

A Renewed and Much-Needed Conversation on Civility



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Civility is not a sign of weakness.

—John F. Kennedy¹

There has been a noted decline in civility in our profession and society.² Citizens appear to struggle to have healthy discussions with those who do not agree with them.³ “Civility is not about agreement, but how we conduct ourselves in the midst of disagreement.”⁴ Numerous commentators have noted that lawyers are “well suited to help address this problem”⁵ as civility is the hallmark of the legal profession that requires us to be role models for others, encourage civil discourse in all interactions and settings, and assure resolution of disputes and conduct of business according to the rule of law.

In our Lawyer’s Oath, we “agree to abstain from all offensive personality” and to conduct ourselves “in conformity with the high standards of conduct imposed on members of the bar as conditions for the privilege to practice law in this State.”⁶ To be an example for society on civil discourse, we must model that behavior in our own profession. As former United States Supreme

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Court Chief Justice Warren Burger noted, “the necessity for civility is relevant to lawyers because you are the living exemplars—and thus teachers—every day in every case, and in every court and your worst conduct will be emulated perhaps more readily than your best.”⁷

While the vast majority of lawyers and judges are civil and professional,⁸ the lack of civility among some members is a consistent source of frustration. Many of us can identify examples of lawyers whose unprofessional tactics added unnecessary cost and aggravation to a dispute to the detriment of the clients and the integrity of the profession. Real-life Michigan examples include a well-respected mediator who threatened to end a mediation unless a lawyer and his client stopped constantly shouting at one another; a judge who threw an exhibit in anger at a new lawyer conducting his first trial; and an out-of-state lawyer whose bullying and bad behavior violated every concept of respect and proper decorum.⁹

Such experiences are in stark contrast with the honor that is present between lawyers who advocate for their clients with civility. These lawyers maintain the respect of their opposing counsel and the court, which can only benefit their clients and the ability to successfully resolve a dispute. I will never forget an early lesson in my career from an experienced colleague who maintained a

well-known reputation of being unnecessarily difficult. Not only did he make our advocacy unpleasant and tense because he simply could not bring himself to be professional to opposing counsel, but his inability to engage in a civil conversation eventually cost our client a \$1 million settlement. Even as a new lawyer, I was convinced that this approach to practicing law would not only be unsuccessful, but quite miserable.

As I was gearing up for the State Bar presidency and talking with lawyers and judges about this opportunity, I heard one consistent request from members: what can the State Bar do to improve civility in our profession? Civility and professionalism are tied to the mission and purpose of the State Bar, its strategic plan, and the recommendations of the 21st Century Practice Task Force.¹⁰ Much of the day-to-day work of the Bar and its committees involves professionalism and civility topics.¹¹ Therefore, it was a natural step for the State Bar, led by Past President Ed Pappas,¹² to convene stakeholders to restart the civility conversation.

The professionalism summit— a renewed conversation

The State Bar continued its efforts on October 18, 2018, at the Hall of Justice in Lansing with the Promoting Professionalism in the 21st Century Summit, a conversation

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on how to improve professionalism among members of the bar in an increasingly divisive world. The summit was attended by representatives of State Bar sections, including the Judicial Section, the Michigan Judicial Institute and other judicial associations, and local and affinity bar associations. Its goals were ambitious:

- Engage a broad array of Michigan lawyers and judges to identify ongoing, practical tools for developing and sustaining professionalism, particularly civility, in the Michigan legal profession.
- Identify how the Michigan legal profession, in particular the State Bar of Michigan and judiciary, may contribute to strengthening the role of public civil discourse and create tools around those ideas.
- Develop strategies for sustained local action and communications on professionalism and civility led by the legal profession and eventually involving the broader community.

The State Bar was fortunate to work closely with the Michigan Supreme Court in planning and producing the summit. Chief Justice Stephen Markman provided the keynote address to set the tone for the day's work.¹³ Markman welcomed this "overdue conversation regarding civility and professionalism within the bench and bar," noting:

Today, however, our emphasis is best focused upon how lawyers and judges should *comport* themselves, their civility, manners, and decorum. These things are certainly *not* of insufficient consequence to justify our fullest attentions on this day; rather, taken together, these things define our workplace environment,

whether it is the courthouse, the place of deposition, or the telephone call; they define our sense of confidence and trust in our fellow practitioners; they define the nature and substance of our agreements and understandings; they define the workaday relationships between the bench and the bar; they define our levels of stress, our vitality, our satisfaction with our work, our relationships, our health.

While the tools of our trade are the positive laws of our communities, the official reports of our judicial tribunals, our pleadings, our briefs, our use of language, and our insights about people, *all* of these are brought to bear within an environment in which we must deal with others, often in the context of "cases or controversies," often in the context of stark and impassioned disagreements. Civil behavior, good manners, and a proper and responsible sense of decorum define the social backdrop upon which these tools are wielded.

Markman suggested that much of how we should comport ourselves is "a matter of common sense, in which we have all been instructed since childhood by our parents, families, friends and teachers." He concluded that, as a profession, we can do better and "whatever becomes of the work of this conference, if all that it does is to lay the groundworks for a later conference, that is not to be disparaged." Markman was hopeful that the conference will initiate a useful next step in "identifying ameliorative approaches and recommendations."

Civility in the courtroom

The summit featured a panel that included Chief Judge Denise Page Hood of

the U.S. District Court for the Eastern District of Michigan, Michigan Court of Appeals Judge Jane M. Beckering, and practicing attorneys Aaron V. Burrell of Dickinson Wright and William W. Jack Jr. of Smith, Haughey, Rice and Roegge.

Hood and Beckering commented that civility starts with the judge. Not only does this require judges to treat all litigants with respect, but to curtail lawyers acting without civility in the courtroom. It can be demoralizing to be the brunt of a judge's frustration, especially in the presence of clients and colleagues. But it can be even more frustrating to be in a situation where a judge refuses to reprimand or control an uncivil lawyer. Judges attending the summit agreed that civil discourse begins with judges and declared that they would like to see more judges adhere to this ideal. In fact, I recently had a sitting judge describe the mistreatment and lack of professionalism she faced when she was an attorney in a case against a successful senior lawyer at a large firm. The presiding judge was cognizant of the lack of civility but was clearly intimidated by the senior lawyer and took no action to curtail the behavior or even reprimand the senior lawyer. In fact, the judge apologized to the lawyer for not controlling the situation. However, the damage was done by this failure of leadership in the courtroom.

The panel reiterated that civility and professionalism improve clients' confidence in the system; if the public doesn't trust the legal system, the system fails. Hood observed that respect for the court starts with the conversations we have with our clients. While we may have opinions regarding a judge we appear before and disagree with that judge's decisions, speaking negatively of the judge demonstrates a lack of respect for those on the bench and affects how the client views the court and the respect the client shows to the process and the judge. And, of course, our tone before the judge must also demonstrate deference and respect as officers of the court.

My partner Ken Neuman recalls when he was a young lawyer arguing a motion for case evaluation sanctions following a no-cause jury trial. The opposing attorney interrupted the judge, who was in the process of granting the motion and asked, "How

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would you know what happened at trial? You slept through the whole thing.” Both Neuman and the judge were taken aback at his lack of respect. A lawyer in the courtroom quickly came up to the podium and sternly instructed the lawyer that “he was done and he needed to leave” and proceeded to walk him out of the courtroom. That lawyer was SBM and OCBA Past President Tom Ryan, who took a noble step to preserve the integrity of the court and ensure civility in that moment.

The impact of technology and relationships

The panel debated whether technology caused the lost connections between lawyers, as less face-to-face discourse inevitably leads to a lack of respect for others. It was suggested that we could improve civility by simply picking up the phone and incorporating the lost art of conversation. With email, it's too easy to misinterpret the tone or dehumanize the other person.¹⁴ In fact, the “need” to respond immediately to email deprives us of the ability to reflect on a more measured response. It may not be realistic to expect traditional phone calls and letters to replace the ease of emails, but Hood suggested emails should be sent with the same level of formality as letters; this simple change—for example, “Dear colleague”—may cause lawyers to consider the nature of the communication and reflect on how the email response will be viewed by opposing counsel and the court.

Summit panelists noted that mentorships and relationships built through bar association involvement help establish collegial relationships that can reduce the stress of the adversarial system. Beckering recalled practicing at a firm where bar association activity was not only expected of all lawyers,

especially young lawyers, but the firm enforced that view by issuing credit to attorneys for bar association activity. In addition, the panel highlighted the need to train lawyers (and law students) to understand that practicing with civility is the most successful way to practice to benefit our clients.

The impact of lawyer wellness on civility

Summit attendees were also privileged to hear from SBM and American Bar Association Past President Dennis W. Archer. The former state Supreme Court justice and Detroit mayor emphasized that lawyers have the power to impact society, challenge injustice, heal and right wrongs, help the most vulnerable and troubled, and be counselors and peacemakers. However, he highlighted the difficulties that confront lawyers today that may lead to more pressure on professionalism and civility: laws that have changed to limit what were previously profitable practice areas, underfunded courts, the sharp increase in student loans, and the involvement of special-interest groups. He noted that each challenge has affected lawyer wellness, creating stress, self-doubt, anxiety, fear, and abuse of alcohol and medication—all of which can lead to lack of civility. In fact, even the most civil lawyers can experience moments of frustration that require self-awareness. Archer encouraged bar leaders to focus on lawyer wellness when creating tool kits to solve the current challenges affecting the profession and civility.

Ideas for further discussion among the bench and bar

Seven breakout groups of approximately 10 members each were asked to answer four essential questions to promote discussion

and propose changes.¹⁵ The groups' proposed solutions were often consistent and included the following:

- Consider adopting Michigan-specific civility guidelines for all state courts with incentives and sanctions. The guidelines would be provided upon swearing-in to new lawyers, with scheduling orders, and at pro hac vice admissions. The civility guidelines, like the federal guidelines, would apply to judges and lawyers.
- Use the Lawyer's Oath more frequently, including presenting clients with a copy of the oath when signing a fee agreement to educate clients about attorney ethics rules or hosting an annual Lawyer's Oath day.
- Recognize lawyers and judges practicing civility and professionalism through awards, social media, or having the State Bar showcase lawyers who exemplify civil practice.
- Create more ombudsman programs in circuit courts to invite comments concerning judges and lawyers who may be struggling with civility in the courtroom.
- Involve law students in courses in civility and proper conduct in the courtroom and with clients and expand the Professionalism in Action programs to third-year students.
- Explore a version of mandatory continuing legal education on civility for all lawyers to renew their licenses, including education on MRPC 6.5(a).¹⁶
- Focus on lawyer wellness and emotional and personality training for lawyers to promote self-awareness.
- Educate and train on uncivil conduct and its unfavorable effect on time management, economics of law practice, and credibility.
- Use a civility mentoring program with volunteers on how to handle civility issues, including online mentoring.
- Encourage and train judges to direct repeat offenders to civility training or civility panels that include an impartial review and judgment, similar to fee-dispute

arbitrations that include peer-on-peer review of actions.

Additional suggestions included involving the public in civility efforts by honoring firms in the community that exemplify professionalism and civility, inviting community organizations to host public speakers on the subject, and encouraging the public to look for attorneys who exemplify civility and reject those who do not.

Next steps: recommendations and continued discussion

The complete list of suggestions developed by the breakout groups is being compiled and provided to the summit organizers and others for consideration and recommendations on next steps. Attendees were eager to meet again and continue the discussions within their respective bar associations and sections. In fact, one of the most consistent suggestions was to conduct similar professional mini-summits across the state in conjunction with local bar associations and lawyer organizations and the Michigan Judicial Institute.

How lawyers and judges comport themselves sets the tone for our profession and community. We owe it to ourselves and the legacy of our profession to not only engage in this conversation with members of the bench and bar leaders across the state, but to implement recommendations to change the trajectory of civility in our profession. We need to treat each other with the respect due to officers of the court. We need the public to know we are professionals and that civility is the hallmark of our profession, and why civility should be sought by clients and not seen as a sign of weakness.

As former United States Supreme Court Justice Sandra Day O'Connor once noted, "civility is hard to codify or legislate, but you know it when you see it. It's possible to disagree without being disagreeable."¹⁷ ■

ENDNOTES

1. The full quotation: "So let us begin anew—remembering on both sides that civility is not a sign of weakness, and sincerity is always subject to proof. Let us never negotiate out of fear, but let us never fear to negotiate. Let both sides explore what problems unite us instead

of belaboring those problems which divide us." John F. Kennedy Inaugural Address (January 20, 1961) <<https://www.loc.gov/item/2015649386/>>. All websites cited in this article were accessed November 9, 2018.

2. Brown, *Civility reboot: Can lawyers learn to be nicer to one another?*, ABA Journal (October 2018) <http://www.abajournal.com/magazine/article/civility_reboot_can_lawyers_be_nicer>; Sigurdson, *Civility, the Rule of Law, and Lawyers: the 'glue' that binds society against social crisis—is incivility the 'ugly new normal' in government, politics*, Sigurdson Post (November 25, 2016) <<http://www.sigurdsonpost.com/2016/11/25/civility-the-rule-of-law-and-lawyers-the-glue-that-binds-society-or-social-crisis-is-incivility-the-ugly-new-normal-in-government-politics-and-the-law/>>; Reardon, *Chapter 3: Civility as the Core of Profession, in Essential Qualities of the Professional Lawyer* (Haskins ed, 2014) <https://www.americanbar.org/content/dam/aba/administrative/healthlaw/03_professionalism_a_lawyers_role_as_attorney_counselor_leader_citizen_03_authcheckdam.pdf>; *Lawyer bullies, incivility: On policing lawyer manners*, ABA (June 27, 2017) <<https://www.americanbar.org/news/abanews/publications/youraba/2015/october2015/the-civility-conundrum/>>.
3. *Id.*
4. *Civility, the Rule of Law, and Lawyers.*
5. *Id.*
6. SBM, *Lawyer's Oath* <<https://www.michbar.org/generalinfo/lawyersoath>>.
7. *Excerpts from Chief Justice's Speech on the Need for Civility*, The New York Times (May 18, 1971) <<https://www.nytimes.com/1971/05/19/archives/excerpts-from-the-chief-justices-speech-on-the-need-for-civility.html>>.
8. Remarks from SBM Past President Ed Pappas at the October 1, 2018, Promoting Professionalism in the 21st Century Summit at the Michigan Hall of Justice. Chief Justice Warren Burger made similar comments in his remarks to the American Law Institute on May 18, 1971: "the overwhelming majority of lawyers and judges comply with basic standards of good manners and professional decorum."
9. Examples were relayed to me by SBM Executive Director Janet Welch, who attended a number of "Promoting Professionalism" summit planning sessions. These experiences were also shared by Ed Pappas, Candace Crowley, and Thomas R. Behm during the planning sessions.
10. The SBM's mission is "to aid in promoting improvements in the administration of justice and advancements in jurisprudence and in improving relations between the legal profession and the public and promoting the interests of the legal profession," *State Bar of Michigan Strategic Plan 2017-2020* (April 17, 2017) <<http://www.michbar.org/file/generalinfo/pdfs/strategicplanreport17.pdf>>. See also SBM, 21st Century Practice Task Force, *Envisioning a New Future Today* (July 18, 2016) <https://www.michbar.org/file/future/21c_WorkProduct.pdf>.
11. This work is performed by the Professional Ethics Committee, the Judicial Ethics Committee, the Judicial Qualifications Committee, the Character & Fitness Committee, Lawyers and Judges Assistance Program, the Ethics helpline and seminars, Practice Management Resource Center, Professionalism in Action program in five law schools, and support of local and special-purpose bar associations including The Centennial American Inn of Court (Genesee County) and The Thomas M. Cooley American Inn of Court professionalism programming and participation in national association and conferences.
12. During Ed Pappas's tenure as president, the State Bar created the Professionalism in Action program, which is now offered at all five law schools in Michigan during orientation to review civility and ethics problems at the outset of students' careers. Pappas continues to lead in this area as chair of the Promoting Professionalism in the 21st Century Summit planning committee. The other "Promoting Professionalism" planners and organizers included William M. Azkoul, Thomas R. Behm, Marge Bossenberry, Gregory Conyers, Candace Crowley, Jennifer Lyons, Brian J. Plachta, Joel H. Serlin, Victoria A. Vuleitch and Janet Welch, with support from law students Rebecca Gorbutt, Marla Le Mae, and Lucy McManaman. Thanks to each of them for their efforts to plan and organize this initial conversation and a special thanks to Candace Crowley for drafting the report following the summit.
13. The complete remarks of Chief Justice Markman will be reprinted in a future issue of the *Michigan Bar Journal*.
14. This has been noted in advice to young attorneys on how to increase civility: avoid email when possible and try to meet face to face. Ryder, *How Young Attorneys Can Increase Civility*, Lawyerist.com (December 14, 2010) <<https://lawyerist.com/how-young-attorneys-can-increase-civility/>>.
15. The four questions were the following:
 - (1) What kinds of actions or activities would be effective in your community (bar association, judicial association, law school, law firm, etc.) to help raise awareness and engage in sustained professionalism and civility conversations?
 - (2) Are you aware of any resources—websites, books, articles, organizations, caselaw, speakers, etc.—that should be included in a Professionalism Tool Kit?
 - (3) How can we sustain this conversation around the state over the next year and beyond?
 - (4) How can we invite the public to the discussion/who should be involved?
 Each of us may have varied answers to these questions.
16. MRPC 6.5(a): "A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyers assistants to provide such courteous and respectful treatment." The Supreme Court of Arizona recently adopted a mandatory professionalism course for all newly admitted members to the State Bar to be completed within the first year of admission. See State Bar of Arizona, *Mandatory Professionalism Course* <<https://www.azbar.org/cleandmcle/mcle/mandatoryprofessionalismcourse>>.
17. See also, Borman, *Walking New Attorneys Down the Path of Professionalism and Civility*, Palm Beach County Bar Ass'n (January 3, 2018) <<https://www.palmbeachbar.org/walking-new-attorneys-down-the-path-of-professionalism-and-civility/>>.