

Illinois Bar Journal  
May, 2008

Column

The Judge's Corner

**\*260 ARE CIVILITY AND ZEALOUS ADVOCACY COMPATIBLE?**

Forceful Arguments, Based in Reason Delivered with Civility, Can Change Hearts and Minds Where Rudeness and Personal Attacks Will Not

Hon. Ron Spears [\[FN1\]](#)

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Judge Justice was in chambers reviewing the files for a scheduled motion hearing in a personal injury suit. He had recently been assigned the case for trial and asked the bailiff to invite the opposing attorneys into chambers for an informal discussion of how best to proceed during the hearing.

After a lengthy delay, the bailiff returned and nervously said: "The plaintiff's attorney refuses to come in and says she does not speak to a judge about a case unless it is in open court with a court reporter present!" The judge felt his blood pressure start to build, but restrained his immediate impulses and informed the bailiff the hearing would start in court at the scheduled time.

Looking back at the court files, the judge recalled pending motions for sanctions alleging the plaintiff's attorney had been obstructive and abusive to witnesses and the opposing attorney during depositions. After taking the bench and hearing arguments on the various motions, it became clear to the judge that plaintiff's attorney was engaging in strategic incivility -- she was choosing to bully. Equally offensive to the judge was that she apparently was convinced that her behavior was justified by a duty to zealously represent her client. Unfortunately, the plaintiff appeared to be encouraging the conduct of his attorney.

Following the hearing, the judge decided to take a few days to calmly deliberate on proper rulings and how to address the civility issues. Sadly, this was not an isolated incident. A November 2007, Survey On Professionalism conducted on behalf of the Illinois Supreme Court Commission On Professionalism revealed that unprofessional behavior among lawyers is commonplace. It takes the form of prejudicial remarks, rudeness, and strategic or intentional mis-behavior (the survey, along with examples of civility codes, can be viewed at <http://ilscpc.org/>). It typically happens outside the view of the judge but sometimes takes place in court.

**Civility "for the sake of living together"**

Is civility inconsistent with zealous advocacy? The only mention of the word "zealous" in the Illinois Supreme Court Rules of Professional Conduct appears in the last paragraph of the preamble:

The lawyer-client relationship is one of trust and confidence. Such confidence can only be maintained if

the lawyer acts competently and zealously pursues the client's interest within the bounds of the law. "Zealously" does not mean mindlessly or unfairly or oppressively. Rather, it is the duty of all lawyers to seek resolution of disputes at the least cost in time, expense and trauma to all parties and to the courts.

Professionalism, ethics, and civility are related but not identical. Professionalism is an umbrella category covering such qualities as ethics, civility, competence, and pro bono work. Ethics refer to the Rules of Professional Conduct, which impose a standard for behavior that lawyers must follow or risk discipline.

Civility is how we should treat one another and other participants in the legal system. Civility includes courtesy, dignity, respect, and decency. In his book *Civility*, Yale Law Professor Stephen Carter acknowledges that we have trouble agreeing exactly on what civility is. He argues that it is "the sum of many sacrifices we are called to make for the sake of living together" and that as part of a society we are governed by standards of behavior that require our self-restraint and self-discipline.

The Virginia Bar Association creed put it this way: "Courtesy is neither a relic of the past nor a sign of less than fully committed advocacy. Courtesy is simply the mechanism by which lawyers can deal with daily conflict without damaging their relationships with their fellow lawyers or their own well being."

\*261 Carter points out, however, that civility is not synonymous with agreement or making the other person feel good. Democracy in general and advocacy in particular require dialogue, and dialogue assumes disagreement.

Criticism and zealous advocacy, within bounds, are not uncivil. Civility does not require us to mask our differences but to find ways to peaceably resolve them. Litigation involves conflict and deeply emotional and controversial issues. It requires taking unpopular positions. Lawyers make forceful arguments intended to influence others through reasoned discourse. Those arguments, which employ logic and reason delivered with civility, can change hearts and minds where rudeness and personal attacks will not.

### **"Be civil" -- a lawyer's paradoxical commandment**

Dr. Kent Keith has published a poem and book about what he calls paradoxical commandments. They consist of 10 authoritative instructions that seem contradictory but may nonetheless be true.

Several examples include: "People are illogical, unreasonable, and self-centered. Love them anyway"; "People really need help, but may attack you if you do help them. Help people anyway"; and "Give the world the best you have and you'll get kicked in the teeth. Give the world the best you have anyway" (the entire list is at [www.paradoxicalcommandments.com](http://www.paradoxicalcommandments.com)). Judge Justice wanted to add one to the list: People want zealous advocates, but may confuse your civility with weakness. Be civil anyway.

Civility is the right thing to do for the legal profession, and even more importantly it is the right thing to do for the client and the public -- it produces good results and avoids bad ones. The Illinois Professionalism Survey revealed that the consequences of incivility include making it more difficult and time consuming to resolve the case; increasing the costs (both economic and emotional) to the clients; making the practice of law less satisfying; and harming the public confidence in the justice system.

The long-term consequences to the offending attorney will include lost cases, unhappy clients, long-term dedicated adversaries, and sanctions from the court. Truth be known, it could also lead to health problems, alcohol or drug abuse, broken personal relationships, and deteriorating job performance.

To be civil is not necessarily to seek popularity with other lawyers or judges by agreeing to legal or procedural rulings, including continuances, that are inconsistent with your client's interests. Some of the most civil lawyers are not overly friendly or the life of the bar parties.

These lawyers know and follow the rules, are punctual and prepared, honor their word, agree to reasonable requests that do not prejudice their clients, seek to minimize conflict, and avoid personal animus. They do not seek approval but demand respect -- for themselves, their client, and the legal system. They do not countenance opposing counsel's lack of civility, incompetence, lack of self-discipline, lack of organization, or inability to manage a caseload. Neither will they shrink from confronting misbehaving judges.

Judge Justice recalled his many years in the litigation arena and how he enjoyed the rough and tumble of jury trials against excellent opposing counsel. It was tough, serious, and as full contact with words as the rules allowed. There was passion, strategy, aggressiveness, and arguments that pointed out with zeal every weakness and defect in the case.

This was all done within the bounds of the law based upon evidence and reasonable inferences. Hard questions essential to the case were not avoided merely because they would upset someone but were not asked merely to harass. In all things, including litigation, there are reasonable limits on conduct. Restraint is required of an officer of the court. This line is not always crystal clear, but it is possible to disagree without being disagreeable. Civility happens, but not by accident.

Judges also owe a duty of civility to the lawyers, litigants, and participants in the legal system. In his written opinion on the pending motions, Judge Justice was careful not to engage in some of the same types of uncivil behavior he condemned. The ruling barred some of plaintiff's evidence for discovery violations, ordered payment of \$7,000 for retaking the evidence deposition that was disrupted, and gave a clear admonition that any further conduct of that type would result in additional and increased sanctions.

As he signed the order, the judge sincerely hoped the plaintiff's attorney would realize that the client needed effective representation not just misplaced zeal.

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