WHY CIVILITY MATTERS

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Why Civility Matters

Introduction

Civility is a misunderstood term. Today’s "real time" world which often judges substance and accomplishment on the shallowest of levels, seems out of touch with the value and tradition that defines civility.¹ That is unfortunate as civility, representing values which are good and constant, comprises a fundamentally important component of good lawyering. When understood and practiced within the professional setting, civility allows our system of justice to work as it was intended, efficiently resolving disputes and in some cases, developing public policy within appropriate legal, moral, and ethical confines.²

So what is civility? It is an attitude and perspective marked by consideration and respect for others.³ Notwithstanding the view of some that lawyers who practice civility are weak and timid, embracing civility is in fact a courageous act, exuding a confidence, character and understanding of the important role the law plays in our daily lives.⁴

Holmes once reflected that the rule of law constituted "the witness and external deposit of our moral life."⁵ He went on to note that the practice of it tended to make "good citizens and good men."⁶ Musing on the distinction between law and morals, he suggested one wishing to know the law and nothing else would "look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict."⁷ To the contrary, at the conclusion of his analysis, he asserts the

¹ Ronald S. Flagg. President of the District of Columbia Bar observed in “Civility in Modern Times,” Washington Lawyer, October 2010 as follows: “We live in a time of instant communication and sound bites. As a result, the most well-known masters of modern media often achieve notoriety by reducing complicated issues into simple slogans, and by demonizing those with opposing views with pejorative labels rather than responding to the merits of those views. While improved communication capabilities should promote participation in debates over public issues, the quick and dirty “gotcha” approach that often characterizes current public policy debates is not conducive to thoughtful analysis of complex issues or the development of nuanced solutions that…best resolve such issues. p. 5
² See Martin v. Parrish, 805 F. 2d 583 (C.A. 5 Tex) 1986 at 585.
³ Mundy and Butts, “In Furtherance of Civility,” Virginia Lawyer, October 2002, p.40
⁴ The Supreme Court of Florida seemed to acknowledge the importance of civility by amending the Oath of Admission to The Florida Bar to include the following pledge: “To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.” The oaths of admission to several other jurisdictions include a reference to civility. See Scott G. Hawkins, “Fair, Civil, a Person of Integrity: Are You? The Florida Bar Journal., January, 2012, pg. 6.
⁶ Ibid.
⁷Ibid.
practice offers “a hint of the universal” perhaps reiterating a fundamental core of our ethical and legal tradition where in Exodus the exhortation was made “to teach them the statutes and the laws, and make known to them the way in which they are to walk and the work they are to do.”

That is why civility matters and is so crucial to the efficient operation of our justice system. Incorporating an approach and attitude that is civility into our daily work becomes easier through use, understanding and practice of a “civility framework.” How that framework works and why it is so important comprises both the thesis and message of this article.

Creating the Civility Framework

Understanding the civility framework requires analysis of the functional role lawyers play in providing service to their clients. Representing a client’s interest and rendering a good and just result requires that the lawyer act as an advocate, counselor, and conciliator. As an advocate a lawyer is responsible for making good faith arguments on behalf of his or her clients. As a counselor, a lawyer uses his or her training

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8 Ibid. “The remoter and more general aspects of law are those which give it universal interest. It is through them that you not only become a great mater in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.”

9 Exodus 18:20, New American Standard Bible

10 Consider the argument made by Levi, An Introduction to Legal Reasoning, quoted in Jurisprudence (West Publishing) at 965: “Moreover, the examples or analogies urged by the parties bring into the law the common ideas of society. The ideas have their day in court, and they will have their day again. That is what makes the hearing fair, rather than any idea that the judge is completely impartial, for of course he cannot be completely so. Moreover, the hearing in a sense compels at least vicarious participation by all the citizens, for the rule which is made, even though ambiguous, will be law as to them.”

11 All lawyers who are admitted to the Bar take the same oath to uphold the same principles. So whether one is engaged in the formal practice of law or involved in some other allied profession or calling, we have all made the same promise and should all aspire to incorporate the civility framework into our daily work and practice.

12 The comment to Rule 4.3 (Advocate) of The Rules Regulating The Florida Bar note “The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change.”

13 Rule 4-2.1 of the Rules Regulating the Florida Bar (Adviser) notes “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral adviser as such, moral and ethical considerations may impinge upon most legal questions and may decisively influence how the law will be applied. (underscore added)

14 The Preamble to Chapter 4 “Rules of Professional Conduct” of the Rules Regulating the Florida Bar observes “Within the framework of these rules…many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer’s obligation 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.”

15 Note 5, op cit., where Holmes observes “When we study law we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court….People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared.
to promote the good and just result." As conciliators, lawyers utilize dialogue, deliberation and reconciliation, as a means and component of conflict resolution. While circumstance and the nature of client representation will always vary, use and application of those functional roles, in varying degrees, will not as they comprise a core component of the service and value lawyers offer their clients. Whether they realize it or not, clients seek the value and insight those functional roles offer when they ask a lawyer for assistance.

Understanding the nature and impact of those functional roles evolve and change throughout a lawyer’s professional life. Few of us could reasonably foresee or understand that admission to the practice was a beginning not the end of a lifelong, professional journey. Time and seasoning deepens that insight. As with most things, some choose to embrace that journey proactively while others simply “go with the flow.” That’s what separates great lawyers, those who truly make a difference, from the ones who simply put in time. In other words, great lawyers come to understand and appreciate the “humanity” of lawyering.

That realization comprises the core basis of the civility framework, an understanding and acceptance of the absolute and continuing interrelationship between the functional and human component of our profession. Activities or actions which courts have labeled as unprofessional almost always take place when lawyers forget or ignore that fact, allowing their actions and activities to operate outside their humanity and hence the civility framework.

Making a conscious decision to incorporate the civility framework into our daily work and practice reminds us that admission to the practice of law does not afford license to ignore respect, fairness, and courtesy. It does not question fundamental, core beliefs as to what is right and wrong,

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16 The California Attorney guidelines of Civility and Professionalism (Adopted July 20, 2007) note in the introduction: “These are guidelines for civility. The Guidelines are offered because civility in the practice of law promotes both the effectiveness and enjoyment of the practice and economical client representation....The legal profession must strive for the highest standards of attorney behavior to elevate and enhance our service to justice. Uncivil or unprofessional conduct not only disserves the individual involved, it demeans the profession as a whole and our system of justice.

17 Past Florida Bar President Francisco R. Angones underscored the importance of this concept when he observed “But true advocacy means helping people avoid disputes in the first place and resolving problems without causing greater harm. Rather than focusing on winning a war, we should learn and perfect skills of listening, mediating, and negotiating. We should become warriors only as a last resort, and even then, play fair.” Angones, “Blessed Are the Peacemakers,” The Florida Bar Journal, December, 2007.
developed over a lifetime. Rather, it challenges and inspires one to use their specialized training to advocate and fight for the good and just result, whether that be in the courtroom, the boardroom, or the community. The practice of law offers the challenge of a lifetime. The civility framework helps us meet that challenge.

How then do we construct the civility framework and make it part of our daily practice? We do so guided by the components of professionalism, attributes which represent what is inherently good and human in all of us, refined by the perspective of our legal training. We all want to do the right thing, be the very best we can and get along with others. For lawyers, those aspirations find expression through collaboration, scholarship, deliberation, and integrity. Melding and uniting those components of professionalism with the functional role of lawyering is what creates the civility framework. When that linkage is understood and incorporated into one’s daily practice, the civility framework is not only created, but flourishes.

Lawyers are fairly proficient at applying the functional side of their profession. Traditional legal education excels in facilitating that process, distilling concepts and theories into rules and statutes. The novice lawyer often embraces the mistaken notion that those rules and statutes in and of themselves offer the key to finding the “right” answer. That is why the observation is often made that new lawyers need to “learn” how to practice and apply their craft. Such statement simply acknowledges that the new lawyer has not yet understood

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18 Thomas Aquinas, in the *Summa Theologica* (I-II, Q xciv, a. 2) starts from the premise that good is what primarily falls under the apprehension of the practical reason...and that consequently, the supreme principles from which all other principles and precepts are derived, is that good is to be done and evil avoided.
19 David Arthur Walters in “Unprofessional Manners,” Miami Mirror, January 15, 2011 observed: “Now we hear that there is widespread dissatisfaction among judges and lawyers at the gradual changing of the practice of law from an occupation characterized by congenial professional relationships to one of abrasive, dog-eat-dog confrontation. The unprofessional conduct of some lawyers can make the practice of law so unpleasant for other lawyers that more than half of practicing lawyers may wish they had chosen another profession. We can only hope that the most disgruntled lawyers do something to radically reform the profession from within rather than take up another occupation. Then their higher duty to the public would mean something.”
20 Note 5, op. cit., where Holmes reinforces this idea by observing “The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means to do not exist for the determinations shall for be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.”
or experienced the fundamental importance and necessity of melding the functional with the human. When that appreciation sets in, the practice of law, or however each of us fulfills our oath during our professional journey, is invigorated. We are able to advise, counsel, and conciliate with a sense of effectiveness and purpose.

It has been suggested that taking pride in one’s work product comprises one of the lawyer’s “core values.” While taking pride in one’s work may seem to be a subjective concept, the practice of law gives that term firm meaning and definition. It should never be forgotten, for example, that the results of one’s representation or work product can have a profound and far reaching impact on a client’s fortune or objectives. The lawyers in each of the cases we will consider in this article forgot or neglected, even for a moment, that most important reality. They failed to understand and acknowledge the core value of their work. The decisions they made and the actions they took might well have been different had they understood the power and effect of the civility framework.

Applying the Civility Framework

Let’s then test the civility framework we have just constructed, applying it within the context of the three functional roles lawyers assume in representing their clients. We will first analyze each functional role from an aspirational perspective and consider whether it was applied in each of the following cases. Such analysis will underscore how application of the civility framework would have created a different and better result for the client. It will also offer strategies aimed at avoiding a similar result in the future.

The Lawyer as Advocate

Advocacy is one of the hallmarks of the legal process. The idea of lawyer as advocate and protector of individual rights is

21 Scott G. Hawkins, President of the Florida Bar observed: “Taking pride in one’s work, habits, and behavior is a core value that transcends all endeavors. This sense of pride springs from the quality of one’s effort—whether in a well-written brief or a well-delivered presentation. Pride also comes when demonstrating restraint by not overreacting to a given circumstance or ensuring that one has that one has informed the court of the contra-authority bearing on a given legal issue.

22 An irony rests with the fact that the lawyers portrayed in the following cases most certainly believed they were offering “aggressive” representation or standing up for the “right” principle. Yet, in fact the following cases disclose representation or conduct that was ineffective.
richly ingrained in our jurisprudential culture. In fact the Rules Regulating The Florida Bar provide that an advocate “use legal procedure for the fullest benefit of the client’s cause.”

In other words, lawyers are charged with the responsibility of advancing a client’s cause fully and creatively. They have a duty “not to abuse procedure” and are prohibited from adopting a policy of “scorched earth” in so doing. How then do we strike an appropriate balance between advocacy and restraint in representing our clients and otherwise fulfilling our professional obligations? An appreciation of the civility framework assists in clarifying advocacy’s true goal and objective.

While advocacy has always comprised an important and key component in advancing our common law, advocacy becomes counterproductive when it is viewed as an end in and of itself. Advocacy should be no more than one of the tools the lawyer uses to persuade or motivate. If utilized effectively it can encourage collaboration, settlement and ultimately, conflict resolution. Its goal should be that of advancing a process that is not personal to the lawyer himself, but one that is advanced so justice may be discovered and served.

So even within an adversarial framework, lawyers should seek common ground and look for ways to cooperate and collaborate even though they are on opposite “sides.” Collaboration, even within an adversarial setting, is the component of professionalism crucial to establishing and maintaining the civility framework. It fosters a climate which encourages dialogue with counsel often resulting in the resolution of disputes and achievement of practical and efficient results for clients.

Great and effective lawyers discover that connection early in their careers. Understanding the black letter law certainly comprises an important beginning in serving a client’s need or interest. But it is the consistent ability to apply the law to the client’s specific circumstance that creates effective

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23 Rules Regulating the Florida Bar 4-3 Advocate, Comment
24 Notwithstanding the Preamble’s strong recommendation that lawyers exercise “sensitive professional and moral judgment” (referred to in footnote 14), the lawsuit, be it civil or criminal, has been referred to as a “small war.” See Fravel v. Haughey, 727 So. 2d 1033 (Fla. App. 5th Dist. 1999)
25 Kelso and Kelso, “Studying Law: An Introduction (West Publishing: St. Paul, Minnesota 1984) notes at page 44: In each of its meanings “common law” implies rules and principle that gradually develop as judges decide individual cases....For most “new” situations, previous cases will contain competing analogies....The critical questions is how the judges will perceive the various factual similarities and differences between the new case and precedents, and whether each precedent will be read broadly or narrowly. Lawyers for the parties will seek to predict judicial behavior and will try to determine how it might be influenced by proofs and argument.
representation. Advocacy helps frame that analytical process, requiring that issues and principles be viewed and evaluated from a number of different perspectives and viewpoints.

Advocacy thus tests the mettle and legitimacy of a client’s cause. It encourages testing and disagreement, assisting in the search for the truth. As each side probes and challenges the other, whether in open court or part of a negotiation, theories or arguments either gain or lose leverage and legitimacy in a process of give and take that inches toward finding a just result. Advocacy encourages collaboration, the process itself creating the realization that neither side “has all the answers.” If utilized appropriately, advocacy offers a constructive evaluation of the strengths and weaknesses of a client’s cause, stimulating resolution and settlement.

Yet, advocacy without collaboration creates a climate in which the civility framework cannot thrive and render justice. Such was the case in Carnival Corporation v. Beverly where review was sought of a trial order sanctioning plaintiff’s counsel, disqualifying him from participation in a personal injury case. In Carnival, despite repeated warnings from the bench, a lawyer continued to make comments which impugned the integrity of opposing counsel. This conduct prompted the trial court to declare a mistrial on its own motion.

While the appellate court quashed the order based upon its contention that the factual framework did not support a contempt order, the Court took great care in making clear that the unprofessional conduct of counsel during that trial should not be condoned.

The Court in Muster v. Muster, 921 A. 2d 756, 759 (Del. Fam. Ct. 2005) amplified this concept when it referenced in its opinion the thoughts of Judge Wakefield who suggested, “The entire fabric of civil litigations is dependent upon the willingness of parties to settle cases at the earlier opportunity before trial and not to assert positions which are unreasonable or against decided case law. Parties and their attorneys must act in good faith in this respect, and, conversely, a party who tenaciously adheres to an unreasonable position or one which is clearly against decided statutory or case law should not be able to avoid the consequences, one of which may be reimbursing the other party for counsel fees after the adverse judgment is entered by the Court.

For example, civil judgments may in certain cases be “reversed…based on improper argument.” Fravel v. Haughey, Note 24, op. cit.

744 So. 2d 489 (Fla. App. 1 Dist, 1999)

Ibid at 491. At issue was the suggestion that after plaintiff retained counsel, plaintiff’s statements varied from those she had given prior to the retention of counsel.

Ibid at 491.

The Court noted: “In granting the petition for writ of certiorari, we share the concerns of other courts under similar circumstances that, even if our opinion is legally correct, it may have the effect of encouraging uncivil and unprofessional trial conduct….Our opinion, however, should not be read as condoning the lack of professionalism and civility revealed by the record of the trial below.
Did advocacy for advocacy’s sake and the imposition of a mistrial promote the administration of justice? The answer is obvious. From a functional perspective, counsel in all probability believed he was doing a good job. His examination certainly was unrelenting. But here lies the disconnect between the functional and the human. The goal of examination during trial should be that of determining the “truth.” But there are limits to that process, limits that a respect for others imposes. The civility framework, which views advocacy from the perspective of collaboration, defines that level of respect, helping one understand there is no accomplishment in achieving a mistrial for a client, especially when one’s own actions resulted in the mistrial.

Counsel in Carnival neglected the humanity of lawyering. The courtroom setting does not offer license or invitation to treat fellow human beings with disrespect and contempt. Quite the contrary, the courtroom and the system it represents encourages dialogue and respect. The obligation we have to our clients demands no less.

The Lawyer as Counselor

Offering counsel, is both an art and a privilege, consuming a lifetime to understand and appreciate. Yet, the general public perceives the ability to offer helpful and thoughtful counsel as a skill that is naturally and immediately bestowed upon every lawyer upon admission to the Bar. (How many times, even in a general, informal setting is a lawyer asked to opine on a variety of topics, the questioner simply assuming the lawyer most certainly “learned” that while in law school.) The fact is that providing counsel is one of the most challenging and difficult functions and services a lawyer offers a client. That is so because there is no “owner’s manual” in this area. Only

For example, despite repeated warnings from the bench, counsel continued to make “intentionally inappropriate remarks which suggested misconduct.” Ibid. at 492.

The Comment to Rule 4-3 “Advocate” of the Rules Regulating the Florida Bar read as follows: “The advocate has a duty of use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed.

Recall an essential thesis of this article—namely that civility empowers us to be more effective professionals. The Court in Peters v. Pine Meadow Ranch Home Ass’n, 151 P. 3d 962, 967 (Utah, 2007) reinforces this concept when it notes: “There is a misconception among some lawyers and clients that advocacy can be enhanced by personal attacks, overly aggressive conduct, or confrontational tactics. Although it is true that this of advocacy may occasionally lead to some short-term tactical advantages, our collective experience as a court at various levels of the judicial process has convinced us that it is highly counterproductive. It distracts the decision-maker from the merits of the case and erodes the credibility of the advocate. Credibility is often directly tied to civility and professionalism. Judges, jurors, and other lawyers are more likely to believe a lawyer who is courteous and treats others with dignity and respect.” Can it be argued that the actions of counsel in Carnival “distracted from the merits of the case?” It would seem so.
time and seasoning help one gain the sense of perspective needed to guide and assist a client.

Offering good and effective counsel is challenging for two major reasons. First, it often requires the lawyer suggest that a client consider or adopt a course of action the client does not initially understand or accept. Second, it requires the lawyer accept and understand that the ability to offer effective counsel arises only as a result of one’s commitment to service and scholarship.

One cannot offer good and reasoned counsel without being equipped with the wisdom, seasoning, and confidence that scholarship provides. This component of professionalism requires commitment and effort that transcends one’s time in law school and carries with it several component parts. It goes without saying that lawyers must maintain technical proficiency, staying abreast of developments in their particular field or specialty. Such proficiency helps them maintain the acuity and insight necessary to advise a client competently and appropriately.

However, attention to scholarship and learning provides the lawyer with more than academic prowess. When applied along with the experience and learning lessons the practice offers, the lawyer begins to acquire awareness and discernment, intangibles necessary to counsel a client with courage and conviction. As one offers counsel, a lawyer must always effectively and honestly represent a client’s interest. The process of offering counsel often commences from the client’s perspective, hastening the discovery of additional facts and insight helpful in crafting and recommending an appropriate course of action.

But there comes a point where telling the client simply what he or she wants to hear is subservient to a greater goal, namely conflict resolution and the administration of justice. Melding the knowledge and insight that scholarship provides with the conviction and desire to act in a client’s best interest creates the civility framework, and prompts the lawyer to offer clear

35 The Comment to Rule 4-2 “Counselor” of the Rules Regulating the Florida Bar read as follows: “Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits.”

36 Note 14, op. cit., Attaining such acuity and insight requires a multidimensional and interdisciplinary commitment “As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system, because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority”.
and reasoned counsel to the client.\textsuperscript{37} It is what separates the great lawyer from the “sales person.”\textsuperscript{38} An example of what can occur when lawyers seemingly ignore the value of effective, civility framework based counsel can be found in \textit{Malautea v Suzuki Motor Co LTD}.\textsuperscript{39} In that case, the defendants and their attorneys appealed sanctions imposed upon them for repeated abuses of the discovery process. \textit{Malautea} involved the plaintiff’s allegation that design defects in the Suzuki Samurai caused or aggravated a series of injuries sustained in an automobile accident.\textsuperscript{40} The record brims with examples where counsel for defense adopted a conscious decision to delay and thwart the discovery process. As a result of said actions, the Court imposed a variety of sanctions on the defendant and its attorneys.\textsuperscript{41} \textit{Malautea} proceeded as it did because lawyers failed to appreciate their responsibility and obligation to counsel clients and do so consistent with the civility framework. Simply stated, advocacy for advocacy’s sake creates a climate where the civility framework cannot exist. The Defendant in \textit{Malautea} had a right to expect forthrightness from its counsel. No matter how difficult that conversation would have been or how much resistance it might have generated, a devotion and respect for a client’s best interests requires a level of candor.\textsuperscript{42} In \textit{Malautea}, much of the information comprising the cause of action could be found within the public domain. What purpose was served by refusing to release information that was already available within the print media?\textsuperscript{43} What purpose was served by

\textsuperscript{37} For a helpful discussion of “zealous representation”, see Crystal, “Limitations on Zealous Represesentation in an Adversarial System, 32 Wake Forest Law review, 671, 673 (1997)
\textsuperscript{38} The Court in \textit{Akron Bar Ass’n v. Miller}, 80 Ohio St. 3d 6, 684 N.E. 2d 288 (1997) observed: “Unlike a salesperson, the good lawyer’s counsel is not directed to the sale of a product but to the best interests of the client. A lawyer’s counseling is more than informing “his client about the legal consequences of pursuing a particular objective that the client has already identified and chosen...Responsibilities to a client go beyond the preliminary clarification of his goals and include helping him to make a deliberately wise choice among them.” Kronman, The Lost Lawyer (1993) 128-129.
\textsuperscript{39} 987 F 2d 1536, C.A. 11th GA, 1993
\textsuperscript{40} Ibid at 1537.
\textsuperscript{41} The Court noted at 1544: “As Judge Edenfield found, the defendants and their attorneys engaged in an unrelenting campaign to obfuscate the truth. They improperly objected to interrogatories in order to avoid revealing information; the answers they gave were incomplete and unreasonably narrow; they delayed (either deliberately or carelessly) complying with the Magistrate Judge’s orders to produce the deposition transcripts; and they never produced the General Motors information as ordered.
\textsuperscript{42} Rule 4-2.1 of the Rules Regulating the Florida Bar underscore this imperative noting: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to laws but to other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation.”
\textsuperscript{43} Remember that in \textit{Malautea} much of the information was either within the public domain or readily observable. For example, defense counsel admitted that he knew of General Motor’s decision not to market the Suzuki sport vehicle (at 1545). In addition, it was clear that the plaintiff had suffered serious injuries as a result of the accident. (at 1539) As such, what useful purpose was served by attempting to “obfuscate the truth” (at 1544)?
distorting the discovery process so that it became an engine whose purpose it was to delay and hide the truth? In this case, the client, whether it realized it from the outset or not, had a right to expect counsel that offered a realistic assessment of the public record and the unavoidable conclusion it suggested. Attempts at thoughtful settlement, rather than protracted litigation, would have better served the client and the furthered the administration of justice.

Situations such as those which occurred in Malautea underscore the absolute imperative to link the functional with the human. The Rules Regulating the Florida Bar encourage lawyers “to exercise independent professional judgment and render candid advice.” The Rules acknowledge that “moral and ethical considerations impinge upon most legal questions.” In other words, the Rules reiterate what the civility framework tells us is true—humanity and integrity comprise key and necessary components to rendering sound and effective counsel.

Malautea offers clear and unmistakable guidance on the value and impact of rendering sound, civility framework based counsel. Professionals generally want to cover “all the bases,” protecting themselves from criticism and claims of possible malpractice. So it is understandable for lawyers counselling clients to take an approach that is most favorable to the client’s position. But there comes a time when candor and realism must became the overriding voice so our system of justice encourages sound and reasoned conflict resolution. The civility framework encourages lawyers to listen to both their hearts along with their minds so that circumstances in Malautea become an exception rather than the rule.

The Lawyer as Conciliator

Understanding the meaning and importance of conciliation is critical as one incorporates the civility framework into their daily practice. Conciliation seeks to overcome distrust, gain goodwill and reach agreement, helping “promote the public good.”

44 Rules Regulating the Florida Bar, Rule 4-3.2 “Expediting Litigation” reads: “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.” Note the Comment, “Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose.” See also Rule 4-3.4 “Fairness of Opposing Party and Counsel.”

45 Rules Regulating the Florida Bar, Rule 4-2.1 Adviser.

46 The Comment to Rule 4-2.1 observes in part “Purely technical legal advice…can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral adviser as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”
Conciliation should be the centerpiece of every action lawyers undertake, forming the basis and foundation of their advice, counsel, and advocacy.

This discussion has argued that the decision a lawyer makes to embrace and incorporate “humanity” into the lawyering process energizes and creates the civility framework. In many ways conciliation drives that decision, acknowledging all that is good and optimistic within human nature. It is a “conscience good” offering hope for what can and should be.

The increasing recognition of the importance conciliation plays in the successful and effective practice of law has given rise to a number of important and hopeful developments within the profession. We speak and think of the practice as “holistic,” “procedural” and “problem-solving,” emphasizing its ethical and moral foundations. We include as one of our aspirational guidelines the rendering of pro bono public service. The Professional Rules of Conduct suggest that alternatives to litigation should always be presented when doing so appears to be in the client’s interest.

These developments recognize the fact that lawyers as conciliators have a responsibility to initiate conflict resolution. The key word is “initiate.” So much of what is good and meaningful requires effort and commitment. The practice of law is no exception. The oath of admission each lawyer takes is a promise whose commitments are profound and challenging, requiring one to publicly affirm that conciliation, not bluster or bravado, will be at the core of their professional life.

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47 Henry Latimer Center for Professionalism, “ideals and Goals of Professionalism.” Article 1, Commitment to Equal Justice Under Law and the Public Good.”


50 American Bar Association, Model Rule of Professional Conduct 6.1.

51 The Court in Team Design v. Gottlieb, 104 S.W. 3d 512, 517-518 (Tenn. App., 2002) observed: “Public policy strongly favors resolving disputes between private parties by agreement. Private parties may, of course, decide to submit their disputes to the courts for resolution; however, a broad range of other formal and informal alternatives are available before they resort to litigation. These procedures are, as a practical matter, limited only by the parties’ imaginations because the parties themselves may agree on virtually any mutually satisfactory procedure that is not illegal or contrary to public policy.”

52 Henry Latimer Center for Professionalism, “Guidelines for Professional Conduct,” Paragraph K “Settlement and Alternative dispute Resolution,” suggests that “Except where there are strong and overriding issues of principle, an attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.”

53 The Oath of Admission to the Florida Bar reads in part “I will abstain from all offensive personality and advance no fact prejudicial to the honor and reputation of a party or witness unless required by the justice of the cause with which I am charged.” (underscore added).
Clients (and the general public) often do not understand this, as the spirit and essence of conciliation runs contrary to the superficiality and instant gratification at the forefront of today’s society. But the misconceptions of others must never deter lawyers from seeking justice and allowing parties an opportunity to frame their cases and state their cause.\footnote{See Johnston and Lufrano, “The Adversary System as a Means of Seeking Truth and Justice,” 35 J. Marshall L. Rev. 147 (2002)}

In other words, the lawyer as conciliator must understand that applying its principles challenges one to embrace a viewpoint that influences every aspect of a professional life. It requires proactively and a desire to make a difference, not only in service to our clients but service to our profession. It is the desire to serve and to be of service that empowers and energizes the lawyer as conciliator. It strengthens ones understanding and commitment to the civility framework, fostering a realization that service to the profession constitutes service to the client. Making this connection, understanding that the practice of law serves multiple constituencies makes it easier to understand why the civility framework is such an important and key component in assuring that the quest for justice is a continuing expression of one’s professional life.

Service in this area can embrace a variety of avenues not the least of which is a willingness to offer suggestion and input as to how processes and procedures within our legal and judicial system might be improved. The civility framework must be at the forefront of those initiatives for them to be meaningful and have lasting effect. An example of the need for conciliation within this context can be found through analysis of In Re Robert J. Snyder, Petitioner which case reviewed the action of a Federal Appellate Court suspending a lawyer from the Federal practice for six months.\footnote{472 U.S. 634, 105 S. Ct. 2874, 86 L. ed. 2d 504 (1985)}

The suspension resulted from the lawyer’s refusal to retract statements made in a letter that the Chief Judge found disrespectful to the Federal Court system. The genesis of the letter, and counsel’s behavior, revolved around submission of a request for compensation under the Criminal Justice Act.\footnote{Ibid at 637. A helpful exercise is that of considering the aforesaid letter in light of the quote from the Preamble to Rule 4 of the Rules Regulating the Florida Bar: “A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.} At that time, the Act required expenditures in excess of $1,000 be
documented. Pursuant to those provisions, the lawyer’s original request for compensation required submission of additional information and was denied. Instead of expending the time and energy necessary to comply with the Court’s request, the lawyer fired off a rather contentious letter refusing cooperation.\textsuperscript{57} Such behavior resulted in the Court suspending the lawyer from the federal practice for six months.\textsuperscript{58}

While the lawyer may well have identified an area within the system requiring attention and perhaps reform, his approach to suggesting a solution or alternative lacked “humanity” and fell outside the civility framework.\textsuperscript{59} Lawyers must always be mindful that they have a responsibility to protect and improve the administration of justice. That responsibility mandates that they be willing to offer a voice and suggest ways in which that system might be improved.

Such process often requires a measured give and take, a respect for differing viewpoints and ultimately a willingness to compromise. Compromise within this context is not a sign of weakness resulting in the abandonment of one’s view or values. It is rather an expression of conciliation and civility and if properly developed will produce results that are “mutually agreeable and morally acceptable.”\textsuperscript{60} Seeking conciliation is thus always a productive pursuit as it results in measured and reflective thought and a kind of advocacy that “helps people avoid disputes in the first place and resolve problems without causing greater harm.”\textsuperscript{61}

\textsuperscript{57} The letter reads as follows “Now, however, not only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it. Further I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorney who will accept criminal indigent defense work. I have simply had it.”

\textsuperscript{58} The Supreme Court reversed the action of the Appellate court noting: “The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone. However, even assuming that the letter exhibited unlawyerlike rudeness or lack of professional courtesy—in this context—does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is “not presently fit to practice law in the federal courts.” At 647.

\textsuperscript{59} David Kennedy in “Autumn Weekends: An Essay on Law and Everyday Life,” in Law and Everyday Life, edited by Austin Sarat and Thomas R. Kearns, The University of Michigan Press, Ann Arbor, 1995 highlighted the challenging dichotomy between the practical and theoretical underpinnings of the practice of law when he observed: “Lawyers remain divided between the transcendent idealism of their normative vision and the institutional grind of legal practice as well as between the programmatic aspirations of legal institutions and the tedium of doctrinal interpretation or document drafting. And like other professionals the international lawyer earns his keep as a ventriloquist, throwing his legal idealism forward from the realism of his everyday.” Pg. 196.


\textsuperscript{61} Op cit., Note 17
Lawyers truly seeking to make a difference will make a conscious attempt to be “conciliatory” as they interact with colleagues and clients. This approach is not apologetic, but to the contrary, acknowledges the absolute role conciliation and civility plays in the professional life. As lawyers, the way in which we treat others is an expression and extension of our respect for the rule of law and the system it protects. Our every action must always be that of an “officer” of the court.

At the very inception of their career lawyers promise to respect the system they represent. Respect, by definition, requires a “deferential regard.” It suggests the need to reflect before acting or speaking and a “willingness to show consideration.” Understanding the nature and need to respect people and institutions does not always come naturally. It requires undertaking conscious deliberation, a component of the civility framework, so that actions and words are measured and thoughtful. Snyder offers a clear example of what can occur when the need for conciliation and respect is ignored or disregarded.

If lawyers are unwilling to “offer deferential regard” to the very institutions they take an oath to respect, how can the public be expected to adopt a different view and perspective? Lawyers must always be mindful of the fact that the administration of justice is defined as a “truth seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.” Their respect for the rule of law and its system cannot and should not simply be “turned on and turned off.” It should be at the forefront of the way in which they approach people, interact with them, and then proceed to counsel and problem solve. That is why a sense of conciliation should be at the forefront of who we are and what we represent as lawyers. It is a fundamental expression of the civility framework.

Snyder, in many ways, is symptomatic of a society that lacks respect for process and protocol. How often do we see selective or “cafeteria” affronts to authority as something to be celebrated and accepted? Doing it one’s own way is often seen as a strength rather than a sign of self-interest and selfishness. Skepticism and lack of confidence often abound when considering our justice system.

62 The Oath of Admission to the Florida Bar reads in part “I will maintain the respect due to courts of justice and judicial officers.”
64 Ibid.
65 United States District Court, District of Idaho and the Courts of the State of Idaho, “Standards for Civility in Professional Conduct,” Preamble
While such skepticism may be an unfortunate by-product of our culture, lawyers can and must play a key and central role in reversing this pervasive misconception of our legal system and its overall goal. Understanding and incorporating the civility framework into our daily practice and professional life can begin to reverse that trend one case, one client, one conversation and one phone call at a time.

Conclusion

This discussion has suggested the civility framework as a way of incorporating professionalism into the daily practice. Doing so celebrates and acknowledges who we are as lawyers and the noble goals, responsibilities, and aspirations of our profession.

Applying the civility framework to our everyday practice offers challenges and opportunities. But there are risks inherent in adopting this approach. Not everyone will necessarily understand or agree with the perspective the civility framework imparts. Our actions might well be misinterpreted by colleague and client alike.

Yet ignoring or neglecting to apply the civility framework and the lessons it imparts offers even a greater risk. It conveys a sense of capitulation and an implicit endorsement of a value system that is often cynical and reactive. Embracing the civility framework offers us the opportunity to slow down and reflect—even if for only a moment. If that extra moment causes us to think once again how we might collaborate with opposing counsel; perform that additional legal research; consider once again an alternative approach or theory to resolve a case; and take a stance, what while unpopular or difficult, is ethically correct our clients and our system will be better served.

Finally, the framework challenges and provides us with a continuing opportunity to mentor, articulating the virtues and benefits of civility to others. Holmes refers to the law as the “external deposit of our moral life.” We must never forget that our justice system protects that life. Lawyers must view themselves as protectors and defenders of that system. It is a responsibility we assumed the day we each took our oaths and the

66 There are those who would argue that “professionalism definitions are overbroad and vague.” See Blankenship, “Lapses in Professionalism may lead to Disciplinary Sanctions,” The Florida Bar News, Volume 39, Number 14, July 15, 2012.

67 Note 5, op. cit.
framework we have just constructed helps remind us of that fact throughout our legal career. That is why civility matters.

Note 21, op. cit where the following observation is made: “Doing one’s best in a positive enterprise will always earn respect. Indeed, modeling such behaviors is key to mentoring and to motivating others to behave in a similar manner. I am convinced, however, that such an approach to practicing does not just happen. Rather, such positive behavior often is the product of modeling the constructive behavior of others and an intention to follow a similar value system.