

ABOTA CIVILITY AND PROFESSIONALISM

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State Bar of Texas

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CHAPTER 6.1

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CIVILITY AND PROFESSIONALISM

**Discussions on dealing with difficult lawyers and
difficult situations**

Presented by TEX-ABOTA

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TEXAS LAWYER'S OATH

I do solemnly swear that I will support the constitution of the United States, and of this State; that I will honestly demean myself in the practice of the law, and will discharge my duties to my clients to the best of my ability. So help me God.

THE TEXAS LAWYER'S CREED
A MANDATE FOR PROFESSIONALISM

**Promulgated by
The Supreme Court of Texas and the Court of Criminal Appeals
November 7, 1989**

I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right.

I. OUR LEGAL SYSTEM

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."
2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
3. I commit myself to an adequate and effective pro bono program
4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
5. I will always be conscious of my duty to the judicial system.

II. LAWYER TO CLIENT

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this creed when undertaking representation.
2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.

4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.

5. I will advise my client of proper and expected behavior.

6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.

7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.

8. I will advise my client that we will not pursue tactics which are intended primarily for delay.

9. I will advise my client that we will not pursue any course of action which is without merit.

10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

III. LAWYER TO LAWYER

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.
2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.
3. I will identify for other counsel or parties all changes I have made in documents submitted for review.
4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been

agreed upon or omit provisions which are necessary to reflect the agreement of the parties.

5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are cancelled.

6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.

7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.

8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.

9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.

10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.

11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.

12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

14. I will not arbitrarily schedule a deposition, court appearance, or hearing until a good faith effort has been made to schedule it by agreement.

15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

16. I will refrain from excessive and abusive discovery.

17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.

18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.

19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

IV. LAWYER AND JUDGE

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.

2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.

3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.

4. I will be punctual.

5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.

7. I will respect the rulings of the Court.

8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.

9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

ORDER OF THE SUPREME COURT OF TEXAS AND THE COURT OF CRIMINAL APPEALS

The conduct of a lawyer should be characterized at all times by honesty, candor, and fairness. In

fulfilling his or her primary duty to a client, a lawyer must be ever mindful of the profession's broader duty to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals are committed to eliminating a practice in our State by a minority of lawyers of abusive tactics which have surfaced in many parts of our country. We believe such tactics are a disservice to our citizens, harmful to clients, and demeaning to our profession.

The abusive tactics range from lack of civility to outright hostility and obstructionism. Such behavior does not serve justice but tends to delay and often deny justice. The lawyers who use abusive tactics instead of being part of the solution have become part of the problem.

The desire for respect and confidence by lawyers from the public should provide the members of our profession with the necessary incentive to attain the highest degree of ethical and professional conduct. These rules are primarily aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon re-enforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.

These standards are not a set of rules that lawyers can use and abuse to incite ancillary litigation or arguments over whether or not they have been observed.

We must always be mindful that the practice of law is a profession. As members of a learned art we pursue a common calling in the spirit of public service. We have a proud tradition. Throughout the history of our nation, the members of our citizenry have looked to the ranks of our profession for leadership and guidance. Let us now as a profession each rededicate ourselves to practice law so we can restore public confidence in our profession, faithfully serve our clients, and fulfill our responsibility to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals hereby promulgate and adopt "The Texas Lawyer's Creed - A Mandate for Professionalism" as attached hereto and made a part hereof.

In Chambers, this 7th day of November, 1989.

The Supreme Court of Texas
Thomas. R. Phillips, Chief Justice

Franklin S. Spears

C. L. Ray
Raul A. Gonzales
Oscar H. Mauzy
Eugene A. Cook
Jack Hightower
Nathan L. Hecht
Lloyd A. Doggett
Justices

The Court of Criminal Appeals

Michael J. McCormick, Presiding Judge
W. C. Davis
Sam Houston Clinton
Marvin O. Teague
Chuck Miller
Charles F. (Chuck) Campbell
Bill White
M. P. Duncan, III
David A. Berchelmann, Jr.
Judges



AMERICAN BOARD OF TRIAL ADVOCATES

Code of Professionalism

As a member of the American Board of Trial Advocates, I shall



Always remember that the practice of law is first and foremost a profession.



Encourage respect for the law, the courts, and the right to trial by jury.



*Always remember that my word is my bond and honor my responsibilities to serve
as an officer of the court and protector of individual rights.*



*Contribute time and resources to public service, public education, charitable and
pro bono activities in my community.*



*Work with the other members of the bar, including judges, opposing counsel, and
those whose practices are different from mine, to make our system of justice
more accessible and responsive.*



*Resolve matters and disputes expeditiously, without unnecessary expense, and
through negotiation whenever possible.*



Keep my clients well-informed and involved in making decisions affecting them.



*Achieve and maintain proficiency in my practice and continue to expand
my knowledge of the law.*



Be respectful in my conduct toward my adversaries.



*Honor the spirit and intent, as well as the requirements of applicable rules or
codes of professional conduct, and shall encourage others to do so.*



PROFESSIONAL CREED

Whereas, the Rule of Law is essential to preserving and protecting the rights and liberties of a free people; and

Whereas, throughout history, lawyers and judges have preserved, protected and defended the Rule of Law in order to ensure justice for all; and

Whereas, preservation and promulgation of the highest standards of excellence in professionalism, ethics, civility, and legal skills are essential to achieving justice under the Rule of Law;

Now therefore, as a member of an American Inn of Court, I hereby adopt this professional creed with a pledge to honor its principles and practices:

- ✧ I will treat the practice of law as a learned profession and will uphold the standards of the profession with dignity, civility and courtesy.*
- ✧ I will value my integrity above all. My word is my bond.*
- ✧ I will develop my practice with dignity and will be mindful in my communications with the public that what is constitutionally permissible may not be professionally appropriate.*
- ✧ I will serve as an officer of the court, encouraging respect for the law in all that I do and avoiding abuse or misuse of the law, its procedures, its participants and its processes.*
- ✧ I will represent the interests of my client with vigor and will seek the most expeditious and least costly solutions to problems, resolving disputes through negotiation whenever possible.*
- ✧ I will work continuously to attain the highest level of knowledge and skill in the areas of the law in which I practice.*
- ✧ I will contribute time and resources to public service, charitable activities and pro bono work.*
- ✧ I will work to make the legal system more accessible, responsive and effective.*
- ✧ I will honor the requirements, the spirit and the intent of the applicable rules or codes of professional conduct for my jurisdiction, and will encourage others to do the same.*





Mission Statement

- To promote the practice of law by Texas lawyers in an ethical and professional manner.
- To educate lawyers, law students, the judiciary and the public on professional ethics and the highest standards of professional behavior.
- To educate all persons regarding the rule of law and the roles of lawyers and judges in the Texas system of justice.
- To serve as a source of accurate information related to misstatements concerning lawyers, judges and the legal profession.

Ten Things You May Not Know About the Texas Center for Legal Ethics

- **We have distinguished parents.** The Center was founded in 1989 by three former Chief Justices of the Texas Supreme Court: Robert Calvert, Joe Greenhill and Jack Pope. Chief Justice Pope, a legendary jurist and a giant in the field of legal ethics, celebrated his 99th birthday in April of this year.
- **We have a twin sibling.** The Center was “born” in November 1989, the very same month that the Texas Lawyer’s Creed was issued by the Supreme Court of Texas and the Texas Court of Criminal Appeals. Both the Center and the Creed encourage attorneys to adhere to the very highest levels of civility and professionalism.
- **We educate every new lawyer in the state of Texas.** By order of the Supreme Court, every newly-licensed Texas attorney is required to take the *Justice James A. Baker Guide to the Basics of Law Practice* course from the Center. Since 1996, over 38,000 Texas lawyers have attended this ethics and professionalism program.
- **We educate the public about the legal profession.** The Center serves as a source of accurate information to counter the vast amount of misinformation the public hears about our profession. Our blog, *On the Merits*, regularly analyzes the news to provide context and perspective on the media’s treatment of lawyers.
- **We honor the best of our profession.** The exemplars of ethics and professionalism never receive as much attention as those behaving badly, but we do our part to correct that oversight. Not only do we not only provide professionalism awards to local bars, we sponsor the prestigious Chief Justice Jack Pope Professionalism Awards, presented each year by Chief Justice Wallace Jefferson.
- **We provide you with one-stop ethics resources.** The Center’s innovative new website, launched in April 2011, includes the numerous ethics rules and codes that you need and use, including the Texas Lawyer’s Creed. Looking for an ethics rule? You’ll find it at LegalEthicsTexas.com. Just click on “resources.”
- **We offer cutting-edge online ethics programs.** Our online library contains a number of professionally-produced, high-definition ethics programs by some of the most knowledgeable ethics experts in the state. Need your three hours of ethics CLE? Go to LegalEthicsTexas.com and click on “courses.”
- **We provide speakers for local CLE programs.** The Center is frequently asked to provide ethics speakers for events throughout Texas, and we try to accommodate every request by matching the right speaker and topic with the needs of local bars and other CLE providers. Contact us for your next ethics speaker.
- **We provide free CLE to qualifying organizations.** Our innovative *Ethics to Go* program provides high-quality CLE programs on DVD to local bars with limited access to live programs; you pay only the course approval fee. To learn more, email Marlyn Pina at marlyn.pina@texasbar.com.
- **We’d love to have you join us!** We accomplish a lot, but we still need your support. If you believe in promoting the highest ideals in the profession, we offer various membership levels, including \$25 for new lawyers. Your contribution supports our mission and gives you access to online CLE programs and other benefits.

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Why Civility Matters — It Is The Essence of Professionalism

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I thank the leadership of ABOTA for inviting me to address “professionalism” with ABOTA members. In this article, I will focus on the core values of our profession: honesty, integrity and civility, why we all must strive to cultivate those values, and how we cultivate those values through activities of our professional organizations.

What Is Professionalism?

The word “professionalism” may mean different things to different lawyers. If you ask a lawyer what the term means, my guess is, if that lawyer has thought about the concept of “professionalism,” the response will include a fairly specific and thoughtful definition. Others, who just don’t consider the term very meaningful, may assign the term no definite meaning at all. Perhaps, for those who accord no special meaning to the term, a vague meaning, such as “being a good lawyer,” will suffice.

I know that when I look at that word, “professionalism,” and when I think about it, that concept definitely means more, and a lot more, than simply “being a good lawyer.” In my view, at the “core” of professionalism are the values of honesty, integrity and civility. Because those values are alive at the “core” of professionalism, our profession and our legal system have substance and are not vacuums that are devoid of values.

What does one mean when one speaks of the values of honesty, integrity and civility? I think we all learned the basic meaning of those concepts by the time we arrived in the second grade. We knew the rules were: 1. Don’t lie. 2. Don’t steal.

3. Don’t hurt anyone. Well, those concepts translate directly into the values of our profession.

When it comes to honesty, I think the meaning of that term should be obvious to lawyers. ABOTA and AIC have defined the meaning of that term so there can be no misunderstanding. ABOTA’s Code of Professionalism specifically provides, “I shall . . . always remember that *my word is my bond* and honor my responsibilities to serve as an officer of the court and protector of individual rights.” (emphasis added). The American Inns of Court (AIC) movement focuses on these values in its *Professional Creed* where it says, “I will value my integrity above all. *My word is my bond.*” (emphasis added). Can we express the meaning of “honesty” any more clearly than stated in ABOTA’s Code and in the AIC’s Creed?

However, some disagree that we must always be honest. At least one commentator has observed, “In situations where honesty conflicts with other important values, there is no reason to presume that honesty should prevail.” See William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS 433, 436, 463 (1999); see also Fred C. Zacharias, *Fitting Lying to the Court into the Central Moral Tradition of Lawyering*, 58 CASE W. RES. L. REV. 491, 510 (2008) (stating author’s instinct that “discarding a lawyer’s obligation of candor in favor of the ethic of zeal has serious costs for the institution of the law.”).

Others in our profession use the words, “zealous advocacy” as a sword to pursue a strategy of winning at all costs. See *Dondi*

Properties Corp. v. Commerce Sav. & Loan Ass’n, 121 F.R.D. 284 (N.D. Tex. 1988) (requiring adherence to standards of civility stated in the Dallas Bar Association’s Lawyers Creed). Can we teach any brand of “moral balancing” and excessive, “zealous advocacy” to beginning lawyers? I say, loudly, “No!”

Integrity is a term I believe is as straightforward in its meaning as honesty. To me, it means trustworthiness. That is, how people view you, i.e., respect. The proven liar is not respected, nor trusted. The only thing you can count on with an untrustworthy person is that their lack of trustworthiness is predictable. Such people will be repeat offenders.

So then, what is the meaning of the term civility as applied to the legal profession? I believe one of the best descriptions of civility was stated by United States Supreme Court Justice Anthony M. Kennedy in a speech at the 1987 American Bar Association Annual meeting. He said, “[Civility . . .] is not some bumper-sticker slogan, ‘Have you hugged your adversary today?’ Civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself. Civility has deep roots in the idea of respect for the individual.” See also *Higgins v. Coatsville Area Sch. Dist.*, No. 07-4917, slip op. at 10 (E. D. Pa. Sept. 16, 2009) (mem. op.).

The importance of these values is obvious to me. To those who question the relevance of these values to the practice of law, I say we adhere to them because it is the right thing to do. However, if more proof is necessary for the “doubters,” I suggest they simply read the disciplinary rules applicable to their

jurisdictions. I cannot imagine that there is a jurisdiction that does not require candor toward opposing counsel, the court, and all others involved in a matter. *See, e.g., Tex. Disciplinary R. Prof'l Conduct 2.01 (render candid advice to client), 3.03 (candor toward the tribunal), 4.01 (truthfulness in statements to others), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (West 2005).*

Yet, it is clear the disciplinary rules are the lowest acceptable level of behavior that will be allowed. When any lawyer violates those or other disciplinary rules, that lawyer is subject to sanctions by the regulatory arm of the licensing agency or bar as well as possible sanctions from a court. The ABOTA and AICF credo of "My word is my bond." is a much higher standard to which we adhere.

If after considering the rules the doubting lawyers still remain unconvinced that we must live by these values, then they should consider the observation of Professors Neil Hamilton and Melissa H. Weresh. The professors contend we must perform at the highest levels of professionalism because we, as lawyers, have a contract with the public, through the legislature. Specifically, they posit pursuant to this contract, the public has granted the legal profession "autonomy" for "peer review," control of membership, and setting of standards.

In exchange, each member of the legal profession and the profession have solemn duties to maintain high minimum standards, discipline members who fail to meet those standards, promote the "core values and ideals of the profession," and restrain self-interest to serve the public purpose of the profession. Neil Hamilton, *Professionalism Clearly Defined*, 18 No. 4 PROF. LAW. 4, 4-5 (2008); Melissa H. Weresh, *I'll Start Walking your Way, You Start Walking Mine: Sociological Perspectives On Professional Identity Development and Influence of Generational Differences*, 61 S.C. L. REV. 337 (2009).

If the doubting lawyers remain unconvinced in the face of all of the foregoing, then it seems to me, they are ignoring the evidence. In my view, the evidence clearly proves the necessity of adhering to the values of honesty, integrity, and civility is based not only on morality, but it is also legally and practically based.

Action Speaks — Cultivating Professionalism by Mentoring

With these values and the necessity to adhere to them in mind, one should ask: How do we, as lawyers, address the need to cultivate values in our profession? Can we rely solely on law schools to see to it that values are injected into nascent lawyers? The answer is, probably not. The academy generally focuses on reworking the patterns of a law student's brain so that a law student "thinks like a lawyer." *See Jeffery A. Maine, Importance of Ethics and Morality in Today's Legal World*, 29 STETSON L. REV. 1073, 1074 (2000); Richard K. Greenstein, *Against Professionalism*, 22 GEO. J. LEGAL ETHICS 327 (2009). The academy can and must do more to discuss and impress students with the importance of values through more expansive professional responsibility classes and curriculum that injects the sense of these values in class lectures and materials.

Yet, some say, our professional values cannot be taught in the same manner that we teach the rule in *Shelley's* case or the definition of murder. *See Christopher J. Wehlan, Ethical Conflicts in Legal Practice: Creating Professional Responsibility*, 52 S.C. L. REV. 697, 725 (2001). Then, where and how are these values to be taught and acquired? In my estimation, the values of our profession are learned by observing and working with other lawyers. It is a process as old as the human race. We have always learned by observation and through association. *Id.* This process, at its finest, is what is called mentoring. Mentoring is becoming a primary

mission of many of our professional organizations, including the American Inns of Court movement.

The need for mentoring has become almost an "emergency" today. While many firms and law departments have excellent training and mentoring programs, too many beginning lawyers have no such environment in which to learn and grow. That is one of the stark realities of our economic times. Large numbers of beginning lawyers have hung their shingles, but have little opportunity to observe and learn from experienced lawyers. At the same time, some beginning lawyers practice in work environments, even in firms, that do not focus closely enough on those learning needs. Also, working hand in hand with bar groups, law schools, and as part of mentoring programs we should create demonstrative educational programs that graphically teach the meaning of these values.

Developing Goals and Programs To Enhance Mentoring

That is where our professional organizations must step in. We must supplement or even serve as the central supply of mentoring and practical education needed by law students and beginning lawyers. Many state bars and other organizations, including ABOTA and AICF, are on that track. They have created programs and vehicles to foster mentoring and educate law students and beginning lawyers. Additionally, they display on their websites assorted materials available to all that describe ways to develop relatively simple, straightforward programs.

One of the most positive and active programs that fosters the development of professionalism through mentoring, both in the law school student and in the beginning lawyer, is the Nelson Mullins Riley & Scarborough Center on Professionalism at the University of South Carolina School of Law. The Center has sponsored, among

other programs, at least two national conferences on the “best practices” of mentoring. In my view, the Center has demonstrated extraordinary leadership in convening forums to gather a broad spectrum of our legal profession’s organizations so that we can learn of, communicate about, and develop effective mentoring programs. At this time, the Center and the AICF are working together to formulate a model mentoring program adapted for smaller groups, like Inns of Court and local ABOTA chapters. The model is being tested now by at least two Inns in the Southeast.

Further, ABOTA’s *Civility Matters* program hits the mark. It graphically demonstrates the meaning of civility through DVDs that contain scenes showing conduct of lawyers in excerpts from movies, television productions and video depositions. Combine the two program concepts and you have a foundation on which to build a system for practical education of law students and beginning lawyers about how they must conduct themselves in the practice of law.

A Call to Action—A Vigorous Movement Pushing Ahead

The professionalism movement in the United States is vigorous and strong. We are enthusiastic and moving ahead to cultivate the values of honesty, integrity, and civility in our profession. Strong professional organizations like ABOTA, the American Inns of Court, state and local bar associations and countless others across the country, must join together to cultivate the values of our profession. How do we enhance this effort? We, the “flagship” organizations, must make a concerted effort to work together, use the resources available now, and make professionalism programs function in every local bar to put our beginning lawyers on the right path. Thank you for being part of this great effort to cultivate professionalism!

If Incivility Strikes . . .

How Should You Respond With Civility In These Situations?

By the Professionalism, Ethics and Civility Committee of ABOTA

Civility problems can arise in a number of different ways. In an effort to provide some guidance, particularly to young lawyers, the members of the ABOTA Committee on Professionalism, Ethics and Civility have assembled a series of practical suggestions. While there is little question that civility requires maturity and patience, it does not require that you act or feel like a doormat. You can represent your client vigorously, without incivility. The next time you confront one of the following common situations, please consider the following civil options:

How should you respond to the nasty letter or toxic email sent by your opponent?

This is a common problem. Different approaches are available. Of course, one can always simply decline to provide any response where there is no substance which warrants one. Other times, you may feel it is necessary or prefer to respond to keep a strong profile. Suppose, after filing an appeal, your opposition writes a two page rant, calling your appeal frivolous, telling you how s/he will have sanctions imposed against you, among other things.

In response, it is best not to engage a lawyer like this. You are not likely to accomplish anything of substance, and psychologically you cannot win playing their game. If you try, you will only draw a longer, more viperous response. Instead, consider something like a two line response which says: "Thank you for your letter. I look forward

to personally seeing you at the appellate hearing."

The same problem also arises, perhaps more frequently, during email exchanges. So-called "toxic emails" are an extension of the same problem. Often they are typed and sent without careful thought, leaving an unfortunate, permanent record.

As but one example, second year associate "A" emails his counterpart at the opposing firm regarding an intensive document production request. "Your client's response is now 20 days overdue and despite early reminders, we seem to have no cooperation from you." In response, Associate "B", who just had three additional projects dropped on his or her desk responds out of frustration, saying: "You'll get the documents when I get around to it! Stop being a pain in my ass!!"

Perhaps Associate B will, like all of us, occasionally regret the fact that s/he hit the send button so quickly. But, within an hour, supervising partners are involved and things can get ugly. Hopefully, the supervisors will reduce, rather than add to the pressures that are building. But, where there is no objective intermediary, full-scale costly discovery wars often break out. No one benefits in the long run.

Particularly when it comes to Blackberry's and rapid email responses, it is all too easy to send off missives that lack the thought and reflection which was easier to employ when letters had to be typed and proof-read. In the case of responsive emails, particularly toxic emails, do not hit the send button unless you are willing to see

that email as a printed exhibit in court document. Often it is best to prepare your response, and then let it sit overnight. Then, when you are fully relaxed, you can decide whether to send it out.

What you do if your opponent is "hiding the ball" during discovery?

This tactic is uncivil and unprofessional, yet it has become far too common during discovery. Hiding the ball creates distrust and creates unnecessary expense and delay. It surfaces in the form of direct concealment as well as in failures to disclose during "meet and confer" exchanges which also require good faith. But, perhaps the most common examples involve the use of objections interposed in bad faith in responses to requests for production and endless privilege logs. Ultimately, all such tactics undermine the discovery process and harm the reputation of the lawyer involved.

The California 2007 Guidelines of Civility and Professionalism specifically address and highlight the various aspects of this problem:

As to document demands:

4. In responding to a document demand, an attorney should not intentionally misconstrue a request in such a way as to avoid disclosure or withhold a document on the grounds of privilege.

5. An attorney should not produce disorganized or

unintelligible documents, or produce documents in a way that hides or obscures the existence of particular documents.

6. An attorney should not delay in producing a document in order to prevent opposing counsel from inspecting the document prior to or during a scheduled deposition or for some other tactical reason.

As to interrogatories:

2. An attorney should not intentionally misconstrue or respond to interrogatories in a manner that is not truly responsive.

3. When an attorney lacks a good faith belief in the merit of an objection, the attorney should not object to an interrogatory. If an interrogatory is objectionable in part, an attorney should answer the unobjectionable part.

Perhaps the best way to put an end to such tactics is to bring it to the attention of your opponent and encourage mutual candor. This is not a sign of weakness nor do you have to sacrifice your legitimate objections. You can simply agree to the following concept that changes the tone of discovery: If a reasonable request is made for something, I will provide it. Of course, this must be a mutual arrangement.

Where problems arise, it is often beneficial to arrange informal and inexpensive methods of exchanging information. These include informal “sit downs” or even lunch with your opponent. Document inspections can often be made easier by traveling to the source and simply sitting down with your opponent present, while you review their voluminous records, with an understanding that

he will mark and copy only what you decide you need. Sometimes if a rapport can be created, it is even possible to jointly meet with witnesses or parties, with lawyers present, to avoid costly depositions, where they are not truly necessary.

The alternative is always available: expensive and time-consuming document exchanges, privilege logs, law and motion hearings and demands for sanctions. If you think your client may potentially benefit from you hiding the ball, consider the following. Sooner or later, the truth will likely come out. It almost always does. If you produced it as required, you can build your case around it. But, if your deception surfaces, both you and your client may face severe consequences, potentially including termination sanctions and disbarment.

How should you respond to an opponent who refuses to grant routine courtesies, like extensions of time or cooperative deposition dates?

Unfortunately, we all find ourselves in this situation from time to time. Acting as if still on the playground, obstreperous counsel employing such tactics are altogether too common. At least two clear alternatives are available to you in response.

One response is to return the discourtesy and escalate the problem. The other is to again take a deep breath and objectively assess your options. In this light, it often becomes easier to see that such inappropriate tactics are usually carried out in the relative obscurity of an office or behind a computer, where letters can be sent out without direct or immediate accountability.

But you can change that and in the process change the tone of your developing relationship. A good way to accomplish this transformation is to invite your opponent out of his or her secure hiding place. Sometimes, with a

personal effort, miracles can occur. But, at a bare minimum, respond without anger or annoyance. To try and effect a “miracle”, start by responding with a phone call, not a letter or email.

If possible, invite your adversary out to lunch or for “coffee”. Many times, once confronted personally, even the most uncivil advocates change their demeanor and soften their approach. Give it a try. You might be pleasantly surprised. Once you have found some common ground, you can address some of the inconveniences you are experiencing and hopefully work them out. The more traditional alternative is to engage in a letter-writing campaign, which often costs your clients more and seldom produces meaningful relief.

How should you respond to the lawyer who is more interested in creating a “meet and confer” paper trail, than resolving disputes?

Sadly, this tactic is often indicative of a journeyman approach, with little concern for efficient or creative resolutions. While it is always a good tactic to respond with civility and attempt to create rapport rather than animosity, opponents who proceed in this fashion often leave little room for compromise.

In those cases where your efforts at cooperation and development of a personal rapport have not prompted a cooperative response, it is sometimes necessary to simply follow the rules of court and file motions to obtain the relief you seek. But, even if matters devolve to that point, be ever mindful of the importance of civility in your responsive letters, emails and courtroom behavior.

The court evaluating the issues will often be able to tell who has been trying to resolve the dispute...and who has fomented it. Particularly where the issues will ultimately find their way into court,

keep your focus on civility and professionalism. It will serve you well in this context, as in all others.

What should you do if your opponent persists in coaching his deposition witness?

To preserve your record, the first thing you must do is to make an appropriate objection. But, do so in a low key fashion. If the problem persists, you may wish to consider addressing the issue off the record with your opponent. This allows you to speak your mind without escalating the problem and gives your opponent an opportunity to save face without hurting his or her pride. Sometimes it is better to speak to your opponent in the hallway away from his client or his associate counsel. If this does not work, then you must continue to put your concerns on the record.

Under appropriate circumstances, you can stop the deposition, according to your local discovery rules, and seek assistance from the court. If you know in advance that you will be dealing with someone who routinely obstructs your efforts to obtain unfiltered testimony, you may wish to videotape the deposition. Such conduct is easier to capture on video tape and may avoid the problem in the first instance.

Courts can fashion protective orders or any number of sanctions to punish and prevent such conduct. For example, in California, Code of Civil Procedure, section 2023 identifies a number of misuses of the discovery process that are punishable by sanctions. These sanctions include monetary sanctions, issue sanctions, evidence sanctions, terminating sanctions and contempt sanctions.

Some states like California have promulgated civility guidelines. In July 2007 the California State Bar published Guidelines for Civility and Professionalism. Section 9, paragraph a(6) of these guidelines specifically addresses the issue:

“Once a question is asked, an attorney should not interrupt a deposition or make an objection for the purpose of coaching a deponent or suggesting answers.”

Paragraph a(8) of the same section also provides: “An attorney should refrain from self-serving speeches and speaking objections.” While inappropriate, this kind of behavior is not uncommon. Usually, polite demonstration of your unwillingness to permit such interference with the testimony of the witness will suffice.

What do you do if an attorney makes rude and degrading comments about you or your client?

Initially, it helps to take a deep breath. Remain calm and attempt to follow the same “meet and confer” approach discussed above. If that does not work, be sure to make a good record of the conduct. Section 9 of the California civility guidelines provides: “An attorney should treat other counsel and participants with courtesy and civility, and should not engage in conduct that would be inappropriate in the presence of a judicial officer.”

Section 9 a(4) of the guidelines provides: “An attorney should remember that vigorous advocacy can be consistent with professional courtesy, and that arguments or conflicts with other counsel should not be personal.” The reference to “personal” evokes Sections 4 and 8 of the guidelines dealing with ad hominem or personal attacks. Disparaging another’s intelligence, integrity, ethics, morals or behavior are personal or character attacks which are simply inappropriate. If your opponent persists in making such personal attacks you may have no other option but to make a good record and let the court deal with it. But, civility does not require that you act like a door mat. You should not tolerate such abusive behavior.

What do you do if oppressive deposition notices are served without any consultation or cooperation?

Trial lawyers have busy schedules. It is difficult to schedule depositions convenient for everyone’s calendar. The best way to approach this scheduling problem is to pick some dates for a deposition and then call opposing counsel to cooperatively pick dates (or indicate the same by cover letter). Ideally, you should try to work it out before a notice is served. This approach might make it easier for your opponent, who in turn might produce witnesses without the necessity of expensive subpoenas.

There are many ways that scheduling issues can arise, including situations where someone notices a future deposition and then opposing counsel retaliates by noticing an even earlier, related deposition. Section a(1) of the California guidelines addresses this issue, stating: “When another party notices a deposition for the near future, absent unusual circumstances, an attorney should not schedule another deposition in the same case for an earlier date without opposing counsel’s agreement.”

Deposition scheduling should not be a game. All parties should attempt to cooperate to work out a sane schedule. If your opposition refuses to do so, make your record, but continue to act with civility, regardless of how they respond. Your conduct reflects upon you. As difficult as it may seem, incivility from your opponent cannot justify and should not prompt you into making uncivil responses.

What if the witness stretches out his answers to make it impossible to finish a deposition?

This tactic can backfire and often will benefit the attorney taking the deposition because he

can keep the deposition open, review the transcript and come back another day to ask more questions. However, it is sometimes used by opposing counsel for delay and oppression. A classic example of that was documented in the recent case *GMAC v. HTFC Corp.*, 248 F.R.D. 182 (E.D. Pa. 2008). This was a commercial dispute and plaintiff GMAC was deposing the CEO of the defendant. After a very long and windy response, the following exchange occurred between the plaintiff's lawyer and the witness:

“Q: Are you done?”

A: No, I'm not. I'm going to keep going. I'll have you flying in and out of New York City every single month and this will go on for years. And, by the way, along the way GMAC will be bankrupt along the way and I will laugh at you.”

The trial court punished the witness with substantial monetary sanctions for exploiting the deposition process. This is yet another misuse and abuse of the discovery system. The lawyer who permitted the witness to act in this fashion was also sanctioned. Common sense and the “golden rule” are good guidelines to follow.

What if your opponent persists in questioning your witness from documents without supplying you and other counsel with copies?

This seems very straightforward but it happens often. Surprisingly, counsel for deponents often let their opponents get away with it. Section 9, paragraph a(5) of the California guidelines addresses the issue: “An attorney questioning a deponent should provide other counsel present with a copy of any documents shown to the deponent before or contemporaneously

with showing the document to the deponent.”

Of course, if many depositions have been taken and all the attorneys have notebooks of the documents being used, extra copies are unnecessary. But, keep in mind that so long as the deponent is not being shown a document, there is no requirement that the deposing attorney provide any copies of source material s/he may be using to formulate questions.

What do you do when there is an objection, instruction not to answer, and a dispute about whether to call the court to get an immediate ruling?

Interposing an objection and instructing a witness not to answer can be obstructionist and unprofessional if done without substantial justification. Experienced counsel will only do so where the testimony sought is privileged, immune as work product, or would significantly invade some real privacy interest of the witness. Most other objections are inappropriate if interposed at a normal discovery deposition.

Similarly, repeated threats to call the court can be contentious, unproductive and lack civility as well. Careful counsel will try to avoid a telephone call to the court in this situation, not wanting to appear too contentious or to provoke the ire of judges who seem to hate dealing even with good faith discovery disputes, let alone ones that must be ruled upon immediately. In short, calling the court can be a high stakes gamble for both sides. A few simple rules will help avoid the appearance of incivility.

First, make certain that you have a real, finely-honed dispute. Counsel asking the objectionable question should simply state why the question is appropriate, while the objecting party should state, not simply why the objection was made for the record, but why counsel cannot allow the testimony to be

elicited. Counsel should explore whether some protective order could be fashioned, that portion of the deposition sealed, or otherwise permit the testimony without waiving privileges and immunities.

Civility requires that counsel try to work out some arrangement that protects the legitimate interests of both sides, but allows the deposition to go forward. Even where a deal is not possible, consideration should be given to making a clear record of the positions of the parties and preserving the dispute for a later time when it can be handled by routine motion to compel. Calling the court should be limited to situations where such calls have been invited or time constraints make it absolutely necessary.

Finally, where such problems seem to recur, consideration should be given to asking the court to appoint a special master under Federal Rules of Civil Procedure, Rule 53, or corresponding state authority, to resolve any future disputes.

When should you consider seeking appointment of a special discovery master or referee?

It is appropriate to request the appointment of a special discovery master or referee when your opponent has shown an unreasonable pattern of incivility and unprofessionalism, which may or may not include rules violations or a violation of legal ethics.

It is now obvious that much of the trial battle has shifted from the courtroom to the discovery practice. If the rules of civil procedure are not consistently enforced on a timely basis, there are those within the profession who will violate these rules in an attempt to gain an advantage. A special discovery master can perform a useful function because he or she is able to either settle these disputes on a timely basis, enter an appropriate order, or make appropriate recommendations to the presiding judge.

This speeds discovery, produces an accurate result, and encourages all parties to abide by the rules. In some jurisdictions, special masters are paid by the parties and the master is allowed to recommend a reapportionment of his or her fees once the master's function is completed. This is not a sanction. It is simply a recognition by the master that one or more parties is more at fault for the problem than others. In many cases, the parties are equally at fault, but in some cases reapportionment is appropriate.

If the parties know that once a knowledgeable master is appointed, fees can be reapportioned, it generally limits attempts to violate the rules. This, in and of itself, saves the parties money. Even if the parties cannot cooperate on a professional and civil basis, it is in their best economic interest to do so, because it is less expensive to pay the master than it is to file motions to compel, argue them and then wait for a decision.

If your opponent does not consent to the appointment of a special discovery master or referee, the court, either under Rule 53 of the Federal Rules, or under an appropriate local rule, or in accordance with the inherent authority of the court to conduct its own business, can appoint a special discovery master or referee, in appropriate circumstances, without the consent of all parties. The court can also order that the master or referee be paid by the parties.

You will need to convince the court that it is in the interests of justice to appoint a special master and that the circumstances of your case warrant it. It may be that both parties believe they are factually and legally correct in their positions and, therefore, a master is likely to vindicate their position.

If one of the issues dividing the parties has to do with privileged documents, or statements, many lawyers file extensive privilege logs because they do not wish to waive

any particular privilege. Many lawyers do not wish the court to examine their privileged documents because they are damaging to their case. A special master can examine those documents, in camera, without disclosing what is in those documents to the court itself. This can be a substantial benefit to the party filing the privilege log.

One word of caution. Many judges are not familiar with the benefits of special masters. Since they have not used special masters, they are not familiar with how to draft the appointment order. This is not a simple procedure. Under the Federal Rules, there are special requirements that must be met, and there are provisions that should be included that are not specifically set forth in the rules. Therefore, you will need to research this issue before requesting the appointment of a special discovery master, and it is recommended that you draft a detailed model appointment order so the judge can easily and conveniently appoint the master.

Then the only issue is obtaining a qualified special master. You and your opponent may agree on this, but if you do not, you may submit a list of recommendations to the court which can be helpful.

Hopefully, use of some of the more personal avenues available to you will resolve most of your incivility problems. We commend them to you. But, if you simply cannot work through them any other way, a special master or referee can make a big difference.

REFLECTIONS ON THE TEXAS LAWYER'S CREED

BY

FRED HAGANS, JAMES H. "BLACKIE" HOLMES III,
JUSTICE EUGENE A. COOK, AND JUDGE LAMAR MCCORKLE

The Texas Bar Journal asked four of the principals involved in the drafting of the Texas Lawyer's Creed to offer their personal reflections on its 20th anniversary. The authors have collaborated on an article, available at www.texasbar.com/tbj, which details judicial references to the Creed. At the time the magazine went to press, the authors were preparing a one-hour ethics CLE webcast that will be available through www.texasbarcle.com.

HAGANS: *We Can Do Better*

I am proud to be a lawyer. I am proud to have been part of the group of people who came together to generate the Texas Lawyer's Creed. Do I think the Creed has been beneficial? Yes, I do. Do I think that the Creed was the final and complete answer to the problem? Of course not.

The atmosphere in which the Supreme Court of Texas Committee on Professionalism began its work was charged with fear that unprofessional conduct had reached epidemic stage. It should not be forgotten, however, that respected members of the bar were concerned that the Committee's work would simply become a tool to stifle creativity and improperly sterilize the litigation process.

I was honored when Justice Eugene Cook called me, a plaintiffs' lawyer, and asked if I would serve as vice chair of the Committee alongside Blackie Holmes, a defense lawyer. I continue to feel honored that I had the opportunity to participate with the many outstanding members of the bar who participated in this effort. The Committee represented a cross-section of the bar in terms of geography and the types of law members practiced.

I remember the sessions in which the drafting subcommittee met to discuss both general topics and very specific details of how things should be expressed. The subcommittee included U.S. District Judge Norman Black, State District Judge Lamar McCorkle, and attorneys David Keltner, Blackie Holmes, and myself. Justice Cook attended and actively participated in the meetings. Although the group was amiable and professional, there were vigorous discussions about what to include. One principle permeated the process: we agreed to seek the best possible product, not just what was acceptable to a majority of the Committee.



The subcommittee unanimously approved the final product before it was submitted to the entire Professionalism Committee.

Over the last 20 years, I have often been reminded that professionalism is more a journey than a destination. It is more a process than a goal or standard. I have also noted that the term *professionalism* is easier to define than to apply. I once commented to a CLE audience that many lawyers think of professionalism as follows:

Professionalism is the way I conduct myself and treat others. Unprofessional conduct is the way others practice and treat me. Few lawyers perceive their own conduct, however inappropriate it may be objectively judged, as unprofessional.

There are many things that affect the way in which we conduct ourselves — the desire to attract or

keep clients, the stakes involved, a society that embraces the philosophy that the "ends justify the means," a changing judiciary, and a social and political atmosphere in which lawyers generally — and trial lawyers specifically — are targets of rhetorical attack. All of these things contribute to the way in which lawyers conduct themselves.

One specific area of concern is the increasing politicization of the judiciary and the judicial process. The judiciary, as one of the three branches of government, has always been a part of the political process. Whether judges are appointed or elected, the selection process seems to focus more on their political affiliation and ideology than on their judicial qualifications. I remember a campaign by a civil district judge seeking re-election in which he stressed his strong belief in the death penalty. While this may have been politically attractive, it had nothing to do with the cases that came before him on his civil docket.

During the last 20 years, technology has had an impact on professionalism — largely, in my opinion, a negative impact. One of culprits is the increased use of email as the primary method of communication. Perhaps I am just old-fashioned. However, I frequently see examples of mean, nasty, and offensive statements in emails that would never be uttered in person. The challenge to be professional is a difficult but worthy goal.

One way that we can all improve the process is to respect the process. Today, the entire judicial process is under attack. When

judges or juries rule for you, they are generally viewed as brilliant and thoughtful. When they rule against you, they are often vilified as stupid and corrupt. As professionals, we can do better.

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HOLMES: *Professionalism from Within*

It does not matter the year or era, the core principles of professionalism remain the same. Civility and credibility are paramount. True professionalism cannot be legislated. Ethical conduct can be codified, but professionalism must come from within the lawyer. A lawyer can be ethical but not professional. If we want professionalism to be a reality, then we must be willing to make a commitment that it will not only be reflected in our daily conduct but will be enshrined in our hearts as well. It seems to me a lawyer should and must want to be civil and credible in dealing with those who are a part of the practice of law. Why not?

When I began practicing law in 1959, it was considerably different. The level of technology was not as advanced. I dictated to a secretary across my desk, and she used carbon paper to make duplicate copies. Reproduction of documents was accomplished by wet and sticky cylinders, which smelled and took forever to dry. Even the switchboard operator at my firm used the old "hello girl" phone banks that required the use of a cord to make a connection on incoming or outgoing telephone calls. Briefing a legal topic was really an art, and the use of the Blue Book and Shepardizing resulted in cases found that were not always discovered by your adversary. Today's technology makes it a lot easier to spit out generic discovery forms and reams of paperwork. The paper battle is horrendous, and we are all guilty of it. I truly believe if your first motion to compel discovery contains a demand for sanctions, then counsel should be required to write the motion in longhand. Technology has to some extent affected our civility to one another in what should be an admired profession.

Not too long ago, the scheduling of a deposition was done by agreement through a telephone call or written inquiry setting forth realistic dates for taking the deposition, not only as to the day but the time in the future. Now, many times the first knowledge that a deposition is scheduled is the notice and *duces tecum* you receive, and so often the dates are not convenient. As a result, telephone calls are necessitated that should have been made in the first place, or the preparation of a motion to quash is required, all of which results in unnecessary time and expense to the client.

The Texas Lawyer's Creed and guidelines for professional courtesy are attempts to put the word "fun" back into the practice, advance the administration of justice, and elevate the legal system to the exalted plateau it deserves. Some believe that through obnoxious, belligerent, and discourteous behavior, the adversary will be intimidated and provoked into similar conduct or wilt under the attack. The opposite should be true, for if you stand by the traditions of courtesy and civility, the adversary might truly see the futility in those efforts and raise such

conduct to your level rather than your stooping to the low road.

It is hard to say what the causes are for the situation in which we find ourselves. Is it increased salaries to associates who feel the need to worship at the altar of the billable hour resulting in unnecessary paperwork and fudging on timesheet entries, or competition for legal representation, or lack of true implementation of a mentor system, or just downright erosion in the character of society? Rena Pederson, writing in the *Dallas Morning News*, observed that the code of personal behavior established by the 110 Rules of Civility authored in 1745 by George Washington when he was 14 years of age are relevant today. In making this observation, she stated, "Since the social revolution of the 1960s, the trend has been to be non-judgmental. Which meant we leveled down. Everything became relative. Any new way was considered better than the old way. Do your own thing replaced do the right thing. Somewhere along the way we forgot that just because we have the freedom to act to extremes doesn't mean we should." Whatever the reason, it is up to us to right the wrong.

The creeds and guidelines that many have worked very hard to prepare will only change the lack of professionalism if a full, good-faith effort is made by all of us to read, abide by, and communicate to each other these guidelines. While the finger can be pointed at many, it is incumbent that we start with ourselves as members of the practicing bar, to work together in an

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attempt to change the problem. The time has come where we, as members of a prestigious profession, start behaving as such, especially among ourselves. Only by unified effort within the legal community will the erosion of professionalism be reversed. The guidelines and creeds are a magnificent start to the solution of the problems within the legal community.

We are a profession and must never forget it. Each day we must renew our commitment to those principles that make the practice of law such a noble endeavor.

James H. "Blackie" Holmes III is a partner in Burford & Ryburn, L.L.P. in Dallas.

COOK: *The Need for Heroes*

By 1988, lack of professionalism had reached epidemic proportions. Attending an American Bar Association program in Chicago, I learned how widespread lack of civility was in the practice of law. I wanted to use the influence of the Court to address the problem.

After discussion, the Court established an Advisory Committee on Professionalism. One of the goals was to represent all aspects of the legal profession. The Court appointed plaintiff and defense lawyers, law school deans and professors, federal and state judges, sole practitioners, and attorneys from medium and large firms. The committee devoted its work to how we could improve the practice of law. Our ancestors would have been proud of the committee and how it handled its task. The lawyers faced the problems with a spirit of common calling.

For many years, I was a volunteer in Special Olympics Texas. One of our oft-repeated mottos is "Together we all win." I appointed Fred Hagans and Blackie Holmes as vice chairs and I served as overall chair. There was no clash of egos. Committee members were able to focus on the common good. Committee members included Judge Norman W. Black, David Burrow, Tom H. Davis, Judge Lamar McCorkle, Dean Frank Newton, Dean Charles Barrow, Bob Sheehy, and Jim Branton. One of my law clerks, Warren Harris, assisted us.

Is the problem cured? No, but we have made noticeable progress. Our long history shows that we will not surrender our proud heritage.

In 1997, while driving to the office, I heard a radio program that was bashing lawyers. I thought, "Why doesn't someone talk about all the good lawyers have done?" I called the ABA and asked to be connected with the department that would have such information. No such luck. I then called the State Bar of Texas and a number of legal organizations. Still no luck. I decided to research and write about my findings. The result, "I'm proud to be a lawyer," was published as an op-ed in the *Houston Chronicle*.

I need heroes. I always have. They give me strength and hope and courage. Many lawyers have been my heroes. And for this I am grateful.

Lawyer bashing is a national pastime, the theme of regular articles and letters to editors, the punch line to countless jokes, and a surefire ratings booster for talk-show hosts.

Despite these insults, I am proud to be a lawyer. I know

what many members of the public apparently do not — that history is filled with generations of lawyers who, like those that Shakespeare's Dick the Butcher would kill, have stood against tyranny to build a free society.

Of the 56 men who signed the Declaration of Independence, 25 were lawyers. Of the 55 delegates to the Constitutional Convention in Philadelphia who hammered out the Constitution, 31 were lawyers. More than half of the nation's presidents have been lawyers. Most Americans know that Abraham Lincoln, president during the Civil War, was a lawyer. But many do not know that Woodrow Wilson, who led us through World War I, was a lawyer or that Franklin Delano Roosevelt, president during most of World War II, was also a lawyer.

Lawyers were no less active as leaders during other challenging periods in American history. Who can remain untouched by the work and words of Barbara Jordan during Watergate: "My faith in our Constitution is whole. It is complete. It is total."

Jordan was not the first Texas lawyer to defend the cause of freedom. Six stubborn lawyers fortified themselves with 180 other souls to defend the Alamo against impossible odds. William Barrett Travis, commander of the Alamo, was only 26 years old when he wrote an open letter to the people of Texas and all Americans, promising that he would "never surrender or retreat." What most people do not know is that Travis had a law practice in Anahuac and, later, in San Felipe, before he sacrificed his life at the Alamo.

The colorful James Butler Bonham was 29 years old when he died at the Alamo. Long before he traveled there, he achieved fame as a spirited lawyer in South Carolina. Those who believe that lawyers never act for anything but profit should read the letter to Gen. Sam Houston in which Bonham volunteered his services as a soldier: "Permit me through you to volunteer my services in the present struggle of Texas, without condition, I shall receive nothing, either in the form of services, pay, or land, or rations."

The tradition of lawyers' courage and commitment to society continues in modern times. Disreputable lawyers are justly criticized. The public, as well as the legal profession, is well served by their exposure. But they are only a small part of the story of the legal tradition. That tradition has been built by the men of the Constitutional Convention, our nation's presidents and other leaders, and by the people laboring within the legal profession today. For every charlatan, we can find a dozen honorable lawyers to offset the jokes, the negative reports, and the dishonorable few.

As Americans and Texans, we have only to look back through our own history to find portraits of honorable men and women who have served society as lawyers. We have only to picture the Alamo and then, 46 days later, the Battle of San Jacinto and the commander who led Texas to victory in the war's decisive battle. He was Sam Houston, a courageous man, a hero committed to building a strong and free society, a capable leader. But first, he was a lawyer.

Eugene A. Cook was a justice on the Supreme Court of Texas from 1988 to 1993.

McCORKLE: *Understanding Our Calling*

Two decades ago, we were engaged in intense professional debate and self-reflection about just how lawyers could properly pursue justice and the best interests of their clients by means considered by many to be unjust, unfair, unreasonable, or uncivil. It was a time when poor and sometimes malicious conduct by one attorney frequently prompted rationalization and relativism to justify equally repellant reprisals by another. Worse, perhaps, was the troubling perspective that a behavior was acceptable “because everyone is doing it.” During this time, there was much discussion about the erosion of public trust and confidence in the courts and the legal profession, and passionate discourse about what exactly constituted appropriate professional behavior. From this process of self-scrutiny came the Creed of Professionalism.

Our bench and bar were fortunate to have the leadership skills of Texas Supreme Court Justice Eugene A. Cook as chair of the Supreme Court committee dedicated to the task of facilitating the spirited exchange of ideas from representatives of all facets of our profession. As a member of the Drafting Subcommittee, I remember researching lawyer licenses, oaths, and codes of conduct in use across the country, as well as professional codes of conduct found in historical writings. For me, this broad view revealed fundamental and ageless truths about what it means to be called to a profession. The Drafting Subcommittee’s discussions were wide-ranging, historical, philosophical, pragmatic, and lively.

The full committee, as well as the entire Texas Supreme Court and Court of Criminal Appeals, considered the Drafting Subcommittee’s working draft. Throughout that review process, there was surprisingly little editorial change. The almost immediate consensus reached may have been attributable to the balance of the committee. More likely, however, was that the Creed gave voice to the cornerstones and timeless principles of justice and fairness of our profession. It articulated those principles in the context of contemporary practice.

The result of this collaborative effort was a unique creed. In my view, it is especially noteworthy for four aspects. The Creed of Professionalism was the first creed that:

1. Called upon attorneys to review the intent and terms of the creed with those they would represent. Each attorney proactively become an educator of all those unfamiliar with our duties and obligations as well as concepts of justice and of appropriate acts of professionalism;
2. Mixed the cornerstone principles of justice with specific acts and with the use of “I,” thereby encouraging a personal commitment by the reader;
3. Was aspirational in concept, simply crafted, and, unlike many codes, its design allowed it to serve as a simple, reflective reminder acting much as a written mentor on appropriate goals for our profession;
4. Recognized specific acts as absolute standards of accepted practice, thereby serving as a compass for those seeking guidance.

I share the view that the Creed continues to require support from the bench and bar to reinforce professionalism, especially in our present age of constant and rapid technological change. I also believe it has had a positive impact on trial practice. One example is the demise of the “My client made me do it” excuse and its progeny.

The contributions of so many in service to the law, most of whose names have been lost through time, should inspire us, reminding us of their past sacrifices and our obligations to all those we now serve. U.S. District Judge Norman Black, a thoughtful and gentle voice in our drafting conversations, is no longer with us and may now be considered among those great judges and lawyers who have given us our legacy. Today he might remind us that justice is more than sentiment and that we are a link in history, preserving the past while encouraging the next generation. I am grateful for the opportunity to have participated in giving voice to something larger than any one individual.

Judges and lawyers have been my heroes as they struggle daily to do the right thing. Whatever we do in service, whether the task is humble or great, we should understand our calling and rededicate ourselves to our profession through application of the principles found in our Creed.

Lamar McCorkle was a Harris County district judge from 1986 to 2008.

Principles of Civility, Integrity and Professionalism

American Board of Trial Advocates

Preamble

These Principles supplement the precepts set forth in ABOTA's Code of Professionalism and are a guide to the proper conduct of litigation. Civility, integrity, and professionalism are the hallmarks of our learned calling, dedicated to the administration of justice for all. Counsel adhering to these principles will further the truth-seeking process so that disputes will be resolved in a just, dignified, courteous, and efficient manner.

These principles are not intended to inhibit vigorous advocacy or detract from an attorney's duty to represent a client's cause with faithful dedication to the best of counsel's ability. Rather, they are intended to discourage conduct that demeans, hampers, or obstructs our system of justice.

These Principles apply to attorneys and judges, who have mutual obligations to one another to enhance and preserve the dignity and integrity of our system of justice. As lawyers must practice these Principles when appearing in court, it is not presumptuous of them to expect judges to observe them in kind. The Principles as to the conduct of judges set forth herein are derived from judiciary codes and standards.

These Principles are not intended to be a basis for imposing sanctions, penalties, or liability, nor can they supersede or detract from the professional, ethical, or disciplinary codes of conduct adopted by regulatory boards.

As a member of the American Board of Trial Advocates, I will adhere to the following Principles:

1. Advance the legitimate interests of my clients, without reflecting any ill will they may have for their adversaries, even if called on to do so, and treat all other counsel, parties, and witnesses in a courteous manner.
2. Never encourage or knowingly authorize a person under my direction or supervision to engage in conduct proscribed by these principles.
3. Never, without good cause, attribute to other counsel bad motives or improprieties.
4. Never seek court sanctions unless they are fully justified by the circumstances and necessary to protect a client's legitimate interests and then only after a good faith effort to informally resolve the issue with counsel.
5. Adhere to all express promises and agreements, whether oral or written, and, in good faith, to all commitments implied by the circumstances or local custom.
6. When called on to do so, commit oral understandings to writing accurately and completely, provide other counsel with a copy for review, and never include matters on which there has been no agreement without explicitly advising other counsel.
7. Timely confer with other counsel to explore settlement possibilities and never falsely hold out the potential of settlement for the purpose of foreclosing discovery or delaying trial.
8. Always stipulate to undisputed relevant matters when it is obvious that they can be proved and where there is no good faith basis for not doing so.
9. Never initiate communication with a judge without the knowledge or presence of opposing counsel concerning a matter at issue before the court.
10. Never use any form of discovery scheduling as a means of harassment.
11. Make good faith efforts to resolve disputes concerning pleadings and discovery.
12. Never file or serve motions or pleadings at a time calculated to unfairly limit opposing counsel's opportunity to respond.
13. Never request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.
14. Consult other counsel on scheduling matters in a good faith effort to avoid conflicts.
15. When calendar conflicts occur, accommodate counsel by rescheduling dates for hearings, depositions, meetings, and other events.

16. When hearings, depositions, meetings, or other events are to be canceled or postponed, notify as early as possible other counsel, the court, or other persons as appropriate, so as to avoid unnecessary inconvenience, wasted time and expense, and to enable the court to use previously reserved time for other matters.

17. Agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect my client's legitimate rights.

18. Never cause the entry of a default or dismissal without first notifying opposing counsel, unless material prejudice has been suffered by my client.

19. Never take depositions for the purpose of harassment or to burden an opponent with increased litigation expenses.

20. During a deposition, never engage in conduct which would not be appropriate in the presence of a judge.

21. During a deposition, never obstruct the interrogator or object to questions unless reasonably necessary to preserve an objection or privilege for resolution by the court.

22. During depositions, ask only those questions reasonably necessary for the prosecution or defense of an action.

23. Draft document production requests and interrogatories limited to those reasonably necessary for the prosecution or defense of an action, and never design them to place an undue burden or expense on a party.

24. Make reasonable responses to document requests and interrogatories and not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and nonprivileged documents.

25. Never produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

26. Base discovery objections on a good faith belief in their merit, and not for the purpose of withholding or delaying the disclosure of relevant and nonprivileged information.

27. When called on, draft orders that accurately and completely reflect a court's ruling, submit them to other counsel for review, and attempt to reconcile any differences before presenting them to the court.

28. During argument, never attribute to other counsel a position or claim not taken, or seek to create such an unjustified inference.

29. Unless specifically permitted or invited, never send to the court copies of correspondence between counsel.

When In Court I Will:

1. Always uphold the dignity of the court and never be disrespectful.

2. Never publicly criticize a judge for his or her rulings or a jury for its verdict. Criticism should be reserved for appellate court briefs.

3. Be punctual and prepared for all court appearances, and, if unavoidably delayed, notify the court and counsel as soon as possible.

4. Never engage in conduct that brings disorder or disruption to the courtroom.

5. Advise clients and witnesses of the proper courtroom conduct expected and required.

6. Never misrepresent or misquote facts or authorities.

7. Verify the availability of clients and witnesses, if possible, before dates for hearings or trials are scheduled, or immediately thereafter, and promptly notify the court and counsel if their attendance cannot be assured.

8. Be respectful and courteous to court marshals or bailiffs, clerks, reporters, secretaries, and law clerks.

Conduct Expected of Judges

A lawyer is entitled to expect judges to observe the following Principles:

1. Be courteous and respectful to lawyers, parties, witnesses, and court personnel.

2. Control courtroom decorum and proceedings so as to ensure that all litigation is conducted in a civil and efficient manner.

3. Abstain from hostile, demeaning, or humiliating language in written opinions or oral communications with lawyers, parties, or witnesses.

4. Be punctual in convening all hearings and conferences, and, if unavoidably delayed, notify counsel, if possible.

5. Be considerate of time schedules of lawyers, parties, and witnesses in setting dates for hearings, meetings, and conferences. When possible, avoid scheduling matters for a time that conflicts with counsel's required appearance before another judge.

6. Make all reasonable efforts to promptly decide matters under submission.

7. Give issues in controversy deliberate, impartial, and studied analysis before rendering a decision.

8. Be considerate of the time constraints and pressures imposed on lawyers by the demands of litigation practice, while endeavoring to resolve disputes efficiently.

9. Be mindful that a lawyer has a right and duty to present a case fully, make a complete record, and argue the facts and law vigorously.

10. Never impugn the integrity or professionalism of a lawyer based solely on the clients or causes he represents.

11. Require court personnel to be respectful and courteous toward lawyers, parties, and witnesses.

12. Abstain from adopting procedures that needlessly increase litigation time and expense.

13. Promptly bring to counsel's attention uncivil conduct on the part of clients, witnesses, or counsel.

Ever wonder what happened to the ideals of civility, integrity, and professionalism to which you aspired in law school? They are alive and well in the American Board of Trial Advocates. Admittedly, these principles are difficult to define. Nevertheless, the legal profession as a whole and each individual lawyer and judge must adopt and practice these concepts so that the members of our profession will again be looked upon as the greatest protectors of our life, liberty and property.

Please join ABOTA in making these principles a reality once again.

ATTACHMENT

INCIVILITY AND SANCTIONS

**MARY SCHAERDEL DIETZ
ERIN F. FONTÉ,
AUBREY B. COLVARD**

State Bar of Texas
35th ANNUAL
ADVANCED CIVIL TRIAL COURSE 2012
San Antonio – July 25-27
Dallas – August 22-24
Houston – October 17-19

CHAPTER 6.1

Incivility and Sanctions

By Mary Schaerdel Dietz, Erin F. Fonté, and Aubrey B. Colvard

Attorneys can often be perceived by the public as aggressive, hostile, and rude. Though these characteristics should not be attributed to the large majority of the attorney population, the stereotype remains due, in large part, to the fact that the legal profession itself demands a certain level of passion and vigor in order to properly advocate for a client. The line between zealous advocacy and incivility is thin however, and what attorneys sometimes forget is that zealousness ends where the client's cause is no longer advanced. As one court noted, "although an attorney must represent his client zealously, he cannot be a 'zealot.'" *Revson v. Cinque & Cinque, P.C.*, 70 F.Supp.2d 415, 442 (S.D.N.Y. 1999).

One notable case illustrates this concept particularly well: a Texas attorney who was representing a client during a deposition attempted to obstruct the examining attorney's questioning, peppering his interruptions with obscenities and personal insults. At one point, the Texas attorney went so far as to call the examining attorney an "asshole" and warned "You can ask some questions but get off of that. I'm tired of you. You could gag a maggot off a meat truck." The behavior was subsequently reviewed by the Delaware Supreme Court, which deemed the attorney's behavior "outrageous and unacceptable." The Court discussed the necessity for civility in the legal profession at length, instructing that "staunch advocacy on behalf of a client is proper and fully consistent with the finest effectuation of skill and professionalism. Indeed, it is a mark of professionalism, not weakness, for a lawyer to zealously and firmly protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process." *Paramount Comm'ns v. Qvc Network*, 637 A.2d 34, 54-55 (Del. 1994). The court then went on to distinguish the Texas attorney's behavior, stating that "a lawyer who engages in the type of behavior exemplified by [the attorney] on the record of the [client] deposition is not properly representing his client, and

the client's cause of action is not advanced by a lawyer who engages in unprofessional conduct of this nature." *Id.*

While some lawyers may view such antics as "good lawyering," incivility typically does more harm than good. In addition to negative reactions by courts, such as the Delaware Supreme Court's reaction above, incivility can have a negative effect on clients, attorneys, the legal profession, and the legal system as a whole. Though the legal profession necessitates a certain level of passion and vigor when advocating for clients, incivility is not necessary. An example of the exercise of civility in a most unexpected situation is Winston Churchill, when announcing by letter to the Japanese Ambassador that a state of war existed between Great Britain and Japan, he closed by stating "I have the honour to be, with high consideration, Sir, Your obedient servant, Winston S. Churchill." Unsurprisingly, Churchill faced criticism for such courteous language to the enemy, but defending his words, he remarked "after all, when you have to kill a man it costs nothing to be polite." Winston Churchill, *The Second World War*, Vol. III, Ch. 32 (1950). These words certainly carry true in today's legal world.

As attorneys, we are expected to maintain a certain level of decorum. The Texas Lawyers' Oath, which we all took when inducted into the State Bar, instructs us to conduct ourselves in a manner befitting to the profession. However, this pledge does not directly mention civility. Other states, however, have taken the extra step of incorporating civility language into their attorney oaths:

- South Carolina - "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."
 - Oath modified October 22, 2003
- Utah - "I will discharge the duties of attorney and counselor at law as an officer of the courts of this State with honesty, fidelity, professionalism, and civility; and that I will faithfully observe the Rules of Professional Conduct and the Standards of Professionalism and Civility."
 - Oath Modified August 14, 2007
- New Mexico - "I will maintain civility at all times."
 - Oath modified March 30, 2010
- Florida - "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."

- Oath modified September 12, 2011

The Texas Lawyer's Creed, however, does specifically speak to civility. The Creed was created in 1988 during a time when, drafter Justice Eugene A. Cook noted, "lack of professionalism had reached epidemic proportions." Fred Hagans, James H. "Blackie" Holmes III, Justice Eugene A. Cook, and Judge Lamar McCorkle, *Reflections on the Texas Lawyer's Creed*, Texas Bar Journal, Vol. 72, No. 10 (Nov. 2009). Though the Creed is not law, its goal is to emphasize the importance of civility in the legal profession, specifically aiming, as drafter James H. "Blackie" Holmes III remarked, "to put the word 'fun' back into the practice, advance the administration of justice, and elevate the legal system to the exalted plateau it deserves."

Id. The Creed's Mandates instruct lawyers to conduct themselves in a manner fitting the profession, and several Mandates specifically reference civility:

- "A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism."
- "I will advise my client that civility and courtesy are expected and are not a sign of weakness."
- "I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct."
- "I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel."
- "A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct."
- "I will be courteous, civil, and prompt in oral and written communications."
- "I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me."
- "I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel."
- "Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are

equally responsible to protect the dignity and independence of the Court and the profession.”

- “I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.”
- “I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.”

Hopefully, we all know how we are supposed to act, however incivility still occurs daily.

Judge Lamar McCorkle, another of the Creed’s drafters, noted that, as attorneys, “whatever we do in service, whether the task is humble or great, we should understand our calling and rededicate ourselves to our profession through application of the principles found in our Creed.”

Id. We encourage lawyers to take the Texas Lawyer’s Creed to heart and practice. For those who do not, there are repercussions and sadly, one’s practice and reputation can suffer. Also, the Courts, when faced with uncivil attorney behavior, have employed varying methods to curtail or punish inappropriate actions. This discussion will focus on methods that are employed by courts when dealing with incivility, including matters in court documents, letters, and email, in-court behavior and verbal incivility. Finally, we will focus on “Hot Topics” including incivility in the Social Media arena and two recent Texas motions for sanctions.

Sanctioning Incivility

Monetary Fines

One method commonly used to handle incivility is the imposition of monetary fines. The Fifth Circuit, for example, upheld a \$10,000 fine issued against an attorney whose pleadings alleged that the judge assigned to his case acted improperly by displaying favoritism for the opposing counsel. *Raspanti v. Keaty*, 2008 U.S. App. LEXIS 8044 (5th Cir. 2008). Another attorney was sanctioned \$2,500 for displaying “an escalating tirade of unsupported accusations and aspirations” that questioned the trial court’s competence in his brief, asserting that the court was naïve, incompetent and biased. *Key Equipment Finance, Inc. v. Hawkins*, 985 A.2d 1139, 1146 (Me. 2009). The court reviewing the sanction opined that “vigorous advocacy cannot be

an excuse for unfounded accusations and childish vitriol,” and found that the attorney’s “statements cannot be excused in the name of zealous representation.” *Id.* at 1146-7. Additionally, an attorney representing himself in his divorce proceeding was fined for writing a letter to opposing counsel in which he called her “inept” and expressed his disappointment that, as a Christian, opposing counsel would represent one Christian against another, “let alone a wife verses a husband.” *Barrett v. Virginia State Bar*, 611 S.E.2d 375, 381 (Va. 2005). Sanctions were also imposed by a court for \$50,000 against an attorney who threatened to “tarnish” a prospective defendant’s reputation and subject him to the “legal equivalent of a proctology” if claims were not settled prior to filing the complaint. *Revson v. Cinque & Cinque*, 70 F.Supp.2d 415, 417, 443 (S.D.N.Y. 1999). Finally, a court assessed \$5,000 in sanctions against an attorney for making disparaging remarks about his adversary, saying in his brief that his opposing counsel fit more as a clown in a circus than an attorney in a court of law. *Nachbaur v. American Transit Insurance Co.*, 752 N.Y.S.2d 605 (1st Dept. 2002).

Courts may impose monetary penalties for verbal incivility. For example, a court sanctioned an attorney \$25,000 for oral comments describing opposing counsel as “stooges,” “weak pussyfooting deadhead[s],” “inept,” and “clunks.” *In re First City Bancorp. of Texas, Inc.*, 282 F.3d 864 (5th Cir. 2002). The Fifth Circuit concluded that these comments violated civility standards and commented that the lower court judge showed admirable “patience and restraint” in not levying a greater sanction earlier in the proceeding. *Id.* Another court fined an attorney \$4,000 for referring to opposing counsel as the granddaughter of a controversial former Dominican Republic dictator. *United States v. Kouri-Perez*, 8 F.Supp.2d 133 (D.P.R. 1998). The court found the statement “unnecessarily intruded into the private life of a colleague and an officer of the court,” and “attacked [opposing counsel] in the most personal way possible, by making allegations about her family and ancestry.” *Id.*

Formal Censure

Another method courts sometimes employ to handle attorney incivility is to issue a formal censure against the offending attorney. For example, a district court censured and reprimanded an attorney when she raised racial issues through the affidavits of her clients, which referred to opposing counsel as “the Grand Wizard of the KKK.” *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306 (11th Cir. 2002). Another attorney, who wrote a disparaging letter about a fellow attorney and then proceeded to forward the letter to eight members of the community was formally censured by a disciplinary board, which found that the attorney engaged in conduct “prejudicial to the administration of justice” and concluded that “in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.” *In re Comfort*, 159 P.3d 1011, 1017 (Kan. 2007). The Kansas Supreme Court upheld the disciplinary board’s decision. *Id.* Censure was also appropriate where an attorney filed a brief replete with allegations against opposing counsel of “professional misconduct, unethical and illegal behavior.” *Galle v. Orleans Parish Sch. Bd.*, 623 So. 2d 692, 696 (La. Ct. App. 1993). The Louisiana Court of Appeals found the attorney’s allegations to be “insulting and offensive,” particularly in light of the fact that the attorney offered no supporting evidence for such allegations. *Id.* Finally, an attorney was censured for writing to a judge to ask him to “please seriously consider retiring from the bench,” and stating that the judge did not “have what is required” to decide cases. *In re Arnold*, 56 P.3d 259, 263 (Kan. 2003). The reviewing court noted that while a lawyer “has a right to criticize a judge . . . to exercise this right, the lawyer must be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms. Unrestrained and intemperate statements against a judge . . . lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.” *Id.* at 767.

Courts have also formally censured attorneys for verbal incivility. For example, an attorney who told a deponent that he would like “to be locked in a room with [her] naked with a

sharp knife,” and needed “a big bag” to put her in “without the mouth cut out” was publicly reprimanded by the South Carolina Supreme Court. *In re Harvey Golden*, No. 24747 (S.C. Jan. 19, 1998). The reviewing panel that originally examined the case found the attorney’s behavior to be “unwarranted” and stated that the behavior “tended to pollute the administration of justice and to bring the legal profession into disrepute.” *Id.* Another attorney was publicly reprimanded for comparing an administrative board to “monkeys” and its statements to “the grunts and moans of apes.” *395 Assocs., LLC v. New Castle Cnty.*, 2005 WL 3194566, at *2 (Del. Super. Ct. Nov. 28, 2005). The Delaware Supreme Court, when reviewing the behavior, found the attorney’s language to be “offensive and sarcastic.” *Id.*

Bar Discipline and Contempt

An uncivil attorney can also be disciplined by a state’s Bar and/or even held in contempt. A Texas attorney was held in contempt, had his license suspended for three years and was sentenced to 90 days in prison for making a gesture simulating masturbation while standing before a Travis County judge. *Ex parte Reposa*, 2009 Tex. Crim. App. Unpub. LEXIS 725 (Tex. Crim. App. Oct. 28, 2009). The Texas Criminal Appeals Court found it “clear from the context of the entire proceeding that, in making the masturbatory gesture, the applicant was not in any way performing his duty of zealously representing his client or advancing his client’s case.” *Id.* at *19. Instead, the court determined, “this was an intentionally disrespectful act serving no purpose but to insult the prosecutor,” and formal censure was appropriate. *Id.* at *20. Another attorney was suspended from practicing law where he filed a brief containing many vitriolic comments about his opposing counsel, including a statement suggesting that the opposing counsel needed a lecture in “good lawyering” and presented “half-baked” arguments to the court. *In re Eicher*, 661 N.W.2d 1, 11 (S.D. 2003). The court wrote that “it is presumed that attorneys will act as vigorous advocates for their clients . . . however, personal attacks on opposing parties and their counsel do not fall within the bounds of vigorous advocacy.” *Id.*

Additionally, an attorney was subjected to Bar discipline for referring to a judge who ruled against him as “Frank the Fixer” and “Frank the Crook” who was “filling the pockets of his buddies.” *In re Palmisano*, 70 F.3d 483, 488 (7th Cir. 1995). The court found these false accusations worthy of disbarment and noted that “false statements, made with reckless disregard of the truth, do not enjoy constitutional protection.” *Id.* Another attorney was jailed for contempt and suspended due to uncivil conduct in filing a memorandum that called a judge a “lying incompetent ass-hole.” *Ky. Bar Ass’n v. Waller*, 929 S.W.2d 181 (Ky. 1996). The Kentucky Supreme Court found the jail sentence appropriate, reasoning that the attorney’s behavior warranted a punishment that would remind him that “he must conform his professional conduct to minimum acceptable standards.” *Id.* 183. Finally, an attorney, who accused a judge in several letters of selfishness and racism when she continued a trial because of a personal family emergency, was suspended indefinitely. *In re Madison*, 282 S.W.3d 350 (Mo. 2009). The Missouri Supreme Court found that the accusations made by the offending attorney were “without factual basis and were made in the heat of anger and pique” and in addition to the indefinite suspension, required the lawyer to be evaluated psychologically and complete anger management and ethics courses. *Id.*

Attorneys can also be subjected to Bar discipline for verbal incivility. A Texas attorney who assaulted a person, verbally abused a lawyer during a deposition, and disrupted the deposition, for example, was suspended from the Eastern District of Texas for three years. *In re Jaques*, 972 F.Supp. 1070 (E.D. Tex. 1997). The reviewing court noted that the offending attorney “cannot effectively represent clients . . . if he cannot control his temper and abide by the judicial process of the court.” *Id.* at 1081. Another attorney, who engaged in flagrantly uncivil language, was disbarred for “vituperative statements” and “vitriolic slurs” that were so offensive that the First Circuit Court of Appeals declined to repeat them. *In re Cordova-Gonzalez*, 996 F.2d 1334, 1337 (1st Cir. 1993). Further, an attorney was suspended for five years for his “steady stream of uncivil, disrespectful, and unprofessional *ad hominem* attacks on

parties, opposing counsel and the court.” *Warren v. Baker*, 2007 U.S. Dist. LEXIS 84904, *4 (M.D. Pa. Nov. 16, 2007). The reviewing court held that the offending attorney’s conduct “evinces a clear misunderstanding of the proper purpose of the civil justice system, a deliberate ignorance of substantive law, and total disregard for his professional responsibilities.” *Id.* at *6. Another attorney was suspended for sixty days after alleging that he held “certain knowledge” that a district court judge, a magistrate, an attorney, and others had conspired to fix a case against his client. *In re Graham*, 453 N.W.2d 313, 318 (Minn. 1990). The Minnesota Supreme Court affirmed the disciplinary board’s determination that the accusations were so unfounded as to merit the suspension and further ordered the attorney to pay \$750 in costs. *Id.* Finally, a court disbarred an attorney who referred to her client’s developmentally disabled minor daughter as “akin to broccoli” and “pretty much a tree trunk.” *In re S.C.*, 41 Cal. Rptr. 3d 453 (Ct. App. 2006). In addition to these comments, the attorney had numerous transgressions in the past that the court also took into account when deciding to disbar the attorney. *Id.*

Strike Offensive Material from Court Documents

Courts have also taken more direct approaches to handling incivility in recorded materials such as striking the inappropriate language from a court document. For example, an attorney who disparaged his opposing counsel’s brief by saying it contained fabrications along with “laughable” and “ridiculous” arguments that were “pure sophistry” was required to strike the “unprofessional discourse” from his brief. *In re Abbott*, 925 A.2d 482 (Del. 2007). Another attorney who filed a brief accusing the lower court of “intentionally fabricating evidence” and misinterpreting a case had his brief stricken from the record and was ordered by the Utah Supreme Court to pay the opposition’s attorneys’ fees. *Peters v. Pine Meadows Ranch Home Ass’n*, 151 P.3d 962 (Utah 2007).

Judicial Criticism

One method courts have employed to handle uncivil behavior is to criticize the behavior directly from the bench. An Indiana court, for example, included a lengthy lecture in its opinion, reprimanding attorneys from both sides for their uncivil behavior. *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992). The court noted that throughout the briefs, the attorneys “launched rhetorical broadsides at each other which have nothing to do with the issues . . . counsels’ comments concern their opposite numbers’ intellectual skills, motivations, and supposed violations of the rules of common courtesy.” *Id.* at 352. The court likened the incivility to “static on the radio” that tends to “blot out legitimate argument” and weaken a brief’s effectiveness. *Id.*

Judicial criticism is also employed to discipline verbal incivility. A Texas attorney, for example, was lectured by the Fifth Circuit for making his oral argument in front of the court in an “inflammatory tone” and a manner that “overstep[ped] the bounds of professional conduct and zealous advocacy.” *Fleming v. United States*, 162 Fed. Appx. 383, 386 (5th Cir. 2006). The Circuit stated that the attorney did not have “carte blanche to employ intemperate and abusive language or to engage in ad hominem attacks on federal judges” and further warned that such behavior in the future would merit sanctions. *Id.* Further, an attorney who referred to his opposing counsel’s brief as a “rant” with a “farcical theme” was reprimanded by the court for his “belligerence” which the court deemed “unwarranted and inappropriate.” *Bettendorf v. St. Croix Cnty.*, 754 N.W.2d 528, 531 (Wisc. Ct. App. 2008). Finally, an attorney who called a lower court’s conclusions “ludicrous and inane” was lectured by the Vermont Supreme Court, which decried this lack of professionalism and stressed that as an officer of the court, a lawyer should show respect for “the legal system and those who it serves.” *Northern Security Ins. Co. v. Mitec Electronics, Ltd.*, 965 A.2d 447 (Vt. 2008).

Hot Topics

Civility and Social Media

Attorneys using social media such as Facebook, LinkedIn, Twitter, or personal or work-related blogs are on the bleeding edge of developing codes of conduct and ethics rules regarding these platforms by lawyers. For example, a Florida attorney faced a public reprimand and \$1,250 fine for writing a blog post in which he discussed a pending criminal trial and the presiding judge. The attorney was of the opinion that a Florida circuit court judge was methodically depriving criminal defendants of their right to a speedy trial. Instead of allowing them four to five weeks to prepare for trial, as was routine, the judge was allegedly asking defendants after whether they were ready for trial only about a week after their arraignment. This, the attorney believed, was a deliberate ploy by the judge to force defendants to ask for a continuance, thus waiving their right to a speedy trial. To remedy the situation, the attorney took to a local blog in which attorneys discussed issues concerning local courts. The attorney's blog post, however, was little more than rational discourse. In his post, the attorney referred to the judge as an "evil, unfair witch," "seemingly mentally ill" and "clearly unfit for her position and knows not what it means to be a neutral arbiter." The Florida Bar concluded that the attorney violated several ethics rules and issued a public reprimand as well as a \$1,250 fine. The Florida Supreme Court upheld this decision, and found no merit in the attorney's First Amendment free speech argument.

In another instance, an Illinois attorney was charged with violating legal ethics for her use of social media. The attorney, an assistant public defender, blogged about the cases she worked on, and allegedly revealed confidential client information in the process. Additionally, in other blog posts, the attorney referred to one judge as being "a total asshole," and to another as "Judge Clueless." In addition to legal ethics violations charges, the attorney also lost her job.

Though the realm of social media is somewhat new to the legal profession, the approach courts take to handle this type of incivility is the same as the types of incivility discussed

previously in this paper. Though it may be tempting to voice frustrations and anger over social media, the price for such behavior is typically not worth it.

Notable Pending Texas Cases

Pending motions in two recent Texas matters, have made headlines and brought focus to the issue of attorney incivility: *In the Matter of the Marriage of R.G.B. and M.G.B. and Buxton Arlington Pet, et al. v. Pete & Mac's Arlington, LLC, et al.* In *In the Matter of the Marriage of R.G.B. and M.G.B.*, the attorneys for M.G.B. filed a motion for sanctions against the attorney for R.G.B., alleging inappropriate behavior including: “referring to a female attorney as a ‘cunt,’ a ‘flat-chested bitch,’ and a ‘dumb shit;’ telling a female attorney that he ‘has never been so embarrassed of a white woman;’ asking a female attorney if she wanted him to ‘examine her breasts for lumps;’ referring to a female attorney as working for an ‘escort service’” The motion for sanctions is currently under review by the Harris County District Court.

Another motion for sanctions was recently filed against an attorney for lack of civility. It is alleged that during the course of routine discovery communications, the defendants counsel in *Buxton Arlington Pet, et al. v. Pete & Mac's Arlington, LLC, et al.* sent a series of inappropriate email communications to the plaintiff's attorneys. In the emails, the offending attorney called the plaintiff's attorney a series of insulting names, including an “ignorant slut,” a “gutless attorney” and a “pussy.” This motion is currently before the Tarrant County District Court for ruling.

Conclusion

Though the legal profession commands a certain level of passion and vigor in order to properly advocate for a client, attorneys must be careful not to cross the line between zealous advocacy and incivility. Attorneys who act in an uncivil manner not only risk sanctions for their behavior, but may also stand to harm clients, their reputation, and the judicial system as a

whole. It is important for attorneys to remember that zealousness ends where the client's cause is no longer advanced: "although an attorney must represent his client zealously, he cannot be a 'zealot.'" *Revson v. Cinque & Cinque, P.C.*, 70 F.Supp.2d 415, 442 (S.D.N.Y. 1999).

