

At Sidebar

PHILIP W. SAVRIN

“There cannot be a stressful crisis next week.
My schedule is already full.” ~Henry Kissinger

MANY ARTICLES HAVE been written decrying the loss of civility in the legal profession and the resulting tarnished image of lawyers as not only generally unpleasant but also Machiavellian pliers of their

trade who will say or do anything to achieve a desired result. That lawyers are the butt of jokes is nothing new. I still chuckle at a joke I heard years ago—that researchers have replaced lab rats with lawyers because there are some things that rats just won't do—and that is unlikely to change. What I would like to propose, however, is that we approach the problem of lack of professionalism internally as something more than an end in itself. Instead of insisting that lawyers be nicer to each other because that is the “right thing to do,” I propose that we take steps to think “outside the law”—not as a moral imperative but to improve our skills as client advocates without defaulting to all-out combat.

Some of this may be counterintuitive to those who were attracted to the competitive nature of the profession in the first place, having traversed the rigors of law school with other ambitious individuals in order to attain a degree of success as a lawyer. This task is made all the more stressful in litigation, where it is the job of opposing counsel to tackle each other in a metaphysical sense—to look for (and exploit) the weaknesses in each other's reasoning and to look for a fumble or a miscue. The pressure is increased several-fold in the courtroom. For those who have not tried cases in front of a jury, consider the stress of driving 80 miles an hour on the highway with two sides trying to steer the vehicle in opposite directions. The degree of concentration required to follow opposing counsel's steps and missteps can demand a balancing act of maintaining a type of tunnel vision that does not obscure the overall goals.

For many, going toe to toe with other lawyers is simply part of the sport. But even outside the area of litigation, understanding legal concepts and applying them to any given situation is a challenging and demanding endeavor. After all, we are trained to believe that few issues are black or white, and we are urged to look for the unique aspects of a particular case to advance our client's cause—be it by distinguishing existing precedent or, in some instances, by creating new law at the confluence of seemingly divergent legal principles. As lawyers, we have been

taught that the law is a seamless web that is constantly undergoing construction and renovation. It is up to us to find the loopholes—the exceptions to the rule that should apply in a given circumstance.

The allure of the law can also be its curse. The ability—indeed, the need—to read and analyze cases endlessly, to contact yet another witness or pose a question in a slightly different way, or to approach a legal problem from another direction can weigh heavily on one's mind. As any law school student or beginning lawyer can attest, there are not enough hours in the day to complete the demanding tasks at hand. (Question: How many lawyers does it take to change a light bulb? Answer: As many as you can afford.) And yet, the tasks must be completed, and ably so, to meet the expectations that are set.

Even though stress can be a great motivator in the practice of law, it can also attack the well-being of those in its path. It should not be surprising, therefore, that our profession suffers from a high percentage of individuals who suffer from alcohol and substance abuse as well as depression and divorce—problems that have broad implications for one's personal welfare. Given their stature in the community, many lawyers are loath to admit to these problems let alone seek assistance or treatment before their condition becomes unmanageable.

Even without a serious problem developing, however, the stress of being a lawyer can creep up without much notice, taking a toll on one's physical and emotional health. There are no panaceas or magical solutions to these problems, but there are steps we can take as lawyers to avoid some of the pitfalls. Here are a few straightforward suggestions that should be practiced on an ongoing basis:

1. Maintain your physical health, including undergoing routine examinations by a physician. Even mundane activities, such as exercise and eating well, go a long way toward clearing the cobwebs from the brain.
2. Set aside time each day or week to interact with family and friends without talking about work. There is no substitute for having relationships with people who know you well, and there is no way for people to know you well unless you spend time with them.
3. Find interests outside the law. Whether it's a hobby, a sport, or another activity, do something you enjoy. By definition, pursuing outside interests will make your life enjoyable and broaden your social interactions.

4. Do volunteer work in a civic or community organization that does not involve the practice of law. Lawyers are especially skilled in the organizational skills that volunteer groups desperately need. Using these skills outside the legal context adds another dimension to your daily activities.
5. Become a leader in a legal association of your peers. You can learn a lot about yourself and group dynamics by going beyond the self-interest of marketing to the broader concerns of the group.

In summary, it is axiomatic that the practice of law

is a taxing profession. The drive to succeed can be relentless, compounded by competition for clients in what appears to be an increasingly business-driven environment. Taking time to care for ourselves can ameliorate the toll the profession exacts and improve our overall ability to prosper in our endeavors. **TFL**

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investigate, but do not typically penalize, “bad manners” or gamesmanship.

So what can we do to return our profession to an era when “scorched earth” tactics were the exception rather than the rule? There is no easy answer. Some federal courts have implemented guidelines designed to encourage voluntary compliance with standards of civility and professionalism. For example, the Central District of California has developed “Civility and Professional Guidelines,” which are based upon the principle that “[a]s officers of the court, lawyers have a duty to use the law” for “achieving justice.” The guidelines include affirmative undertakings and specific directives for lawyers’ duties to other counsel and to the courts. The Seventh Circuit has promulgated “Standards for Professional Conduct Within the Seventh Federal Judicial Circuit,” which also sets forth 30 “standards” of voluntary undertakings as well as lawyers’ duties to other counsel and the courts. Notably, both of these voluntary guidelines and standards provide that they shall not be used as a basis for litigation or for sanctions or penalties and that nothing therein supersedes or detracts from existing codes or standards of conduct.

It may just be wishful thinking to conclude that voluntary guidelines alone will solve a problem that sanctions and penalties could not. But perhaps the answer lies in something simpler. Retired Supreme Court Justice Sandra Day O’Connor has suggested the following: “Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public’s eyes In my view, incivility disserves the client because it wastes time and energy—time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.”²

Maybe we have to re-educate our lawyers on the actual goal—not to win the battle but to further the clients’ interests. It is true that bullies—whether in the courtroom, the conference room, the playground, or the football field—often get away with “bad acts,”

but bullies do not always get what they want. In a recent court case heard in the District of Puerto Rico, the judge offered the following opinion on the topic: “When a court or a jury sees incivility, it is viewed as a sign of weakness rather than strength, and as an effort to obstruct rather than to present the facts and the law fairly. The result is that the lawyer’s presentation is received with skepticism rather than trust. In turn, this undermines the lawyer’s credibility and ability to persuade the court or the jury.”³

Moreover, with the advent of social media, online networking, and countless search engines, a lawyer cannot escape the reputation he or she has—well deserved or not. Those who exemplify the worst stereotypes of “Rambo” tactics are known among the communities in which they practice, and their predilections are easily discerned. Even though maintaining civility in the face of an unreasonable adversary may be frustrating and unrewarding in the short term, the better course of action is to strive to maintain the trust and respect of other lawyers and judges and to keep your eye on the finish line. Even clients eventually recognize that the immediate benefits gained by the loudest and trickiest counsel often disappear and end up hurting their cause.

Please let me know if you have any thoughts on how the FBA can help restore civility to the practice of law. **TFL**

Few C. Bomchill

Endnotes

¹One court described its role in this regard as “act[ing] as ‘kindergarten cop’ [to] referee a dispute between attorneys caused by one who either never learned or has forgotten the basic good manners others learned before first grade.” *Saldana v. Kmart Corp.*, 84 F. Supp. 2d 629, 640 (D.V.I. 1999).

²Sandra Day O’Connor, *Civil Justice System Improvements*, Speech to American Bar Association at 5 (Dec. 14, 1993).

³*Baez-Eliza v. Instituto Psicoterapeutico de Puerto Rico*, 275 F.R.D. 65, 74 (D.P.R. 2011).