

CIVILITY IN THE COURTROOM

A JUDGE'S PERSPECTIVE

BY SENIOR JUDGE GERALD W. HARDCASTLE

While sitting as a senior judge in another judge's courtroom, I noticed a sign which read, "Professionalism and Civility – The Least that is Expected." It was like mother's voice saying, "Behave while I am gone!" or "Don't tease your little sister!" It was a reminder of the obvious but the judge thought it was important enough, problematic enough, that there be a sign – a warning.

Too often attorneys and litigants view the courtroom as the ultimate bar fight – a place where winning, at whatever cost, is the goal, and where the rules are: there are no rules. Yet court proceedings in the adversarial process are not bar fights but minuets. The expectation is that there will be a reasoned examination of facts and principles under the rules of procedure and the rules of evidence.

One of the great professional experiences for a judge is watching good attorneys examine and cross-examine witnesses and listening to them respectfully argue relevant legal and factual issues. Issues become more clear, applicable law becomes more defined and there is confidence that disputes are better resolved. Litigants win and lose but there

is a sense of civility and rationality. The litigants have had their day in court without being sucker-punched in an abusive and degrading process.

But is it really necessary to remind grown, college-educated lawyers of the obligation to be civil? There should be an agreement that the practice of law, and court proceedings in particular, should be civil. But for some reason, incivility is like looting after a riot: there is understanding that incivility is bad but, hey, everyone else is doing it and they get all the free stuff. There is an implication that incivility works. The purpose of this article is to suggest that incivility in the long term does not serve the interests of attorneys or clients.¹

How Rude Is It?

Addressing uncivil behavior is the part of the daily fare of judges, particularly of family courts. As an example, I limited argument on pre-trial motions. The reason? I found that if attorneys argue motions, the first two minutes are spent arguing the merits of the motion, the next three minutes are spent arguing the opposing party's lack of human worthiness,

and the last three minutes are spent arguing about the opposing attorney's lack of value. The opposing attorney's argument is spent in the same fashion but with the order of points reversed – all of this with numerous objections and interruptions.

My experience is not unique. In listening to other judges speak about their days, the primary reflection is the increasingly uncivil tone of the courtroom. Judges are frustrated. They are distracted, on too many occasions, from the legal and factual issues surrounding the allegations fundamentally in dispute to matters concerning the unprofessional and uncivil conduct of those in court.

And this experience is not unique to family courts. When former U.S. Supreme Court Justice Sandra Day O'Connor spoke at the University of Oklahoma, she stated that only 50 percent of lawyers would choose the legal profession if they had it to do again. She largely attributed this attitude to a lack of lawyer civility.² Lawyers have become dissatisfied with lawyers.

A task force commissioned by the Maryland Court of Appeals to study civility in its court system concluded:

Without exception, these senior practitioners opined that professionalism has declined over the years. The decline is marked by rancorous discovery disputes; loss of trust between lawyers (resulting in an increase in 'defensive practices,' for instance, the perceived need to memorialize every discussion with a confirmatory letter); a breakdown of the traditional mentoring of new lawyers; an increase in the unauthorized practice of law; lack of civility in and out of the courtroom; the failure of courtroom attorneys to treat witnesses and each other with respect; and an increase in lawyer advertising.³

The most startling fact: of the attorneys interviewed by the task force, only one-third wanted to remain in the practice of law for the rest of their careers.⁴

Civility is Good Lawyering

Many continuing education courses are offered on how to do a better job for clients. There is no end to the courses designed to show the "winning strategy" for something or other. I suggest that if you want to be effective in court, one of the best winning strategies is to become professional and civil in your practice, especially when appearing in front of a judge.

Before specifically discussing civility in court proceedings, it is helpful to understand the general nature of what goes on during court proceedings from the judge's point of view. Essentially, court proceedings are about dispute resolution. There are many ways disputes can be resolved between contestants, including everything from coin tosses to wars. Hopefully, as lawyers and judges, we understand the advantages of resolving disputes consistent with the rules of evidence and rules of procedure under the adversarial process.

From the judge's perspective, contested court appearances, whether motion hearings or trials, involve three issues.⁵ First, what is it that each of the parties is requesting? Attorneys should be clear about what is being requested. Second, is it within the judge's purview to grant the request? And third, is what is being asked the best result? Attorneys who present facts and argue consistently within this outline understand how judges think. Those attorneys are going to win – at least within a range of judicial discretion.

Unprofessional and uncivil behavior distorts this process. It leads the judge and the proceedings from the noble job that judges believe they are called to do into a confused jungle. And judges remember with a sense of distrust those who lead them into the jungle. Judicial perception of the value of an attorney's professional character, reputation or skill is not an unfair consideration. It is simply human nature.

Justice Anton Scalia and Bryan A. Gardner, Esq. in "Making Your Case" assert that in court proceedings attorneys should show themselves worthy of trust and affection. Trust is won by honestly presenting the case. Affection is displayed by a positive attitude toward the court, a collegial attitude toward opposing counsel, in a refusal to take cheap shots and in asserting a forthright manner. These positive attitudes are inconsistent with unprofessional and uncivil behaviors.

Some cases can be won by any attorney and some cases will be lost by every attorney. But the great majority of cases are less predictable and in these cases, the character of the attorney influences how effective he or she is. And an attorney's trust and affection – that is, his professional character and reputation – build over time and are difficult to change. Judges do not easily forget the attorney who is less than forthright and honest or who accepts rulings with threats of appeal or emotional criticism. Attorneys who guide judges to make intelligent and legally appropriate decisions, and do so with respect for the process and those within it, are more welcomed.

Some attorneys work very hard to maintain high standards and work very hard to respect the court process; others seem unaware of the impact that unprofessional and uncivil behavior has on the process and on the judge. The point is that civility is good lawyering. Judge John Erlich stated it simply: "In the heat of litigation, emotions and zealous advocacy sometimes get the best of any attorney. I've rarely seen aggressive conduct be effective in the courtroom. Rather, respectful and reasoned presentations are much more persuasive."⁶ Virtually every judge I have ever spoken with agrees. Remaining focused and maintaining a professional and civil attitude are fundamental keys to success in court.

CONTINUED ON PAGE 8 ►

CIVILITY IN THE COURTROOM

CONTINUED FROM PAGE 7

There is a common perception that clients want attorneys who are aggressive and “willing to fight for the client.” Particularly in family court, there are clients who feel that divorces are occasions for bloodletting – the more the better. The reality is that it is impossible to get a pound of flesh through legal proceedings. First, concepts such as no fault divorce, equal division of property and child support guidelines are all designed to take the anger out of family court proceedings. Second, no judge desires to hear testimony relative to the various deeds of the parties during the marriage unless relevant to legal issues the judge must decide, and generally, the really good emotional garbage is not relevant to any issue the judge must decide. Third, approximately 90 percent of all cases settle; thus, the actual venting of all those emotional issues rarely occurs. The reality is that what clients want is to get a fair and favorable decision. This result is attained by a focused, reasoned and civil attorney much more often than one who offends the judge by uncivil behavior.

Clients need to understand that winning is the benefit of a civil, trusted attorney. They need to understand that their interests are best served by an attorney who is trusted and

respected by the judge. From the initial interview the client should be told that being civil and respectful is part of being a successful lawyer: a lawyer that is successful for the client. An attorney’s integrity and credibility, established over time, should not be lost for the sake of an unreasonable client.

A Few Common Rules Regarding Civility

In reviewing what judges have written on courtroom civility, there are a few rules that tend to be consistently mentioned. This list is not intended to be comprehensive and is certainly only the start of addressing the issue of civil behavior.

1. Carefully prepare your case.

When I first came to Las Vegas to practice law, in order to do legal research in the county law library on the weekend, you needed a key to the law library. There were a limited number of keys and they were handed out on a first-come, first-served basis. The reason that Mort Galane was so feared as an attorney was that he always seemed to have a key and could be found in the law library each weekend. You knew that he read everything there was on any issue of law in cases he handled.

2. Be clear, succinct and candid in your oral and written communications to the court and always be honest when representing anything to a judge.

Courtroom process is fundamentally about communication. Good attorneys are clear about what they want and get to the point. And judges trust their representations.

3. Accept the ruling of the judge, subject to appropriate review.

There are various reactions to unfavorable decisions. One response is to immediately inform the judge that you are going to appeal the decision. The reason most judges are not influenced by threats of appeal is that most judges have been appealed and those who have been on the bench for any appreciable time have been reversed. It is simply not new information.

Another tactic is for the losing attorney to question the judge as to how his client is going to live with this decision. This is rather like the 80-year-old murderer who was sentenced to 100 years in prison. Clients are expected to do the best they can. It is surprising, however, how many clients can comply with an order once the order is entered.

The best advice after an adverse decision is to accept the ruling, thank the judge and opposing counsel for their courtesy, and leave the courtroom. If the decision is flawed, allowing the judge to reconsider his decision by an appropriate motion supported by law and reason is much more likely to get the result you desire than an immediate attack.

4. Maintain emotional self-control.

The judge is entitled to expect attorneys to assist in maintaining dignity and decorum in the courtroom. Obviously, there should be no inappropriate faces, gestures or comments which disrespect the judge, opposing counsel or opposing parties. If you want a good role model, think of Gary Cooper awaiting high noon: a quiet, reasoned, but elegant and effective man. He would have been a good trial attorney.

5. Learn and observe local rules regarding practice before the court.

There has been a deterioration of simple practices before the court in recent years. There has been an increase in attorneys who rudely arrive late without notifying the court. Attorneys frequently do not rise when addressing the judge and often treat oral argument as if it were a casual conversation in which interruption without purpose is allowed. There is an increase in the amount of food and beverages brought into the courtroom. No judge enjoys enforcing rules of practice and decorum.

One of the common points made by judges in other jurisdictions is the issue of addressing judges as “Sir” or “Ma’am.” I thought that it was just my sensitive ears but there are many judges who believe such addresses are too familiar and too demeaning.

There are many other specific rules that could be addressed but fundamentally, civility is a matter of attitude. It is about believing that civility and professionalism are what is best for your client and for your practice. Judges understand that an attorney can have a bad argument or a bad day but attorneys who consistently upset proceedings, misrepresent or badly distort, or are otherwise uncivil will ultimately fail to convince the judge. At least in court, nice guys do not finish last.

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- 1 The adversarial system places the control over the process in the litigants. Fundamentally, the judge has the decision-making obligation and is otherwise to remain neutral and passive. The judge is allowed to interfere in the process only to make certain that there is fairness. Accordingly, while the judge may address issues of professionalism and civility, the primary obligation is on the parties in their presentations to conform to rules and procedures. There is nothing in the adversarial system that suggests toleration of unprofessional or uncivil behavior.
- 2 O'Connor, Justice Sandra Day, Professionalism: Remarks at the Dedication of the Univ. of Okla. Law School Bldg. and Library (2002) wymcases.courts.state.wy.us/application/oscn/deliverdocuments.asp?citeid=434236.
- 3 Hon. Lynne A. Battaglia, Chair, The Maryland Jud. Task Force on Professionalism – Report and Recommendations pp. 3-4 (Nov. 10, 2003).
- 4 *Id.* at 20.
- 5 This analysis is adopted from Scalia, Justice Anton, and Gardner, Bryan A., “Making Your Case: The Art of Persuading Judges” (2008).
- 6 Erlich, Hon. John P., www.wsba.org/media/pubication/barnews (Aug. 2008).