. For instance, incivility by an attorney can cost her a case. As Professor Judith Fischer, a former litigation partner, aptly noted in her article "Incivility in Lawyers' Writing: Judicial Handling of Rambo Run Amok" (*Washburn Law Journal*, Vol. 50, p. 369, 2011), "In a close case, civility may tip the scales toward a lawyer with a reputation for integrity, causing the uncivil lawyer's client to lose the case."

Moreover, pointless bickering over discovery or a contested request for a continuance of a hearing can waste judicial resources through unnecessary motions to compel and opposed motions to continue.

Uncivil attorneys can lose the respect of their legal community, including fellow attorneys and judges. In San Antonio, the seventh largest city in the nation, uncivil attorneys who do not conform their behavior to the civil norms of the legal community can be ostracized. This type of response also occurs in smaller towns and commu-

nities, where a lawyer could also lose business because of a reputation for being uncivil.

The need for increased civility in the legal profession has led to, among other things, over 140 state and local bar associations issuing civility codes with aspirational rules that lawyers should adhere to, several states add-

ing civility to their attorney oaths for newly admitted attorneys (including, but not limited to, Florida, New Mexico, Utah, and South Carolina), and even mandatory civility in a handful of jurisdictions requiring civility from its attorneys (including South Carolina, Florida, Arizona, Michigan, and the US District Court for the Northern District of Texas).

Incivility by an attorney can cost an attorney a case, her reputation, and the confidence of the public. Civility, on the other hand, can vastly improve a lawyer's practice by reducing costs to the client, lowering stress for the attorney, and improving the public's perception of lawyers. ■

ADDITIONAL RESOURCES

- ② Cardozo Public Law, Policy & Ethics Journal, Vol. 11, p. 239, Spring 2013, "Making Civility Mandatory: Moving From Aspired to Required," David A. Grenardo http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188407
- ② HLR: Off The Record, Vol. 5, p. 1, 2014, "An Uprising of Civility in Texas," David A. Grenardo <http://www.houstonlawreview.org/wp-content/uploads/2014/09/Grenardo-David-Final.pdf>

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