



ILLINOIS STATE BAR ASSOCIATION

# BENCH & BAR

*The newsletter of the Illinois State Bar Association's Bench & Bar Section*

## **"Strive mightily": Some thoughts on civility and the Illinois bar**

*By David W. Inlander and Ronald D. Menna, Jr.*

The Times of London recently ran an article on the lack of civility<sup>1</sup> of American attorneys.<sup>2</sup> It noted that "98 per cent of the lawyers are spoiling things for the other 2 percent."<sup>3</sup> One of the attorneys highlighted was an Illinois attorney who has been censured once, and twice suspended for brief periods, for using offensive language in correspondence with opposing counsel and public employees.<sup>4</sup> The article remarked that the lawyer "felt that some of those who disciplined him 'don't know their a\*\* from a hole in the ground.'"<sup>5</sup> In 2009 a Winnebago County, Illinois attorney was suspended for 60 days for the disclosure on her blog of client confidences she learned as an assistant public defender.<sup>6</sup> In early 2013, a Lake County, Illinois attorney was held in contempt and taken into custody for calling a judge's ruling "ridiculous."<sup>7</sup> While the plural of anecdote is not data,<sup>8</sup> concerns over the lack of civility within the profession have been seriously discussed for almost three decades.<sup>9</sup>

The duty of attorneys to conform to high standards was well established before these concerns over civility arose.<sup>10</sup> To address this problem, over 100 states, courts and bar associations have adopted codes or rules regarding civility.<sup>11</sup> The Illinois Rules of Professional Conduct do not specifically mandate civility,<sup>12</sup> and the Illinois Supreme Court has not adopted any mandatory or voluntary guidelines for attorney civility.

There is wide acceptance of the thought that incivility is caused by lawyers being too "zealous."<sup>13</sup> Almost 30 years ago, Illinois Circuit Judge Richard L. Curry summed up judicial concern about incivility and zealousness in a trial court order, stating: "Zealous advocacy is the buzz word which is squeezing decency and civility out of the law profession. Zealous advocacy is the doctrine which

excuses, without apology, outrageous and unconscionable conduct so long as it is done ostensibly for a client, and, of course, for a price. Zealous advocacy is the modern day plague which infects and weakens the truth-finding process and which makes a mockery of the lawyers' claim to officer-of-the-court status."<sup>14</sup>

The concept of "zealous advocacy" dates back approximately 200 years in England.<sup>15</sup> It surfaced in the United States in the 1908 ABA Canons of Professional Ethics number 15 ("How Far a Lawyer May Go in Supporting a Client's Cause") in the establishment of a requirement that lawyers pursue their client's objectives with "warm zeal."<sup>16</sup> The 1969 ABA Model Code of Professional Responsibility Canon 7 required attorneys to represent clients "zealously within the bounds of law."<sup>17</sup>

By the early 2000s, the concept of "zealous" representation had, for the most part, disappeared.<sup>18</sup> The 1983 and the current 2002 ABA Model Rules of Professional Conduct do not use that word, except in the preamble.<sup>19</sup> Similarly, in Illinois the word "zealous" is found only in the preambles to the Illinois Rules of Professional Conduct adopted in 1990<sup>20</sup> and the Rules of Professional Conduct of 2010,<sup>21</sup> and "zeal" is currently only found in a comment to Rule of Professional Conduct 1.3.<sup>22</sup>

To discontinue incivility, several Illinois courts and one bar association have adopted rules, all of which are, essentially, very articulate restatements of the Golden Rule. That these most basic guidelines needed to be adopted is, indeed, a sad commentary in itself.

In 1993 the Seventh Circuit adopted 50 voluntary Standards for Professional Conduct, broken into three categories – lawyers' duties to other counsel; lawyers' duties to the

Court; and the Courts' duties to lawyers.<sup>23</sup> In 2008, the 17th Judicial Circuit, which serves Boone and Winnebago Counties, approved a Statement of Professional Aspirations for the Legal Profession in the 17th Judicial Court,<sup>24</sup> and instituted an attorney mentoring program and a Peer Review Council pilot project.<sup>25</sup> In 2008, the 3rd Judicial Circuit, which serves Madison County, also adopted an Aspirational Code of Professionalism.<sup>26</sup> In 2010, Circuit Court of Cook County Rule 13.11 implemented 36 rules of civility which apply to the practice in its Domestic Relations Division, broken into three categories – decorum, fairness and administration; scheduling; and discovery conduct.<sup>27</sup> In 2010, the McLean County Bar Association adopted voluntary Principles of Professionalism.<sup>28</sup>

What can the Illinois Supreme Court do about incivility? Is punishing lawyers who are uncivil the answer?<sup>29</sup> Some cases have held that the Court's inherent authority to punish litigants before it,<sup>30</sup> should be treated as an ethical violation to be handled by regulatory bodies such as the ARDC,<sup>31</sup> so that no additional rules are needed.<sup>32</sup>

Four states have added a civility pledge in their oaths of admission for newly admitted attorneys.<sup>33</sup> Several Courts have now adopted mandatory civility rules.<sup>34</sup> It may be that mandatory codes of conduct are now necessary<sup>35</sup> for the same reason the Rules of Professional Conduct are mandatory – they serve to inform attorneys and the public what conduct is and is not acceptable. These guidelines might serve to reverse the current "Rambo" culture<sup>36</sup> and demonstrate to attorneys and the public once again that civility and "diligent" representation are not only compatible, but also increase the credibility and professionalism of our justice system. It

is time for our profession to return to being held out as an admirable model to follow, rather than one to ridicule. ■

The title of this article refers to: "And do as adversaries do in law, strive mightily, but eat and drink as friends." William Shakespeare, *The Taming of the Shrew*, Act 1, Scene 2.

1. "Civility is identified as those obligations that lawyers owe to other lawyers, their clients, and the court generally." Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 Gonz. L. Rev. 99, 146 (2011/2012), <[https://www.law.gonzaga.edu/law-review/files/2011/12/Campbell.final\\_.pdf](https://www.law.gonzaga.edu/law-review/files/2011/12/Campbell.final_.pdf)>.

2. Will Pavia, *Rude and Crude Army of 'Rambo' lawyers Urged to Cool it in Court*, *The Times*, February 2, 2013, p. 43, <<http://www.thetimes.co.uk/tto/news/world/americas/article3675801.ece>> (subscription required).

3. *Id.*

4. *Id.*; see also, Jennifer Smith, *Lawyers Behaving Badly Get A Dressing Down From Civility Cops*, *Wall Street Journal*, January 28, 2013, p. A1, <<http://online.wsj.com/article/SB10001424127887323539804578263733099255320.html>>.

5. *Id.*

6. *In re Kristine Ann Peshek*, M.R. 23794, 2009 PR 00089 (Ill. May 18, 2010).

7. Ruth Fuller, *Lake County Judge Holds Lawyer in Contempt Case*, *Chicago Tribune*, February 19, 2013, <[http://www.chicagotribune.com/news/local/suburbs/grayslake\\_gurnee\\_round\\_lake/ct-llawyer-in-contempt-20130220,0,6285034.story](http://www.chicagotribune.com/news/local/suburbs/grayslake_gurnee_round_lake/ct-llawyer-in-contempt-20130220,0,6285034.story)>.

8. The original source of this aphorism is unclear, and is usually attributed to George Stigler (an economist), Roger Brinner (an economist) or Frank Kotsonis (a pharmacologist).

9. See, e.g., American Bar Association Commission On Professionalism, "... *In The Spirit Of Public Service: A Blueprint For The Rekindling Of Lawyer Professionalism* (1986), <[http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/professional\\_responsibility/stanley\\_commission\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/stanley_commission_report.authcheckdam.pdf)>; Brent E. Dickson and Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 Val. U. L. Rev. 531 (1994), <<http://scholar.valpo.edu/vulr/vol28/iss2/2/>>; Campbell, *supra*, note 3.

10. "A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards." *In re Sawyer*, 360 U.S. 622, 646 (1959) (Justice Stewart, concurring).

11. See, American Bar Association, Center for Professional Responsibility, *Professionalism Codes*, <[http://www.americanbar.org/groups/professional\\_responsibility/resources/professionalism/professionalism\\_codes.html](http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html)> (last updated August 2012).

12. See, Supreme Court Rule 770; RPC Preamble 5 (prohibits conduct "which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute"); RPC 1.3, Comment 1 ("... A lawyer is not bound, however, to press for every advantage that might be realized for a client. ... The lawyer's duty to act with

reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); RPC 3.1, Comment 1 ("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. ..."); and RPC 8.4.

13. See, e.g., John Conlon, *It's Time to Get Rid of the "Z" Words*, *Res Gestae* (Feb. 2001), at 50; Allen K. Harris, *The Professionalism Crisis – The "Z" Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. Rev. 549, 551 (2002); Joseph J. Ortego, Lindsay Maleson, *Incivility: An Insult to the Professional and the Profession*, *The Brief*, Volume 37, Number 3 (2008), <<http://apps.americanbar.org/abapubs/lrc/pdfs/ortego.pdf>>; David D. Dodge, *The "Z" Word, Civility & the Ethical Rules*, 44 *Ariz. Atty.* 18 (2008).

14. Quoted in, Maurice E. Bone, *A Lawyer's Choice – Civility or Hardball*, 79 *Ill. B.J.* 216 (1991); see also, Richard L. Curry, *Lawyers of Conscience Enforce the Unenforceable*, 74 *Ill. B.J.* 120, 121 (November 1985) ("None of us who have practiced for any length of time can fail to note the dramatic decline in the level of civility between lawyers. Today we live in a 'me' society not a 'we' society and that regrettable change has been made manifest by certain of our colleagues. 'Zealous advocacy' is the buzz-word which serves to legitimize the most outrageous conduct, conduct which regrettably debases the profession as well as the perpetrator").

15. The concept can be traced back to the remarks made by Lord Henry Brougham in 1820, while defending Queen Caroline against charges of treason in political proceedings in the House of Lords, in what is known in England as Queen Caroline's case. See generally, Jane Robins, *The Trial of Queen Caroline: The Scandalous Affair That Nearly Ended a Monarchy*, (Free Press 2006); and Monroe Freedman, *Henry Lord Brougham and Zeal*, 34 *Hofstra L. Rev.* 1319 (2006).

16. 1908 ABA Canons of Professional Ethics, <[http://www.americanbar.org/content/dam/aba/migrated/cpr/1908\\_code.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/1908_code.authcheckdam.pdf)>.

17. 1969 ABA Model Code of Professional Responsibility, <<http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf>>.

18. Harris, *supra*, note 14, 53 S.C. L. Rev. at 572 (noting that by 2002, forty-two states and the District of Columbia had eliminated a duty of "zealous advocacy" in favor of a duty of diligent representation).

19. 1983 ABA Model Rules of Professional Conduct, Preface, <[http://www.law.cornell.edu/ethics/aba/2001/ABA\\_CODE.HTM#Preface](http://www.law.cornell.edu/ethics/aba/2001/ABA_CODE.HTM#Preface)>; 2002 ABA Model Rules of Professional Conduct, Preamble and Scope, <[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html)>.

20. Illinois Rules of Professional Conduct of 1990, Preamble ("The lawyer-client relationship is one of trust and confidence. Such confidence only can be maintained if the lawyer acts competently and zealously pursues the client's interests within the bounds of the law. 'Zealously' does not mean mindlessly or unfairly or oppressively. Rather, it is the duty of all lawyers to seek resolution of disputes at the least cost in time, expense and

trauma to all parties and to the courts.") (emphasis added), <[http://www.state.il.us/court/SupremeCourt/Rules/Art\\_VIII/repealed/ArtVIII.htm](http://www.state.il.us/court/SupremeCourt/Rules/Art_VIII/repealed/ArtVIII.htm)>.

21. Illinois Rules of Professional Conduct of 2010, Preamble ("[2] ... As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. \* \* \* [8] ... Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. ... [9] ... These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.") (emphasis added), <[http://www.state.il.us/court/SupremeCourt/Rules/Art\\_VIII/ArtVIII\\_NEW.htm](http://www.state.il.us/court/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm)>.

22. "Rule 1.3: Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client. Comment [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." (emphasis added), <[http://www.state.il.us/court/SupremeCourt/Rules/Art\\_VIII/ArtVIII\\_NEW.htm#1.3](http://www.state.il.us/court/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#1.3)>.

23. Seventh Circuit Standards for Professional Conduct, <<http://www.ca7.uscourts.gov/Rules/rules.htm#standards>>.

24. Aspirational Code of Professional Conduct in the 17th Circuit, <<http://www.wcbarockford.org/newsdetails.asp?newsID=157>>.

25. 17<sup>th</sup> Judicial Circuit, Local Rules, Part 21.00, Professional Conduct, <[http://www.illinois17th.com/index.php?option=com\\_content&task=view&id=377&Itemid=91](http://www.illinois17th.com/index.php?option=com_content&task=view&id=377&Itemid=91)>.

26. 3<sup>rd</sup> Judicial Circuit, General Administrative Order 2008-7, Aspirational Code of Professionalism, <<http://madsioncountycircuitcourt.org/cms/wp-content/uploads/2011/06/2008-C-7-Aspirational-Code-of-Professionalism.pdf>>.

27. Cook County Rule 13.11, <<http://www.cookcountycourt.org/Manage/RulesoftheCourt/ReadRule/tabid/73/ArticleId/50/13-11-Civility.aspx>>.

28. McLean County Bar Association Principles of Professionalism, <<http://www.mcleancountyil.gov/DocumentCenter/Home/View/221>>.

29. Jennifer Smith, *Lawyers Behaving Badly Get A Dressing Down From Civility Cops*, *Wall Street Journal*, January 28, 2013, p. A1, <<http://online.wsj.com/article/SB10001424127887323539804578263733099255320.html>> ("Mr. Ziman doesn't feel his conduct warranted a suspension, said his lawyer, Joseph Collins, who said he personally doubts civility codes will do much to burnish lawyers' reputations. 'I think the end goal,' Mr. Collins

said, "is not going to be achieved by pursuing attorneys who use offensive language.").

30. *Aspen Servs., Inc. v. IT Corp.*, 220 Wis.2d 491, 497, 583 N.W.2d 849, 852 (Wis. Ct. App. 1998) ("Aspen is correct in its assertion that the new rules of civility, SCR 62 'Standards of Courtesy and Decorum for the Courts of Wisconsin,' are not enforceable by the Board of Attorneys Professional Responsibility. [Citation omitted.] However, it is mistaken in its belief that the rules in SCR 62 ... cannot be the basis for imposing a sanction for incivility during litigation. The trial courts and the appellate court of this state do have statutory and inherent authority to enforce civility in the courtroom that is not dependent upon ... SCR 62."); see also, Amy R. Mashburn, *Making Civility Democratic*, 47 Hous. L. Rev. 1147, 1155-56 (2011), <[http://www.houstonlawreview.org/archive/downloads/47-5\\_pdf/\(1\)Mashburn.pdf](http://www.houstonlawreview.org/archive/downloads/47-5_pdf/(1)Mashburn.pdf)>; and Judith D. Fischer, *Incivility in Lawyers' Writing: Judicial Handling of Rambo Run Amok*, 51 Washburn L. J. 365 (2011), at 372-94, <<http://ssrn.com/abstract=1822515>>.

31. Gabriella M. Filisko, *Be Nice: More States Are Treating Incivility as a Possible Ethics Violation*, ABA Journal, Law News Now, April 1, 2012, <[http://www.abajournal.com/magazine/article/be\\_nice\\_more\\_states\\_are\\_treating\\_incivility\\_as\\_a\\_possible\\_ethics\\_violation/](http://www.abajournal.com/magazine/article/be_nice_more_states_are_treating_incivility_as_a_possible_ethics_violation/)>.

32. See, e.g., Mashburn, *supra*, note 31, 47 Hous. L. Rev. at 1221; Fischer, *supra*, note 31, 51 Washburn L. J. at 394.

33. See, *In re Fla. Bar*, 73 So.3d 149 (2011); South Carolina S.Ct.R. 402(K), Admission To Practice Law, <<http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=402&subRuleID=&ruleType=APP>>; N.M. Rules. Gov. Admiss. Bar R. 15-304, <<http://www.nmexam.org/rules/rules304.htm>>; The Utah Oath, <[http://www.utcourts.gov/courts/sup/forms/Attorney\\_Oath-Out\\_of\\_State.pdf](http://www.utcourts.gov/courts/sup/forms/Attorney_Oath-Out_of_State.pdf)>.

34. See, e.g., Arizona S.Ct.R. 31(a)(2)(E) ("Unprofessional conduct" means substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona.), <<http://www.azcourts.gov/Portals/26/LDP/Docs/Rule%2031%20as%20of%209-28-10.pdf>> and 41(g) ("The duties and obligations of members shall be: ... (g) To avoid engaging in unprofessional conduct and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause with which the member is charged."), <[http://www.azcourts.gov/portals/20/ramd\\_pdf/r-05-0021.pdf](http://www.azcourts.gov/portals/20/ramd_pdf/r-05-0021.pdf)>; *In re S.C. Bar*, 709 S.E.2d 633 (S.C. 2011); *In re Norfleet*, 595 S.E.2d 243 (S.C. 2004); *In re White*, 707 S.E.2d 411 (S.C. 2011); The Texas Lawyer's Creed – A Mandate for Professionalism, <[http://www.legalethicaltexas.com/Downloads/Texas-Lawyers-Creed/Texas\\_Lawyers\\_Creed.aspx](http://www.legalethicaltexas.com/Downloads/Texas-Lawyers-Creed/Texas_Lawyers_Creed.aspx)>; Utah Supreme Court Rules of Professional Practice, 14-301 Standards of Professionalism and Civility, <<http://www.utcourts.gov/resources/rules/ucja/ch14/03%20Civility/USB14-301.html>>. The U.S. District Court for the Eastern

District of Washington adopted a "civility code" in its Local Rule 83.l(k) requiring lawyers to "... act with dignity, integrity and courtesy", and "that civility and courtesy are not to be equated with weakness." E.D. Wash. LR 83.1(k), <[http://www.waed.uscourts.gov/sites/default/files/local\\_rules/waed\\_local\\_rules\\_20130201.pdf](http://www.waed.uscourts.gov/sites/default/files/local_rules/waed_local_rules_20130201.pdf)>, pp. 74-76. In *Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284, 287-88 (N.D. Tex. 1988), the U.S. District Court for the Northern District of Texas, sitting *en banc*, established 11 standards of conduct for civil litigation.

35. See, David Grenardo, *Making Civility Mandatory: Moving from Aspired to Required*, 11 Cardozo Pub. L. Poly & Ethics J. \_\_\_, forthcoming, p. 23 ("Requiring civility would increase civility amongst the legal profession, as attorneys would likely act civil rather than be subject to sanctions, penalties or liability. When conduct is merely voluntary, such as civility codes, then one may choose not to follow those recommendations without any personal repercussions.") and 24 ("Based on the benefits of civility and the issues the legal profession faces with incivility, some in the legal profession believe civility should be mandatory.") <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2188407](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188407)>.

36. See, Billy L. Walker, Senior Counsel, Utah State Bar, Office of Professional Conduct, quoted in Grenardo, *supra*, note 36, 11 Cardozo Pub. L. Poly & Ethics J. \_\_\_, forthcoming, at pp. 23, 70.

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THE ILLINOIS STATE BAR ASSOCIATION'S  
BENCH & BAR NEWSLETTER, VOL. 43 #9, MAY 2013.  
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