

# LITIGATORS CORNER: Civility or Honesty? Which Should You Choose?



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Civility? Or honesty? Civility? Or honesty? Which do I choose? Can I have my cake and pie, or must I pick one or the other? Are the two mutually exclusive? Sometimes they are. In that case, I choose honesty over civility every time.

Civility has again become a popular topic of discussion. It is a buzzword for those who, with our typical modern and extremely abbreviated attention span, apprehend the legal profession as being too contentious, too mean, and too argumentative. An article in the November 21, 2001 *Chicago Tribune* laments the problem. So does an article in the November 2001, *CBA Record*, which says we have "let the human part of our lives shamefully dissipate as we pursue our calling."

The problem was treated in more depth about ten years ago when the lack of good behavior and the misuse of the rules to abuse one's opponent, rather than to discover facts, were surveyed and analyzed in

the "Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit," reported at 143 F.R.D. 371. In my April, 2001 *IP Today* column ("What I Would Do If I Were Boss"), I described a deposition where two lawyers begin arguing, and the argument descends into a fist-fight. Fighting isn't grown up, of course, but everyone who litigates probably has gotten angry from time to time. I recall another case before a judge with a reputation for being difficult, abusive, and coercive. (For unbridled commentary on a judge, you might want to read *United States v. Pina*, 844 F.1 (1st Cir. 1988); I can't safely quote it here.). The judge sent the litigants to a magistrate. In an off-the-record conference, the discussion became heated. The magistrate got out of his chair, walked around his desk, and pointed his pencil in the face of one of the lawyers, who responded, "Don't point your pencil in my face!" while rising from his seat. Other cooler heads intervened.

The Interim Report and the articles treat incivility both as a modern phenomenon, and an example of a deteriorating profession. Competitive pressures and the growth of law firms into mega-firms, as the Interim Report pointed out, have contributed to a recent surge in nasty tactics. I doubt, however, that lack of civility in resolving disputes is a new phenomenon, at least in the long term. In times past, disputes between civilized people (and even between lawyers) were resolved on occasion with brutal and deadly force. Alexander Hamilton and Aaron Burr resolved their differences in Weehawken, New Jersey with pistols. Duels were legal in South Carolina until 1880 or so, and were authorized in the German army until World War I. I recall that Vice President, then Senator, and finally Confederate Army General John Breckinridge got in a dust-up on the floor of the House or Senate. So did a member of England's Parliament. One of the Founding Fathers, Button Gwinnett, died in a duel after signing the Declaration of Independence.

Ironically for modern litigation, the Encyclopedia Britannica reports that the duel came into fashion because people of the time were looking for an alternative to what they had as a means of dispute resolution. Solemn affirmation by oath in legal proceedings reportedly led to a lot of perjury,

and left "too much to chance or manipulation by priests." If the plaintiff accused the defendant of a crime and the defendant retorted that the plaintiff was a liar, the judge ordered them to duel. The combatants were even required to post a bond so they wouldn't scat before the duel. So anyone who thinks things are contentious now ought to read a little history. We don't duel any more, and we are better off.

While we no longer duel, that doesn't mean the problem of contentiousness has gone away. It continues to exist. We are human. Law is an adversarial process, and all of us lose our tempers from time to time. No matter what, manners do count. But I think we are focusing too much on being nice guys, and we are letting the abusers take advantage of it.

Why do I believe this? Because there is a different kind of character who is smart enough to see civility as a weapon. Every one of us has met the lawyer who lives by smoothly lying. These types are usually charming, smooth, seemingly credible and professional. Like Professor Zoltan Karparthy, the Hungarian speech teacher in *My Fair Lady*, they "oil their way around the floor, oozing charm from every pore." But niceness doesn't equate to truthfulness. The *Tribune* said the meanest lawyer isn't necessarily the best one. I say that the nicest lawyer isn't necessarily the most honest one. Lawyers who are now turning "civility" into a weapon are the same lawyers who can twist nearly every rule meant to achieve progress in a lawsuit into another slit trench in the Stalingrad defense. They make their living by avoiding or destroying the rules, not by following them and applying them to their client's best advantage. There is a difference.

The goal of our judicial system is not to be a country club. The goal is "the just, speedy, and inexpensive determination of every action." In patent cases, we've frequently given up on the second and third. Now some would have us sacrifice the first of those three important goals rather than call the facts as we see them, including calling an opposing lawyer on the carpet when he or she tries to mislead or manipulate a court. I can think of nothing worse than to sacrifice truthfulness and effective representation of one's client in order to avoid being called "uncivil." The purpose of discovery is to get at the facts, in the hope the case will achieve a result that reflects reality — that is, the truth. It is very important that we not lose sight of these goals simply because everyone wishes to avoid hearing hard facts.

The loss of a case because of the desire to avoid uncivility doesn't happen all at



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once. Instead, like the Chinese torture of death by a thousand cuts, each by itself non-fatal, it is the accretion that counts. The clever tactician-lawyer knows that. In one of our cases, we were in a conference with a judge. The opposing counsel described an earlier meeting as including statements by our firm's lawyers that we knew had not been made. We called him on it. The adversary didn't apologize or disagree; instead, we were accused of being uncivil, and descending into childish disputes. That wasn't the first instance, either.

The goal was to make our side appear unreasonable and untruthful, while our adversary appeared magnanimously above the fray. In a weirdly true way, this is an *ad hominem* attack. It was a small attack, just one cut, intended to be followed by more. The person who can be made over time to seem unduly contentious is disparaged, not for his views, but for his manner of presentation. (A professional propagandist would love it.) The accusation is never made directly as an attack on the adversary. Instead, the argument is phrased indirectly: "we" lawyers shouldn't, etc. One lawyer I know was fond of walking into court and telling the judge that we should "as lawyers, all be peacemakers," that the judge shouldn't be bothered with the dispute, and that the lawyers should work something out between them. The truth is, he didn't believe that any more than you or I believe the earth is flat. As soon as we were out of court, he took out his shiv and used it to avoid giving us the discovery sought by our motion.

Large firms came in for more of the criticism in the Interim Report. The Report said:

The totality of the written responses to Question III 5 b also shows a great concern with the practices of large law firms, which are singled out as the major source of problems, and their younger associates, since large firms are perceived as using all discovery tools available, often unfairly and to the detriment of solo practitioners . . . .

143 F.R.D. at 395

The pressures of competition have gotten worse since 1992; big firms decided to pay new associates the same money that federal district judges earn after twenty or thirty years of practicing law. (See 28 U.S.C. § 135). The current recession makes the competition even more intense, because, as the *New York Lawyer Magazine* wrote, many firms are freezing salaries, delaying partnerships, dropping bonuses and even laying off lawyers. Chances are we can expect these conditions to continue. One of my readers in California asked how lawyers learned to abuse the rules and to lie; he questioned whether law schools were teaching their students properly. I told him I didn't know how law schools were teaching the subject these days, but that it is a subject that needs addressing.

Like the so-called "peacemaker" I described, the slickster counts on the fact that the judge doesn't see everything that is going on in the case. The judge isn't around for telephone conferences, meetings, depositions, or ninety-nine percent of the stuff that makes up the modern lawsuit. Judges are a bit like theatre-goers. They see a one-act or two-act play. The play gives them no knowledge of the case as a whole, that is, what's

happening in the world outside the theatre. No judge sees what you lawyers see: the behavior of both you and your opposing party outside of court. You see it all. Judges don't even get back-stage into the dressing rooms, nor do they see rehearsals, nor do they see how the charming character on the stage behaves elsewhere.

Justice Thomas said that the tendency to avoid speaking one's mind, and to mistakenly avoid frankness and candor

results from an overemphasis on civility. None of us should be uncivil in our manner as we debate issues of consequence. No matter how difficult it is, good manners should be routine. However, in the effort to be civil, many who know better actually dilute firmly held views to avoid appearing "judgmental." They curb their tongues not only in form, but in substance. The insistence on civility in the form of our debates has the perverse effect of cannibalizing our principles, the very essence of a civil society.

When it comes down to a choice of being nice or being honest, we should pick honesty every time. That is consistent with the real purpose of our system of justice. So, being nice is great, as long as honesty isn't sacrificed along the way. One of the greatest politicians of our time, Winston Churchill, who knew how to compromise, said this:

Never give in, never give in, never, never, never, never — in nothing, great or small, large or petty — never give in except to convictions of honor and good sense. **(IPT)**