

Civility in a Time of Incivility

by Judge J. Frederic Voros, Jr.

EDITOR'S NOTE: *The following remarks were given by Judge Voros at a CLE sponsored by the J. Reuben Clark Law Society in the Joseph Smith Memorial Building, Salt Lake City, on June 15, 2016. We republish them here with the author's permission. To avoid disrupting the flow of Judge Voros's remarks, while providing our readers with citations to the many resources on which Judge Voros draws, we suspend our usual limitation on endnotes.*

I appreciate the opportunity to speak at this CLE sponsored by the J. Reuben Clark Law Society. I graduated from the J. Reuben Clark Law School and am in fact the first – but not the only one – of its graduates to serve on a Utah appellate court. I also taught at the S.J. Quinney College of Law for 10 years. So today I'm wearing my “game-day tie” – blue and red stripes – proclaiming my dual allegiance to our two great law schools.

My topic today is Civility in a Time of Incivility. I understand that you are here in large part to earn ethics CLE hours, even though earning those hours requires you to listen to a judge talk about civility. I hope to persuade you today that civility is not as dull a topic as you might think – and also that eschewing incivility is in everyone's best interest.

The Utah Supreme Court has added compliance with the Utah Standards of Professionalism and Civility to the Attorney's Oath. So you younger lawyers have taken an oath to act civilly. Our supreme court has also incorporated the Standards of Professionalism and Civility into the Utah Rules of Professional Conduct. So now an “egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility” may support a finding that a lawyer has committed misconduct.¹ In addition, the Judicial Council has adopted Utah Standards of Judicial Professionalism and Civility.² We judges should be setting a good example. More on that in a moment.

Today I would like to focus on one rule of attorney civility in particular, Rule 3:

Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

The rule is not difficult to understand: give others the benefit of the doubt; no name-calling; don't make it personal. Treat others as you want to be treated.

But you would be wrong to think these simple rules of good conduct command universal support in America today. When I googled “Is civility,” Google suggested the following searches: “Is civility dead,” “Is civility dead today show,” and “Is civility dead in America.” Apparently Google users are wondering if civility is dead in America. And who would blame them?

What a presidential season it has been! Mocking an opponent's physical characteristics; accusations of pants-wetting; name-calling such as “little baby,” “spoiled brat without a properly functioning brain,” “a person with no natural talent,” and “delusional narcissist.” As you know, I'm not making this stuff up.

To be fair, though, politics in America has long been a contact sport. President Lincoln was castigated by the press and his political opponents as a “monster,” a “perjurer,” an “ignoramus,” a “buffoon,”

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a “butcher,” and a “devil.” He was accused of behaving “like a thief in the night,” of being a “miserable tool of traitors and rebels,” and of being “adrift on a current of racial fanaticism.”³ Lin-Manuel Miranda, creator of the Broadway hit *Hamilton*, reminds us that in the election of 1800, Jefferson called Adams “a blind, bald, crippled, toothless man who is a hideous hermaphroditic character with neither the force and fitness of a man, nor the gentleness and sensibility of a woman.”⁴ Adams responded that Jefferson was “a mean-spirited, low-lived fellow, the son of a half-breed Indian squaw, sired by a Virginia mulatto father.”⁵ And an atheist.⁶ And dead, so don’t waste your vote on him.⁷

I wish this phenomenon were limited to politicians, and usually it is, but some judges have also acted in a way we would have to call uncivil. To be honest, I think it started at the top. Consider these gems from the late Justice Antonin Scalia, a brilliant jurist, but one often criticized as an example of incivility:

The [majority] opinion is couched in a style that is as pretentious as its content is egotistic . . .

If, even as the price to be paid for a fifth vote, I ever

joined an opinion for the Court that began: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,” I would hide my head in a bag.⁸

In another opinion he wrote, “Even accepting Justice Breyer’s rewriting of the Eighth Amendment, his argument is full of internal contradictions and (it must be said) gobbledy-gook.”⁹ He concluded by stating, “Justice Breyer does not just reject the death penalty, he rejects the Enlightenment.”¹⁰

How did Justice Scalia do under Rule 3? “Hostile, demeaning, humiliating”? I think so. Disparaging the intelligence of another? Again, I think so. I leave you to decide whether the pejorative “gobbledy-gook” in fact “must be said” in a judicial opinion. So even if you look to Justice Scalia as a model in other ways, please do not imitate his tone of incivility.

But others have. Consider this in-court exchange between Chief Judge Edith Jones and Judge James L. Dennis of the United States Court of Appeals for the Fifth Circuit:



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JUDGE JONES: [slams her hand down on the table]
Would you like to leave?

JUDGE DENNIS: Pardon? What did you say?

JUDGE JONES: I want you to shut up long enough for me to suggest that perhaps . . . you should give some other judge a chance to ask a question.¹¹

Hostile? Yes. Demeaning? Yes. Attributing improper conduct? Yes. Where do you suppose Judge Jones got the idea that she could talk to a colleague, a fellow judge, that way right there in the courtroom?

But even Justice Scalia and Judge Jones must, if the reports are true, take a back seat to Justice David Prosser of the Wisconsin Supreme Court. In a closed-door debate he called former Wisconsin Chief Justice Shirley Abrahamson a “bitch” and threatened to “destroy” her.¹² He later described his tirade as “entirely warranted” on the ground that she had goaded him into it.¹³

That’s bad, but things got worse. In a separate incident, Wisconsin Supreme Court Justice Ann Walsh Bradley told the *Milwaukee Journal Sentinel*, “I was demanding that he [Justice Prosser] get out of my office and he put his hands around my neck in anger in a chokehold”; another source – I’m not sure who, but this incident happened in the presence of four other supreme court justices – said, “She charged him with fists raised,” and he “put his hands in a defensive posture” and “blocked her.”¹⁴ In doing so, the source said, he made contact with Justice Bradley’s neck. The source almost literally said that she hit him in the fist with her face.¹⁵

Let’s take a brief time-out, step back, and think how grateful we are to practice law in Utah, where nothing remotely like this happens. (There is a structural reason for that – aside from the fact that we in Utah generally prize civility – but that is a topic for another day.)

Anyway, we see a lot of incivility today from politicians and even judges. The former, at least, is not new. But what strikes me as perhaps somewhat new is the current challenge to the notion of civility itself.

That civility is a positive civic virtue seems self-evident. But it is not. Some see it as another word for “political correctness,” and see political correctness as repressive self-censorship. Bruce Thornton, a scholar at the Hoover Institution, recently authored an essay entitled “Three Cheers for Political Incivility,”

in which he contended that incivility is neither new nor unwelcome. He argued that “trying to moderate or police, based on some subjective notions of ‘civility’ or decorum, the clashing expressions of passionate beliefs often is an attempt to limit the freedom to express those beliefs, and a way to benefit one faction at the expense of others.”¹⁶ Historian and author Craig Shirley recently published an essay entitled “In Defense of Incivility,” in which he wrote, “The elites always talk about civility in politics. That is a way to control the citizenry, by shaming them into silence.”¹⁷ And a student at the University California at Irvine – not Berkeley, mind you, but *Irvine* – recently argued that civility “as an ideology is a pillar of white supremacist imperialism.”¹⁸ And of course the deadly terrorist attack on the satirical magazine *Charlie Hebdo* in France ignited a debate here at home about the positive role in our public discourse for offensive – thus arguably uncivil – satire.

Furthermore, online publications – *Reuters*, *Popular Science*, and the *Chicago Sun-Times* to name a few – are increasingly phasing out comments sections because, in the words of one commentator, “when Internet users are allowed to post their thoughts anonymously, online discussions inevitably deteriorate into uncivil flame wars.”¹⁹ Maybe you are familiar with “Godwin’s Law”: “As an online discussion grows longer, the probability of a comparison involving Hitler approaches 1.”²⁰ More on that later.

I understand that the powerless, those without a platform, sometimes have to scream to be noticed – Dr. Martin Luther King said that “a riot is the language of the unheard.”²¹ Incivility is, in a sense, a cousin of civil disobedience, which has a long moral pedigree. Democracy is messy and impolite,²² and “mockery is a leveller.”²³ Maybe sometimes mockery or another form of incivility – however impolite – is your only weapon, your only voice.

But that’s not true for us lawyers and judges. We are not powerless. We have voices. We need not and should not resort to incivility. And I would like to suggest three reasons why not.

First, incivility is bad for the administration of justice. Hammurabi said he enacted his code “so that the strong should not harm the weak.”²⁴ An important purpose of law, perhaps its fundamental purpose, is to protect the weak from the strong; in a lawless environment, the strong have their way. They take what they want; only those even stronger can stop them. But in our system, the law limits the dominance of the powerful.

I understand that we live in a world of relative haves and have-nots, of rich and poor – a state of affairs, by the way, that the man whose name adorns this building described as “sin.”²⁵ But sinful,

virtuous, or morally neutral, in this world of relative haves and have-nots, the former can afford more justice than the latter. If you want equal justice for all, that's a flaw in our system, not a feature – a necessary one, perhaps, but a flaw nonetheless.

Anyway, we aspire to a system in which legal outcomes flow from the impartial application of neutral rules, not from the threats of bullies. And make no mistake, the conduct condemned by Rule 3 – hostile, demeaning, and humiliating words and personal attacks – is not just uncivil, but bullying and abusive. And to seek a result in our system of justice by bullying is to repudiate the rule of law. It relies on might, not right.

Your presence at a presentation on civility suggests that you are probably more often on the receiving end, rather than dispensing end, of abusive language. What is your appropriate response? I can tell you what Justice Kennedy and Justice Breyer did when Justice Scalia mocked their writing and reasoning. They ignored it. And that is the approach I have usually taken. I was a young lawyer filing an unlawful detainer action against a business tenant when my opposing counsel screamed at me, “If you go through with this, I will have your freaking bar license!” (Only he didn't say freaking). I ignored his tantrum and proceeded with the eviction. (And, as it turned out, as little as I knew, I knew more about unlawful detainer than he did. His bluff, like so many bluffs, was borne of ignorance and insecurity.)

But in retrospect, I believe – or at least think I believe – that the better response would be to step out of the frame of the conversation and have a meta-conversation: “Whoa, there's no need to shout or get abusive. Can we discuss this civilly, or are we done here?” In fact, I offer this to you as a ready-made response for use in these situations: “Counsel, can we discuss this civilly?”

Second, you should avoid incivility because it is bad advocacy. Remember Godwin's Law? “As an online discussion grows longer, the probability of a comparison involving Nazism or Hitler approaches 1.”²⁶ It comes with a corollary: “Once such a comparison is made, the thread is finished, and whoever mentioned the Nazis has automatically lost whatever debate was in progress.” In other words, by playing the Hitler card you admit you have no better card.

Two years ago my court addressed the risk of abusive litigation tactics. An attorney had described a judge's minute entry as “a complete fabrication” and, without factual basis, accused opposing counsel and the judge of collaboration. In the end these tactics hurt, not helped, the lawyer's case. Our opinion stated:

Assigning Machiavellian motives to errors of judges and lawyers is improper and usually inaccurate. And aside from implicating the Rules of Professional Conduct and the Standards of Professionalism and Civility, inflammatory language and personal accusations undermine the position they ostensibly support. Knowledgeable readers understand that those with persuasive arguments based on law and logic rarely resort to ad hominem attacks.²⁷

Abusive language in a brief betrays weakness.

Another reason incivility is bad advocacy is that it causes the judge to identify with the lawyer you attack. When one person attacks another, we humans tend to sympathize with the victim. So if you accuse your opposing counsel of “cheating on the facts” or “mischaracterizing the record,” the reader – the judge – may instinctively feel you must be exaggerating or perhaps even feel that you are a bad person for having accused another lawyer so brazenly. So as much as you want to vent, as much as you want to express your outrage, my advice is: don't.

Instead, I offer this practice pointer. Instead of venting, instead of expressing your outrage, just give the judge the facts and let the judge experience the outrage first-hand. For example, suppose you are briefing a negligence case in which liability depends on whether the traffic light was red or green just before the collision. And suppose that the testimony is conflicting on what color the light was. You're on appeal or briefing a JNOV motion, and your opponent writes that witness X testified that the light was green. But she didn't! You know she didn't! And you know your opponent knows she didn't! How could they say that? In a just world, they should pay a price for mischaracterizing the record! I agree; they should pay a price. So what's your play?

You could play it like a 2016 presidential candidate and call your opponent “lyin' Fred.” You could play it like Justice Scalia and say that even with opposing counsel's rewriting of the record, their argument is full of (it must be said) gobbledy-gook, and you'd sooner put a bag over your head than make that argument. Or you could play it like Justice Prosser is alleged to have done, and grab your opponent's neck. But let me propose a response that is not only more civil, but, I believe, better advocacy. And – bonus – one that lets you be a better person and a better lawyer at the same time.

I suggest that you don't call your opponent anything. Make this about their argument – their words – not their character. You cannot judge another's character; but you can test the accuracy

of their words. So don't say your opposing counsel misrepresented the record, twisted the witness's words, or anything like that. Don't frame yourself as the victim. Instead say, "[the opposing party] states that Witness X testified, quote, the light was green [cite to opposing brief]. In fact, the witness testified, quote, the light was red [cite to record]." Done. No outrage, at least on your part. But the judge will feel it, because now you have framed the judge as the victim of the mischaracterization. You are just pointing it out. You won that exchange.

A third and final reason to avoid incivility is that uncivil attacks are often factually wrong. I understand that lawyers and clients lie. Still, in this particular case, are you sure your opposing counsel, or their client, lied, rather than misremembered? Hanlon's Razor often applies: Never attribute to malice what is adequately explained by stupidity. It, too, comes with a corollary: Don't rule out malice. But I don't think I'm being naïve in believing that we as lawyers and judges err more than we cheat. Your opponent may be deliberately lying, but then again, they may be careless, sloppy, or overworked. So while I believe we need to face down bullies and refute false statements by showing them to be false, our rules of civility remind us, and I think it's sensible advice, to be cautious about casting aspersions. Let's start, at least, by judging others as we would want to be judged.

In sum, I hope I have convinced you that civility is less boring than you thought. Incivility is practiced even by public figures who should know better, and more people than you might think applaud that trend. But those of us in the law should not follow their lead. To quote my favorite songwriter, "You and I, we've been through that, and this is not our fate."²⁸

We should reject incivility as bad policy, bad advocacy, and – usually – factually wrong. Besides, incivility is hardly risk-free: if we try to be good lawyers without also being good people, we run the risk of being neither. Thank you.

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4. Mark Binelli, 'Hamilton' Creator Lin-Manuel Miranda: The Rolling Stone Interview, ROLLING STONE (Jun. 1, 2016), <http://www.rollingstone.com/music/features/hamilton-creator-lin-manuel-miranda-the-rolling-stone-interview-20160601?page=4> [https://perma.cc/TXZ5-HV4A]; Chris Altman, *Smear Tactics: The Dirtiest Tricks in American Politics* (Apr. 27, 2015), <http://all-that-is-interesting.com/dirtiest-us-presidential-campaign-tactics> [https://perma.cc/SAB3-YSVF].
5. Altman, *supra* note 4.
6. Kerwin Swint, *Founding Fathers' Dirty Campaign*, CNN (Aug. 22, 2008), <http://www.cnn.com/2008/LIVING/wayoflife/08/22/mf.campaign.slurs.slogans/> [https://perma.cc/5W5A-LKE3].
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8. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 & n.22 (2015) (Scalia, J., dissenting).
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11. *In re Charges of Judicial Misconduct*, 769 F.3d 762, 768 (D.C. Cir. 2014).
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