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Professionalism in the Legal Profession

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PROFESSIONALISM IN THE LEGAL PROFESSION

by Hon. Gerald Lebovits

It is not always easy for lawyers to be civil, even if, like me, you work in Civil Court. Civil lawyers are polite lawyers. Civility in the law is a lawyer’s version of asking “May I have a glass of water, please?” and “Kindly pass the bread basket, if you would?”

The best teachers of professionalism are judges, good ones and bad. We learn from both. We emulate both. Judges enforce rules. They can disregard them, too.

I learned some lessons the first time I had a case in Supreme Court on the criminal side when I was a youthful Manhattan Legal Aid lawyer. While I awaited the court’s calling my case, I saw the judge ridicule one lawyer after another before the assembled, to the delight of all but the target of the court’s wit. The judge was smart and honorable — and decidedly sarcastic.

To one lawyer, who argued a point not wholly relevant, the judge said “Thank you. I shall file that in ‘Nice to Know.’” To another, who tried to explain why he needed an adjournment, the judge said, “I see you’ve avoided the dangers of over-preparation.”

My turn came. I approached the bench off the record and introduced myself. To my surprise, the judge arose, shook my hand, and introduced himself — though he needed no introduction. I told him that the case will have to be tried, that I do not want to waste the court’s time by talking about a plea. He thanked me, and I returned to counsel table to put the motion schedule on the record. That was when my test began.

The judge spoke to my client directly. “Your lawyer says you don’t want a plea bargain,” the judge explained. “But if you plead guilty today, you’ll get the lowest possible sentence: 1 1/2 to 3. If you don’t take it, the next time you come to court the offer will be 2 to 4. Then, 2 1/2 to 5. Then 3 to 6. Then 3 1/2 to 7. Then 4 to 8. Then . . . .”

I gently rose my hand, interrupting him. The judge nodded his head, granting me permission to speak. I said: “The maximum is 3 1/2 to 7.” The judge retorted, without skipping a beat, “Then he’ll have something to appeal.”

One lesson I learned that day is how vital it is for judges to use the bench to dispense justice as best they can without profiting from the occasion to show how smart they are.

Professionalism among lawyers is more than competence. It is more than the ethical practice of law. Professionalism also means civility, and civility means courtesy, decency, fairness, integrity, and similar hallmarks of virtue. Professionalism means being honorable toward opposing counsel, toward clients, toward the court, toward witnesses, toward colleagues, toward everyone. Competence and ethics represent the floor below which no judge or lawyer may descend. Professionalism is the ceiling, the height of the profession of law, the goal to which all judges and lawyers should ascend.

Some dishonest lawyers are quite civil, while some nasty lawyers are perfectly ethical. Still others are civil and ethical, but you will not want to hire them, because they might not get the job done. The professional is the competent, ethical lawyer who daily displays the traits of civility. Professionalism wins cases, promotes public confidence is the legal profession, encourages the efficient resolution of disputes. Professionalism makes the practice of law enjoyable.

Continued on Page 12
Professionalism, Continued from Page 8.

I doubt that clients ever complain that their lawyer was rude to their adversary. But not every client knows what is best. They might think they want a Rambo lawyer. What they need is a lawyer who wins. When things are equal, and often when they are entirely unequal, the professional will win. Professionalism, like honesty, is not only the best policy: It is the only policy.

Professionals do not engage in reprisal; they never respond in kind to uncivil attacks. Lawyers often think that a response will deter bullies, defend clients, show innocence. Respond they may, but only if necessary, and never in kind. Professionals will read the judge, if the incivility occurs in court. If the judge signals in some way that the attack is meritless or irrelevant to the dispute, keep quiet, or at least ask whether the court wishes a response. Think of the movies. Heroes do not defend themselves against unworthy opponents. They do not have to. The audience will do it for them.

Professionals are not narcissistic. They comply with technical rules if they can, but they will not complain when an adversary violates some hyper-technical rule that the court has the discretion to ignore and will ignore. Points are lost, not won, by complaining. While thinking of ways to ignore the technical defect, the judge might lose track of the substantive argument. It is never good from an advocacy perspective when the judge sees the lawyer as a whining cry-baby.

Professionals have no martyrdom complex. Martyrs insist on their client’s innocence. Every time an adversary raises an argument, any argument, the martyr will contend that the adversary obviously seeks to commit some egregious due-process violation.

Professionals do not indict. Indictors accuse. The worst accuse falsely. They put people on the defensive. They comment on motive, not on merits.

Professionals are not editors. To edit is to inject personal beliefs, to vouch for the credibility of client and argument. Editors do not realize that it is stronger to argue, “The case should be dismissed” than to contend plaintively, “In my opinion the case should be dismissed.”

Professionals do not insult, use epithets, engage in name-calling, stoop to vulgarity, or disparage. Absent from their vocabulary is invective, vitriol, and caustic speech. Hyperbole and deception are non-existent, as are uncivil adjectives, verbs, adverbs, and nouns. Professionals do not threaten, obstruct, or assert frivolous claims or defenses.

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Continued on Next Page
The best lawyers know that stridency is ineffective, that road rage is the road to personal and professional failure, that the best clients distinguish between aggression and aggressive advocacy.

The best lawyers stand up to bullies, not by responding in kind, but by reporting unprofessional conduct as it occurs, by involving the court as appropriate, by creating a record of abusive tactics, by participating in activities that teach and promote professional conduct, and by being eternally self-vigilant.

Emanating from the work of the Committee on the Profession and the Courts, known as the “Craco Committee,” the New York State Standards of Civility, codified at 22 NYCRR 1200, went into effect on January 1, 1998. It is not binding. It is not meant to supplement or supplant existing rules. Its violation cannot lead to punishment or sanctions. It is meant only to allow lawyers to disagree without being disagreeable—to glorify the zealous and bury the zealot.

Many opposed its promulgation. If lawyers had failed to abide by ethics and court rules, was the answer to devise yet another code, a toothless, aspirational code, no less? Is it right to have an etiquette code that limits, even contradicts, tough representation? Do lawyers deserve to be treated like errant children, with a code that asks them please to play nicely? If a civility code is a public-relations device, will the public respect lawyers more than before because of a code that asks lawyers to play nicely, please?

Despite the opposition, most lawyers endorsed the Standards. Eight and a half years later, they are engrained onto our legal consciousness. The rudeness the Standards were designed to discourage still exists, just as adopting the New York State Penal Law did not eliminate crime in New York City. But the Standards remind us what goals we seek for our colleagues, our profession, and ourselves.

The Standards’ Preamble reflects its intent: “to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession’s rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course.” Among its suggestions: “In professional dealings with others, lawyers should be courteous and civil in all communications.” It further suggests that “lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.” The Standards tell lawyers to “avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.” The Standards note that “effective representation does not require antagonistic or acrimonious behavior.”

The Standards ask lawyers, consistent with their clients’ interests, to respect opposing counsel’s schedule and commitments. They ask lawyers to return telephone calls and answer correspondence promptly.
They ask lawyers not to serve papers in way that takes advantage of an opponent’s absence from the office or inconveniences an adversary. They ask lawyers not to let any aspect of litigation be used to harass or unnecessarily prolong litigation or increase litigation expenses. They ask lawyers to conduct themselves with dignity and not be rude or disrespectful. They ask lawyer to adhere to promises and agreements with other counsel and to agreements that circumstances or local custom dictate.

The Standards cover judges and court personnel, too, and appropriately so. If judges are to teach professionalism, they must live it. Judges “should not employ hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses” and should consider everyone “when scheduling hearings, meetings or conferences.” Judges should be punctual and “decide promptly all matters presented to them for decision.”

What is wrong with any of that? Nothing. Unless you always thought that Atticus Finch was the bad guy. In which case, maybe you are not happy being a lawyer in any event.

I treasure the time I worked on Staten Island. Among the things I will always appreciate is that a sense of professionalism exists far more clearly here than elsewhere in New York City and beyond.

Did you know we have an office in Monmouth County, New Jersey?

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