

On civility and ethics

Remember this?

[I] do swear that [I] will support the Constitution of the United States and that of the state of Minnesota, and will conduct [myself] as an attorney and counselor at law in an *upright and courteous manner*, to the best of [my] learning and ability, with all good fidelity as well to the court as to the client, and that [I] will use no falsehood or deceit, nor delay any person's cause for lucre or malice. So help [me] God. (Emphasis added.)

For more than a century, this has been the oath taken by attorneys upon admittance to the bar in Minnesota.¹ In fact, Minnesota is one of 21 states with an attorney oath that contains a specific reference to civility.² While Minnesota's oath appears to have always mentioned civility, some states, such as Texas, added civility to their oath as recently as 2015. A majority of states' oaths are silent on civility.³

Notwithstanding our solemn promise of courtesy, I do not need to tell you that many Minnesota lawyers fall short of consistent uprightness and courtesy. Nor is this a particularly new insight. You may remember the Professionalism Aspirations approved and endorsed by the Minnesota Supreme Court in January 2001.⁴ Many states enacted such guidelines

beginning in the 1990s in response to concerns about deteriorating professionalism. I remember well those conversations and concerns when I first started practicing in the mid-1990s. This Office wrote frequently about the subject in the 1990s as well.⁵

While there are certainly several ethics rules in Minnesota that may be implicated by uncivil conduct (which I will discuss shortly), the persistent nature of this issue has prompted some states to do more with their ethics rules. For example, Michigan has an ethics rule, which can serve as the basis for discipline, which states: "A lawyer shall treat with courtesy and respect all persons involved in the legal process."⁶ This rule has withstood constitutional scrutiny.⁷ South Carolina added a civility clause to its oath, required all lawyers to retake the new oath, and specifically included violation of the oath as a grounds for discipline.⁸

Minnesota has not experienced a push to do more with its ethics rules on civility, but I have received several requests over the last year to write an

article regarding ethics and civility. As we look at some of the challenges in the profession, including lawyer well-being, and see reports on the pervasive nature of bullying and harassment in the profession,⁹ there is no doubt that the lack of civility is damaging the profession. As Chief Justice Burger observed almost 50 years ago, "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."¹⁰

Crossing the line

All unethical conduct is unprofessional, but not all unprofessional conduct is a violation of the ethics rules warranting discipline. As Judge Cleary (then OLPR Director) noted in 1999, a lot of "ill-mannered" conduct—general rudeness or name-calling that is coarse but not hostile in terms of race or gender, for example—is typically outside of the reach of the ethics rules.¹¹ Certain misconduct, however, is unquestionably both unprofessional and unethical.

For example, Rule 3.1, Minnesota Rules of Professional Conduct (MRPC), prohibits frivolous claims of law or fact. Rule 3.3, MRPC, prohibits lying to the court or the submission of false evidence (or failing to correct previously submitted false evidence). Rule 4.1, MRPC, prohibits a lawyer from making a knowingly false statement on behalf of a client, and Rule 8.4(c) prohibits dishonest or deceitful conduct generally.

Other rules may be less obvious or may not occur to practitioners. For example, there is an entire rule specifically denoted to fairness to the opposing party and counsel. Rule 3.4, MRPC, has many subparts and is worth a refresher. A lawyer shall not, or counsel another to, "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value."¹² A lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."¹³ While the first two clauses of this rule are well-known, don't forget the third clause. It is not improper to pay a witness's expenses or to compensate an expert witness—but otherwise, take care. A lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."¹⁴

One of my personal favorites (due to painful memories of ridiculous discovery disputes): A lawyer shall not "in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party."¹⁵ Discovery is to gather information to support or defend a case; it not supposed to be a pitched battle or war of attrition. Prosecutors are well aware of this next rule, but general litigators may not be: A lawyer shall not "in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a



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personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.”¹⁶ From the first clause, take care when trying to use “bad facts” you know about the opposing party that have little to do with the dispute at hand. You may think it is fair leverage, but if it’s unrelated to the matter at hand, it may not be. Finally, a lawyer shall not “request a person other than a client to refrain from voluntarily giving relevant information to another party” unless the person is a relative or an employee.¹⁷

Rule 4.4(a), MRPC, is particularly on point for some uncivil conduct: “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use means of obtaining evidence that violate the legal rights of such a person.”¹⁸ Every year, lawyers violate this rule and are disciplined. One example of recent public discipline involved intentionally grabbing opposing counsel by the arm during a deposition.¹⁹ For a variety of reasons, there is probably no good reason to touch anyone you work with, except for a handshake. A related Rule, 8.4(g), prohibits harassment based on protected status in connection with a lawyer’s professional activities.²⁰ Rule 8.4(h) prohibits discriminatory acts that violate federal, state or local law.²¹ Remember also that Rule 8.2, MRPC, prohibits a lawyer from making “a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.” Truthful statements regarding the judiciary are protected; knowing or reckless false claims are not. While this overview is brief, the text of the rules denotes the type of conduct that crosses the line from uncivil to unethical.

Conclusion

To quote Judge Cleary again, “Good lawyers are not only ethical, they are also professional, and they do not need to resort to misbehavior to get our attention.”²² Incivility demeans the profession, wastes time and resources, interferes with the efficient resolution of disputes, and contributes to the toxicity of the profession. Just because it might not be unethical does not mean incivility should be practiced. Please remember your oath and work at not being that person. ▲

Notes

- ¹ See Minn. Stat. §358.07 (2019) (emphasis supplied). Legislative history disclosed same oath in 1905 as well.
- ² David A. Grenardo, *A Lesson in Civility*, 32 Geo. J. Legal Ethics 135, 149 (2019).
- ³ *Id.* (Texas added the words “with integrity and civility in dealing with and communication with the court and all parties” to its oath in 2015.)
- ⁴ These Aspirations can be found in the Minnesota Rules of Court at 1197 (2019).
- ⁵ See, e.g., Edward J. Cleary, “Professionalism: More than Civility,” Bench & Bar (October 1999). The OLPR website contains numerous article on the topic of civility and ethics under the “Articles” tab.
- ⁶ Rule 6.5(a), Michigan Rules of Professional Conduct.
- ⁷ *General Administrator v. Fieger*, 719 N.W.2d 123 (Mich. 2006); *Fieger v. Michigan Supreme Court*, 553 F.3d 955 (6th Cir. 2009).
- ⁸ Rule 7(a)(6), South Carolina Rules for Lawyer Disciplinary Enforcement.
- ⁹ “Us too? Bullying and Sexual Harassment in the Legal Profession,” International Bar Association (May 2019).
- ¹⁰ *A Lesson in Civility*, 32 Geo. J. Legal Ethics at 138.
- ¹¹ Edward J. Cleary, “Professionalism: More than Civility,” Bench & Bar (October 1999); see also Martin A. Cole, “When Incivility Crosses the Line,” Bench & Bar (January 2014).
- ¹² Rule 3.4(a), MRPC.
- ¹³ Rule 3.4(b), MRPC.
- ¹⁴ Rule 3.4(c), MRPC.
- ¹⁵ Rule 3.4(d), MRPC.
- ¹⁶ Rule 3.4(e), MRPC.
- ¹⁷ Rule 3.4(f), MRPC.
- ¹⁸ Rule 4.4(a), MRPC.
- ¹⁹ *In re Williams*, 917 N.W.2d 423 (Minn. 2018).
- ²⁰ Rule 8.4(g), MRPC, states “It is professional misconduct for a lawyer to harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status in connection with a lawyer’s professional activities.”
- ²¹ Rule 8.4(h), MRPC, states “It is professional misconduct for a lawyer to commit a discriminatory act prohibited by federal, state or local statute or ordinance that reflects adversely on the lawyer’s fitness as a lawyer.”
- ²² Edward J. Cleary, “Professionalism: More than Civility,” Bench & Bar (October 1999).