FERN C. BOMCHILL

Restoring Civility

MY FIRST MAJOR federal trial was a multimillion-dollar case (when multimillion was real money). We had a four-month trial and a jury that deliberated for four weeks. We had spent six years in discovery, poring over 50 years of documents stored in in a warehouse (before electronic discovery) and conducting dozens of depositions throughout the country.

Not surprisingly, much of the document review and many depositions were performed by the younger lawyers on the opposing teams. We all had litigation training in law school, but ethics (what we *must* do) and civility (what we *should* do) were not then part of the general curriculum. The Model Rules for Professional Conduct had not yet been drafted by the American Bar Association, much less adopted by the individual states. (The ABA and some jurisdictions had adopted the Model Code, but at that time neither this code nor ethics and civility generally were part of the legal training in law schools or in law firms.) There were few, if any, CLE requirements for ethics or otherwise, and Rule 11 had not yet been incorporated in the Federal Rules of Civil Procedure.

But what we did have seemed to work better than rules and seminars. We had role models who taught us the clear line between zealous advocacy and incivility. To be sure, in our case, there were plenty of disagreements and sparring between opposing counsel—before and during the trial. We certainly strategized for advantage, and more than once I caught my opponents in what I thought were not clear statements of fact or law. However, there was never any question that we were expected to conduct ourselves professionally at all times—ethically and civilly toward our opposing counsel and the court. Accordingly, when we received a frantic call from opposing counsel that his clerk had mailed us, instead of his client, the privileged document containing the lawyer's settlement advice, we agreed to return the unopened envelope immediately. And after the jury returned a verdict in our favor, I received sincere congratulations from the opposing counsel with whom I spent the first six years of my professional life. To this day, we have relationships built on mutual respect and trust.

Obviously, the practice of law has changed. The stakes have gotten higher; competition has become fiercer. Winning the battle—at any cost—has become the prize, even though sometimes this win has nothing to do with prevailing in the war. For example, depositions have become jousting matches, often dominated by aggressive, obstructive, and even hostile conduct. Even nonlitigators have adopted the "no holds barred" approach.

Due to these undesirable changes, and perhaps due to the lack of role models, legal educators supplemented their curriculum with ethics training and rules on ethics and civility were adopted or enhanced. In the deposition arena, the Federal Rules of Civil Procedure were amended in 1993 to require that objections during a deposition be stated "concisely and in a non-argumentative and non-suggestive manner." Fed. R. Civ. P. 30(d)(1). Many states also set stringent rules on the scope of speaking objections during depositions. And most jurisdictions enacted some version of the ABA's Model Rules of Professional Conduct, which, among other things, require "truthfulness" and "fairness" to an opposing party and counsel. As the rules increased, so did the rhetoric. The topics of ethics and civility have popped up in legal writings that urge lawyers to bring "inappropriate conduct" to the attention of the courts and the regulatory authorities.

Either as a consequence of the attention given to ethics and civility or as a litigation strategy, sanctions motions have become quite prevalent and part of the litigation norm. Judges have several tools to use in addressing such motions. In addition to civil procedures rules, courts may rely upon 28 U.S.C. § 1927, which authorizes sanctions against an attorney who "so multiplies the proceedings in any case unreasonably and vexatiously." The fact is, however, that courts are hesitant to use these tools. When it comes to lawyers' dealings with one another, the task of determining which side's story rings true is often too exhausting, petty, or otherwise unsavory for the court to endure.[1] Typically, in the court's view, disputes or delays attributable to a perceived lack of civility are the fault of both parties, and both counsel lose credibility as a result. Likewise, regulatory authorities may

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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**

Philip W. Savrin is a partner with the law firm Freeman Mathis & Gary LLP in Atlanta, Ga. He has held leadership positions in civic and bar associations on both the local and national level. He is a member of the editorial board of The Federal Lawyer.

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

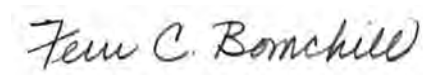
So what can we do to return our profession to an era when "scorched earth" tactics were the exception rather than the rule? There is no easy answer. Some federal courts have implemented guidelines designed to encourage voluntary compliance with standards of civility and professionalism. For example, 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**



Endnotes

[1]One 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).

[2]Sandra 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).