ARTICLE: Lawyer Certification, Civility, "Good Moral Character," and Pressures for Conformity

2001

Reporter: 25 J. Legal Prof. 101

Length: 8258 words

Author: Harry Cohen *

LexisNexis Summary

... In the past few years the Chief Justice of the United States has embarked on a mission to acquaint all of us with the fact that "civility" and "competence" are lacking in many of our American courtroom advocates and that the legal profession is generally lax in enforcing standards of legal ethics. ... Although we should not take Professor Cuddihy's thesis too literally, his ideas are thought provoking to one interested in the American legal profession's attitudes toward civility and certification. ... The term "moral turpitude" was condemned by Professor Bradway in 1935 as a concept which is "vague, nebulous . . ." with "a discretionary meaning," and his point was amply demonstrated in a Kansas case, State v. Bieber, where a lawyer was disbarred for possession of liquor during the great experiment, but whom one judge said was really disciplined because he advised his clients to evade the law. ... Although it would be untrue to say that American lawyers have been coerced into conformity and silence on controversial issues, it can be argued that the judiciary has often found lawyers "unfit to practice law," because of a lack of civility, good manners, or for merely thinking unpopular attitudes aloud. ... Yet a solicitor of more than twenty-five years experience has written in 1975 that the English barrister is quite regularly "unavailable" and it is "a fact of professional life" that the barrister's clerk is the decision maker concerning what cases his principal shall accept. ...

Text

[*101]

In the past few years the Chief Justice of the United States has embarked on a mission to acquaint all of us with the fact that "civility" and "competence" are lacking in many of our American courtroom advocates and that the legal profession is generally lax in enforcing standards of legal ethics.

In a 1971 speech before the American Law Institute, called "The Necessity for Civility," [1] Justice Burger called for a kind of definitive code of "personal behavior to insure civility in courts," [2] because

> . . . civility is to the courtroom and adversary process what antiseptic is to a hospital and operating room. The best medical brains cannot outwit soiled linen or dirty scalpels--and the best legal skills cannot either justify or offset bad manners.

With all deference, I submit that lawyers who know how to think but have not learned how to behave are a menace and a liability, not an asset, to the administration of justice. And without undue deference, I say in all frankness that when insolence and arrogance are confused with zealous advocacy, we are in the same trouble the courts of England suffered through more than a century ago. Today English Barristers are the most tightly regulated and disci-

---

* Marc Ray Clement Professor Emeritus of Law, 1954. This Article is a reproduction of the first article that Professor Cohen wrote in Volume 1, in the Spring of 1976, for The Journal of the Legal Profession. The blue book style conforms to the time this Article was written.

[1] Burger, The Necessity for Civility, 52 F.R.D. 211 (1971).

[2] Id. at 217.

plined in the world and nowhere is there more zealous advocacy. [3]

Two months later, he told the American Bar Association that the Bar must tighten its regulations concerning lawyer ethics. [4]

The ABA reacted to its "warning" by establishing a Special Committee **[*102]** on the "Moral Fitness and Character of Applicants for Admission to Law School," which had the task of re-examining "the feasibility and wisdom of establishing systems for screening applicants for admission to law school as to moral fitness and character for admission to the bar . . . ." [5] Nothing of substance has ever been heard from or about this committee.

On November 26, 1973, the Chief Justice, addressing the Fordham University Law School, noted that one-third of our trial lawyers in "serious cases" are "not really qualified to render adequate representation . . ." [6] because of incompetence, and many lack etiquette, manners and professional ethics. [7] He suggested that some system of "certification for trial advocates" be created based on the British model where "the quality of the English Barristers is uniformly high . . . ." [8]

To summarize this bit of recent history is not to berate or criticize the Chief Justice, mainly because little of this is new. Yet the Chief Justice is a catalyst of this train of thought, and it is time for common elements in these ideas to be brought together.

Although there can be no tolerance of disorderly conduct by lawyers or anyone else in courtrooms, and for that matter anywhere else, the lawyer has a right and a duty to express ideas he believes will help his client or generally aid the search for truth. However, among those who agree with Justice Burger, "civility" or even impertinent conduct by lawyers are never defined. No distinction is made between competence and behavior, with the resulting conclusion that one must be well behaved, good mannered and courteous in order to be a competent lawyer, especially a trial lawyer. If one must conform in all respects to the mores of one's community in order to be competent, i.e., if good manners, etc., are part and parcel of competence, there is an important point being made. If competent lawyers must be overly careful in expressing ideas and thought processes, a real question arises as to whether the welfare of our system is being enhanced. A great deal of valid change has been nurtured by imaginative nonconformists, and the legal profession has produced its share. Ideas can be expressed in courtrooms and elsewhere without tumult and shouting. The views put forth by the Chief Justice conjure specters of narrow control of trial lawyers by an established oligarchy enforcing vague, subjective standards. This vision is nurtured by past history and a fear that such certification methods will be applied to other areas of the practice of law. **[*103]**

Because of our historical experience any demands for more lawyer certification (we are "certified" already through bar examinations) and more civility must be open to question. It has been argued that the organized bar associations have often been guilty of xenophobia. [9] It may be coincidental, but during periods of national stress or periods of tension for the legal profession, either real or artificial, the organized bar has reacted vigorously to any challenge to the status quo. [10] It has been argued that the ethical standards promulgated in 1908 by the American Bar Association relating to solicitation and advertising, excluding all notice of specialization to the public, were directly aimed at "low status urban lawyers," often ethnic types who were not graduates of the "decent" and "respected" law schools, and who

---

[3] Id. at 215.

[4] Burger, The State of the Federal Judiciary--1971, 57 A.B.A.J. 855, 857-58 (1971). Four years later, the Chief Justice exorted the state supreme court justices to drastically regulate the conduct of the Bar. N.Y. Times, Aug. 6, 1975, at 35.

[5] Report of the Section of Legal Education and Admissions to the Bar, 97 A.B.A. Rep. 453 (1972).

[6] Burger, The Special Skills of Advocacy, 46 N.Y.S.B.J. 89, 91 (1974).

[7] Id. at 95.

[8] Id. at 91.

[9] Auerbach, The Xenophobic Bar, The Nation, June 19, 1972, at 784. "Today again--as early in the century during the Red Scare after World War I and in the McCarthy era--the legal profession equates character with conformity and, by so doing, practices politics under the guise of preserving professionalism." Id.

[10] Id. "There is a venerable tradition of professional concern with character, but anyone familiar with the history of the American legal profession knows that this anxiety is episodic. It emerges during periods of national stress when professional elite groups are upset by the swift pace of social change, by sharp challenge to the status quo, or by what they perceive as rampant lawlessness and disorder." Id.

were causing the profession to be lowered in "public esteem." [11] In the 1920's, an effort was made, especially by the Pennsylvania Bar Association, to "strengthen the character" of aspiring lawyers, by not admitting applicants who had nonconformist attitudes generally, or toward the practice of law, or who said that they "might" do certain things under questioning by the bar examiners. [12] Many said the profession was "overcrowded," an old and still used **[*104]** euphemism for the idea that too many lawyers were going after a small percentage of the population's legal business (the commercial community), leaving the others to scramble after personal injury, criminal and divorce work. Only recently has it been realized that most of the population has much more legal work to be done.

In the cold war days, the American Bar Association resolved that all lawyers who are "members of the Communist Party of the United States" or "who advocate Marxism-Leninism" be expelled from membership and that "all state and local bar associations or appropriate authorities immediately commence disciplinary actions of disbarment" for such activity [13] [italics added].

If courts consistently emphasize that lawyers' manners and thoughts are as important as their actions and thought processes are considered germane to "certification," the profession could be increasingly subjected to what has been called a "bureaucratization of spirit," [14] which pervades our society. Although the proponents of more certification and more civility may be shocked by the thought, their increasingly stringent demands are actually part of a large scale effort toward the invasions of privacy and harassment of those who disagree with governmental trends, either toward "equalitarian uniformity" [15] or in the direction of other kinds of despotism. **[*105]**

What is Civility?

Civility can be generally defined as that mode of behavior which makes a restrained and moderate society possible. [16] The idealists among us think of civility as those actions which demonstrate courtesy and dignity toward all, friends as well as opponents, those who agree and those who do not. A civil person is moderate and restrained toward all individuals, groups and ideas. Over time, however, those with political and social authority have used the concept of civility to sustain their power and position in society. The ruling elite has often used the term civility to describe toleration of each other's views and essential dignity. Those governed were supposed to obey the established order and remain civil toward it with similar conduct. [17] Civility thus utilized as a political tool justifying acts of authority has been rationalized under duty concepts derived from natural law, with moral responsibilities emphasized. Once, however, it is demonstrated that the ruling regime acted in a less than divine manner, the concept of civility loses a moral foundation. [18]

---

[11] Auberbac, supra note 9, at 784. An expanded version of these arguments may now be found in J.S. Auerbach's Unequal Justice (1976). Although the work was published while this article was being published, and it is too late to discuss it here, the book is a documented history of Professor Auerbach's version of American bar associations and their impact on American law and lawyers. Although its substance may appear distasteful to many 1976 lawyers, we cannot escape the facts of our past, which demonstrate bar associations' and their leadership's hostility to changing social conditions, to say nothing of class, religious, racial and ethnic bias.

[12] Douglas, The Pennsylvania System Governing Admission to the Bar, 54 A.B.A. Rep. 701 (1929). The writer gave brief digests of the grounds of rejection in a great number of cases. Some of these follow, and it should be noted that these are direct quotes of reasons for rejecting an applicant to practice law.

[13] Proceedings of the House of Delegates, 76 A.B.A. Rep. 531-32 (1951). Although it was argued by some that the term "Marxism -Leninism" was a vague term and Whitney North Seymour of New York moved to insert words like "and who has forwarded the objectives of" and to substitute for the term "Marxism-Leninism" the words "the overthrow of the government by force," such protestations were voted down. Mr. Canfield said that the term "Marxism-Leninism" is consistently used to describe the entire doctrine embraced by communism and is a more complete definition than that suggested by Mr. Seymour! Id. at 531.

[14] Nisbet, The New Despotism, 59 Commentary 31, 42 (1975). "A century ago, the liberties which now exist routinely on stage and screen, on printed page and canvas, would have been unthinkable in America--and elsewhere in the West, for that matter, save in the most clandestine and limited of settings. But so would the limitations upon economic professional, educational, and local liberties, to which we have by now become accustomed, have seemed equally unthinkable a half century ago . . . ." Id. at 43.

[15] Id. at 42.

[16] Mount, The Recovery of Civility, 41 Encounter 31 (1973).

[17] Id. at 36-37.

[18] Id. at 37.

Lately, civility is more utilized as a symbol of toleration either for the majority action or a minority viewpoint. [19] In a democratic situation, there is a functional reason for civility. All viewpoints are assessed, and then preferences are voted. In this context the functional necessity for majority rule prevents chaos and disorder. However, if there is no moral or functional justification for civility, it becomes a neutral idea, which any individual or group, majority or minority, accepted or not, may discard when any cry of injustice or disagreement, real or apparent, appears. [20] **[*106]**

The extent to which any society will exercise civility is a matter of tradition and circumstances. Will a society truly tolerate conduct or attitudes which are repugnant to the majority's sense of order and justice? If repugnant people or ideas are tolerated, how must those persons or ideas be delivered and packaged? There is always a nagging fear that a society will not have "an inbuilt governor" [21] and the majority will make undue demands on minorities, i.e., nonconformists, who cannot sincerely accept the restrictions ordered.

In a recent book by Professor John M. Cuddihy, The Ordeal of Civility, [22] it is argued that the European-American Protestant dominated culture has increasingly turned the concept of civility into an esthetic judgment, an etiquette which makes artificial behavior, politeness, niceness, so-called good taste and restraint, the absolute values in society. [23] Those who do not conform do not enter society at most of its higher levels. [24] It is argued that western civilization helped create Marxism, Freudianism and even the Chicago Seven trial situation by demanding too much of what is labeled the "Protestant Etiquette," [25] another label for a kind of civility.

Both Freud and Marx, it is said, went through much of the same type of conflict with the prevailing concept of civility of their times. Freud thought western civilization to be founded on the "suppression of instincts." [26] He argued that arbitrarily created and imposed manners, forms, social rites, and decorum are often used as masks for lust, greed or even violence. [27] The coarse and crude public world of economic and social relationships, as well as the private world of sexual intercourse, were "gentled" [28] by the society, producing only the appearance of ethics and morality. [29] Although Freud did not believe the system entirely nihilistic, he still resented what he thought to be a sickness. [30]

The first political article Marx wrote was on censorship. [31] He had **[*107]** been requested to restrain himself, but he could not suffer what he thought to be the "inherent tension" [32] in the civilization between truth itself and the problem of speaking and writing the truth. For Marx, "tactlessness was no crime." [33] Restraint on writing or speaking

---

[19] Id.

[20] Id. at 38.

[21] Id. at 43.

[22] J.M. Cuddihy, The Ordeal of Civility (1974).

[23] Id. at 13.

[24] Id. at 38. "The ticket of admission to European society was not civil rights but bourgeois rites. The price of admission as not baptism, as Heine thought, but Bildung and behavior." Id.

[25] Id. at 4.

[26] Id. at 40. Freud wrote in 1908: "'Our civilization is, generally speaking, founded on the suppression of instincts. Each individual has contributed some renunciation--of his sense of dominating power, of the aggressive and vindictive tendencies of his personality.'" Id.

[27] Id. at 44, 54, 66.

[28] Id. at 66.

[29] Id. at 42. "There were ever to be constraints, a matter of conforming externally to the rules of others by concealment and dissimulation, a politics rather than an ethics or an etiquette." Id.

[30] Id. at 105. "You may suspend ethics and still have a tolerable world, but when you eliminate also the appearance of the ethical --namely, manners--nihilism is born. Freud was resentful enough to try this experiment, cautious enough to limit it." Id.

[31] Id. at 121.

[32] Id. at 123. "He perceives accurately that the civil society of bourgeois culture will yield on everything except procedures; it will concede all nouns, if it can retain control of the adverbs." Id.

[33] Id. at 128.

what one thought to be the truth was an "iron cage." [34] He finally came to the idea that the "primal savagery" [35] of the business struggle was masked by slogans and passwords, pretense or hypocrisy.

Although we should not take Professor Cuddihy's thesis too literally, his ideas are thought provoking to one interested in the American legal profession's attitudes toward civility and certification. In order to have a stable, orderly legal system, we must ask all lawyers to give up their unique personalities their conspicuousness, their authenticity? [36] Or is it better for the society that obsession of any degree be denied a place in the legal profession? It has been argued that the great cultural triumph of our middle class dominated society is the bringing into disrepute of obsession or fanaticism. [37] Yet, while most of us abhor fanatics, radicals and extremists, is it necessary to the general welfare that we deny admission to the professions of those persons and make professional pariahs of them?

Good Moral Character--Moral Turpitude and Nonconformist Attitudes

In the past century or so, the American legal profession and the courts have denied admission to or have disciplined lawyers who refused to take oaths or state their political, moral and social attitudes. Thus persons who do not conform to accepted patterns of delivering their opinions or views do not have "good moral character," which all lawyers must demonstrate before being admitted to the bar.

The conceptual umbrella for the testing of "character" has been the judge-made ideas [38] now codified in Disciplinary Rule 1-102 of the ABA Code of Professional Responsibility. It is said that lawyers shall not "engage in illegal conduct involving moral turpitude . . ." [39] or "engage **[*108]** in any other conduct that adversely reflects on his fitness to practice law." [40] The term "moral turpitude" is extensively used in many statutes as well as in disciplining professionals generally. [41] There are cases involving the definition of moral turpitude concerning deportation of aliens, impeachment of witnesses, defamation proceedings and numerous other situations. [42]

Courts have held lawyers to lack moral turpitude where there was habitual intoxication, [43] bigamy, [44] operation of a house of prostitution, [45] conduct amounting to adultery or fornication, [46] operation of a gambling room [47] and for continuously making "anonymous, embarrassing, disturbing and annoying telephone calls" to the office of a physician. [48] Decisions have not always been consistent, and in situations such as automobile traffic misconduct, income tax violations, assault and battery, and manslaughter there is little uniformity. [49]

The term "moral turpitude" was condemned by Professor Bradway in 1935 as a concept which is "vague, nebulous .

---

[34] Id. at 125.

[35] Id. at 141.

[36] See Broyard, Books of the Times, N.Y. Times, January 2, 1975, at 31.

[37] J.M. Cuddihy, supra note 22, at 125. "A man Marx obsessed, he attacks bourgeois civil society whose 'great cultural triumph is,' as Podhoretz observes, 'precisely that it brought obsession into disrepute.'" Id.

[38] In re An Investigation of the Conduct of the Examination for Admission to Practice Law, 1 Cal. 2d 61, 68, 33 P.2d 829, 832 (1934); see Comment, 15 Stan. L. Rev. 500 (1963).

[39] ABA, Code of Professional Responsibility, DR 1102(A)(3).

[40] Id. at DR 1-102(A)(6).

[41] Weckstein, Maintaining the Integrity and Competence of the Legal Profession, 48 Tex. L. Rev. 267, 276-77 (1970).

[42] Bradway, Moral Turpitude as the Criterion of Offenses that Justify Disbarment, 24 Cal. L. Rev. 9, 15 (1935).

[43] See Annot. A.L.R.3d 692, 694-95 (1968).

[44] See Annot., 36 A.L.R.3d 735, 739 (1970).

[45] Id. at 740-41.

[46] Grievance Committee of Hartford County Bar v. Broder, 112 Conn., 263, 152 A. 292 (1930) (disbarment ordered).

[47] Matter of Fischer, 231 App. Div. 193, 247 N.Y.S. 168 (1930).

[48] State v. Ablah, 348 P.2d 172 (Okla. 1959).

[49] See Weckstein, supra note 42, at 19.

. . ." with "a discretionary meaning," [50] and his point was amply demonstrated in a Kansas case, State v. Bieber, [51] where a lawyer was disbarred for possession of liquor during the great experiment, but whom one judge said was really disciplined because he advised his clients to evade the law. [52] The quest for meaning on the subject was characterized by Justice Robert Jackson as one involving a "wearisome repetition of cliches" and "irrationality," [53] often bearing no apparent relationship to fitness for the practice of law. **[*109]** Despite such pronouncements there are cases where lawyers have been held to lack moral character and fitness to practice law for expressing unpopular ideas. [54] In In re Summers, [55] a conscientious objector, who refused to take an oath to bear arms for the state of Illinois, was denied admission to the bar. Admission has been also denied in a case where the applicant refused to take a non-communist oath and had written critically of the country's policies. [56] The reason given for not admitting such an otherwise qualified person was based on a lack of cooperation with bar officials. The most recent United States Supreme Court decision on the subject upholds oaths which demand acceptance of state and United States constitutions "without any mental reservation," [57] and those who do not sign such oaths are refused admission to practice law. In these decisions, as usual, the concept of moral character is utilized, [58] and, in spite of the dissatisfaction with the vagueness and subjectivity of the standard, it seems that a great deal of outspoken resentment [59] has once again been beaten back.

Although it would be untrue to say that American lawyers have been coerced into conformity and silence on controversial issues, it can be argued that the judiciary has often found lawyers "unfit to practice law," because of a lack of civility, good manners, or for merely thinking unpopular attitudes aloud. The situation is not of recent origin. The original lawyers for Peter Zenger were "struck out of the roles of attorneys" without a hearing because they signed and offered into the records an "exception denying the legality of the judges and their commissions." [60] Courts generally do not accept much so-called "impertinence" **[*110]** even when conduct is constructive [61] and have disciplined lawyers either by contempt citations [62] or suspension from practice when they express disagreement on an assortment of ideas. [63] Granted that excesses of zeal, emotion and accuracy of the lawyer are difficult to tolerate, nevertheless appellate decisions do not give lawyers much leeway. [64]

The prevailing judicial attitude seems to discipline or punish bar applicants and lawyers for their attitudes as much as for their overt actions or activities. The recent handling of the Alger Hiss case in Massachusetts is a good example. On April 4, 1975, Alger Hiss was denied reinstatement to the Massachusetts Bar by the Board of Bar Over-

---

[50] Bradway, supra note 42, at 19.

[51] 121 Kan. 536, 247 P. 875 (1926).

[52] In a concurring opinion, Justice Harvey said that he conceded that the mere possession of intoxicating liquor does not necessarily involve moral turpitude, but

[53] See Weckstein, supra note 41, at 278.

[54] See the cases collected in Note, The Imposition of Disciplinary Measures for the Misconduct of Attorneys, 52 Col. L. Rev. 109, 1051 (1952).

[55] 325 U.S. 561 (1945).

[56] In re Anastaplo, 366 U.S. 82 (1961) (Bar Committee engaged in a "wide-ranging exchange" to explore such things as Anastaplo's "abstract belief in the 'right of evolution . . . .'"). See also Konigsberg v. State Bar of California, 366 U.S. 36 (1961) (In this case, a companion to Anastapkoi, Konigsberg unequivocally denied any belief in violent overthrow of government but he refused to sign any oath.).

[57] Law Students Civil Rights Research Council, Inc. v. Wadmond 401 U.S. 154 (1971). See Annot., 33 L. Ed. 2d 865.

[58] In the Wadmond case, the Supreme Court emphasized the Anastaplo and Konigsberg cases, and it seems they are still good law. 401 U.S. 154 (1971).

[59] In the first of the famous Konigsberg decisions, wherein an applicant for admission to the bar refused to sign any oath, Justice Black said that the term "good moral character"

[60] N.Y. Times, April 7, 1975, at 33.

[61] See Lawson, Public Criticism of the Courts by Lawyers: A Problem in Legal Ethics, 15 Ala. L. Rev. 461, 472-74 (1963). See also B. Twiss, Lawyers and the Constitution 1962) for a discussion of "respected" lawyers for large monetary interests guiding the thought processes of judges.

[62] See Annot., 27 L. Ed. 2d 953, 963 (1970).

[63] See Annot., 14 L. Ed. 2d 934, 954 (1965).

[64] See Lawson, supra note 60, at 471. See also 12 A.L.R.3d 1408 (1967).