

## **THE CONNECTION BETWEEN INCIVILITY AND WELL-BEING**

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Early on in my legal career I found myself working as opposing counsel to an attorney who, at least when it came to speaking with me, apparently had never heard that many people begin phone conversations with greetings such as “hello, how are you today?” or “good afternoon, I’m calling to discuss the discovery you sent to my client.” Instead, our typical phone call started like this:

Me: “Hello, [opposing counsel’s (“OC”) name], this is Bill.”

OC: “What the f\*\*\* is wrong with you? I can’t believe you sent me this chickens\*\*\* discovery. We’re not going to answer this. I’m moving for sanctions.”

[this was normally barked at me at a loud volume, dripping with disdain].

It generally did not matter what the issue was; the tone and general substance of most of our phone calls was essentially the same: i.e. I was incompetent and would soon face a sanctions motion.

Whether it was because I was wrestling with my own confidence as a freshly minted attorney, or because I just assumed that is how some lawyers practiced and I needed to grow a thicker skin, looking back I am embarrassed to say that I allowed this to go on for well over one year. In the midst of it, OC’s conduct was taking a mental and physical toll on my well-being. I dreaded taking calls from OC and, when I had a waiting message, I physically felt a knot in my stomach. Too often I let the interaction distract me from other work, or darken my mood for the rest of the day. Too frequently I would replay the conversations in my head while I laid awake trying to sort it all out and wondering if this was typical of the practice of law.

I have a friend who often reminds me that you should not let another person ruin your day. But early in my career I could not easily shake these conversations. Although time has colored my memory, I am confident that on occasion, and particularly after some of the more severe encounters, I considered whether litigation specifically, and the practice of law more generally was really the profession for me.

Ultimately I did not leave litigation or the profession, and I eventually put a stop to the tone of OC's phone calls with me. One day after returning from a visit with my doctor I explained to OC that my doctor had diagnosed me with hypertension. I then told OC that I was reasonably certain that my high blood pressure resulted directly from my phone calls with OC; that OC must, in fact, be a carrier. OC laughed and from that point forward we started our phone calls with the sort of pleasantries adults typically exchange at the beginning of phone calls.

Over the past several years, our profession has started giving greater consideration to incivility in the practice of law. We have all heard the stories, attended CLEs devoted to the topic, and been asked to reconsider our conduct and the conduct of others as to whether it was civil or professional. I write this article not to rehash those stories or scold lawyers, but to suggest that the costs of incivility to the well-being of lawyers, to the image of the profession, and to the public that we serve far outweigh any perceived strategic benefit. I also hope to explore what might be at the root of some such behavior, and to offer some possible solutions.

The costs of incivility are real. Although not a study of lawyers' performance,<sup>1</sup> at least one study found that almost half of workers who experienced incivility cut back their work effort.<sup>2</sup> That same study revealed that 80% of people lost time worrying about what happened in an uncivil encounter.<sup>3</sup> In another study, researchers discovered that study participants who were treated rudely by other study participants were 30% less creative and produced 25% fewer ideas.<sup>4</sup> And it is not just the recipient of uncivil behavior who pays a price. In another study, researchers discovered that merely witnessing uncivil conduct directed at others can diminish the witness' problem-solving skills.<sup>5</sup> Significantly,

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<sup>1</sup> While admittedly, these studies were not focused on the conduct of lawyers, as a reflection of society at large, undoubtedly these findings are equally applicable to lawyers as they are to other professions and workplaces.

<sup>2</sup> Christine Porath and Christine Pearson, *The Price of Incivility*, Harvard Business Review (Jan.-Feb. 2013)

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

researchers discovered that 12% of people reported that they left their job because of incivility.<sup>6</sup>

The legal profession is not immune to its members losing satisfaction due to treatment by colleagues. For example, in *Lee v. American Eagle Airlines, Inc.*, in the course of considering a motion for attorneys' fees and costs, the Court noted the powerful and credible testimony of a young lawyer at an evidentiary hearing that reflected some of the conduct that was taking place in the underlying matter.<sup>7</sup> Among other things, the young lawyer testified that during phone conversations with opposing counsel she was hung up on, told she had been assigned to work on the case because she was African-American, and wrongly accused of making misrepresentations.<sup>8</sup> The young attorney further testified that her experience with opposing counsel was a factor in her decision to leave her litigation practice.<sup>9</sup>

Incivility clouds cognitive abilities, diminishes creativity, damages reputations, drives up the costs to the client, drives down professional satisfaction and, in some cases, drives lawyers right out of practice. Moreover, it often leads to or exacerbates stress, substance abuse, anxiety, and a diminishment of a lawyer's mental health, all of which are well-documented, ongoing challenges for our profession.<sup>10</sup>

What can we do differently? At the outset, when someone acts in an uncivil manner, we are often quick to vilify the individual. But not all persons who act in an uncivil manner do so because of some deep character flaw or for a nefarious reason. Instead, consider that some individuals who act in an uncivil manner do so because of a significant underlying challenge in that person's life. Perhaps it results from a family or personal crisis, whether financial, medical, or emotional. This "uncivil actor" may need support and direction to resources to address the underlying issues. Fortunately, those resources are plentiful and include the State Bar of New Mexico's Judges and Lawyers Assistance Program ("JLAP") and the Solutions Group Employee Assistance Program. The former is a free service for all members of the New Mexico bench and bar and law students and provides

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<sup>6</sup> *Id.*

<sup>7</sup> *Lee v. American Eagle Airlines, Inc.*, 93 F. Supp. 2d 1322, 1325 (S.D. Fla. 2000)

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See P.R. Krill, R. Johnson, & L. Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016)

confidential professional and peer to peer assistance for members of the legal profession experiencing problems with alcohol and other drugs, depression, and other mental health/emotional disorders, as well as with issues related to cognitive impairment. Likewise, the latter offers four free counseling sessions per person-per concern-per year for individuals working in the New Mexico legal community, as well as their family members. Both can assist an individual in getting at the root of what may be impairing an individual's well-being and causing that person to act in an uncivil and unprofessional manner.

Of course, not everyone who acts in an uncivil or unprofessional manner has an underlying crisis or mental health issue that might explain their conduct. For some, it is an occasional or one-off intemperate moment; quickly remedied and seldom repeated. For others, however, it is how they believe the practice of law should be; i.e. "we work in a rough-and-tumble profession and we should use incivility in a strategic manner to gain an advantage for a client. If opposing counsel cannot deal with it, perhaps they chose the wrong profession." But whether this latter individual realizes it or not, the damage to their physical and emotional well-being, the cost to their clients, the damage to their reputation, and the damage they inflict on their colleagues and the profession far outweigh the illusory benefit that they believe they might derive from their uncivil conduct. Moreover, although there appears to be limited research on the issue, logically the more one engages in caustic behavior on the job, the more likely that behavior will permeate the rest of that individual's life. At some point it may become more than a strategy; it may become their defining characteristic and can result in the loss of friends, family, a sense of community, and that individual's overall well-being.

Inevitably, any discussion about incivility and its effect on a person's well-being tends to focus on the negative aspects of incivility, and the negative underlying causes. It is important, however, to think about the "other side;" i.e. the benefits of acting civilly. Remember OC, the attorney who tied my stomach in knots? Once we established a civil relationship, we ended up sharing more than polite greetings in the openings to our phone calls; we became collegial. Indeed, OC became somewhat of a mentor to me and I ended up learning much about practicing law from OC that served me well in my career. Over the course of many subsequent cases where we were opposing counsel, unburdened by the tone of our early relationship, we were able to focus on the merits of the case and the attendant factual and legal issues. We treated each other civilly and fairly, while never

compromising our advocacy for our clients. In short, we enjoyed working on cases with one another; we enjoyed the practice of law. I hope that OC's overall well-being was the better for it; I am certain that mine was.

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