

# Civility

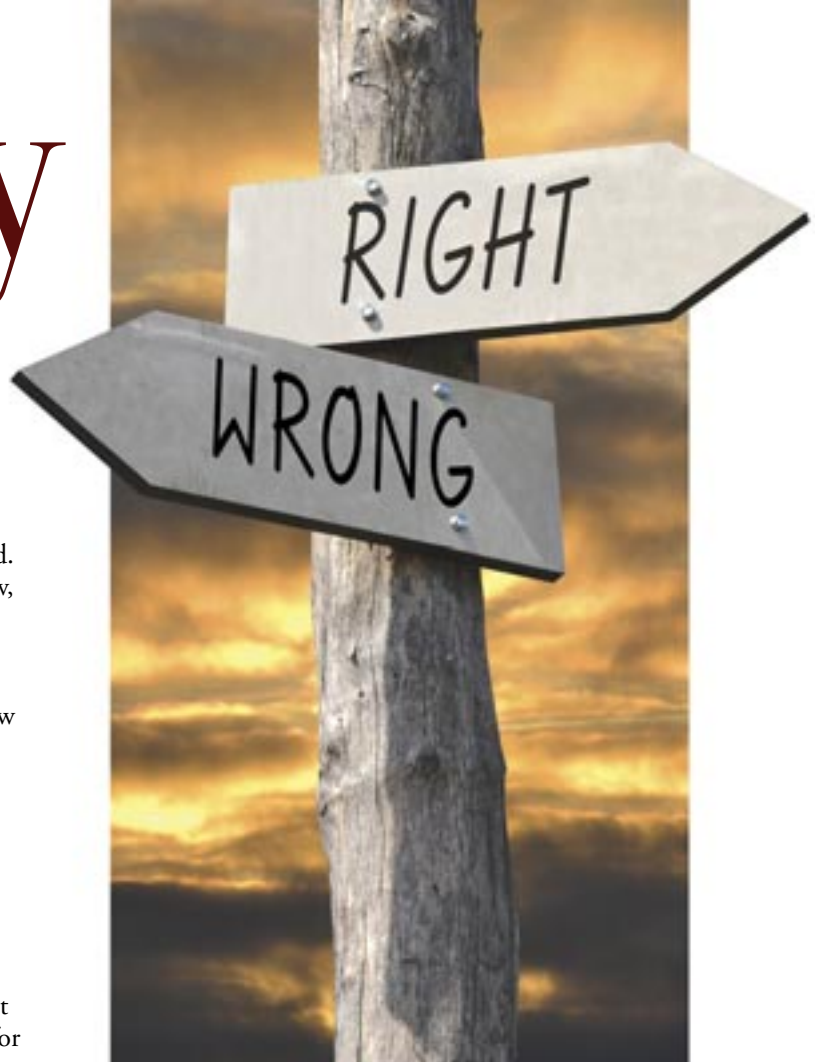
Doing what we ought to do.

WRITTEN BY YSMAEL D. FONSECA

An essential element of ordered society is civility; respect for one another is necessary in a multicultural society to advance the common good. Nowhere is this more important than in the practice of law, where actors are constantly fighting for, preserving, and advocating for someone's rights. It is so important and, seemingly, so lacking in our profession that the oath for new attorneys was modified in 2015 to add a line for a new lawyer to swear to: "conduct oneself with integrity and civility in dealing and communicating with the court and all parties."<sup>1</sup> Civility goes beyond the Texas Disciplinary Rules of Professional Conduct, which simply set a minimum for how we conduct ourselves as lawyers and focus more on what we can or cannot do: Civility is a reminder of what we *ought* to do.

Our profession is one of relationships, whether they involve other members of the bar or the courts. One might think this would be reason enough, or incentive enough, for lawyers to be cordial and civil with each other. But that is not necessarily the case. It is difficult—especially as a new lawyer—not to be overtaken by passion and the pursuit of what is right, but we're not playing a part in "Law & Order: Special Victims Unit." As important as the case is for a client and as passionate as one may be to advance a cause, respect for the process and development of a case through the tools of procedure is more important. As Justice Sandra Day O'Connor posited, "[i]t is enough for the ideas and positions of the parties to clash; the lawyers don't have to."<sup>2</sup> In fact, I have found as a judge that reasoned heads are often most effective in arguing and presenting a case before the court. Creating more noise, distracting from the issues, and putting the focus of a case on a personality—and not the case itself—can be more damaging in the court's consideration of the issues when briefs have not sufficiently addressed a court's concerns or the law.

But the need for civility extends beyond the courtroom; a judge can parse through the flamboyant displays of passion and impertinent self-righteous anger. (I haven't found anything a strong bang of the gavel can't fix.) A case is developed while attorneys on both sides are working to advance their positions, and they must interact while following the rules of procedure and specific law that applies to their case. Although they are adverse to each other, they do not have to see each other as enemies. Both sides have an interest in justice, both sides want their case to be fully developed, both sides want the facts to be borne



out and the proper law to be applied, and it is in these mutual interests and shared goals that lawyers must focus their relationship with each other. Some may be too quick to object or oppose a motion for continuance, or to engage in gamesmanship when working on a schedule for hearings or depositions—forgetting just as quickly that at some moment or another the offending lawyer may be the victim of tactical advantage. Instead, we should all extend courtesies and understanding to each other—except when they run afoul of the law, a court order, and a clear obligation to the client.

In the modern practice of law, the main obstacle in maintaining civility is also the greatest asset to effective legal representation: technology. Technology has overtaken the practice of law, from the ease of communication to the more recent trend of artificial intelligence. But the greatest challenge technology presents is the distance it creates between practitioners. No longer are the halls of the courthouse or the conference rooms of a mediator or a deposition an opportunity to build on human relationships. Instead, we have curt email conversations, easy access to word processors that facilitate tirades, and canned requests for sanctions that could be resolved in a face-to-face discussion or even a telephone call. I have seen how attorneys who have never met are fighting about a discovery dispute without even having attempted a discussion of the issues. I have also seen family disputes aired out in a

courtroom when it should have been clear to attorneys that a single issue preventing an amicable solution required attorneys to simply sit and talk with each other about alternatives. It is unfortunate, but true, “that lawyers who know how to think but have not learned how to behave are a menace and a liability, not an asset, to the administration of justice.”<sup>3</sup> We must recognize the challenge of technology in our practice to avoid incivility.

So, how can we be more civil? There are small steps we can take: (1) If possible, avoid Zoom hearings for contested hearings, instead show up to court and talk with opposing counsel before the hearing; (2) Avoid depositions by Zoom unless travel is cost-prohibitive so you have an opportunity to foster a relationship with opposing counsel and talk about the path to take on the case; (3) Stop emailing and pick up the phone—it’s easier to hide and let loose when you’re hiding behind a screen; (4) Don’t be so quick to seek sanctions—confer, be patient, and leave sanctions for the egregious faults in conduct; (5) Set aside the “gotcha” mentality and reflect on tactical decisions that simply form part of gamesmanship and are not necessarily part of adequate, zealous representation of your client; (6) Temper client expectations concerning adversity in heated cases—e.g., family cases—counsel requires more than simple advocacy for a position, it requires candor in explaining that the adversarial process does not mean there isn’t a joint obligation to develop the case, engage in discovery, and to respect each other, the process, and, ultimately, the decision;

(7) Simply communicate and do so with respect—we are masters of words, in every situation there is surely a way to be effective, direct, and cordial; and (8) Be honest and direct—that is how you are most effective.<sup>4</sup>

In the long run, the future of our profession (i.e., how it is regulated, respected, and regarded) will be determined by how we cultivate relationships and how civil we are with each other. We must “[c]ultivate a tone of civility, showing that [we] are not blinded by passion.”<sup>5</sup> We must demonstrate to the public that we are able to rise above our passions and to, instead, stand alongside our colleagues with equanimity and with respect for the law and its processes in the mutual pursuit of justice. **TBJ**

#### NOTES

1. Acts of 2015, 84th Leg., R.S. ch. 17, Sec. 1 (codified at Tex. Gov’t. Code § 82.037(a)(4)).
2. Sandra Day O’Connor, *Professionalism*, 76 Wash. U. L. Q. 5 at p. 9 (1998).
3. *Excerpts From the Chief Justice’s Speech on the Need for Civility*, N.Y. Times (May 19, 1971), <https://www.nytimes.com/1971/05/19/archives/excerpts-from-the-chief-justices-speech-on-the-need-for-civility.html>.
4. See Sandra Day O’Connor, *Professionalism*, 76 Wash. U. L. Q. 5 at p.8 (1998).
5. Antonin Scalia and Bryan Garner, *Making Your Case: The Art Of Persuading Judges*, p.34 (Thomson West, 2008).



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