

AMERICAN BAR ASSOCIATION

SECTION OF DISPUTE RESOLUTION

SECTION OF ANTITRUST LAW

SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW

SECTION OF STATE AND LOCAL GOVERNMENT LAW

GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION

SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR

SECTION OF SCIENCE AND TECHNOLOGY LAW

SECTION OF INTELLECTUAL PROPERTY LAW

SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

YOUNG LAWYERS DIVISION

SECTION OF TORT TRIAL AND INSURANCE PRACTICE

SECTION OF BUSINESS LAW

SAN DIEGO COUNTY BAR ASSOCIATION

INDIANA STATE BAR ASSOCIATION

NEW YORK STATE BAR ASSOCIATION

DELEWARE STATE BAR ASSOCIATION

AMERICAN JUDICATEURE SOCIETY

JUDGE ADVOCATES ASSOCIATION

NATIONAL CONFERENCE OF THE ADMINISTRATIVE LAW JUDICIARY

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association affirms the principle of civility
2 as a foundation for democracy and the rule of law and urges lawyers to set a high
3 standard for civil discourse as an example for others in resolving differences
4 constructively and without disparagement of others.

5
6 FURTHER RESOLVED, That the American Bar Association urges all lawyers,
7 ABA member entities and other bar associations to take meaningful steps to enhance the
8 constructive role of lawyers in promoting a more civil and deliberative public discourse.

9
10 FURTHER RESOLVED, That the American Bar Association urges all
11 government officials and employees, political parties, the media, advocacy organizations,
12 and candidates for political office and their supporters, to strive toward a more civil
13 public discourse in the conduct of political activities and in the administration of the
14 affairs of government.

15
16 FURTHER RESOLVED, That the American Bar Association supports
17 governmental policies, practices, and procedures that promote civility and civil public
18 discourse consistent with federal and state constitutional requirements.

Report

Lawyers play many roles in modern society. We serve as advocates for clients, as members of our community boards, and as judges sworn to uphold the rule of law. We are career public servants and elected officials, political advisors and media experts. We are even journalists, business leaders, and sports figures. In all these walks of life and more, lawyers are leaders in our society. This gives us a unique opportunity, and obligation, to make important contributions at important times.

Now is such a time. Contemporary political discourse continues to spiral to unprecedented levels of acrimony and venom, thereby endangering not only the quality of decision making about important public issues, but also the very lives and safety of public servants and citizens. A true and free democratic society cannot long endure in such a toxic environment. It is time for lawyers as leaders in our society, and the ABA as the leader of leaders, to stand and take action.

A. The Challenge and the Opportunity

1. The Current State of Public Discourse

Public discourse lies at the heart of American democracy. People can and will have different views on matters of public concern, and it is the engagement of that diversity that is the political process.¹ Effective engagement is constructive in nature. It fosters greater understanding, public involvement, respect despite differences, and a sense of community. It leads to solutions that are responsive to citizen needs and fosters an environment of social trust. Increasingly today, this is called “civil public discourse,” a means of civic engagement that encourages people of all political persuasions to vigorously but responsibly debate the choices that face our communities and our country today.² Key elements of civil public discourse include dialogue,³ respectful communication⁴ and informed public decision-making.⁵

But in recent years, public discourse has turned increasingly sour and contentious, and is getting worse. Reason and orderly debate all too often is giving way to invective, distortion, and gamesmanship. Once the art of compromise and statesmanship, political debate is now too commonly a battle between extremes, where power, not reason, prevails, and where closed minds simply seek to impose a point of view rather than listen respectfully to others and work with the legitimate issues they raise. This concern was echoed recently by a panel of experienced political observers in a discussion on civility in American politics at Emory University: “[P]roductive discourse on important but divisive political issues often devolves into

¹ See generally ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

² The recently created National Institute for Civil Public Discourse at the University of Arizona, chaired by former Presidents Bill Clinton and George H.W. Bush, employs a similar definition. See National Institute for Civil Public Discourse, Questions and Answers, <http://nicd.arizona.edu/node/5> (last visited April 19, 2011).

³ See, e.g. DANIEL YANKOLOVICH, THE MAGIC OF DIALOGUE (1999).

⁴ See, e.g., Delores Foley, *The Method of Dialogue: Promoting Understanding Between Hawaiians and Non-Hawaiians*, in THE HANDBOOK OF CONFLICT MANAGEMENT (WILLIAM J. PAMMER & JERRI KILLIAN EDS., 2003).

⁵ See, e.g., CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (CAMBRIDGE UNIVERSITY PRESS 1970).

even more polarizing diatribe when public voices incite tension without encouraging reflection and unity.”

Such destructive discourse has negative consequences for society.⁶ It fosters polarization rather than community, enmity and contempt rather than understanding and tolerance, alienation instead of involvement. It limits the potential for problem-solving, as fewer voices and ideas are heard and factored into decision-making. Thus, it is not surprising that many important issues facing our country remain unresolved. Christopher Moore, the author of the classic text, *The Mediation Process*, explained why negative communication interferes with reaching solutions. “Unproductive communication can lead to a breakdown of interaction between the parties or the inability to start negotiations at all.” Incivility leaves citizens frustrated, disillusioned, and reluctant to participate in democratic governance.

It is well-established that democracy cannot function effectively under these conditions.⁷ Without a social structure that supports tolerance, a basic level of trust, and a spirit of community, political institutions become hollow.⁸ Government becomes less efficient, effective, and responsive.⁹ And where government is less responsive, citizens are more likely to respond to conflict with violence rather than rely on civil institutions and the rule of law.¹⁰ Building civil discourse capacity in developing democracies is an important component of the ABA’s Rule of Law initiatives,¹¹ and it is no less important at home than it is abroad.¹²

Words matter. How we treat each other matters. In our public discourse, it is time to begin talking to each other with mutual respect, no matter how much we disagree.

2. Leadership by Lawyers and the American Bar Association

Lawyers are particularly well suited to help address this problem. We are leaders throughout our society, and as such have a unique capacity to influence the character of public discourse. We set the tone for the debate with the advice that we give to clients, friends, political allies, and others who seek it. We have the gravitas, and often the platform, to be heard.

Just as we have a voice, lawyers also have a choice: We can encourage a destructive tone that results in rancor, divisiveness, and public decision-making by power rather than reason. Or we

⁶ See, e.g. MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* (1973); LEWIS KRIESBERG, *CONSTRUCTIVE CONFLICTS: FROM ESCALATION TO RESOLUTION* (1998); DEAN G. PRUITT & SUNG HEE KIM, *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT* (3RD ED. 2004).

⁷ See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2001); Michael Woolcock & Deepa Narayan, *Social Capital: Implications for Development Theory, Research and Policy*, 15 *WORLD BANK RESEARCH OBS.* 225 (2000).

⁸ See, e.g., ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN ITALY* (1993); BRIAN O’DONNELL, *CIVIL SOCIETY: THE UNDERPINNINGS OF AMERICAN DEMOCRACY* (1999) (applying civil society principles to American democracy).

⁹ See, e.g., Susan Rose-Ackerman, *Corruption: Greed, Culture and the State*, 120 *YALE L.J. ONLINE* 125 (2009); Larry J. Diamond, *Three Paradoxes of Democracy*, 1 *J. DEM.* 3 (1990).

¹⁰ See, e.g., MARY KALDOR, *GLOBAL CIVIL SOCIETY: THE ANSWER TO WAR* (2003).

¹¹ <http://apps.americanbar.org/rol/programs/anti-corruption.html>.

¹² Roderick P. Hart & Bartholomew H. Sparrow, *Politics, Discourse, and American Society: New Agendas* 11 (2001).

can encourage the use of language and tone that is less divisive and more conducive to substantive discussion and rational decision-making. By encouraging more constructive civil discourse, we honor the profession's most noble call, to statesmanship.

The ABA has answered this call to leadership many times. In 1983 the House of Delegates adopted the Model Rules of Professional Conduct, which have been adopted by nearly all states and serve as a beacon for attorney ethics internationally. At their origin, and as they have evolved, these rules recognize the “influential role [of lawyers] in the formation and implementation of public policy ... [as well as] ... persistent concerns about lawyer honesty, candor, and civility.”¹³

The House of Delegates also has supported numerous resolutions similarly aimed at fostering lawyer civility. In 1991, for example, the House of Delegates passed Resolution 104 encouraging greater discussion of professionalism and ethics in law schools and Continuing Legal Education Programs.¹⁴ In 1995, the House of Delegates passed Resolution 113 encouraging federal, state, territorial, and local bar associations, and courts, to adopt standards of “civility, courtesy, and conduct,” in recognition that “a lawyer owes the profession adherence to a higher level of conduct than observance of the rules of professional conduct.”¹⁵

Just this year, American Bar Association President Stephen N. Zack led association efforts to restore and reinvigorate civics education through the ABA Commission on Civic Education in the Nation's Schools.¹⁶ Filling the glaring void in education today, the initiative seeks to provide youth with the understanding and the skills necessary to be effective citizens in the democracy they will inherit through workshops on such vital topics as civic participation, rights and responsibilities, and identity and pluralism. These are difficult issues, and it is civility in discourse that makes addressing them possible.

This resolution builds on such efforts in seeking once again to answer the call for leadership.

B. The Resolution

The resolution is composed of four parts: a statement of principle, a call to action for the legal profession, an appeal to those who work with government and the political process, and an authorization for ABA participation in the development of legal standards and practices that promote civil public discourse. Each merits further discussion.

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¹³ *Chair's Introduction*, Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000”) in ABA MODEL RULES OF PROFESSIONAL CONDUCT, 2010 EDITION.

¹⁴ RESOLUTION 104, AUGUST 1991.

¹⁵ Seth Rosner, ABA Standing Committee on Professionalism, Report with Recommendation to the House of Delegates (August 1995).

¹⁶ See Commission on Civic Education in the Nation's Schools.

http://www.americanbar.org/groups/public_education/civics.html (last visited April 19, 2011)

The Statement of Principle

This statement reflects many of the ideas described in the preceding discussion. In particular, it recognizes the importance of civility and civil public discourse as a key component of democratic governance and the rule of law. It also focuses on the unique role that lawyers play in this process, and the corresponding obligation that lawyers therefore have to society at large. Its aspiration is clear: lawyers should set a high standard for others to follow in engaging in civil discourse.

The statement of principle further acknowledges that disagreement can be handled in a way that is destructive or constructive, and makes clear that constructive resolution of such conflict is most desirable. Finally, by discouraging the “disparagement” of others during the course of civil discourse, the first statement of principle explicitly acknowledges the divisiveness of contemporary discourse and calls instead for disagreement with respect. Nothing in the resolution contemplates restrictions on speech or the promulgation of codes that might be interpreted to regulate speech.

2. The Call to Action for the Legal Profession

The second part of the resolution puts the first and fundamental principle into effect by issuing a call to action – specifically urging “all lawyers, ABA member entities, other bar associations, and government officials and employees, to take meaningful steps to enhance the constructive role of lawyers in promoting a more civil public discourse and a more deliberative American democracy.”

a. Scope

Significantly, this call to action takes place at several different levels. It begins with “all lawyers,” which recognizes that the duty to affect civil public discourse is first and foremost a personal obligation of any lawyer, regardless of practice or profession. It’s how we conduct ourselves day in and day out as we engage with our clients and communities that matters most, and this point is as important as it is often overlooked.

But the call to action goes further by asking for bar associations to take a leadership role as crucial legal institutions in our society. In this regard, the call to action begins at home, by asking all sections, divisions, forums, commissions, and other “ABA member entities” to take “meaningful steps” (discussed further below) with respect to encouraging a constructive role for lawyers in fostering civil public discourse. Yet this section also acknowledges that the ABA does not represent the full universe of the organized bar and so it also asks all other bars – including state and local bars, territorial bars, and specialty bars – to take similar meaningful steps to promote the lawyer’s role in civil public discourse. In this way, the resolution seeks to engage the legal professional as whole in the effort to uplift the level of our local, state, and national political discourse.

b. “Meaningful Steps”

The call to action is the heart of the resolution, and its most creative component. It is phrased in terms of “meaningful steps” to allow for all parties who fall within its scope to do what they can do, what they want to do, to further the constructive role of lawyers in the process of public civil discourse. Rather than being overly directive, the resolution anticipates that a thousand flowers will bloom, unleashing the creative potential of American lawyers at their best.

The resolution anticipates that resources, opportunity, and commitment will vary greatly among lawyers and the organized bar. It therefore asks only that lawyers take “meaningful steps,” recognizing that some may want to take larger steps while others may only prefer to take smaller steps. The resolution welcomes any and all of these steps, as long as some action is taken and it is meaningful.

At the individual level, this can be as simple as changing one’s own tone or stance as one participates in public discourse, if only for a day on an experimental basis. Such a minimal effort, undertaken by lawyers all over the country, would by itself have a profound effect on civil discourse when taken as a whole. Or an individual lawyer can go further, by getting involved in one of the many civil discourse efforts taking place all over the country as a volunteer or board member,¹⁷ or simply by suggesting that a collaborative process be used to address an issue of public concern, or helping to fund or promote one underway. These civil discourse efforts are a part of a larger movement to integrate consensual conflict management methods into public decision-making, often called “collaborative governance”¹⁸ or “public engagement.”¹⁹

ABA entities and other bar associations can fulfill this call to action in a myriad of ways. At the smaller end of the scale, setting civil public discourse as an agenda item for a meeting of the entity’s council or leadership, to consider how it engages in public civil discourse and what it might do to make a more purposive contribution, would be a simple but very meaningful step. More substantially, a section or committee could also set up a task force to study the issue and develop options for action. Such options might include, for example, writing an article about the

¹⁷ See, e.g., Arizona’s Project Public Civil Discourse, an initiative of the Arizona Humanities Council working in collaboration with organizations from around the state, provides opportunities for the public to participate in trainings, forums, and special events that share, model and provide insight on collaborative problem-solving skills on such issues as growth, education, healthcare, religion, race, immigration and transportation. <http://projectcivildiscourse.org/index.php>. A national center on civil discourse has been created at the University of Arizona. The National Institute for Civil Discourse brings together political leaders, scholars and others in a “nonpartisan center for debate, research, education and policy generation regarding civic engagement and civility in public discourse consistent with First Amendment principles.”

¹⁸ See, e.g., Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 J. DISP. RESOL. 269; Matthew Leighninger, *The Next Form of Democracy: How Expert Rule is Giving Way to Shared Governance...and Why Politics Will Never Be the Same* (2006); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1 (1997). Examples of collaborative governance methods vary widely, from town hall meetings (including large-scale models like AmericaSpeaks) and study circles (such as those modeled by Everyday Democracy) to citizen juries, deliberative polling, military/civilian conversations sponsored by A Seat at The Table, and deliberative dialogue processes promoted by the Kettering Foundation.

¹⁹ See, e.g., BEYOND CIVILITY: FROM PUBLIC ENGAGEMENT TO PROBLEM SOLVING, NATIONAL LEAGUE OF CITIES: AN ACTION GUIDE FOR CITY LEADERS (2011); Amanda R. Broun & Wendy D. Puriefoy, *Public Engagement in School Reform: Building Public Responsibility for Public Education*, STAN. J. CIV. RTS. & CIV. LIBERTIES (2008).

meaning of civil public discourse within that specialty area in the section's newsletter or magazine, holding a law student writing competition on the topic, or perhaps engaging in an outreach effort to local schools and community centers. ABA entities and other bar organizations could also hold panel discussions at association meetings on the area's intersection with civil public discourse, identify an issue to focus on in convening a state, local, or national civil public discourse event, or even choose to work with civil public discourse for a year as an organizational theme. The list of potential "meaningful steps" is limited only by one's ability to imagine the possible.

3. The Appeal to Those Who Work With Government and the Political Process

The third part of the resolution asks those who work with the political process and government to "strive toward a more civil public discourse in the conduct of political activities and in the administration of the affairs of government."

In a representative democracy such as ours, elected officials, political candidates, parties, the media and advocacy groups play a dominant role in the debate over issues of public concern. In important respects, they are the very face of public discourse, and, as such, are where the current decline in political discourse is most visible. They can do better, and this resolution asks them to "strive" to do so. This language is significant because it recognizes that the political arena is a hardy place, where differences in ideology, means for achieving ends, campaign styles, competition for power and influence, and other political pressures can push discourse to the brink. These dynamics are fundamental to the American political process and this resolution does not seek to change or deny the robust environment in which the political process takes place.

Rather, it simply asks political actors to tone down the rhetoric and at least try to engage in political activities with greater regard for principles of civil public discourse than is often presently seen. At least try to demonstrate respect for opposing views instead of caustically dismissing them for cheap and divisive political effect. At least try to listen to the needs, interests, and concerns that underlie opposing political views with an open mind to see if there may be room for compromise or common ground upon which to build a mutually acceptable solution. At least try to engage in the issues rather than merely score political points. Of course, the highest level of civil public discourse may not be achievable in any particular situation. But that does not mean that all efforts are futile, and certainly does not justify using the most extreme of tactics. As in all other matters, change in political discourse comes through striving for what we can do, rather than falling victim to what we cannot, and it is change in the political discourse that these resolutions so fundamentally seek. Perfection need not be the enemy of the good.

4. Authority to Participate

The fourth and final part of the resolution enables the ABA and its member entities to participate in the development of national, state and local government policies, practices and procedures that "promote civility and civil public discourse." This provision allows the ABA member entities, and the organization as a whole, the greatest flexibility in taking the meaningful steps it chooses

to fulfill the goal of doing what we can as lawyers to uplift the level of public discourse today. In particular, it would provide the ABA and its member entities the authority to draft or comment on legislation or administrative or judicial rules that would promote civil discourse if that was the “meaningful step” chosen as a course of action. By authorizing ABA participation, it would also ensure that any such rules, regulations, or practices comport with federal and state constitutional laws. In so doing, it would also allow the ABA and its member entities to foster the structural advance of democratic governance by encouraging the growth of collaborative processes that are increasingly being integrated into federal, state, and local government policy making.

Respectfully submitted,

R. Wayne Thorpe
Chair, Section of Dispute Resolution
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