

## A Noble Profession

**M**y first interaction with lawyers occurred when I attended high school in Texas and participated in our school's mock trial program. Our mock trial program formed as a result of the national concern that the trend among young people was toward a lack of respect for our laws and our legal system. These programs grew in the 1970s in Texas as well as throughout the country. The hope was that high school students would gain a positive educational experience regarding the legal system. In Texas, the programs were so successful that a statewide competition began in 1980. The statewide competition has now been running for more than 30 years, has awarded thousands of dollars in scholarships to student participants and is recognized as an approved academic competition by the Texas Education Agency.

Two lawyers who were alumni of my high school volunteered their time to coach our team and prepare us for the local competition. The two lawyers gave us the hypothetical fact pattern of a civil case and then worked with us over several weeks, giving us guidance regarding courtroom procedures and trial preparation. They emphasized as a guiding principal courtroom decorum, which, among other things, required that we display the utmost respect to all courtroom participants, and, in particular, the judge to whom we were to refer as "your Honor." They also emphasized the importance of civility toward our opponents, which included not only referring to opposing counsel in the courtroom by their surnames but refraining from making any type of disparaging personal remarks or displaying acrimony toward our opponents. The two lawyers also required that at the end of the competition, my team members and I shake hands with our opponents. They were great role models and mentors for the entire team. The mock trial program accomplished what it set forth to do. I had a great sense of awe and respect for the legal system. I perceived the two lawyers as belonging to a noble profession of which I wanted to be a member.

### An Uncivil World

My entry into the legal profession coincided with several developments that many have recognized as transforming the practice of law into a profession that is no longer guided solely by the standards set forth by those two volunteer lawyers. Rather, civility is now often a casualty of another guiding principal that says we must zealously represent our clients. Unfortunately, there are some who construe zealous representation as requiring scorched earth litigation tactics. Strategic incivility in discovery, motion practice and at trial, is no longer uncommon. Astonishingly, it is not unheard of for members of our profession to display incivility toward judges. I identify below three developments that prompted this transformation.

First, beginning in the 1980s, the increasing competition for clients led many big city law firms to expand their size and presence to other metropolitan areas in order to market themselves as better able to handle a client's statewide or nationwide needs. Law was becoming less local and the need to develop relationships with opposing counsel was no longer essential, as lawyers on opposite sides were less likely to regularly see each other in court. Television and media began to portray the practice of law as glamorous and a path to wealth. Although lawyers were beginning to command top salaries, television and media did not disclose the demand for an ever-increasing number of bill-

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able hours. It became customary for the big law firms to file pro forma motions regardless of whether the litigation truly required the motion or actually advanced the litigation in a meaningful way. The practice of law was becoming more a business.

Second, the dialogue in the media, beginning with the cable networks, was devolving into abrasive exchanges and reflected a trend toward incivility in the general population. The pundits on the various media outlets were perfecting the practice of inciting their audiences through vitriol and inflammatory commentary. This type of dialogue in the media is no longer unusual and has likely influenced at least some of the incivility we are seeing in our profession as reflected by interactions between lawyers in and out of court.

Third, the emergence of revolutionary technology, which allows us to communicate with one another more efficiently, has also facilitated the propagation of uncivil communi-

cation among and between members of our profession. One example is the flaming email, which might just be the epitome of incivility. Social media, at once creating a method by which to remain instantly connected, has also served as a vehicle for uncivil behavior. This new frontier of communication requires a more deliberate effort at establishing protocols for how we exchange information.

### What Was It Like Before

I have spoken at length with veteran members of the local Bar about the state of civility in the 60s and 70s, before these trends began to transform our profession. This is what I learned.

The Bar was a small group of lawyers. San Diego Trial Lawyers Association, which is what Consumer Attorneys of San Diego was called before the name change, totaled about 25 members and they would meet for lunch in the basement of the U.S. Grant. The defense lawyers Bar num-

bered about 50 lawyers and they mainly did insurance defense work. All lawyers were on a first name basis and for the most part, cordiality and camaraderie prevailed among and between both sides of the Bar. Lawyers who engaged in uncivil conduct were at risk of receiving what was referred to as the "Golden Ass" plaque.

The potential of being a recipient of the plaque was a strong incentive to be civil. There was no lawyer advertising and because referrals were the biggest source of cases for most lawyers, a good reputation was critical.

Insurance defense work was all local. It was not uncommon for opposing counsel in an injury case, and on occasion the adjuster, to personally meet at the beginning of the case, even over lunch, and discuss the case and its merits. Not only would such discussions often lead to early resolution of a case but insurance companies would send more cases to lawyers who resolved cases early. There simply was

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There was rarely a need for the ubiquitous confirming letters of today. Your word was your bond with regard to agreements reached with opposing counsel. Discovery motions were handled in a single department and judges identified lawyers who repeatedly engaged in sharp practices as acting outside the professional standards of San Diego lawyers.

Lawyers would return calls and in letters addressed each other by their first name in order to promote civility. Secretaries would often suggest different wording if a dictated letter appeared to contain rude language.

Lawyers litigated against each other in such a way that at the end of the case, the opponents would be able to shake your opponents hand and maintain a good working relationship. That part sounds familiar and much like what those two volunteer attorneys told me I should do many years ago during my mock trial competition in high school.

### Where Do We Go From Here

There is no shortage of guidance in our profession on civility. During the past few years the American Bar

Association has made a commitment to promote civility. The American Board of Trial Advocates and the State Bar of California have created civility guidelines.

The San Diego County Bar Association also created its own attorney code of conduct. Not surprisingly, much of what is in these guidelines is just plain commonsense.

My discussions with senior members of the Bar regarding civility has led me to believe that the following approach is a good start on the path of civility. First, at the start of the case and long before you even file your Case Management Statement pick up the phone and call opposing counsel to introduce yourself. Take time to discuss the case, the discovery you anticipate you will need and potential dispositive motions you foresee. If nothing else, this sets the tone for the remainder of the case. Second, talk to opposing counsel before unilaterally scheduling a deposition. If opposing counsel has already noticed a deposition, don't set a deposition for a date just before the already scheduled deposition. Third, consider having face to face meetings regarding discovery disputes.

You will likely accomplish more this way rather than simply exchanging twenty (20) page meet and confer letters. Third, keep your word. If you

agreed to do something, then do it and stand by your word. Don't play "gotcha." Fourth, make reasonable agreements regarding email communication and the protocol you will follow in using email communication. That means no flaming emails. Fifth, return opposing counsel's phone calls. There is no quicker way to have the relationship deteriorate than to refuse to return phone calls. Finally, litigate a case in such a way that at the end of the case, you are able to shake your opponents hand.

I know there are many members of the bar who follow this approach. If, however, you find yourself in a situation in which you can not remember all of the civility guidelines prepared by the various bar associations, or even the approach described above, all you need to remember is the last guideline above from which all other civility guidelines flow: litigate a case against opposing counsel in such a way that at the end of the case, you are able to shake your opponent's hand. I first heard this from the two attorneys who coached my high school mock trial team many years ago. Several of the various association guidelines on civility recommend this approach. It makes absolute sense and I will strive to follow that guideline. I encourage you to do the same. **TBN**

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