

STANDARDS FOR PROFESSIONALISM AND CIVILITY AMONG ATTORNEYS: THE SOUL OF A LAWYER

By
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The Soul of a Lawyer

Years ago I wrote a piece entitled “The Soul of a Lawyer.” I had a new assistant who when she transcribed my dictation spelled “Soul” as “Sole.” I guess she didn’t believe we had one.

We all know that we in the legal profession have less than a stellar reputation. According to a survey I read recently, the general public considers lawyers to have a 34% trust rating—just one percentage point above auto mechanics. We have a lot of work to do.

About a month ago, I settled a case (actually four cases!) arising out of a commercial landlord-tenant dispute. It should have been resolved easily without any lawsuit but instead we found ourselves in a 2 ½ year battle and four different lawsuits. The opposing party, who had much greater resources than our client, hired two law firms to represent her who decided to turn the matter into World War III. In 35 years of practice, I have never seen the kind of behavior that these two lawyers engaged in. They were rude and nasty, they lied, they misrepresented the facts and the law, they filed bad faith motions, they drove up the fees—you name it. The male member of the legal team thought it would be appropriate to intimidate my associate, a female, by cornering her in the hallway of the courthouse and cursing at her (more than once). The concept of “civility” was not part of the make-up of these lawyers. The worst thing was that at times our judge let them get away with it. While this behavior at times seemed to “serve” their client, it certainly did not serve the justice system or justice itself. It was frustrating, because to confront this behavior, to report this behavior to our judge, made us look like we were being “uncivil” and that we were simply engaging in unprofessional name-calling. Anyway, it led me to take a look at the topic of this piece--Standards of Professionalism and Civility Among Attorneys and to write this article.

In his book *Choosing Civility*, P. M. Forna describes civility this way:

Whatever civility might be, it has to do with courtesy, politeness, and good manners. . . . Courtesy, politeness, manners, and civility are all, in essence, forms of awareness. Being civil means being constantly aware of others and weaving restraint, respect, and consideration into the very fabric of this awareness. Civility is a form of goodness; it is gracious goodness. But it is not just an attitude of benevolent and thoughtful relating to other individuals; it also entails an active interest in the well-being of our communities and even a concern for the health of the planet on which we live.

This issue, “civility,” then, is really about who we are or who we want to be in this profession. So much about what we do as litigators is about winning or even beating up opposing counsel. But is it or should this be the emphasis? I would argue that it is not—I know that is sacrilegious to some of my colleagues. I think our work is about something else. It is about telling the truth. It is about serving our clients and about serving the justice system, and doing so with civility and class and with care.¹

As lawyers we are often faced with situations that require us to make choices. Should we do the right thing, but risk hurting our case? Should we do the right thing, but miss an opportunity to trick our opponents. It is my view that decisions shape our lives and define who we are.

The “Law of Civility”²

There is actually a surprisingly large body of law that has developed around these concepts of civility and professionalism. In California, there are at least five sources of law in this area. They are:

- California Business & Professions Code § 6068
- California Rules of Court
- California Rules of Professional Conduct
- Professional organizations’ rules of civility and professionalism
 - California State Bar Litigation Section’s Model Code
 - American Inns of Court Professional Creed
- Case law

This body of law has relevance in at least six areas of our practice that I can figure out. They are:

- Attorney discipline
- Contempt of court
- Legal malpractice/breach of fiduciary duty
- Sanctions for bad behavior

¹ I would like to think that in the 37 years I have practiced law that I always lived up to these ideals, but I know I have not. I am a “sinner” just like everyone else, but I am going to keep trying.

² This is not an attempt to be anything close to an exhaustive treatment of the “law of civility,” but mostly just some musings and thoughts on the subject.

- Prevailing party attorneys' fees
- Generally getting the judge mad at you

I was pleased and surprised to find in my research that California actually has a statute that requires civility on the part of attorneys at least in some respects. *California Business & Professions Code* § 6068 reads in relevant part as follows:

It is the duty of an attorney to do all of the following:

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

An obvious source of law as it relates to civility is our California Rules of Professional Conduct. These rules guide us in certain ways that touch on civility—avoiding conflicts of interest, protecting clients’ confidential information, honoring confidential communications, keeping clients informed about significant matters relating to our representation of them and the like. Failing to comply with these rules can lead not only to discipline or disbarment, but to civil liability for malpractice as one example discussed below demonstrates.

A number of our professional organizations have adopted rules of civility and professionalism. These are relatively new to our profession. The American Bar Association has them, various sections of the California State Bar have them, Inns of Court have them and some County Bar Associations have their own. Some of them are very detailed, and some are more general. They are available on the various websites of the organizations and surprisingly and happily they might matter. Courts around the country cite these various sets of rules in reported cases to support sanctions awards, fee awards, and malpractice awards. If for no other reason, then, we should pay attention to them and use them as tools in appropriate cases.

One of the most comprehensive guidelines which has been proposed by the California Bar’s Litigation Section (we litigators need it the most) is the Preamble to the Litigation Section’s Model Code of Civility and Professionalism. It starts with this sentence: “The practice of law should be an honorable and noble profession.” Amen. The preamble goes on to say:

Due to the contentious nature of litigation, some lawyers occasionally resort to engaging in abusive, offensive, derogatory, uncivil and unprofessional conduct in an attempt to gain an unfair advantage. Such conduct not only is improper, it is detrimental to the legal profession as a whole, and counterproductive.

The Model Code, then, lays out 13 pages of rules of civility and guides lawyers to be truthful, civil and courteous, to communicate promptly and often with clients, to bill accurately, to not seek unnecessary continuances or to delay litigation, to extend professional courtesies, to cooperate in scheduling meetings, depositions and other proceedings and to encourage settlement. Unfortunately, however, this is just a “model” code and these are just guidelines that have no binding effect (yet, anyway), but they are a start and something we as attorneys should aspire to.

There are a whole bunch of cases that have looked at some of these rules of civility. Under Business & Professions Code § 6068, Westlaw identifies 277 “notes of decision,” and most of them relate to sanctions, attorney discipline and malpractice. Some of the more fun cases are discussed below.

In a 1985 case, *Doris Day v. Rosenthal* (1985) 170 Cal.App.3d 1125 (yes, the Doris Day), attorney Rosenthal sued Ms. Day for unpaid attorneys fees allegedly incurred. She filed a cross-complaint for malpractice and breach of fiduciary duty and the court entered a judgment for \$26,396,511 in Doris Day’s favor. At the trial, Ms.

Day's attorneys relied heavily on the fact that Rosenthal had violated certain provisions of the Rules of Professional Conduct. Rosenthal argued that these were not relevant and were only applicable to an attorney discipline action. The court disagreed and wrote a severe condemnation of Mr. Rosenthal's behavior and breach of his obligations as an attorney. In his concurring opinion, Justice Arabian wrote:

...the recorded history of this matter discloses a course of conduct pursued by a votary of greed, who was insatiate in his avaricious appetite, lamentable in his judgment, and who engaged in a constant and deliberate usurpation of his noble office. (*Ibid.* at 1181.)

A more obvious area where the "law of civility" has some application is in cases involving sanctions. One favorite is *Huggins v. Coatesville Area School District* (2008) 2008 WL 4072801, a U.S. District Court case out of Pennsylvania. The lawyers in this discrimination and wrongful termination case apparently really got into it during depositions as you can see from the following exchange noted by the Court:

For instance, when Defendants' counsel, Mr. Ellison, objected to a question posed by Mr. Hannah to Dr. Walker, Mr. Hannah responded, "Shut up. You are such an a-hole." Mr. Ellison's rejoinder was, "Next question. Dr. Walker, [Mr. Hanna]'s off his meds today. Pay no attention to that."

The court took exception to this kind of behavior as you can see:

When lawyers place a higher value on being heard than on being understood, when they trample on civility, or when their supposed devotion to their clients leads to stridency or worse, they undercut the belief in the law and in the legal profession. At a minimum, uncivil, abrasive, abusive, hostile or obstructive conduct by lawyers impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Because such conduct tends to delay, and can even deny, justice, a presiding judge may be called upon to determine whether one or more adversary has committed sanctionable conduct. Events in this case present the Court with that unwelcome task.

And finally, the court issued a very interesting "sanction" award as follows:

It is further ORDERED that no later than six (6) weeks from the date of entry of this Order, counsel who attended the June 5, 2009 deposition of Dr. Walker, namely, Mr. Hannah and Mr. Ellison, shall join each other for a meal (each responsible for his own costs)...

It is interesting to note that the court cited to the Philadelphia Bar Association's Principles of Professionalism in discussing these issues.

In another sanctions case, *Aynes v. Kellogg Sales Co.* (2008) 2008 WL5423035, the U.S. District for the Western District of Washington awarded sanctions of \$2,000 for the bad behavior of an attorney. Counsel for the defendant Kellogg had apparently played some games when it came to setting some depositions. Although the District Court Judge noted that “the Court is loathe to award sanctions in this case or any other case,” it did so and took note of defense counsel’s uncivil behavior:

This is not the first case in which counsel for Kellogg has had her civility and professionalism challenged. This Court has, on prior occasions, had an opportunity to read transcripts which betrayed the harsh manner in which counsel deals with her adversaries on matters of little moment to the ultimate outcome of the case. Counsel’s action in this case is consistent with that pattern.

The Court directed counsel to the Code of Pre-Trial Conduct and Code of Trial Conduct promulgated by the American College of Trial Lawyers, and went on to say:

All counsel are welcome in this Court. The only way counsel can get into trouble with this judge is to treat one another or to treat Court staff disrespectfully. This Order is intended as a painful, albeit, necessary reminder of this basic admonition.

As I mentioned above, the courts have also considered the uncivil or bad behavior of opposing counsel in making prevailing party attorneys fees awards. One example is found in *Sukenic vs. County of Mariposa* (2004) 2004 WL 3522693, a U.S. District Court of Arizona decision. Although the court opined that the prevailing party’s counsel’s number of hours billed exceeded what was “reasonable,” the court added to the fee award because of opposing counsel’s bad behavior:

The Court will also add 125 hours for time unnecessarily required by Ms. Baker’s unprofessional bickering with Ms. Langerman as well as her inefficient conduct of the case in depositions and motions, including the unsuccessful special action to the Arizona Court of Appeals and the unsuccessful interlocutory appeal to the Ninth Circuit Court of Appeals.

Bad conduct, delaying conduct, and overzealous conduct is particularly relevant to and important to a judge’s decision about prevailing party fees. When attorneys try to “punish” the opposing side by scorching the earth, by abusing the discovery process or by filing frivolous motions, that kind of unprofessional behavior is relevant to the court’s determination of an attorneys’ fees award.

In closing, I want to go back to some of my soul talk. I was recently listening to a commentator on the radio who said that you should live your life by thinking about your funeral. What do you want people to remember? What do you want people to say in

your eulogy? There is the story about old-time baseball player Ty Cobb's funeral that some of you may have heard. Apparently, Ty Cobb wasn't a very nice guy and when the minister asked at his funeral if any one wanted to say anything as a tribute, there was a long silence. Finally a guy in the back of the pews stood up and said: "his brother was worse." Let's hope we can all do better than that.

At my funeral, I don't really care if anyone says "he was a great trial lawyer or he never lost a case."³ I would like to be remembered as someone who told the truth, was fair-minded and kind to his fellow man, a man who could be trusted, a guy who made a positive impact on the people around him, that he was compassionate and, yes, civil.

³ The latter certainly is not true.