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Keeping Civil Cases Civil: A Best Practices Guide from 4 Perspectives

Litigation and Dispute Resolution

“So, what do you call a thousand lawyers chained together at the bottom of the ocean?” “A good start.” This is the clever quip that Tom Hanks’ character Andrew “Andy” Beckett says to Denzel Washington’s character, Joe Miller, in the 1993 Oscar-winning drama, Philadelphia. Andy prevails in an employment discrimination case against his former law firm. It’s a common lawyer joke, but its placement is what makes it so clever.

Andy had sought the legal assistance of numerous outside counsel, each time being turned aside because of fear of his disease (HIV), his sexual orientation (homosexual), or simply because of the seemingly insurmountable legal hurdle of challenging a high-power law firm.

But Joe Miller, a sole practitioner and personal injury lawyer, who also admits ignorance and fear of Andy's disease and sexual orientation, agrees to take on the case. In doing so, he overcomes his fear, and embraces a new life vision. Later, while he's strapped to a hospital bed in a terminal state, Andy ironically shares that lawyer joke with Joe, knowing that Joe has transformed from that emblematically loathed ambulance chaser lawyer into a compassionate human being.

At the heart of such transformations is the embrace of civility. The lawyer joke that spread across pop culture and mass media is the result of a few common assumptions toward lawyers:

- They are liars, or at least manipulators of the truth;
- They only have their own best interests at heart; and
- They respect money and client business over societal and personal betterment.

These assumptions are not novel and in fact date back millennia. Socrates excoriated lawyers in Plato's Theaetetus: the lawyer's "slavish condition has deprived him of growth and uprightness and independence … he has been driven into crooked ways; from the first he has practiced deception and retaliation and has become stunted and warped … and is now, as he thinks, a master in wisdom."

President Abraham Lincoln took exception to this view:

> "There is a vague popular belief that lawyers are necessarily dishonest … If in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave."

There was hope of changing the poor perception of lawyers in Lincoln's time, and there is still hope today.

Lawyers are not immutably nefarious. But to change this image, lawyers need to rededicate themselves to civility. While it is difficult to precisely define civility, there are a few things that certainly need not be associated with a civil lawyer:

Weakness

Practicing civility does not mean you are lazy and uninventive in your representation of your client. Rather, it demonstrates an intellectual security and strength. One who shirks his or her duties to civility and plays fast and loose with the rules demonstrates his or her own weakness and lack of confidence in his or her abilities to rise to the challenge on a balanced playing field.

Passive agreeableness

Practicing civility does not mean that one simply acquiesces to any demand of an opposing counsel

or even a court. Rather, it means that they act reasonably, in the best interests of the justice system, and do not act on emotion or in obstruction of another party.

Adherence to rules or guidelines

Practicing civility does not mean meeting mere minimal standards of decorum but should mean a dedication to a holistic approach to lawyering — being not only an effective member of the bar, but a dedicated member of a community.

Therefore, a lawyer cannot define himself or herself by their book of business, or win/loss record, but how they support pro bono and diversity initiatives. In time, this more defined dedication to the public not only achieves personal well-being and societal growth, but also permits the lawyer to hone his or her skills so they are more effective brief writers, transactional authors, and litigators.

In the abstract, such lofty goals probably sound nice, much like white noise does to the soon to be slumbering. But these goals, at their base, start with adherence to the Rules of Professional Responsibility and Civility Oaths being promulgated by many states.

The problem is many lawyers have treated the Rules of Professional Responsibility like a ceiling, rather than a floor to conduct. Moreover, they have treated them like any other legal problem — susceptible to reinterpretation and side-stepping. But, the Preamble and Scope of the Model Rules of Professional Conduct make clear what is expected of licensed legal practitioners.

> "The Rules do not … exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules." Rather, a lawyer is a "public citizen having special responsibility for quality of justice." As such, "a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession … A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance." Lastly, a lawyer must be reminded that he or she "is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."

If today's lawyers all acted in conformity with the Preamble's guidance, other citizens would be diving into the ocean to unshackle them. Sadly, that is not the case. And there are many publicized examples of simply abhorrent conduct.

Therefore, an incremental approach is in order. The authorship of this article represents a first step: namely, seeing lawyers from all different representational backgrounds as co-authors. The second of these steps is that each of those folks agreed to the following best practices to advance to cause of civility in the profession.

In-house perspective

Do not promote a scorched earth approach to litigation.

The clients need to be reminded that their behavior triggers and serves as an example for the

behavior as outside counsel. There will always be a desire to please the client. So, having a frank discussion with outside counsel regarding the client's expectations, including a desire to act civilly, is essential.

The reputation of the client in the community is an important business consideration.
Litigation victories are satisfying for clients and for outside counsel. But, for clients, cases are not tried in a vacuum. A victory achieved with questionable tactics can set a company up as a target for costly future litigations.

Clients should promote AFAs.

This detracts from the importance of the billable hour, and thus disincentivizes churning of bills on ineffective legal strategies.

Promote diversity within and without.

Diversity breeds better perspectives and new ideas. Clients should ask for diversity commitments from their outside counsel and other vendors.

Make a pro bono commitment.

Companies and in-house counsel need to devote themselves to local, regional, and national pro bono organizations.

Be open to commercial solutions.

In-house counsel should always be open and available to discussions with their counterparts across the table. Even contentious litigations can offer opportunities for mutual commercial growth.

Plaintiff's lawyer perspective

Choose your cases wisely.

Case selection is exclusively within the control of the plaintiff's attorney and is an important part of maintaining your reputation, and credibility with opposing counsel, which fosters civility.

Advocate for your clients not only with the court and a jury, but also with opposing counsel.
Since most civil litigation settles, plaintiff lawyers should learn to maintain an open dialogue with opposing counsel to help them better understand the extent of their clients' liability and exposure.

Encourage the public's respect of our profession.

It is unfortunate that some (if not most) of the public perceives lawyers as dishonest and unethical, and even more unfortunate that there are examples of prominent lawyers behaving this way. As plaintiff lawyers, we have an opportunity to change this and restore the public faith in our justice system.

Remain diligent with discovery, but also reasonable.

Working through discovery disputes is an important skill for plaintiff's lawyers and involves picking your battles and moving discovery forward by focusing on what is essential to proving your case.

Be a leader in diversity.

Plaintiff's lawyers have an important responsibility to shape and progress our society forward. Please make diversity and inclusion one of these priorities by hiring, promoting, and mentoring the future leaders of the bar, representing clients of all backgrounds, and helping to ensure future litigants will have the same or improved access to justice.

Involve the court when necessary.

When a party becomes uncivil, the court should be aware of the conduct, particularly when it is discriminatory, involves bullying tactics, or is otherwise obstructive.

Defense lawyer perspective

Always follow the Golden Rule.

We all want to be respected and be treated with respect. The way to foster that kind of relationship with counsel it to provide it to others. Beginning negotiations from a starting point of respect creates an atmosphere of collegiality rather than cantankerousness, and as noted above, allows for creative solution-making down the line. If we respect one another, we can work better with one another, and get to a resolution more efficiently.

Understand where your opponent is coming from.

We are all taught in law school to advocate zealously for our clients, and to make sure our opponents hear our most convincing arguments. Many attorneys forget that having a bit of emotional intelligence goes a long way.

Spending a few moments to think about where your opponent is coming from, and understanding their motivations and end-goals, can help us to better engage and persuade other counsel (and their clients) of the points we want to make.

Let reasonableness be your guide.

Sometimes we have the challenge of working alongside counsel or clients who have a "scorched earth" mentality. It's our job as skilled practitioners to explain that that kind of mentality will hurt more than help the efficient litigation of the case, and that we risk losing credibility with the court or with our adversaries. Being reasonable with co-defendants and with adversaries has lasting effects that can bleed into future dealings in a positive way.

Realize we're all in this together.

As noted above, some attorneys can be myopic in their view of how far their actions reach. Less than civil behavior from one defense counsel can ruin negotiations before they've even begun for the rest of the co-defendants.

We should all be incentivized to conduct ourselves with decorum and a sense of mutual respect, not only because it's the right thing to do, but because our actions can affect relationships between other parties in the litigation, which later can come back to bite our own clients.

Seek intervention if needed.

Hopefully we can all litigate our cases in a civil manner that will obviate the need for court intervention. Sadly, this is not always the case. When making the decision to involve the special master or the court, ground your communication in the facts of the conduct without any color commentary. You should be able to inform the fact-finder of bad behavior without engaging in "tit for tat."

Judiciary perspective

Judges dislike petty disputes that counsel could avoid by talking to each other.

There was a case where opposing counsel had their offices in the same high-rise office building but brought a dispute to the court about in which office the deposition would take place. The court's decision told the lawyers to play rock, paper, scissors to decide this monumental issue.

Do you think the judge was calling attention to their childishness? On a similar note, when opposing counsel says he could schedule the deposition any Monday, Wednesday, or Friday, don't say that is too bad because you are only available Tuesday or Thursday. When those disputes were raised in front of me (and they were), I told counsel they had five minutes to work it out themselves, or I might pick Saturday or Sunday. Amazing how often that worked.

Cooperate with opposing counsel to save the client money.

No negative effect on the merits of the case. One way to convince a reluctant client is to say, "this is the budget with cooperation, and this is the much higher budget if we don't cooperate." Another way to deal with a client who doesn't want you to cooperate is to say that instead of cooperating, you will "strategically proactively reveal information" to opposing counsel. Of course, that is just cooperation in another guise.

Disagree with opposing counsel as needed but without being disagreeable.

Common courtesy goes a long way, even if one can't reach agreement on things. Don't let the client's feelings toward the opposing client interfere with your having a civil working relationship with opposing counsel.

Communicate effectively and politely.

Return telephone calls or emails from opposing counsel promptly. However, think before you hit "reply" to an email. While communication is now instantaneous, it is wise to cool off before you send a "nasty-gram." And avoid any language (especially four-letter words) that you would be embarrassed for the court to read. Or to put it another way, don't write anything that you would not want your mother to read.

Grant reasonable extension requests unless it will prejudice your client's rights.

Also, do not regularly serve motions on your adversary on Friday afternoon at 5 pm (or in courts with electronic filing, at 11:59 pm). Nor should you file before a holiday or when you know your adversary has told you they will be on vacation.

Protect your reputation with the court.

Judges do talk about lawyers (perhaps not as much as we should). While cases are decided on the merits, regardless of counsel's ability or reputation, issues like scheduling and extensions are in the court's discretion. You want the judge to exercise that discretion in your favor.

Do not interrupt the judge.

It may not be fair that he or she can interrupt you, but that usually is to keep the hearing moving along. Even if the judge is being rude, you are not likely to get points for trying to talk over the judge. And, of course, never yell.

If you have made an agreement with opposing counsel, especially an oral one, stick to it.

The respect you will earn from your adversary and the court is worth it, even if you (or particularly a senior partner) think in retrospect that it's a bad deal.

Show up to court early, or at least on time.

It is frustrating to a court with a full hearing calendar when lawyers are late (and somehow, it's the same lawyer every time who has train problems). And you are not likely to be at your best if you rush into court seconds before the judge takes the bench.

If you really are stuck in traffic or the train is delayed, have the court's phone number or email handy to at least alert the court. And a real apology goes a long way. (While the practice of the morning cattle call calendar calls is mostly a thing of the past, it was in some sense a response to lawyers not showing up to court on time.)

Never mislead the court.

Better to say you don't know something and will get back to the court promptly than to guess or make it up. And if you later realize that you misspoke, correct the record promptly.

Let the facts speak for themselves.

Avoid excessive adjectives, adverbs, and ad hominem attacks. If some conduct is egregious, let the court determine that from reading those facts, not your labeling them as egregious. And that is particularly true about references to opposing counsel. Most judges do not like name-calling in briefs (or in the emails between counsel that get attached to the motion). As the old TV show Dragnet would say, "just the facts."

Conclusion

Clearly, there are many steps that will need to be accomplished to bridge the gap from these best practices to the ideals set forth in the Preamble to the Model Rules of Professional Conduct. But, to paraphrase Joe Miller, sometimes we all need to start by having it explained to us like we are two-year-olds. There's no better place to start than at the beginning. Hopefully, we suggest a few such beginnings here.

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