FOR WANT OF PROFESSIONALISM

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I have wanted to write an article about the concept of "civility" for some time. Having spent time practicing law and observing how others practice law, I have long heard the emphasis on the qualities associated with "civility." I suggest that the debate is not about civility because misconceptions about that word that have arisen over time.[1] The greater issue is about professionalism (a "code of decency") and what that means in today's legal market.

It should be somewhat embarrassing to all of us that an article entitled "Incentivizing Lawyers to Play Nice: A National Survey of Civility Standards and Options for Enforcement"[2] even exists. Indeed,

> "[t]here have been countless writings … about widespread and growing dissatisfaction among judges and established lawyers who bemoan what they see as the gradual degradation of the practice of law, from the vocation graced by congenial professional relationships to one stigmatized by abrasive dog-eat-dog confrontations."[3]

Numerous causes of the degradation have been advanced.[4] These include such things as the increase in the number of lawyers, less-discriminating variables for bar acceptance, failures in new lawyer mentoring, the organization structure and politics of law firms, an imbalance in lawyers' views of their role in the process, lawyer advertising, inadequate education during law school, the unlikelihood that lawyers will see each other on cases frequently, and the plain old lack of the camaraderie found in the days of old. No matter where you fall on the explanation, the existence of a problem cannot be denied.

I firmly believe the concept of professionalism is central to the practice of law. I cannot say I have been perfect in my 22 years, and at times I do need to check myself. However, we who are hired to resolve disputes cannot ourselves become the dispute. We need to stand above the fray, seeking not to exact procedural victory at the cost of our integrity and reputation, but an outcome that fosters faith in the soundness of our legal system.

A look at the Eastern District of Michigan's "Civility Principles" shows that in the eyes of our federal judiciary, "civility" is clearly not just about being courteous and polite. Those principles identify specific tactics that most would consider odious.[5] One might suggest the principles gestated from things that have historically aggravated federal judges (to the point where they felt they must politely describe certain offensive behavior without naming the specific offenders). These are not just principles of civility, they comprise a code of conduct. Dare I ask why such code is even necessary? Is this not how we should conduct ourselves without judges having to tell us to do so?

Perhaps the decline in professionalism results from the fact that some lawyers simply believe they can get away with it. Let's face it. Judges loathe disputes that stray outside the merits of the case and the loss of otherwise valuable time spent mediating between bickering lawyers. Unprofessional lawyers know this, and likely know which judges are least likely to do anything about it. I also often wonder whether the loss of the jury trial as a regular means of actual case resolution has inclined lawyers to press advantages and conduct themselves in ways that six or 12 citizens would never tolerate. Indeed, it seems that some unprofessional conduct could even be described as being designed specifically to avoid a jury trial. Lawyers should never fear losing to the point of succumbing to unprofessional conduct or making winning more important than doing the right thing.[6]

Don't get me wrong. We are in the advocacy business, and ours is an adversarial system. But advocacy and adversity do not require an awful attitude or the subordination of our value system to winning at all costs. In an adversarial system, for every winning side, there must be a losing side.

The better lawyers are the ones who do not make victory paramount, but instead respect the value of doing the right thing in the process of achieving an outcome. As one author phrased it, "In short, professionalism is defined not as what a lawyer must do (obey ethics rules while acting zealously on behalf of a client), but what a lawyer *should* do to protect the integrity of the legal system."[7] Or, as Powell Miller stated more succinctly in describing another lawyer, "he hits hard, but he never hits below the belt."

It seems to me that that there are four avenues to make our practice more professional and civil.[8] The first avenue is (as mentioned) already in place: codes that emanate from the judiciary that keep professionalism as a primary focus. The second avenue is consistent enforcement of those codes by individual judges with respect to specific lawyers (and for elected judges, a judicial tenure commission willing to see resulting complaints from unprofessional lawyers for what they are). Third, we need to make our own reputations for professionalism matter, both among the bar and in the greater public (we are not sharks – we are individuals of integrity). Finally, we need to curb the urges of some of the consumers of our legal services to have us act unprofessionally. We need to say "no" to clients who would have us behave in ways less than at our best.

I submit there is a reason that certain lawyers[9] historically have the reputations that they do, commanding the utmost respect of the bench and bar. It's not just because they're nice people. It's because they do the right thing, the right way, every time. It shouldn't be that hard for each of us to do the same in our own practice.

Footnotes

1 Reardon, "Civility as the Core of Professionalism," *Business Law Today* (September 2014).
2 Preston and Lawrence, *48 University of Michigan Law Journal of Reform*, Issue 3 (2015).
3 "Civility as the Core of Professionalism," *supra*.
4 Campbell, "Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility" 47 *Gonz L Rev* 99, 101-107 (2011).
5 For example: falsely holding out the possibility of settlement, failing to stipulate to undisputed matters, discovery as harassment, unfairly limiting response times, refusing to agree to reasonable requests for extensions, filings of default without notifying opposing counsel, deposition tactics one wouldn't dare try before a judge, strained interpretations of discovery in artificially restrictive manners, and objections meant solely to delay or withhold relevant information.
6 But let's face it: there are some of us who probably can't help themselves and will act in ways that the rest of us never would. We all know who the worst offenders are, even if we don't name them publicly. Who is to blame for them? We all are. Because little or nothing is done about it.
7 Campbell, *supra* at 141 (emphasis in original).
8 Candidly, these avenues are regrettable because they concede that there is unprofessionalism amongst us.
9 It is unquestionable that the pre-eminent reputations of lawyers like George Googasian stem not just from their skill, but from their absolute commitment to the integrity of our legal system. We all know the lawyers of this caliber and why they are held in such high esteem. But for space constraints, I could name them here without fear that any would be challenged.