



# Civility in the Practice

by *Richard R. Endacott*

Ask an old timer how the practice of law has changed, and we'll probably drone on about how in the "good old days" civility prevailed. We might tell about a young colleague who appeared before Federal Judge Robert Van Pelt and didn't know when to stand and when to sit. After a few minutes of observing counsel, Judge Van Pelt, always the gentleman, called him to the bench and gently informed him that he should stand during opening statement and sit during cross examination, not the other way around.

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Another member of our gray-haired group might insist on relating a story about the civility of practice in Omaha years ago. He'd tell how there were far fewer lawyers then, most of them had downtown offices and gathered each morning at the same coffee shop to talk shop. They all knew each other well. And if one of them acted uncivilly toward a colleague, everyone knew it by the next morning and the offender was verbally sanctioned.

But, we insist, the practice has changed. The practice now involves more frequent impersonal and sometimes abusive confrontations, signs of dwindling civility. Chief Justice William Rehnquist agrees that lack of civility is a problem. He told Virginia law school grads in 2001 that incivility remains one of the greatest threats to the ideals of American justice — and to the public's trust in the law.<sup>1</sup>

Surveys show that many practicing lawyers agree with the Chief Justice. Robert Half International recently surveyed 200 attorneys among the nation's largest law firms on this subject. Nearly half (49%) reported civility among lawyers has nose-dived.<sup>2</sup>

Just what is civility? Perhaps the best examples of civility come from Great Britain where the tradition of manners, tact, sportsmanship, and civility has prevailed for centuries. In 1941 Winston Churchill, following the Japanese bombing of Singapore and Hong Kong, wrote the Japanese Ambassador to inform him that a state of war existed between Great Britain and Japan. Churchill ended his letter to the Ambassador with these words:

"I have the honor to be, with high consideration, Sir, your obedient servant,

Winston Churchill"<sup>3</sup>



Churchill commented on this letter in his memoirs, stating his philosophy of civility this way: “Some people did not like this ceremonial style. But after all, when you have to kill a man, it costs nothing to be polite.”<sup>4</sup>

At the other end of the spectrum, here’s an example of incivility. This is an excerpt from a deposition involving two nationally-recognized lawyers:

Mr. J.: You don’t run this deposition, you understand?

Mr. C: Neither do you Joe.

Mr. J: You watch and see who does, big boy. And don’t be telling other lawyers to shut up. That isn’t your \_\_\_\_\_ job, fat boy.

Mr. C: Well, that not your job either, Hairpiece.<sup>5</sup>

Few lawyers in Nebraska behave this way. However, we’ve all seen lesser examples of incivility in our practice.

If civility is truly on the decline, what are the causes of this decline? Commentators on the subject list many reasons. Here’s a portion of one list:

1. Technological innovations which intensify the pace and stress of practice.
2. Competition for clients.
3. Increasing numbers of lawyers, law firms, judges, and courts, reducing the incentive and ability of lawyers to develop and maintain cordial relationships.
4. Mushrooming of discovery, perhaps fostering discovery abuse and sanctions.
5. The decline of mentoring and apprenticeships in which older lawyers passed down the tradition of civility to younger lawyers.<sup>6</sup>

In the face of these inevitable changes, what can we do to raise the level of civility in the practice of law? Some answers lie in the Nebraska Code of Professional Responsibility. The Code is laced with civility directives: The lawyer should be temperate and dignified; the lawyer should not offend the dignity and decorum of judicial proceedings; ill feeling of clients should not influence the lawyer in conduct, attitude and demeanor toward opposing lawyers; the lawyer should be courteous and agree to continuances, and waivers of formalities which do not prejudice the rights of our clients.<sup>7</sup>

Unfortunately, these civility directives in the Code are tempered by frequent admonitions that the lawyer represent his client “zealously.” My dictionary defines a “zealot” as one who is “immoderate or fanatical.” Sounds more like Rambo than Rehnquist. Are we really to be “fanatical” in the representation of our clients? Perhaps terms such as ardently, conscientiously, competently, or with utmost dedication could serve the same purpose without undercutting the Code’s civility provisions.

Thus, even the Code sends a mixed message regarding how we should govern ourselves. That being the case, when the pressure is on, deadlines are approaching, clients and opposing counsel are calling, faxes and e-mails are pouring in, and we’re only one frayed nerve away from our own offensive outburst<sup>8</sup>, what can we do? Try this: Use the old “count-to-ten-and-take-deep-breath” technique, remember what Mom said about minding our manners, apply the Golden Rule, and, oh yes, by all means, Madam or Sir, think about Mr. Churchill.

In closing, I hope you agree that there’s a need for more civility in the practice.

What?

You don’t agree?

Why you miserable scumbag! . . .

Oops . . .

1 . . . 2 . . . 3 . . .

Winston, HELP! 

Endnotes:

<sup>1</sup> “Would the Learned Counsel Please Stop Screaming”, Patrick Jonsson, *The Christian Science Monitor*, 7/17/01

<sup>2</sup> “Incivility Among Lawyers Spikes, Plagues Profession” Stephen Van Drake, *The South Florida Business Journal*, 2/17/03

<sup>3</sup> “Civility as an Art Form in Diplomacy and the Law,” Jacob A. Stein, *The Cosmos Club Journal*, 1999

<sup>4</sup> Stein, *supra*.

<sup>5</sup> “Civility is Not Optional,” Kent B. Scott, *Voir Dire*, Vol. 1, No. 3, Utah State Bar, Winter 1996

<sup>6</sup> “Please Please Me: Voluntary Civility Standards for Lawyers”, Cathleen Cavell, *Mass Gov*, 2001, internet address: [State.ma.us/obcbbbo/please](http://State.ma.us/obcbbbo/please)

<sup>7</sup> *Nebraska Code of Professional Responsibility*, EC 1-5, EC 7-36, EC 7-37, EC 7-38, EC 7-39, DR 7-101.

<sup>8</sup> This expressive phrase was created by Marianne E. Brown, in her article, “Why Civility Matters” published in the Fall 2001 *The Philadelphia Lawyer*.