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CIVILITY IN PRACTICE: ATTORNEY, HEAL THYSELF

ROGER S. HAYDOCK†

“And do as adversaries do in law—
Strive mightily, but eat and drink as friends.”

-Shakespeare, *Taming of the Shrew*, 1, 2

“The measure of a civilization is the degree of obedience to
the unenforceable.”

-Lord Moulton

INTRODUCTION: BACK TO THE FUTURE

Imagine litigation practice in the twenty-first century. Imagine what future generations of lawyers will think of our litigation practice. Imagine their surprise—their shock—about how some of us practice “civil” litigation and treat each other. Are there lawyers of our generation who practice “scorched earth” and “take no prisoners” litigation? Is there a growing number of lawyers who use tactics and techniques that go way beyond commonly accepted notions of “civil” practice? Is our legal profession becoming cluttered with impolite, intemperate, and insulting litigators? A lot of lawyers, judges, and commentators think so.¹

One such commentator is I.M. Sivil, a preeminent practitioner and scholar who has studied and analyzed our present civil litigation system. This essay contains a transcript of an exclusive interview I.M. Sivil graciously granted on the condition the author/interviewer would not be impolite, intemperate, or insulting. Imagine future generations of litigators reading it and reacting to it with sighs, gasps, guffaws, and perhaps, disbelief.

Q: What is uncivil conduct?

A: Uncivil conduct is anything that is not civil conduct.

Q: That’s not a very useful definition.

A: Defining incivility is like grabbing a shadow. You see it—or think you see it—but you can’t get a hold of it.

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1. Saylor, *Rambo Litigation: Why Hardball Tactics Don’t Work*, A.B.A. J., Mar. 1, 1988, at 78, 81.

Q: So what are you saying—that it is impossible to define, or that only the Shadow knows?

A: The difficulty in defining incivility is a major reason why it is difficult to regulate and eradicate. But it can be described.

Q: How would you describe it?

A: The lack of civility manifests itself in a number of ways such as:

- A high level of contentiousness that exists between lawyers and parties that is unrelated to the merits of litigation;
- Conduct that unnecessarily antagonizes the opposing attorney and is counterproductive to the best interests of the contentious lawyer's client;
- The inability of attorneys to agree on simple, procedural issues such as scheduling of discovery, extensions of time, and the location of depositions;
- Mischaracterizing negotiated settlements;
- Filing retaliatory motions which do not advance the merits of the case;
- Making remarks that are sarcastic, demeaning, or sexist.

Q: That's all?

A: Oh, no, no. These are just some examples. Others include:

- Lawyers who instinctively blame someone else, usually the opposing attorney, for everything that goes wrong;
- Lawyers who always complain about the opposing attorney's conduct, and refuse to accept responsibility for their mistakes and poor judgments;
- Lawyers who fail to exercise common decency and fail to observe notions of fairness;
- Lawyers who regret they didn't go to dental school.

THE EXTENT OF THE PROBLEM

Q: How widespread is this problem?

A: Lunchtime conversations for some litigators routinely include at least one astounding story of lawyer contentiousness. Bar association magazines publish articles on obnoxious and obstructionist practitioners. Continuing legal education programs offer such courses as "Dealing with the SOB (sic) Litigator."

Q: Sick?

A: Diseased, at least.

Q: Are you saying that there are more contentious lawyers around than ever before?

A: There is either a larger percentage of lawyers who are real litigation jerks, or there are more jerks around because there are more lawyers. Either way, there is a serious problem.

Q: But not everyone agrees there is a serious problem with lawyer incivility.²

A: The exact scope and nature of the problem is not yet clearly defined.

Q: What's your position? Is there or isn't there a really serious problem?

A: I'm just one voice. There are some in the profession who believe that incivility permeates practice like a plague. And there are others who view questionable behavior as a minor rash in our profession. There is a genuine disagreement over the scope of the problem, but there is no disagreement that a real problem exists.

Q: Well, acts of incivility have always been practiced by some attorneys.

A: Ever since Cain first sought representation for killing Abel.

Q: Some of your earlier descriptions of uncivil behavior are based on perceptions, and what is inappropriate behavior to some lawyers is appropriate conduct to others.

A: Our legal profession needs to reach a reasonable consensus of what is civil and what is not.

Q: Lawyers reach a consensus?

A: I know it might be asking a lot, but we have to be careful not to create questionable standards of civility based on archaic traditions and out of date customs, like the "old boys network."

Q: How come?

A: Overly "civil" professional relationships may be based on personal relationships, causing friends to protect and cover up for each other. Some lawyers may be perceived to be uncivil merely because they are strangers or have diverse ways of practicing. These and other improper bases for determining appropriate conduct must be avoided.

2. Goldberg, *Playing Hardball*, A.B.A. J., July 1, 1987, at 48, 52.

Q: Are there some types of practice that are less affected by the problem of incivility?

A: Sure. Some specialized areas of practice commonly involve fewer instances of contentious behavior because most of the lawyers are experienced and know each other. For example, some bankruptcy, patent, and criminal lawyers who deal with each other on a regular basis are less likely to tolerate or be dominated by rude and obnoxious opponents. Lawyers who practice in small communities and who often see each other in professional or social settings also tend to maintain cordial, polite relationships.

Q: Why are these lawyers different from other litigators?

A: They are not different. Their type of practice is. It is in their best interests to be decent because they will soon be dealing with each other again, and it is easier for them to enforce voluntary good conduct.

RATIONALIZING INCIVILITY

Q: Why do lawyers act uncivilly?

A: Who says they're acting?

Q: Why do they act like . . .

A: Lawyers engage in inappropriate conduct for a variety of reasons. They often believe they have justifiable reasons for what they do and seldom perceive their questionable conduct as being inappropriate.

Q: So they rationalize their actions?

A: Of course, like any "rational" person.

Q: How so?

A: The reasons they rely on to justify their uncivil conduct include:

- The conduct serves the best interest of the client;
- The behavior serves the needs of the attorney;
- The adversary system or society requires or promotes this conduct;
- The behavior is a necessary strategy or an effective tactic;
- The opponent has provoked the retaliatory conduct;
- Freedom of speech and practice protects such behavior;
- The absorption of blue ink from law school exams has affected their judgment.

Client Interests and Attorneys Needs

Q: Let's explore those supposed reasons. How do the interests of the client affect attorney behavior?

A: Clients expect, some even demand, victory prompting lawyers to make all efforts to meet those needs. Many clients are impressed with aggressive attorneys who engage in combative conduct, encouraging lawyers to be warriors. Still other clients believe if they suffered an injury or loss they have been wronged and that someone else—not them—has to be responsible. And some clients believe their lawyers ought to mimic the client's emotional feelings and hostility towards the opposing side.

Q: What about the needs of attorneys? How do those needs affect the conduct of the attorney?

A: Some lawyers *have* to win. They cannot stand or imagine losing. Winning is not just everything, it's the only thing. Further, many attorneys need paying clients. Having an insufficient number of paying clients is worse than having no clients. Many clients want to retain only attorneys who win for them. An attorney who loses a major case or several minor cases faces the loss of a client. There are clients who are willing to take their money elsewhere unless an attorney wins, and so the attorney feels the pressure to win at all costs.

Q: But there is more to practice than money.

A: Absolutely. Some lawyers base their self-esteem on their won/loss record. If they win they feel good about themselves. If they lose they feel poorly. Other lawyers commit acts of incivility because they enjoy acting them out. These attorneys may be acting dysfunctionally, but the "enjoyment" they gain overcomes whatever notions they have about acting improperly.

Q: But some situations justifiably trigger an inappropriate response.

A: The heat of a battle may cause a lawyer to temporarily lose control or react in an inappropriate manner. While this conduct is not justified, it can be understandable, just like taking the bar exam. Some lawyers premeditate this response, though, and attempt to justify their conduct as if it were spontaneous.

The Adversary System and Societal Pressures

Q: What about the adversary system and its affect on civility?

A: The adversary system itself fosters competitive relationships. Conflict is the name of this game, and all is fair in this war, or so some lawyers think.

Q: You don't expect attorneys to be perfect, do you?

A: Not every day, of course not. But I do expect them to be accountable. Many inappropriate acts and statements occur in situations in which the offending lawyer cannot be held accountable for such conduct. This conduct may occur only in the presence of the other attorney. There is little accountability for these acts done outside the public ken.

Q: Our society places this pressure on lawyers, doesn't it?

A: To some extent. Name a movie in which the "good" trial lawyer lost. When did Perry Mason ever lose? Why should real lawyers?

Q: But that's fiction. What impact does that have on attorney conduct?

A: Fiction often becomes reality. Many believe the end justifies the means. Our society portrays lawyers as acting out this belief. Paul Newman in "The Verdict" won the case only after violating a number of ethical prohibitions. Cher in "Suspect" did not exactly aspire to high ethical standards.

Q: What about judges?

A: Some judges treat lawyers disrespectfully and treat parties unfairly. Lawyers figure they might as well treat each other the way these judges do.

Q: What about good judges?

A: When acts of incivility are brought before a judge, it can be difficult for the judge to assess the conduct and determine what to do. When lawyers come before judges complaining of each other's conduct, the judge often feels like a daycare worker disciplining six year olds who complain the other started the name-calling and deserves to be punished.

Q: So, judges are now daycare workers?

A: Too often judges scold the "kid lawyers" and send them outside to practice more.

Q: Next you'll be blaming law schools and CLE programs for failing to teach lawyers how to behave.

A: Interestingly, some lawyers argue that they should be

taught how to act professionally and should not be expected to act professionally on their own.

Q: Law schools and some national CLE programs effectively teach trial advocacy to law students and lawyers, don't you agree?

A: That depends on the course. Some courses on trial advocacy not only fail to address the problem of incivility but also contribute to its rise. These courses focus primarily on assertive skills training, and do not include topics on civility. Law students and lawyers learn how to be aggressive, but not how to balance notions of fair play and assertiveness.

Inappropriate Strategies and Tactics

Q: Is incivility ever an appropriate trial strategy?

A: Some lawyers attempt to justify committing questionable or inappropriate acts because the situation requires such conduct. A common rationalization is that there is no other course of conduct available, and it is appropriate to be inappropriate. Other lawyers believe that a necessary part of the litigator's stock and trade are such traits as hostility and antagonism, not to mention being obnoxious and an obstructionist.

Q: You're not suggesting that lawyers be wimps, are you?

A: Some lawyers believe that to be polite is to exhibit a weakness. These lawyers believe that a firm, assertive position requires them to be rude and insulting.

Q: Aren't some of those who complain about overly aggressive behavior incapable of doing such things and don't want other lawyers effectively using such tactics?

A: A wrong is a wrong, regardless of whether it can be done well.

Q: There are a lot of unfair things attorneys can do, and incivility cannot be equated with unfairness. Just because conduct is unfair doesn't make it wrong, does it?

A: Lots of things in life—and practice—are unfair. Incivility involves inappropriate conduct and behavior.

Q: What is a lawyer to do when the opposing attorney does something that is uncivil?

A: Many lawyers believe that uncivil conduct is any conduct committed by opposing lawyers. These lawyers believe that

they always act in a civil manner and the problem is always with the other lawyer.

Q: But sometimes it is, isn't it?

A: Sure.

Q: Then why not retaliate?

A: Nothing justifies the use of uncivil conduct in retaliation.³ It only compounds the problem. Revenge only brings out the worst in attorneys, and it has no place in our profession.

Q: What about teaching the other side a "lesson?"

A: It is tempting to think that if the opposing lawyer is trying to use questionable tactics then the opponent should be shown how such tactics can really be used effectively. Attorneys should only think about such a counter tactic but never act it out.

Q: What about some good old righteous indignation?

A: Uncivil behavior is simply not the right thing to do to respond to uncivil behavior.

Q: Can't you imagine a situation which would justify uncivil and unprofessional conduct?

A: Our clients are entitled to our best efforts to serve them but not to the corruption of our character.

Free Speech and Privilege

Q: Aren't uncivil statements protected by free speech?

A: First Amendment rights of free speech do not protect im-

3. Provocation by opposing counsel only mitigates discipline and does not prevent imposition of sanctions. *Commonwealth v. Perillo*, 474 Pa. 63, 73, 376 A.2d 635, 641 (1977) (Roberts, J., concurring) ("Retaliatory conduct by counsel has no place in a courtroom.") However, at least one court has held that provocation may constitute an extenuating circumstance. *See Broge v. State*, 288 So. 2d 280 (Fla. Dist. Ct. App.) (no mistrial where defense counsel goaded prosecutor into improper remarks, *cert. denied*, 419 U.S. 845 (1974)).

Kansas reaches an opposite result. *State v. Turner*, 217 Kan. 574, 538 P.2d 966 (1975). The attorney accused defense counsel, among other things, of being a liar, acting in bad faith, playing dirty pool, and using smear tactics. *Id.* at 574-75, 538 F.2d at 968-69. The attorney was charged with violating DR 1-102(A)(5) (conduct prejudicial to the administration of justice) and DR 7-106(C)(6) (undignified and discourteous conduct which is degrading to a tribunal). These accusations were directed toward opposing defense counsel during the trial. *Id.* The court concluded that the attorneys' duty to the court, the profession, and the public precluded this type of conduct. *Id.* at 577-80, 538 F.2d at 970-72. The court held that open disrespect and personal attacks upon opposing counsel brought disrepute upon the legal profession and disrupted the orderly progress of the trial. *Id.* at 578, 538 P.2d at 971.

proper statements.⁴ An attorney's right to free speech is tempered by obligations to both the courts and the bar.⁵

Q: Doesn't some privilege protect statements made by attorneys about other attorneys?

A: Some attorneys incorrectly think that a privilege protects their uncivil statements. But remarks that may be qualifiably privileged in a libel action may still be grounds for inquiry regarding professional misconduct.⁶ Truth may mitigate but not prevent the imposition of discipline.

Q: Statements made or actions taken outside the courtroom are not subject to regulation, are they?

A: Inappropriate behavior directed toward opposing counsel is inappropriate regardless of when and where it occurs.⁷

REMEDIES

Q: Let's focus on remedies. Aren't there already a number of available remedies for problems of incivility, like professional rules of conduct?

A: The Model Rules of Professional Conduct and the Model Code of Professional Responsibility regulate defined "ethi-

4. *In re Sawyer*, 360 U.S. 622, 646 (1959) (Stewart, J., concurring).

5. *State v. Nelson*, 210 Kan. 637, 641, 504 P.2d 211, 215 (1972). *See also* *Polk v. State Bar*, 374 F. Supp. 784, 788 (N.D. Tex. 1974) (Respondent, after being released from jail for failure to appear as a defendant at trial, issued a public statement calling the district attorney dishonest and unethical and the judge perverse. The court concluded that the attorney's statements were not prohibitive of any inability to represent clients competently and honestly and that attorney made the statements as a private citizen and not as a lawyer which reduced the state's interest in disciplining him.); *State Bar v. Semaan*, 508 S.W.2d 429, 432-33 (Tex. Civ. App. 1974) (court held that isolated incidences of criticism of a fellow attorney in public did not constitute professional misconduct).

6. *See* Annotation, *Libel and Slander: Privilege in Connection with Proceedings to Disbar or Discipline Attorney*, 77 A.L.R. 2d 493 (1961); *see also* *Leimer v. Hulse*, 532 Mo. 451, 463, 178 S.W.2d 335, 339, *cert. denied*, 323 U.S. 814 (1944).

7. *Van Iderstine Co. v. RGJ Contracting Co.*, 480 F.2d 454, 459 (2d Cir. 1973). "Advocacy is an art in which the unrelenting pursuit of truth and the most thorough self-control must be delicately balanced. Lawyers, as officers of the court, must always be alert to the rule that zealous advocacy on behalf of a client can never excuse contumacious or disrespectful conduct." *Id.* Opposing counsel is properly considered part of the "tribunal" and within the purview of DR 7-106(C)(6) although no discourtesy is directed toward the trial court. *State v. Turner*, 217 Kan. 574, 578, 538 F.2d 966, 971 (1975). Two disciplinary rules apply to statements made outside of court proceedings: DR 1-102(A)(4) (engaging in conduct allowing dishonesty, fraud, deceit, or misrepresentation) and DR 1-102(A)(6) (engaging in any other conduct that adversely reflects on fitness to practice law). MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4), DR 1-102(A)(6) (1980).

cal" conduct.⁸ Uncivil behavior may fall outside these definitions and be legally ethical.

Q: Do the Rules or Code establish standards for which an attorney may be disciplined for criticizing another lawyer?

A: Ethical considerations state that an attorney shouldn't make "unfair or derogatory personal" references to opposing counsel and should be "courteous" to opposing counsel.⁹

Q: Can an attorney be disciplined for violating an ethical consideration?

A: No. Ethical considerations are aspirational and not grounds for a sanction.¹⁰

Q: What about procedural rules, like Federal Rules of Civil Procedure 11, 26 and 37?

A: You should teach law school. Those rules control specific and narrow types of attorney conduct.¹¹

Q: Well, judges can monitor and sanction lawyers for other conduct.

A: If the conduct occurs in the presence of the judge.¹² I don't think it would be economically feasible to have a judge officed in every law firm, although it is an intriguing idea.

Q: Maybe we should only be concerned about uncivil behavior if it affects the results an attorney obtains, and then malpractice standards would provide the client adversely affected with a remedy.

A: The law of torts regulates the minimal level of acceptable behavior.¹³ We should all aspire to much higher standards.

8. MINN. RULES OF PROFESSIONAL CONDUCT preamble: scope (1988).

9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-37, EC 7-38 (1980).

10. Schaefer, *Attorneys: "Don't Take Thy Opposing Counsel's Name in Vain!"*, 56 FLA. BAR J. 606, 606 (1982).

11. Lawyers who act in bad faith, vexatiously, wantonly, or for oppressive reasons can be sanctioned by courts who may dismiss client's case. *Batson v. Neal Spelce Assoc., Inc.*, 805 F.2d 546, 550 (5th Cir. 1986). Lawyers who bring claims not based on existing law and not a good faith extension of existing law may be sanctioned under Rule 11. *Huettig & Schromm, Inc. v. Landscape Contractors Council*, 582 F. Supp. 1519, 1522 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (1986).

12. Most disciplinary judicial proceedings involve instances of clearly outrageous and unconscionable conduct. The case of *In re Crumacker* involved an attorney who vilified his opponents continuously throughout court proceedings. 269 Ind. 630, 649-57, 383 N.E.2d 36, 45-49 (1978), *cert. denied*, 444 U.S. 979 (1979). Most judicial disciplinary proceedings involve conduct that occurred during court proceedings. *See In re McAlevy*, 69 N.J. 349, 350-51, 354 A.2d 289, 290 (1976).

13. *See W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS* § 1, at 6 (5th ed. 1984).

Q: Why? If something is not unethical or illegal it should be allowable.

A: Uncivil conduct by its very nature eludes regulation and correction by rules, orders, or the law itself.

Q: What then can be done?

A: A number of jurisdictions are making some efforts to control incivility. These jurisdictions have established role modeling and educational programs and have promulgated codes and creeds of civility.

Q: Role modeling?

A: Yes. A community of a small number of professionals attempt to enforce voluntary standards of good behavior through collegial role modeling and peer pressure.¹⁴

Q: Education?

A: Some jurisdictions publicize their concerns about contentious practice and advise lawyers to avoid this type of misconduct and to conduct themselves in a "professional" manner.¹⁵

Q: Codes and creeds?

A: Some bar associations have promulgated a set of professional standards of civility, and some courts have established these standards through an order.¹⁶

Q: What are these standards?

A: The code or creed typically contains pledges, admonitions, or specific standards of conduct.

Q: What are examples of a pledge?

A: My word is my bond.

I will cooperate with my opponent as much as possible and scrupulously observe our mutual understandings.

I will be courteous, civil, and prompt in oral and written communications.

I will be punctual for conferences, hearings and trials.

I can disagree without being disagreeable.

14. Smith, *The Erosion of Professionalism*, FOR THE DEFENSE, Feb. 1989, at 1, 1.

15. FEDERAL PRACTICE COMMITTEE, SUBCOMMITTEE ON ATTORNEY CONDUCT REPORT TO THE DISTRICT COURT 1 (1989) (report discusses and makes recommendations about the lack of civility among lawyers litigating at the United States District Court for the District of Minnesota).

16. THE SUPREME COURT OF TEXAS AND THE COURT OF CRIMINAL APPEALS, THE TEXAS LAWYER'S CREED — A MANDATE FOR PROFESSIONALISM (Nov. 7, 1989) (printed and distributed by the Texas Bar Foundation and the Texas Center for Legal Ethics and Professionalism) [hereinafter TEXAS LAWYER'S CREED].

I recognize that effective representation does not require obnoxious behavior.

I will never take cheap shots.¹⁷

Q: You're serious?

A: They're serious.

Q: What are examples of an admonition?

A: No lawyer shall be abusive or offensive to another lawyer.

Lawyers should not quarrel over matters of form, but should focus on matters of substance.

No lawyer shall pursue conduct which harasses an opposing party.¹⁸

Q: What about examples of standards of conduct?

A: All lawyers shall commit themselves to achieve their client's objectives as quickly and economically as possible.

Lawyers shall treat adverse parties and witnesses with fairness and due consideration.

Lawyers shall conduct themselves at all times in a professional manner and refrain from conduct that degrades the symbol of our judicial system.¹⁹

Q: What else have the courts done to stem this tide of uncivil conduct?

A: Some judges, by themselves or with the assistance of magistrates or referees, take early and firm control of the case by initially and periodically scheduling conferences with lawyers to monitor the progress of the case and the relationship among the lawyers.²⁰

Q: What about court administrators?

A: Court administrators in some jurisdictions send to lawyers who file pleadings a notice which contains a list of pledges, admonitions, or standards and reminds the lawyers to act accordingly.²¹

Q: Have the professional bars done anything?

A: Some state and federal bars require lawyers to attend a CLE course on civil conduct to maintain their status as a

17. George, *A Plea for Civility: Lawyer's 10-Point Pledge*, TRIAL, May 1988, at 65, 65.

18. TEXAS LAWYER'S CREED, *supra* note 16.

19. Dondi Properties Corp. v. Commerce Savings & Loan Ass'n, 121 F.R.D. 284, 287-88 (N.D. Tex. 1988).

20. See, e.g., FED. R. CIV. P. 16, 26(f).

21. FEDERAL PRACTICE COMMITTEE, *supra* note 15, at 2.

member of the bar.²²

Q: What else have bar associations done?

A: Some bar associations have mentoring programs where experienced lawyers share their experiences with novice lawyers and advise these new lawyers regarding acceptable community standards.²³

Q: What about law firms? What have they done, or what can they do?

A: Law firms can adopt a code of conduct which regulates civility and collegiality, review sanctions imposed on or problems with its lawyers, carefully monitor and take responsibility for the actions of its attorneys, hold in-house educational seminars to address issues of professionalism, appoint partners as mentors to associates on incivility, and reward lawyers who act civilly.²⁴

Q: What about solo practitioners?

A: They can meet with themselves more often or buy a reflective mirror for their office.

Q: What about violations of these rules and orders? Are there sanctions that can be imposed?

A: The codes and creeds are usually self-enforcing. There are usually no provisions for what happens if there is a violation. Presumably the court orders are enforceable like any other order, through a civil contempt proceeding,²⁵ unless proving the nearly improvable becomes impossible.

Q: How effective have these remedies been?

A: It's too soon to tell. Most of these remedies have been enacted relatively recently, and it's too early to determine what affect they will have on uncivil conduct.²⁶

22. *Id.* at 2-3.

23. Smith, *supra* note 14, at 1.

24. Gering, *Law Firms Adopt Credos*, A.B.A. J., Jan. 1989, at 56, 56.

25. Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519, 1520 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (1986). Judicial sanctions can be imposed for violations of Rule 11 by: "[A] warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances." *Thomas v. Capital Security Serv., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988). One such additional measure is the ordering of the attorneys not to charge their clients for the time and expenses incurred in bringing or defending motions for sanctions on collateral matters not related to the merits of the case. *Id.*

26. A comprehensive and detailed list of proper standards of conduct has been promulgated by Texas.

AN ANSWER

- Q:** Isn't it sort of embarrassing to be part of a profession that has had to promulgate "be nice to each other" rules?
- A:** Actually, it is humiliating. Why should lawyers or anyone—except, maybe children—need to be told to be decent folk?
- Q:** Maybe acknowledgement of the problem will be enough.
- A:** Not for those who do not admit there is much of a problem.
- Q:** The enactment of pledges and creeds may correct the behavior.
- A:** Professionals do not become nice by taking an oath or by being told to be decent. Lawyers who take an oath but act uncivilly are hypocrites for which no oath will make them civil. Attorneys who continually need to be told to be nice after acting indecently are maybe beyond hope.
- Q:** Perhaps the remedies adopted in some jurisdictions will remedy the problem.
- A:** Not unless there is some way the remedies are really enforceable, and even then, punishment is unlikely to cure the problem. No effective law can be fashioned to maintain civil behavior and decent relationships.
- Q:** What will resolve the problem?
- A:** The most effective answer lies within each lawyer. The most obvious way to prevent incivility is to act civilly. Litigators need only be and act like honest, fair, and compassionate humans and the problems would be minimized. The willingness to insult others and be disagreeable is not only inconsistent with respect for the law but also inconsistent with respect for opponents. A modicum of politeness does more than make practice more pleasant, it also benefits the attorney's client.
- Q:** You are preaching. Why don't you just say that decency and fairness beget decency and fairness?
- A:** You have said it.
- Q:** So your answer is that the ultimate answer lies within each of us?
- A:** Someone a long time ago said it much better than you or I could say it: Do unto others as you would have them do unto you.²⁷

27. Matthew 7:12, Mark 12:31, Luke 10:27, John 15:12.