

# Illinois Bar Journal

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## Civility & Professionalism Growing Cause for Concern?

By **Ed Finkel**

Keeping civility and professionalism on the docket.

Some Illinois attorneys and judges assert that political divisiveness, social media, the pandemic, and Zoom fatigue have contributed to a decline in civility and professionalism in the legal sector during the past few years, undermining previous gains.



Presenters at two ISBA CLE programs in March explored this phenomenon, the deeper reasons behind it, and possible silver linings. To provide a digest of their perspectives, the Illinois Bar Journal caught up with several presenters from the programs: a two-part seminar titled “Civility and Professionalism 2022: Pivoting for the Pandemic,” cosponsored by the ISBA Bench & Bar Section and the Illinois Supreme Court Commission on Professionalism; and “The Role and Benefits of Professionalism: Perspectives From the Bench and Beyond,” sponsored by the ISBA Federal Civil Practice Section.

### Defining ‘civility’ and ‘professionalism’

Judge Michael Chmiel of the 22nd Judicial Circuit in Woodstock, who coordinated the two-part CLE, defines civility as how courteously and politely people interact with one another. Professionalism encompasses civility but goes beyond it.

“The profession, among other things, polices itself formally and informally and has certain protocols as far as how you dress, how you act, how you interact,” he says. “It’s like wearing the tie versus what’s under the tie. We should be civil in everything we do. As a professional, you should be civil, no question about it. As a human being, you should also be civil.”

As presiding judge of the civil division in McHenry County, Judge Chmiel issued a series of standing orders that begin with a section on professionalism and civility. It reads, in part:

Parties and the attorneys who represent them are reminded to engage in professionalism and civility in the handling of cases which come before the Court. To the extent possible, attorneys should confer with each other on pending matters *before* coming to the courthouse. Each time a case is called in open court, the Court will endeavor to engage in a meaningful court appearance for the parties, with a desire to move matters along efficiently and effectively.

Judge Chmiel encourages other judges in the division to issue similar orders to establish a culture of rapport in their courtrooms. "Every time I go into my courtroom, I realize we need it," he says, adding, "Personally, I've seen positive strides. When I see civility and professionalism, I applaud it. All too often, we focus on the negative."

Judge Chmiel sees attorneys talking before a case as part and parcel of zealous advocacy: "It's helpful to the court and the parties if there's some dialogue. You don't have to give up trade secrets or strategic points. To the extent we realize we're all in this together at some level, and we're trying to get to a proper result, it serves all involved."

## Warning signs

Christine Anderson, director of probation and lawyer deferral services for the Illinois Attorney Registration & Disciplinary Commission (ARDC), says her agency has needed to issue more reminders the past couple of years. "Since the pandemic, we have been getting even more complaints about uncivil conduct—in the courtroom, in depositions, in emails," she says. "Sometimes it's related to opponents, sometimes to clients, and sometimes to the general public. It doesn't always relate to a case."

If an attorney is criticizing a judge publicly, and especially if the complaint is dishonest, the ARDC files formal complaints and has levied disciplinary sanctions, such as "suspension until further order of the court," which requires reinstatement, Anderson says. "Lawyers have gotten pretty significant sanctions," she says. "That's one end of the spectrum."

At the less-severe end, a lawyer might say something inappropriate and then apologize. If the matter has reached the ARDC, the agency might merely send out a caution letter that reminds the offending attorney that the preamble of the Illinois Rules of Professional Conduct urges a "professional, courteous and civil attitude to all persons in the legal system."

"Or they might enter into a diversion agreement, where we might ask them to do some continuing legal education on issues of civility," she says. "We've had several instances where we required them to send a letter of apology to the person. We have a variety of ways we handle it, depending on the severity of what's being said and who it's being said to."

The preamble comment can't be used in actual disciplinary cases, Anderson notes, so the ARDC usually turns to Rule 4.4(a), which says, "In representing a client, a lawyer shall not use means that

have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

Rules 8.4(c) and (d) also can come into play, she says. Those involve, respectively, “lawyers who engage in conduct involving dishonesty, fraud, deceit, or misrepresentation”; and those who “engage in conduct that is prejudicial to the administration of justice.”

Anderson rejects that zealous representation ever requires running afoul of these dictates. “I don’t think zealousness means being uncivil or impolite,” she says. “You should watch your language, watch what you post—we’ve been getting a lot of complaints about postings on social media. If you’re upset about something, and you’re writing an email, do your draft and then hold off for a day. Look at it the next day. Don’t send it in the middle of being totally upset or aggravated about something. I tell my kids that, too.”

It’s possible that the pandemic has made people more willing to say things they wouldn’t have in the “before times,” Anderson says. “We get complaints from judges about a lawyer acting up in their courtroom,” she says. “Sometimes we get complaints from clients: ‘A lawyer said this to me. I got a text message with rude comments.’ Or lawyers call opposing counsel names, or make derogatory [comments] in letters, or emails, or phone calls. It comes from a wide variety of places.”

## Origin stories

Pandemic-induced stress and the temptation to shout over one another on social media are immediate catalysts for incivility and unprofessionalism. But Dr. Alexandra Tsang, director of the Kane County Diagnostic Center in Batavia, says negative behaviors ultimately stem from deeper sources.

“Depression, anxiety, and substance-abuse rates have gone up in recent years among attorneys,” she says. “It’s a profession that has multidimensional stress. You have long hours, the effects of the pandemic in terms of court not looking the same and pandemic-related isolation, high-stakes cases, plus the personality traits that go along with attorneys. Which are great—perfectionistic, competitive, very ambitious—but under multidimensional stress, these traits can lead to burnout.” Tsang cites a study from the American Psychological Association that shows attorneys are 3.6 times more likely to suffer from depression than nonattorneys.

Another factor that Tsang cites is “vicarious trauma” suffered by people who witness trauma in others. While the legal profession might not typically be characterized as a “helping profession” like mental health or social work, she notes, “by the nature of the work, you’re exposed to people who are undergoing some sort of negative life event. Happy people don’t retain attorneys.”

An attorney representing a client in a criminal case might be exposed to police reports with distressing details, a transcript of a deposition with similar information, or pictures of a crime scene, Tsang says. “There’s a cumulative effect of working with the negatives of life and human tragedy. You see too much. Over time, if you have nothing else in your life to balance it with, it can slowly cause compassion fatigue.”

Statistically, issues like mental health and substance abuse have gotten worse over time, although Tsang wonders whether that's at least partly due to negative stigmas related to mental health fading away and more people asking for help. In addition to incivility, Tsang says other symptoms of burnout, vicarious trauma, and compassion fatigue include absenteeism from work, neglecting one's own health, and experiencing sleep disturbances.

Jayne Reardon, who's retiring this month as executive director of the Illinois Supreme Court Commission on Professionalism, says she's been studying incivility for the 16 years she's been with the commission and has seen it improve—until the past five or six years.

"The political course under the former [presidential] administration affected social interactions at all levels, including lawyers," she says. But incivility "has been a problem in our profession for a very long time. Part of the reason for that is the adversarial nature of litigation, which sets lawyers to go to their respective corners of the boxing ring to attack each other."

Reardon does find solace in the progress that has been made: "If we had not been working to educate judges and lawyers on the benefits of civility, how much further would we have fallen?" But, she adds, "I do feel like Sisyphus, pushing a rock up the hill and having it fall down on you, and not making as much progress as we would like."

Humans are wired to react to incivility with incivility, prompted by the "reptilian" fight-or-flight part of the brain known as the amygdala, Reardon says. "If you're not very purposeful or intentional in the way you communicate, it tends to devolve into, frankly, a very primitive level of interaction," she says.

The personality traits that make someone an excellent litigator don't necessarily lend themselves to civility, either, Reardon says, seconding Tsang. "Lawyers, to a greater extent than the normal population, tend to have 'Type A' personalities, be highly perfectionistic in their approach, and have very high standards for themselves," she says. "And at the same time, they have low resiliency skills. They're unable to shake off a loss, or a setback, or being outargued."

Lawyers also can very consciously engage in incivility, which Reardon terms "strategic incivility," because they think it will help their cases. "Judges say they do not like incivility, and they encourage professionalism, but there is a lingering belief that lawyers will gain an advantage by attacking the other side—throwing them off their game, perhaps."

Education of various kinds can help, although Reardon doesn't believe education helps with those who deliberately engage in strategic incivility. In those cases, she says, judges must intervene. "It's pretty well known in the legal community which judges will take a stand against that," she says.

Reardon's presentation focused on the connection between civility and diversity, based on research that suggests women and people of color are more likely to be on the receiving end of incivility than white males—and that women and people of color have lower tolerances for incivility. "Our profession is one of the least-diverse professions out there," she says. "It's pretty important to maintain or, frankly, regain credibility as a profession devoted to seeking equal justice for all."

## **Rediscovering civility through ADR**

The rise of alternative dispute resolution (ADR) may provide more opportunities to foster civility and professionalism in the law.

Case filings are down, but “that doesn’t mean controversy is down,” says Judge Chmiel, who has coined the term “alternative professionalism.”

“It means the ADR world is dealing with more and more of it,” he says. “If you’re not litigating in a courtroom, you’re still dealing with an issue in dispute. What about civility and professionalism in that format?”

“I expect the attorneys attending mediations to collaborate with each other rather than to scorch the Earth to promote their client’s position,” says Case Ellis, a mediator and arbitrator based in Cary. “We’re moving into an area where it’s a collaboration rather than an adversarial argument. You tend to be more civil.”

Ellis, a former trial attorney, attempts to set a relaxed tone and make it clear that he’s there to help resolve a dispute, not declare a winner and loser. He also emphasizes to all parties that he’s less interested in the black letter of the law. “That allows lawyers to transition from, ‘How do we win a summary judgment?’ to, ‘How can we put this to bed right now?’ At some point, you have to weigh what’s been offered, what’s presented, or take the risk of rolling the dice in front of a jury or judge.”

Ellis hopes civility in the ADR arena will carry over to the courtroom, where he believes incivility is worse than ever. “I’m in a world that’s 90 percent civil,” he says. “It’s a very refreshing change to sit down with lawyers who talk about how their college football teams are doing and relate to each other on a human level. And the clients can talk to each other.”

When Ellis started as a mediator 26 years ago, lawyers who weren’t yet clear on the concept of ADR used to make opening statements and bring slide decks to establish their position. “When [lawyers] start to argue, the parties start looking at me, and I say, ‘Let’s get that cup of coffee we were talking about and come back.’ Without fail, the lawyers look at me and say, ‘We’re sorry, we realize we’re not supposed to be arguing.’ It’s all about setting the tone.”

Ellis has trained mediators overseas and when he visited a courtroom in London, he didn’t see any of the incivility he encounters in the U.S. “Incivility would not go over well in the U.K.,” he says. “I love to take English barristers to the Daley Center. Their heads explode. Lawyers are yelling at one another; judges are yelling at lawyers. It’s a total donnybrook compared to what you see in a British courtroom.”

American judges don’t tend to tell lawyers to be respectful or behave themselves as forcefully, Ellis says. “Judges are elected here,” he says. “Judges are very conscious of their popularity or lack of popularity. They’re a little reluctant to do anything that’s going to alienate the bar or the court watchers.”

As increasing numbers of civil cases are resolved through mediation agreements than through judgments in some states, including Illinois, Ellis is optimistic that this trend also will introduce more

and more civility into the judicial system. “We joke about dropping the ‘A’ in ADR,” he says. “We think it should be DR: dispute resolution.”

Retired U.S. Magistrate Judge Sidney Schenkier of the Northern District of Illinois, who now does mediation and arbitration, sees incivility stemming from several factors. “From the lawyer’s point of view, sometimes it’s tactical—thinking: ‘I’m going to get an advantage by overwhelming or beating down the other side,’” he says. “Sometimes, it’s inexperience or a lack of confidence: ‘I’ve got to be tough, or people won’t take me seriously.’ Sometimes, it’s stress about losing not only the case, but the client.”

Retired U.S. Magistrate Judge David Bernthal of the Central District of Illinois, who’s now of counsel to Webber & Thies in Urbana, agrees that ADR may provide a haven from the incivility of litigation. “It’s always adversarial, but I try to get people to understand, you don’t lose or win the mediation,” he says. “You’re not pitching a case to me, because I’m not going to decide anything. It gives people a chance to be an attorney and counselor, with an emphasis on ‘counselor.’”

Attorneys in mediations don’t need to be emotional, pound the table, or use pejoratives, says Judge Bernthal, who participated with Judge Schenkier on the CLE panel. “It’s a softer process that hopefully allows people to dial back on their nastiness,” he says. “I always remind lawyers, ‘Prepare your client. Help them understand what’s happening here. I also understand that you want to look good in front of your client. You don’t want to look soft. You want to look tough.’ This allows them to dial it back a little bit.”

## **Good judgment**

Incivility is nothing new in the legal profession, says Judge Schenkier, who sat on the Seventh Circuit Court of Appeals 30 years ago. “In a lot of ways, it’s intensified. But the core problem is not new,” he says. “When you have people in politics who speak in the worst terms about their opponents, and you have judges that trash lawyers and other judges, it creates a lower ceiling for what’s acceptable.”

The line between incivility and zealous advocacy is not always clear, Judge Schenkier says. “It can be tough. It can be bruising. People ask questions that are uncomfortable. When that is in pursuit of developing evidence in the case, that doesn’t make it unprofessional or uncivil. But when you’re attacking somebody personally, or their family, and you’re demeaning them, that obviously is a pretty clear line.”

Judges need to underscore that “that’s not the way we do things,” especially in dealing with a younger attorney who might simply be misguided, Judge Schenkier says. A more seasoned attorney who’s pursuing incivility as a strategy is a different story, he says, recalling a discovery dispute in a case in which the attorneys were sending personally demeaning emails back and forth. He noticed the emails were all written at midnight or 1 a.m. So, he banned the attorneys from sending one another emails between 11 p.m. and 7 a.m.

“Get a good night’s sleep,” Judge Schenkier says. “In the end, that wasn’t the only reason, but it communicated a message. In fairness to the parties, they took it to heart. Six months later, they settled the case. They stopped trashing each other and developed a better relationship.”

Judge Bernthal says that with two retired judges on the panel, the last thing they wanted to do was preach to lawyers about the behavior of lawyers. "High on my list is the responsibility of the courts," he says.

That starts with setting an example. Judge Bernthal recalls that the late Judge Abraham Lincoln Marovitz of the Northern District of Illinois provided a "cheat sheet" of sorts that he kept on his bench (Judge Bernthal kept a copy on his, as well). "Have patience, listen, speak softly," he says. "Those are all good things to remember. If a judge loses his or her temper, or shouts at the lawyers, or they think you're being sarcastic, that undermines the dignity of the process. Judges should not get confused that they're a TV judge there for entertainment."

"You can take somebody aside after court: 'Can you stay for a second, I want to talk to you?'" he adds. "You can say, 'You're better than that.' The next step up might be a rebuke from the bench to calm somebody down. Every time I'd rule on an objection, one attorney would look up to the sky, roll his eyes, and groan. Finally, I said, 'Stop doing that; you can disagree with the court's ruling, but I don't need all the nonsense. He apologized, and we moved on.'" But when attorneys don't move on, or such behavior becomes chronic, sanctions become necessary.

The legal profession and the court system are a subset of society, Judge Bernthal says. "Society at large seems to be sliding. As our technology gets more impressive, our behavior goes in the opposite direction," he says. "If you flew five years ago, did you ever worry about the guy next to you punching out the flight attendant? People act like they don't know how to behave anymore. We must stay vigilant and keep incivility from creeping into our profession."



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#### ISBA RESOURCES >>

- ISBA Free On-Demand CLE, *Nothing Stands Alone: People, Process, and Technology* (recorded December 2021).
- ISBA Free On-Demand CLE, *Client Data—Collect It All* (recorded August 2021).
- ISBA Free On-Demand CLE, *Leverage Your Website for Today's Clients* (recorded May 2020).
- [ISBA Practice HQ, Manage a Practice.](#)

“**Civility and Professionalism 2022: Pivoting for the Pandemic**,” a two-part CLE program cosponsored by the ISBA Bench & Bar Section and the Illinois Supreme Court Commission on Professionalism, was held on March 8 and 15.

The CLE program, “**The Role and Benefits of Professionalism: Perspectives From the Bench and Beyond**,” was held on March 3 and was sponsored by the ISBA Federal Civil Practice Section.

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