

More than Minding Your Ps and Qs

Cultivating Civility in a Tech Age

By Katherine Mikkelson

The assistant county attorney who sends an email dripping with sarcasm and laced with insults. The opposing counsel who is impossible to reach via phone, email or text for days on end. The lawyer who would rather check email on her device than look you in the eye and have an actual conversation. Examples of incivility abound in the profession, and many have bemoaned that our digital, high-tech, right-now culture is aggravating the problem. Indeed, a recent survey by Robert Half Management Resources found that 50 percent of chief information officers surveyed believe that mobile device usage (cell phones, smart phones, handheld devices and laptops) has significantly increased breaches of workplace etiquette over the past three years. To be sure, technology provides many advantages, but it also contributes to a growing level of incivility in our society.

The ABA Model Rules of Professional Conduct reference civil behavior frequently. Guidance is first provided in the preamble. Comment [5] states that "... A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." Likewise, comment [9] states that it is "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."

The rules are also instructive. Rule 4.4(a), Respect for Rights of Third Persons, states: "In representing a client, a lawyer shall not use any means that have no substantial purpose other than to embarrass, delay or burden a third person..." Rule 8.4(c), Misconduct, states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Additionally, Rule 3.2, Expediting Litigation; Rule 3.4, Fairness to Opposing Party and Counsel; and Rule 3.5, Impartiality and Decorum of the Tribunal; all touch on courtesy as it pertains to the lawyer as an advocate. Rule 3.2 states, "The lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client." Rule 3.4(d) states that the lawyer shall not "in a pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a ... discovery request..." And finally, Rule 3.5(c)(3) states that a lawyer shall not communicate with a juror after discharge of the jury if "the communication involves misrepresentation, coercion, duress or harassment." Clearly the drafters of the rules had civility in mind even if that term was not used.

Ethical obligations aside, here are our top ten tips for cultivating civility.

Free Audio Program on Civility

Listen to *Cultivating Civility*, a free, 30 minute audio program created by the Division, at www.governmentlawyer.org.

1. Consider Your Communication Vehicle

It is always better to deliver unpleasant communications in the most personal way possible. Don't email if you can call, and don't call if you can communicate in person. Email

does not offer tone, body language or facial expressions, all of which help the recipient process the information and understand the context of the message. Laura B., an attorney formerly employed with a state regulatory agency, states, “If I have something difficult, unpleasant, or adversarial to say, I pick up the phone rather than send an email, whenever possible. It is so easy for someone to misconstrue an email. Such misunderstandings tend to aggravate rather than resolve a dispute.” Laura does this both with opposing parties and with colleagues within her own organization. She follows up with an email or letter after the conversation if it’s necessary to create a paper trail.

2. Beware the Siren Call of Your Device

While enduring a particularly long or dull meeting, it’s tempting to sneak a peek at your smart phone. After all, everyone is doing it. Another recent study by Robert Half Management Resources found that 85 percent of executives say it’s common for professionals to read and respond to their mobile devices during business meetings. Whether it’s playing *Words with Friends* or just trying to stay on top of emails, don’t do it. Chances are, your boss will notice. Greg Brooker, Civil Division Chief of the United States Attorneys’ Office in Minnesota, sees device addiction with lawyers of all ages, but especially with young lawyers. “Public law office managers need to set expectations early. Educate your lawyers as to what is appropriate and what is not. Just as there are no devices in the court room, it is also important to leave them out of meetings.” Brooker and experts in the field recommend taking special “smart phone breaks” where meeting attendees can check their devices. Attendees will be more receptive to putting away devices when they know it will be permissible to check them at a designated time.

3. Be Respectful of Others’ Schedules

Showing up late for a meeting or appointment is sometimes unavoidable. Cars break down, kids get sick, trains get delayed. But repeatedly doing so indicates a basic lack of respect towards your opposition, your client or the court. If you are cramming too many appointments into your day, you will need to readjust. Public lawyers’ schedules are not always their own, and asking a colleague to take over a matter is usually not an option due to lack of resources. Sylloris Lampkin, a federal agency attorney, tries to delegate when she can. “I have found that breaking projects down into delegable tasks for interns and/or paralegals is often quite helpful. Also, analyzing your office’s standard practices and procedures and then eliminating, changing, and combining several steps can be been helpful with time management. This type of analysis can lead to creative solutions, such as virtual filing systems and online calendaring.” Lastly, make sure to leave ample time between appointments to allow some breathing room.

4. Practice Basic Social Niceties

Those little social niceties you learned in kindergarten? They will serve you well as an adult. Saying “good morning,” “please,” “excuse me” and “thank you” will endear you to your fellow lawyers, administrative support, court personnel and yes, even your opposition. Stop to say hello to colleagues you pass in the hallway. Take out your earbuds in the elevator and converse with the court clerk. Get off your phone while you are at the bar meeting and network with your fellow members. Engage with your fellow humans and while you’re at it, treat them as you’d like to be treated.

5. Litigation is Not War

The scorched attitude is so two decades ago. Don't craft your discovery request seeking the kitchen sink when all you really need is information about the faucet. When opposing counsel makes a brilliant argument on a motion or does a good job on a deposition, take a minute to compliment her. Consider reasonable requests from the opposition.

Agree to the two day extension to respond to a motion. Greg Brooker says that his office has an unwritten policy allowing discretion to grant reasonable requests for extensions within the parameters of court ordered deadlines. "Our lawyers can do this without seeking a supervisor's permission. It's really a two-way street because with our heavy caseloads, there will come a time when we need an extension. When we agree, it generates goodwill. Also, it allows our attorneys to focus their attention on the merits of the case, rather than unnecessary side shows."

6. Don't Keep Them Hanging

In the practice of law, few things are more frustrating and irritating than phone calls and emails that are not returned. A good practice is to return both within 24 hours. The Summit County (Ohio) Prosecuting Attorney's Office has such a policy. Says Margaret Scott, Deputy Chief Assistant Prosecuting Attorney, "Our office policy and my personal practice is that no phone call or email goes unanswered for over 24 hours. I always give a response even if it is simply acknowledging the call/ email and stating that I am 'looking into it' and will get back at a later time." Scott also uses her "out of office" features on her voice mail and email, letting callers know when she will be out. "During times that I am in trial I always return calls after-hours, noting that I am in trial and promising to get back to the person in X days."

7. Use a Cool Down Period

When you receive a mean and nasty email, your first inclination is probably to shoot an equally mean email right back. Resist, urges Susan L., a former assistant city attorney. "If you get an email and your emotions shout that it requires an immediate response if not deadly force, do nothing. Generally the sender will apologize within 36 hours because your silence will be deafening." For emails that require an eventual response, she recommends asking another lawyer or your secretary to either draft or review your response. "Don't send anything that you aren't willing to see blown up as an exhibit at trial or attached to a brief to the court."

8. Keep your Commitments

If you say you're going to do something, do it. Get the agreement signed by the appropriate parties, set up the meeting with stakeholders, finish drafting the memorandum of understanding by Thursday. If time gets the better of you and you find you will be delayed, follow up with the recipient, client or boss so this person knows you are not reneging on your promise. Remember that under-promising and over-delivering will result in increased client satisfaction.

Addressing Civility at the Local Level

Two men were arrested in December of 2012 for disorderly conduct during an Easton (Connecticut) Board of Selectmen meeting. The Easton Courier reported that the men repeatedly spoke out of turn with angry outbursts, disrupting the town council meeting. The Courier described the men as part of a small group of citizens who regularly attend selectmen meetings to criticize the actions and leadership of a particular selectman (www.eastoncourier.com/447/two-residents-disrupt-eastonselectmens-meeting-leading-to-arrests/). Incidents of incivility between local officials and the public make the news, and increasingly, local governments are fighting back with civility policies, rules and resolutions.

For example, in 2006, the Ware County (Georgia) Board of Commissioners incorporated decorum rules that require members of the public to direct remarks to the chairman rather than individual commissioners, and prohibit ad hominem remarks. (www.warecounty.com/Residencecommissionmeetings.aspx).

The Washoe County (Nevada) Board of Commissioners has adopted a policy that is published with every board meeting agenda. It states in part:

The Board of County Commissioners conducts the business of Washoe County and its citizens during its meetings. The presiding officer may order the removal of any person whose statement or other conduct disrupts the orderly, efficient or safe conduct of the meeting. Warnings against disruptive comments or behavior may or may not be given prior to removal. The viewpoint of a speaker will not be restricted, but reasonable restrictions may be imposed upon the time, place and manner of speech. Irrelevant and unduly repetitious statements and personal attacks which antagonize or incite others are examples of speech that may be reasonably limited. (www.washoecounty.us/bcc/agendas.html)

Likewise, in 2007 and again in 2011, the City of North Miami Beach passed a resolution where the mayor and city council committed themselves to “maintaining civility in their public and political discourse.” The resolution was built upon the following six principles:

- Respecting the right of all citizens to hold different opinions;
 - Avoiding rhetoric intended to humiliate, illegitimize or question the wisdom of those whose opinions differ;
 - Striving to understand differing perspectives;
 - Choosing their words carefully;
 - Speaking truthfully without accusation and avoid distortion; and
 - Speaking out against violence, prejudice and incivility in all of their forms.
- (Resolution R2011-22, North Miami Beach, April 27, 2011)

Government entities that draft such policies need to be mindful of potentially trampling on First Amendment rights. Rules should be viewpoint-neutral and be applied in a consistent, non-arbitrary manner. (See, Terri Day and Erin Bradford, *Civility in Government Meetings: Balancing First Amendment, Reputational Interests, and Efficiency*, 10 First Amend. L. Rev. 57 (Fall 2011)).

9. Diffuse with Humor or Kindness

If a situation gets heated, laughter or humor may help diffuse it. Make a self-deprecating joke during those tense negotiations. When opposing counsel begins to rant, tell her that you assume you are no longer invited to their office's summer picnic. Likewise, try to make a connection with the difficult people you encounter in your practice. Take the annoying opposing counsel out to lunch. Bring in bagels or donuts to the administrative assistant who rolls her eyes when you request a task. Maureen Essex manages the Singapore Justice Training Center, a small office with only two other employees who did not get along. Employee #1 was hired first and felt usurped by employee #2 who felt the need to aggressively prove herself. "The two were barely speaking. I took the new employee aside for some private time over coffee outside of the office. She relaxed immediately. What I had taken for self-assurance was actually insecurity," said Essex. Essex also spent some private time with the first employee, re-affirming her importance to the team. "Time, team meetings and shared projects with urgent deadlines caused the two of them to learn how to rely on each other, respect each other and eventually value each other."

10. Apologize

If you realize you've overstepped your bounds or acted rudely, your best bet is to apologize, sincerely and profusely. And then learn from your mistake. We all make them.

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