



## PROFESSIONALISM: MORE THAN CIVILITY

BY EDWARD J. CLEARY

*Manners are of more importance than laws. Upon them, in a great measure the laws depend. The law touches us but here and there, and now and then. Manners are what vex or sooth, corrupt or purify, exalt or debase, barbarize or refine us, by a constant, steady, uniform, insensible operation, like that of the air we breathe in.*

— EDMUND BURKE

Let's start with the obvious: there have been and there always will be lawyers who could charitably be called "ill-mannered." The anecdotal evidence from around the nation reflects a growing consensus that a certain percentage of the practicing bar is out of control — rude, uncivil and downright boorish. We all know lawyers who act out like undisciplined children when things don't go their way (ask the judges). This misbehavior might occur at a deposition, over the phone, in a letter, or even in court. Most often the conduct in question does not rise to an ethical violation. Of course some misbehavior does cross the line: commencing frivolous litigation (3.1, MRPC), making an intentionally false statement of fact or law (4.1, MRPC), and disregarding the rights of third persons (4.4, MRPC) come to mind as acts that are at once unprofessional and unethical.

When our office receives complaints concerning clear examples of incivility and unprofessional behavior on the part of an attorney that do not rise to an ethical violation, we find that these complaints are often filed by one attorney against another, usually after a round of name calling and swearing at a deposition or after an occasion of other rude behavior, harsh language, or bad manners during or after a court hearing. Usually these complaints are dismissed, even though we may be personally appalled by the lack of professionalism demonstrated. Sometimes, in these instances, the language is so egregious we proceed under 4.4, MRPC, and issue discipline for the misconduct.<sup>1</sup>

Other jurisdictions have begun to hold attorneys accountable with severe sanctions when the line between incivility and ethical misconduct becomes blurred. Recently a federal judge in New York filed a complaint

as a result of statements made by counsel in her courtroom accusing the judge of "corruption" and for telling her "you stink." While the federal bar settled for an apology and a public censure, the state bar (under code provisions not in effect in Minnesota) suspended the attorney for three months finding that the comments "were derogatory, undignified and inexcusable."<sup>2</sup>

What was the lawyer thinking? The obvious answer is that he wasn't thinking at all. In addition to the censure and suspension, his reputation and livelihood were damaged, perhaps permanently, because of this outburst. Yet how does one teach an adult manners? And are there not occasions when lawyers should be heard at all costs, at the risk of being obstreperous, within the role of a zealous advocate? Finally, is civility "enough" or does the definition of "professional" encompass more esoteric qualities?

### SOME REASONS, SOME RESPONSES

One commentator suggests incivility is a result of self-absorption and distrust.

Following a rule of good manners may mean doing something you do not want to do, and the weird rhetoric of our self-indulgent age resists the idea that we have such things as obligations to others. We suffer from . . . the elevation of self-expression over self-control.<sup>3</sup>

If this is so, teaching manners may be beyond our ability. Aspirational standards will then remain merely aspirational unless and until the direct result of professional incivility is group opprobrium rather than silence, or worse yet, reward. Without disgrace and isolation as a consequence of lack of self-control, some lawyers will refuse to temper their unbridled boorishness.

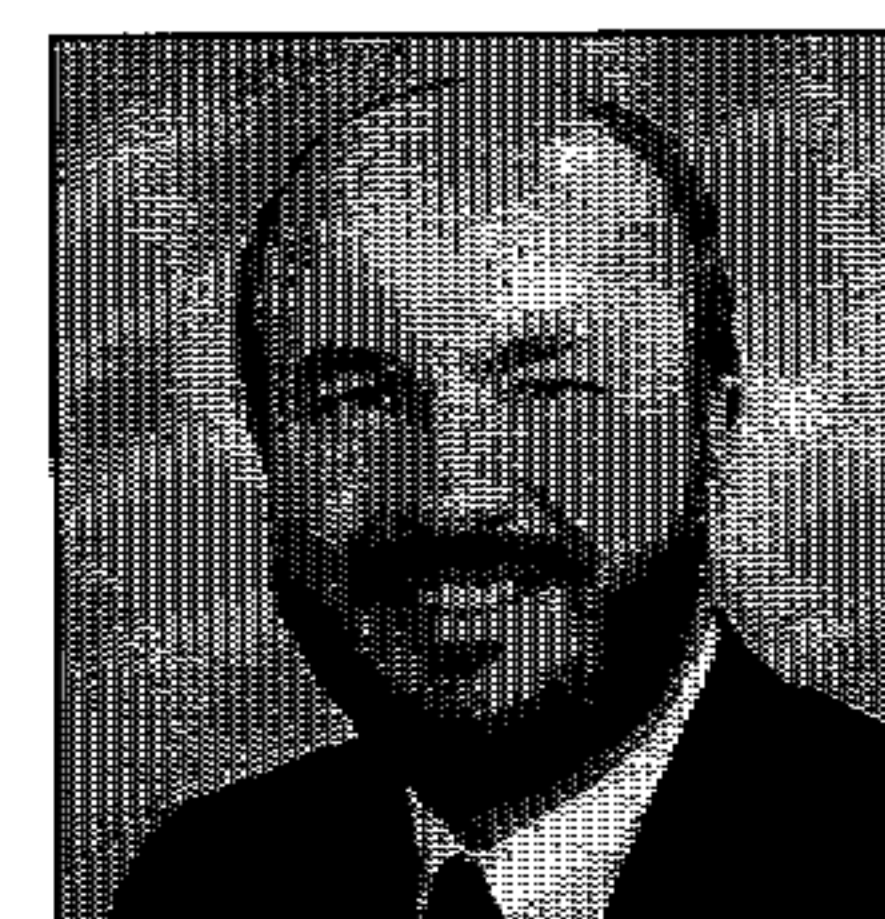
Another commentator suggests that this is not all bad ("the civility movement nourishes unrealistic assumptions about public debate that foster a crippling crybabyism"<sup>4</sup>) suggesting that demanding a standard of civility is simply another means of maintaining control, perpetuating the status quo. One could also note that there has always been a certain degree of incivility in some areas of practice and that some attor-

neys will argue that this is necessary. In contrast to this argument is my own observation, presumably shared by some others, that the attorneys I have admired the most over the years for their skill and style seldom allowed zealous advocacy to degenerate into stridency or rudeness.

There is no doubt that the climate has changed over the years. Economic concerns continue to predominate over the thoughts of many practitioners who may, as a result, give short shrift to concerns over "manners." Others feel that the climate change may be due in part to the high stress that generally pervades the legal community at this time. The recent ABA commission's recommendation that we embrace fee-splitting with nonlawyers as part of a multidisciplinary practice only further calls into question whether we are involved in a business or a profession with special privileges and responsibilities. This potential change, as well as others, adds to the insecurity many lawyers feel about the direction of the profession. Regardless of the source of the misbehavior however, you will find many veteran lawyers and judges who bemoan the current state of affairs of incivility within the profession and argue that the acrimonious atmosphere has led to further dissatisfaction among legal practitioners.

We are left then with an overall consensus that we need to revisit certain precepts as to the relationship between lawyer and client, lawyer and lawyer, lawyer and third parties, and lawyer and judge. Perhaps we all need some remedial training by way of aspirational standards, but I continue to believe that only a small number of lawyers are consistently uncivil, just as there are only a small number of lawyers who consis-

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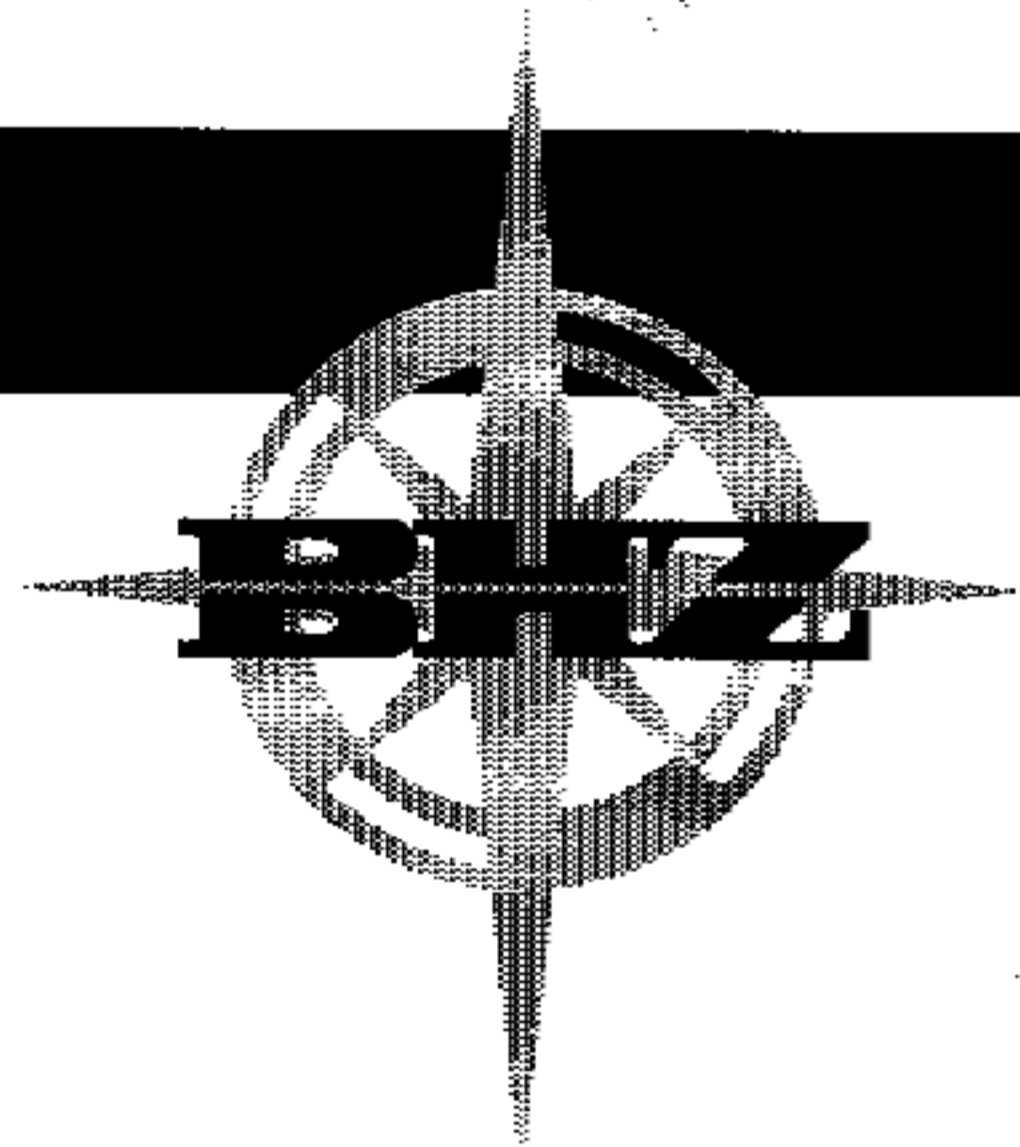
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tently violate our disciplinary standards. The problem is that this small group poisons the environment within which we practice.

The MSBA Professionalism Committee is working to develop recommendations to improve the situation, ranging from the adoption of aspirational standards to specific suggestions concerning the involvement of the law schools and educational efforts aimed at both judges and lawyers. These educational efforts will be aimed in particular at those new to our profession, and will seek to clarify what is acceptable behavior and what is not.

In a perfect world, every young lawyer would have a mentor in her chosen field to demonstrate the right way to approach the practice with dignity and competence. Short of that perfect world, each of us has a duty to set an example, not just of acceptable demeanor, but of what it means to take pride in our chosen profession.

### CONCLUSION

While the perception that there has been an increase in incivility is based primarily on anecdotal evidence, there does seem to be a consensus throughout the legal community that a definite trend has emerged involving misbehavior that has become more common rather than merely isolated. While all unethical behavior by definition is also unprofessional, there is a range of unprofessional behavior that does not reach the level of a disciplinary violation. When experienced lawyers engage in unprofessional behavior, they set precisely the wrong example for incoming practitioners. Good lawyers are not only ethical, they are also professional, and they do not need to resort to misbehavior to get our attention. They are disciplined, they are focused on serving their clients effectively and, perhaps most importantly, they value their reputation within the community and will not allow it to be stained by a momentary lapse of reason. □

### NOTES

1. See Marcia A. Johnson, "Uncivil Practice," *Bench & Bar* (April 1994) p. 15. Usually the misconduct results in private discipline, but occasionally the outcome is public. See *In re Starr*, 577 N.W.2d 210 (1997).
2. Hal R. Lieberman, "Lawyer's Incivility Provokes Three-Month Suspension," *The New York Professional Responsibility Report*, July, 1999, p. 4.
3. Stephen L. Carter, "The etiquette of democracy," *Christian Century*, April 8, 1998, p. 366.
4. Randall Kennedy, "The Case Against Civility," *The American Prospect*, Nov-Dec. 1998, p. 84.