

# CIVILITY, COURTESY, PROFESSIONALISM, AND BEHAVING RESPONSIBLY IN AN AGE OF RUDENESS

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A long time ago, when the world was kinder and gentler—and perhaps so was I, there were only “lawyers.” They were people who cared about other people and their problems and about their profession, and who owed a greater allegiance to the legal profession than to money, success, or even their clients.<sup>1</sup> They were counselors, confidants, and often friends who enjoyed their work and were proud of what they accomplished.<sup>2</sup>

Where in the name of change and progress has this concept of a “lawyer” gone? What has happened to that beloved, honest, bifocaled counselor whose eloquence and commitment was epitomized in movie classics such as *To Kill a Mockingbird*<sup>3</sup> or *Inherit*

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<sup>1</sup> Peter T. Fay, *Officers of the Court*, 20 INT’L SOC’Y BARRISTERS Q. 280, 285-86 (1985). Attorneys’ first, primary and overriding loyalty must be to the system. An attorney must be an “officer of the court” before he even meets a client and must remain so throughout his relationship with that client.

<sup>2</sup> As stated by Chief Justice Burger:

In their highest role, lawyers should be healers of conflicts, as such, should help the diverse part of a complex, pluralistic social order function with a minimum friction . . . We lawyers often point with pride to the great achievement of the legal profession – the countless examples of courageous advocates supporting the claims of people who were subject to the abuse of governmental power.

Warren E. Burger, *The Role of the Lawyer Today*, 59 NOTRE DAME L. REV. 1, 2-4 (1983).

<sup>3</sup> Pakula-Mulligan Prod. Inc. & Brentwood Prod. Inc. 1962. Gregory Peck won an Oscar for his brilliant performance as a Southern lawyer who defends a black man accused of rape. The setting is a dusty Southern town during the depression. A white woman accuses a black man of rape. Though he is obviously innocent, the outcome of his trial is such a foregone conclusion that no lawyer will step forward to defend him except Peck, the town’s most distinguished citizen. His compassionate defense costs him many friendships, but earns him the respect of the

*the Wind*?<sup>4</sup> Are the “lawyers and principles” of yesteryear going to be replaced with the image of the “Fortune Cookie Litigator?” or “Call Saul?”

It is no secret that civility is at an all-time low among lawyers and it is not exactly a surprise that the legal profession is not viewed favorably among most Americans, as there is a growing lack of civility in the legal world.

Unfortunately, as a long-time litigator, I have all too often witnessed attorneys who claim to be zealously representing their clients in fact crossing the line and failing to behave responsibly. Such acts of rudeness and bad legal behavior include, among others:

- Nasty letters or toxic emails;
- Hiding the ball during discovery;
- Failure to grant routine courtesies such as extensions of time, scheduling hearings and depositions, etc.;
- Creating an excessive paper trail for billing purposes rather than resolving disputes;
- Making rude and degrading comments about the lawyers, clients and witnesses;
- Using abusive and lengthy objections during depositions and hearings;
- Setting hearings and depositions without consultation or cooperation;
- Continued questioning of witnesses from documents without supplying counsel with copies;
- Pit bull lawyering as a professional tactic also known as “Rambo tactics;”
- Using the courts and litigation for purposes of conflict instigation rather than seeking conflict resolution;

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town.

<sup>4</sup> Metro-Goldwyn-Mayer 1960. The film depicts two headstrong, intelligent, and opinionated lawyers, one believing in the theory of evolution and the other against it, and their courtroom battle with civility and dignity for their respective theories.

Using improper tone and language;  
 Engaging in *ex parte* communications with the court and others;  
 Not knowingly misstate, misrepresent or distort any fact or legal authority;  
 A mindset that litigation is war and that describes trial practice in military terms;  
 A conviction that it is invariably in your interest to make life miserable for your opponent;  
 A disdain for common courtesy and civility, assuming that they ill-befit the true warrior;  
 A wondrous facility in manipulating facts and engaging in revisionist history;  
 A hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation, rather than fact-finding;  
 An urge to put the trial lawyer on center stage, rather than the client;  
 Needless and ineffective histrionics during meetings, hearings, and depositions; and  
 “Confirming” in writing positions that were never taken.

Although unprofessionalism can be readily identified when witnessed, various authors have attempted to further define professionalism, also known as civility. One author, struggling with the difference between ethics and professionalism, states that “[t]he basic distinction between ethics and professionalism is that rules of ethics tells us what we must do and professionalism teaches us what we should do.”<sup>5</sup> The U.S. District Court of New York stated that “[c]ivility refers to more than surface politeness: it is an approach that seeks to diminish rancor, to reconcile and to be open to non-litigious

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<sup>5</sup> Frank X Neuner, Jr. *Professionalism: Charting a Different Course for the New Millennium*, 73 TUL. L. REV. 2041, 2042-43 (1999).

resolutions.”<sup>6</sup>

The present-day concern is that incivility has risen to the level of unethical behavior and is sanctionable and cannot be excused under the rubric of zealous representation, as exemplified by car bumper stickers bragging, “My Lawyer Can Beat Up Your Lawyer.”

Presently, the adversarial process is defined solely in terms of winning; seldom do the methods, means, or expenses involved matter. These new-fangled gunslingers dispute every fact, rehear every order, and cannot be relied upon to remember correctly what was said by the judge at the latest hearing of my Rambo attorney.<sup>7</sup> This behavior is accompanied by repeated motions to amend, motions to compel, motions for extension of time, motions for sanctions, motions for contempt, motions to rehear motions previously reheard, reargued and re-decided<sup>8</sup> and the time slips continue to mount up. In this process, the only motion not filed is a motion to set the matter for trial,<sup>9</sup> for to do so would bring an end to this insanity, and insanity takes hundreds of hours to cure, even if it kills or bankrupts the patient in the process.

To speak of a need for civility, courtesy, and professionalism seems unfortunate. Nevertheless, if we are to keep the jungle from closing in on us, we must reemphasize the requirement that, in a court of law and in the litigation process, all participants must conduct themselves with civility, professionalism, and respect for the law and each other.<sup>10</sup> When attorneys rant and rage, engage in name-calling,

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<sup>6</sup> *Revson v. Cinque & Cinque*, 70 F. Supp. 2d 415, 434 (N.Y. S.D. Nov. 22, 1999).

<sup>7</sup> *See generally* *Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776 (7th Cir. 1991). The court found deliberate attempts to frustrate discovery, repetitious obstructive tactics after the court has determined there was no merit to objections raised and the raising of arguments and statements that were capricious and aimed at stymying discovery efforts all to the degree warranting Rule 11 sanctions.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 781 (“It almost appears as if for some reason the [defense attorneys] did not want the case tried”).

<sup>10</sup> Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1346 (n. 29) (1997) (citing to the survey by the A.B.A. Young Lawyers Division, *The State of the Legal Profession: 1990* (1991)). The 1990 survey asked lawyers to extent to which they have observed lack of courtesy, incompetent representation, or unethical

and almost come to blows, they demean the entire process of law and set a poor example for all witnessing such conduct. If lawyers do not respect the system, how can we expect others to respect lawyers and the legal process?

Good behavior, rather than a sign of weakness, demonstrates a commitment to the higher ideals of the legal system which rise above any individual action. For no matter how brilliant a lawyer's advocacy, and no matter how much time is spent in preparation, failure to behave professionally results in a liability, rather than an asset to the administration of justice.<sup>11</sup> Lawyers must be the standard bearers for their profession. We must meet the challenge and assume the responsibility of disciplining our members, or we will eventually lose the right.

As members of the legal profession, we live out who we are by our actions, and it is time this includes good manners, disciplined behavior, and respect for each other and for the legal system. It is these requirements that are at the core of maintaining and preserving our democratic system.

Perhaps it is time to supplement the code of professional responsibility with a code of personal behavior to ensure civility in courts. Toward this end, I propose the following:

*The Twelve Commandments of Professional Behavior*

Thou shalt not interrupt thy adversary while he or she makes an argument.

Thou shalt not impute to thy adversary an unworthy motive.

Thou shalt not mischaracterize, omit, or misrepresent

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behavior by lawyers, whether colleagues or opposing counsel. Of those responding, 95% stated that they have observed a lack of courtesy at some point in their career.

<sup>11</sup> See generally *Canella v. Bryant*, 235 So. 2d 328, 332 (Fla. Dist. Ct. App. 1970). The Court more specifically stated, "It has been the common practice and courtesy of attorneys . . . to cooperate . . . as it is well their duty to do in the furtherance of justice and as officers of the court." *Id.*

any fact or law to thy adversary.

Thou shalt not be rude, impatient, or discourteous to thy adversary or to any court personnel.

Thou shalt not be disrespectful or discourteous to any judge, magistrate, or general master.

Thou shalt not engage in any behavior designed to manipulate wrongfully or abuse the legal process.

Thou shalt not practice law as a "hired gun," but rather will act independently of thy clients and of thy self-interest.

Thou shalt at all times conduct thyself as an officer of the court.

Thou shalt not create delay.

Thou shalt not utilize the legal procedures to frustrate and increase expense.

Thou shalt not seek only to "win-at-all-costs."

Thou shalt behave unto other lawyers as you would have other lawyers behave unto you.

Some basic decisions must be considered and made. The majority of lawyers cherish and respect the process. Accordingly, it is time to organize and clearly communicate to those who do not that to continue incivility and disruption is simply unacceptable.

It is hoped that the adoption of these commandments will lead to a reaffirmation that practicing law is a profession and not a "business," and that lawyers owe a greater allegiance to the legal profession than they do to their client or to winning.

Perhaps by raising awareness and sensitivity toward the problems of legal behavior among lawyers, courtrooms will one day have chiseled in stone the words "We who labor here seek only truth and seek it with professionalism, civility, and dignity." If future lawyers take these words to heart, then reminders will not be necessary, essays like this one will be an anachronism, and we will again begin to hear the phrase "ethical as a lawyer" in common usage.

*DEDICATION*

This essay is in honor of June Mary Makdisi and John Makdisi, who recently retired from our Faculty, were unanimously granted emeritus status and, as a parting gift, simply asked for the encouragement of scholarship. This speaks volumes to their commitment to the academic profession, scholarship, and to this School of Law.

On a personal note, June Mary, affectionately known to her students as “Mama June,” is a valued friend and colleague. You could always have a warm conversation on a personal basis with her, receive honest and caring feedback, and then leave with a piece of candy from her office’s ever-full bowl of goodies. Her value to the Faculty and Law School is considerable, but to me, her kindness and friendship is what I will remember and miss.

John is the most diligent, hard-working professor and scholar that I have met during my more than thirty years in academia. Ever jotting down information on his “little black book,” he was always available for an intellectual conversation and even good advice. Every morning, I could pass by his office on my way for coffee and he would always be working away on his computer or meeting with a student.

In addition to his excellent performance as Dean, he was a terrific resource and colleague when he returned to the faculty. I will miss him both professionally and personally.

John, June Mary, come back and visit often, and stay in touch. I wish you both much health and happiness.