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Seminars

Fulfilling a Public Trust: The Professional Lawyer



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Professionalism Commission*

**Friday, March 17, 2017
1:30 p.m.–4:45 p.m.**

3 Ethics credits

FULFILLING A PUBLIC TRUST: THE PROFESSIONAL LAWYER

PROGRAM PLANNERS

The Honorable John Acosta, *United States District Court, Portland*
The Honorable Richard Baldwin, *Oregon Supreme Court, Salem*
The Honorable Kathleen Dailey, *Multnomah County Circuit Court, Portland*
The Honorable Daniel Harris (Ret.), *Harris Mediation and Arbitration, Wilsonville*
The Honorable Mary Mertens James, *Marion County Circuit Court, Salem*
Sandra Hansberger, *Attorney at Law, Portland*
Scott Hunt, *Busse & Hunt, Portland*
Professor Steve Johansen, *Lewis & Clark Law School, Portland*

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SCHEDULE

- 1:00 Registration**
- 1:30 Professionalism: The Hero Inside Us All**
The Honorable John Acosta, United States District Court for the District of Oregon, Portland
- 2:20 Modeling Professional Conduct: The Attributes of a Professional Lawyer**
- ◆ Competence, courtesy, restraint, honesty, and credibility
 - ◆ Examples in the legal community
- Moderator: The Honorable Daniel Harris (Ret.),** *Harris Mediation and Arbitration, Wilsonville*
The Honorable Adrienne Nelson, *Multnomah County Circuit Court, Portland*
David Bartz Jr., *Schwabe Williamson & Wyatt PC, Portland*
Parna Mehrbani, *Lane Powell PC, Portland*
- 3:25 Break**
- 3:40 Improving Public Confidence in the Legal Profession**
- ◆ Community education and community service
 - ◆ Participation in local government
 - ◆ Performing pro bono work
- Moderator: The Honorable Daniel Harris (Ret.),** *Harris Mediation and Arbitration, Wilsonville*
Edwin Harnden, *Barran Liebman LLP, Portland*
Kristina Holm, *Perkins Coie LLP, Portland*
Alycia Sykora, *Alycia N. Sykora PC, Bend*
- 4:45 Adjourn**

FACULTY

The Honorable John Acosta, *United States District Court for the District of Oregon, Portland*. Judge Acosta was appointed a magistrate judge for the United States District of Oregon on March 5, 2008, and maintains chambers in Portland. Prior to his appointment, Judge Acosta served as Senior Deputy General Counsel for TriMet, the public transportation authority for metropolitan Portland, and before that he was in private practice in Portland and Alaska. Judge Acosta is a member and past chair of the Oregon State Bar Joint Bench/Bar Commission on Professionalism, and he serves on the University of Oregon School of Law Dean's Advisory Council. Judge Acosta also has been active in the community through service on the boards of several nonprofit social services organizations, as a member of legal professional associations, by teaching as an adjunct professor at the University of Oregon Law School, and by coaching high school mock trial students, among other volunteer activities.

David Bartz Jr., *Schwabe Williamson & Wyatt PC, Portland*. Mr. Bartz is president of Schwabe Williamson & Wyatt PC and a practicing trial lawyer with a focus on environmental- and construction-related matters. His clients include a wide array of transportation sector clients, including ports, ships, and shippers. He also works with contractors, property developers, and building owners. He served for 12 years on the Oregon State Bar Advisory Committee on Diversity and Inclusion and is past chair of the Oregon State Bar Construction Law Section. Among other awards and recognitions, Mr. Bartz is the 2016 recipient of the Edwin J. Peterson Professionalism Award. He is admitted to practice in Oregon and Washington.

The Honorable Daniel Harris (Ret.), *Harris Mediation and Arbitration, Wilsonville*. Since retiring from the bench in 2013, Judge Harris has worked as a full-time mediator and arbitrator. He was a Jackson County Circuit Court judge from 1997 to 2013. He serves on the Oregon State Bar Alternative Dispute Resolution Section Executive Committee and is a member and past chair of the Oregon Bench and Bar Commission on Professionalism. He cofounded and served as president of the William V. Deatherage American Inn of Court, is past president of the Circuit Court Judges Association, and was on the faculty for the New Judges Seminar from 2002 through 2014. Judge Harris is the recipient of the 2010 Oregon State Bar Wallace P. Carson, Jr., Award for Judicial Excellence and the 1995 Oregon State Bar President's Public Service Award.

Edwin Harnden, *Barran Liebman LLP, Portland*. Mr. Harnden is the managing partner at Barran Liebman, where he represents employers in all stages of employment litigation and handles employment dispute resolution. He is a Fellow and Oregon chair of the American College of Trial Lawyers, a Life Fellow of the American Bar Foundation, and a national Fellow of the College of Labor and Employment Lawyers. He is past president of the Oregon State Bar, the Multnomah Bar Foundation, and the Professional Liability Fund. Mr. Harnden speaks regularly on employment law topics at conferences across the country. He is involved regionally and nationally in developing advanced leadership and management roles for law firms and lawyers. Among other honors and recognition, Mr. Harnden is the recipient of the 2012 Multnomah Bar Association Professionalism Award, the 2011 Lawyers' Campaign for Equal Justice Henry H. Hewitt Access to Justice Award, and the 2009 Judge Learned Hand Lifetime Humanitarian Achievement Award.

Kristina Holm, *Perkins Coie LLP, Portland*. Ms. Holm focuses her practice on business litigation in the federal and state courts and in alternative dispute venues. Her experience covers a broad range of matters, including complex business, contract, director and officer liability, securities, and trademark disputes. She has litigated matters in industries including reinsurance, pharmaceuticals, healthcare, and consumer and retail products. Ms. Holm also maintains an active pro bono practice and has handled cases involving a wide variety of constitutional law issues in both her pro bono and litigation practice. She serves on the ACLU of Oregon Lawyers' Committee, the American Constitutional Society Oregon Lawyer Chapter board, and the Oregon Women Lawyers board. Ms. Holm is the recipient of the 2015 Oregon State Bar Pro Bono Award and a corecipient of the National Crime Victim Law Institute Pro Bono Attorney of the Year award.

FACULTY (Continued)

Parna Mehrbani, *Lane Powell PC, Portland*. Ms. Mehrbani practices all aspects of intellectual property law, including trademark, copyright, right of publicity, trade secret, licensing, intellectual property contracting, and litigation. She also practices general commercial litigation. Ms. Mehrbani manages Lane Powell's trademark registration and enforcement practice, including trademark portfolios for both small and large companies, and she is cochair of the firm's Diversity Committee. Ms. Mehrbani is a member of the Oregon Bench and Bar Commission on Professionalism, the U.S. District Court of Oregon Local Rules Committee, the International Trademark Association, the Federal Bar Association Oregon Chapter, the Oregon State Bar Intellectual Property Section executive committee, Oregon Women Lawyers, the Oregon Minority Lawyers Association, and the Multnomah Bar Association. Ms. Mehrbani is admitted to practice in Oregon and Washington.

The Honorable Adrienne Nelson, *Multnomah County Circuit Court, Portland*. Judge Nelson was appointed to the Multnomah County Circuit Court in February 2006 and hears civil and criminal cases. Prior to her appointment, Judge Nelson practiced in the areas of criminal defense, family law, labor and employment law, and general litigation. She sits on the American Bar Association Standing Committee on Public Education, is the Oregon delegate to the ABA House of Delegates, and is vice president of the Owen M. Panner American Inn of Court. Among other honors and awards, Judge Nelson has received the 2016 Multnomah Bar Association Award of Merit, the 2015 Oregon State Bar Diversity and Inclusion Award, and the 2003 Oregon Women Lawyers Judge Mercedes Diez Award. Judge Nelson is a frequent speaker on a number of topics, including diversity, leadership, and professional development.

Alycia Sykora, *Alycia N. Sykora PC, Bend*. Ms. Sykora specializes in business law, health law, civil litigation, and appeals. She also serves as a judge pro tem and an arbitrator in the Deschutes County Circuit Court. She is secretary and past chair of the Oregon State Bar Constitutional Law Section, CLE Committee chair and past president of the Deschutes County Bar Association, a member of the American Constitutional Society Oregon Lawyer Chapter board of directors, and a member of Oregon Women Lawyers. Ms. Sykora teaches Introduction to Comparative Politics at Central Oregon Community College. She is the recipient of the 2015 Oregon Bench and Bar Commission on Professionalism Edwin J. Peterson Professionalism Award. Ms. Sykora is admitted to practice before the United States Supreme Court.

On Professionalism

Conduct Counts: Professionalism for Litigation and Courtroom Practice¹

By the Honorable Daniel L. Harris and the Honorable John V. Acosta

Ensuring the quality of our professional lives and improving the public's perception of our profession begins with our conduct toward each other. It also rests on our conduct in the courtroom, before judges, opposing counsel, juries and members of the public. Lawyers are educated and trained to exercise a high degree of skill and competence in representing individuals and organizations in the legal system. They should complement those attributes by exercising the highest standard of conduct when dealing with judges, clients and one another, whether verbally or in writing. Professionalism differs from ethics in that ethics rules are mandated rules of conduct, while professionalism is a standard to which lawyers should aspire. The following suggestions for observing professionalism stem from years of litigation and courtroom experience—and some hard lessons learned during that time. This list was compiled from comments received from judges, attorneys and clients who were asked for suggestions on what can be done to improve professionalism. Integrating these suggestions into daily practice not only will improve the quality of your professional life, but will also make you a more effective advocate for your client.

1. Promote the efficient resolution of disputes.

In most cases, an attorney should advise the client of the availability of mediation, arbitration and other appropriate methods for resolving disputes outside of the courtroom. A professional lawyer should always consider, and advise the client of, the most efficient way of resolving the dispute. This includes consideration of the effect litigation and particularly the trial will have on your client and the benefits to your client that flow from resolving a dispute sooner rather than later. Most clients want a dispute resolved in a timely manner with minimal cost; staying out of court usually accomplishes that goal. Attorneys should do everything they can to resolve pretrial disputes without involving the court. This is especially true with disputes over discovery issues—many motions to compel discovery can be resolved without using the resources of the justice system.

2. Be a counselor to your client, not a mere puppet.

Clients don't always know what is and isn't right. They aren't familiar with the ethics rules that bind lawyers and the unwritten local conventions lawyers observe when working on cases with one another. Some clients want you to dislike the opposing party as much as they do and, thus, they expect you to make the other side's life miserable. Some clients also might not appreciate that you and your opponent are professional colleagues and very likely will have cases against one another in the years to come, and they might not take into account that your relationship with a judge is important to your ability to represent them in the current case and other clients in future cases. Adopting a "scorched-earth" or "take-no-prisoners" approach to litigation will not serve your client's interests and ultimately will work to your client's disadvantage in resolving the dispute. A lawyer should defuse emotions that might interfere with the effective handling of litigation and which could complicate or preclude resolution of a dispute in a way that best serves the client's interests. If a client requests or insists upon a course of action that is contrary to local custom or would be counterproductive to the client's interests, tell the client so and explain why. Some clients

¹ From the *Oregon State Bar Bulletin*—August/September 2007. © 2007 Daniel L. Harris and John V. Acosta. Reprinted with permission.

might take longer to understand this notion than will others, but you can't represent your client's interests by taking an action you know will ultimately harm those interests.

3. Keep your word.

Lawyers spend a lot of time putting things in writing, but in the daily practice of litigation a lot of routine business gets done verbally. Your ability to practice effectively will depend to a large degree on whether opposing counsel and co-counsel trust you. If your colleagues know they can trust you to do what you say, your professional life will be a lot easier. So, do what you say you will, and if you can't do or agree to something, then say you can't do or agree to it. You'll find that a little candor goes a long way.

4. Don't fudge.

Credibility is everything. Some lawyers gain a reputation for being fudgers. They overstate the facts in a case, misrepresent the holding in a case, or misstate the position of the opposing party. Some attorneys believe they are simply zealously representing their clients when they stretch or shade the truth. They are actually doing a disservice to their clients. Once this reputation sets in, it is difficult for a lawyer to regain credibility, and it ultimately diminishes the lawyer's ability to be effective as an advocate. Credibility and reputation are earned from hard work, ethical practice and a believable and accurate representation. Credibility and reputation will get you a lot further during litigation and especially in a courtroom than any other aspect of your practice.

5. Disagree agreeably.

Lawyers don't always agree, especially when they are on opposite sides of a case. But a disagreement between lawyers shouldn't devolve into a declaration of war. Lawyers should keep in mind that disagreements are inherent in litigation and that each side has a job to do for his or her client. In doing that job it is inevitable that lawyers will disagree on the facts, legal or procedural issues, the credibility of a party or witness, or the value of a case. When the disagreement can't be resolved, accept that the disagreement is a legitimate difference of opinion between two professionals and don't take it as a personal affront.

6. Extend professional courtesies.

"Live by the sword, die by the sword." It's a maxim that applies to litigation and to litigators. The professional lawyer consents to reasonable requests for extensions of time, resets, rescheduling and other routine matters. If such a request won't prejudice your client, there's usually no legitimate reason not to agree to an opponent's request. If you refuse a reasonable request and your opponent takes the matter to the judge and you can't demonstrate prejudice to your client or unreasonableness by your opponent, think about how you'll look to the judge. The time will come when you'll need an extension, reset or rescheduling of a deadline or event. When that time comes, don't expect your opponent to be reasonable toward you if you've refused similar requests from your opponent.

7. Be prepared.

The process of litigating a case and preparing it for trial can be more important than the trial itself. Being prepared is to know the rules of civil procedure and courtroom protocol and to follow those rules. This includes such things as: conducting efficient and focused depositions; knowing cases cited in the briefs to address questions at oral argument; marking your exhibits and preparing an exhibit list before trial; exchanging your exhibits with the opposing counsel before

trial; knowing what is and is not appropriate to mention in your opening statement; knowing how to offer an exhibit into evidence; carefully selecting and preparing jury instructions and understanding the hearsay rule. Professionalism begins with conducting all phases of litigation well and being prepared to enter the courtroom to conduct your business there in a competent manner.

8. Be on time!

Some lawyers have a hard time showing up at a deposition, a hearing or even the trial at the time it is scheduled to be conducted. Most lawyers work at showing up on time and if they can't be there on time, they make an effort to notify their opponent or the court of the reason for their tardiness. But some lawyers have no problem with regularly being 10 or more minutes late for a scheduled appearance and never understand that showing up late for a scheduled proceeding or court appearance exhibits an attitude of disrespect for those who are being made to wait.

9. Be courteous and respectful.

A little courtesy and respect go a long way. You can't belittle or mistreat courthouse staff or opposing counsel without affecting your standing with the judge or the trier of fact. Whether dealing with opposing counsel, a court reporter, courtroom staff or your own co-workers, showing respect toward everyone is often the most effective way to establish the basis for relationships that will serve you and your client well later on. Treating an opponent with respect and professional courtesy typically creates a cordial (if not friendly) dynamic that gives you credibility and influence with your opponent. Ultimately, these characteristics will translate into better results for your client, regardless of whether the case settles or goes to trial.

10. Pay attention to your appearance.

Most lawyers are appropriately dressed and groomed when they participate in a case proceeding and come into the courtroom. Some forget where they are. Professional lawyers present themselves in such a way as to not detract from the presentation of their case.

11. Maintain an appropriate demeanor.

It is unprofessional to overreact in the courtroom to something you don't agree with—especially to a ruling by the judge on an objection. Some lawyers have the unfortunate habit of overreacting to testimony or to a ruling they don't agree with in the courtroom. This tends to undermine a lawyer's effectiveness and credibility in the courtroom. The advice of one judge is to “not take a judge's ruling or decision personally.”

12. Object to the evidence in an appropriate manner.

Trial lawyers should be frugal with their objections. If it is not hurting your case, don't object. Seasoned trial lawyers object infrequently; rookies jump up and down constantly. It is unprofessional and ineffective to be registering constant objections. When an attorney makes an objection to the evidence, the attorney should stand and say “objection,” and in a summary fashion state the basis for the objection, such as “relevance” or “hearsay.” If the court wants the other attorney to respond, the court should so indicate. Lawyers can become sloppy and unprofessional with the objection process. Most judges do not appreciate “speaking objections,” where the attorney ends up giving information to the jury that can't be obtained from a witness.

13. Write as if your reputation depended on it.

During a typical case your written communications will comprise the majority of your contact with the judge, your opponent and your client. In many cases, your written word is often the first contact you will have with each of them. Each time you compose a pleading, brief, letter or e-mail, you shape your professional reputation. With that in mind, don't write anything you wouldn't want to be known for among your peers or you wouldn't want read to a jury. Your written work product should be free of hyperbole, sarcasm, exaggeration, threats and personal attacks. Don't overstate the facts of the case, and be careful to accurately present relevant legal authority. Proofread your written work for grammar, spelling and typographical errors. Remember that each time you write you have the unique opportunity to build your professional reputation among judges, colleagues and clients, so make sure you're creating a reputation you can live with.

14. Avoid ex parte contacts with the court.

Any attempt to gain an advantage over your opponent through an ex parte contact with the court, or the court staff, will poison your reputation with a judge. This includes everything from direct contact with a judge on the merits of the case to supplying information to the court without adequate notice to opposing counsel. For example, it is not appropriate to place a motion or memorandum into the hands of the judge while mailing a copy of the document to opposing counsel, which may arrive at the lawyer's office two or more days later.

15. Don't take unfair advantage of opponents.

While it's part of the litigation process to capitalize on your opponent's mistakes or inexperience, it's not necessary to deliberately embarrass, humiliate, intimidate or bully an inexperienced or less skilled opponent. Experienced lawyers should model appropriate professional behavior to less experienced lawyers. If we model rude and boorish behavior to less experienced lawyers, we will create the kind of lawyers that make practice more stressful and less enjoyable. Engaging in such inappropriate conduct might cause your opponent to work harder than he or she otherwise would, to the ultimate disadvantage of your client—and make you look foolish in the process.

16. Don't do something just because you can.

Justice Potter Stewart once said, "There is a big difference between what you have a right to do and what is right to do." No ethics rule prohibits lawyers from yelling at their opponents or engaging in intimidating behavior, and the ethics rules don't require that lawyers be cordial to one another. On the other hand, think about how you'd like to spend the next 40 years as a practicing lawyer. Do you want to build hostile and acrimonious relationships with lawyers against whom you might be practicing for decades? Probably not. It usually takes very little effort to be cordial to your opponent, and that small investment of goodwill will pay large dividends to you in the years to come.

17. Don't behave differently than you would in front of a judge.

The great bulk of litigation occurs outside the presence of a judge. The rules of professionalism aren't different just because the judge isn't present to watch your every move. If you wouldn't engage in the behavior in front of a judge, then don't do so when the judge isn't around.

18. Don't let your opponent control your behavior.

Some lawyers behave unreasonably or harshly, or are consistently difficult precisely because they want you to lose your objectivity and shift your focus to “getting back” at them. They know that if they can get you to focus on them, then you'll spend less time working up your case. Once they get you thinking about how to get back at them and not about how to build your client's case, they've won. So keep your balance. Your client deserves an objective, diligent advocate—not a hothead bent on vengeance against another lawyer.

19. Don't take yourself too seriously.

A wise practitioner once said, “Take what you do seriously, but not yourself.” Keep in mind that the case is not about you. Many lawyers over-estimate the impact they have in the cases they try in the courtroom. The truth is that the trier of fact focuses on the message (i.e., the facts) and not the messenger unless, through inappropriate conduct, the messenger gives the trier of fact reason to focus on him or her.

The Topic Is Civility *You Got a Problem with That?**

By Robert C. Josefsberg[†]

My topic is civility—you got a problem with that? Unfortunately, the lack of civility in our society and in our profession is not a laughing matter.

We are suffused with embarrassment in this country about the decline of morality and look for reasons in our government, our churches, our economists, our media. But among the most potent reasons must be the failure of many leaders of the legal profession to accept their role as law enforcers—to act as the keepers of their clients' conscience.¹

In a system fixated on winning, civility has become a meaningless issue, discarded, not even debated by whoever is left standing. I am not going to discuss ethics here, nor will I discuss professionalism. Ethical decisions are often made alone—made between you and your conscience. No one ever knows about them. Civility is different: It's how you treat others. A civil and courteous lawyer may, unbeknownst to you, be unethical. And the converse is also true; an ethical lawyer may be very rude, contentious and lacking in civility.

Professionalism is a larger category. It includes civility, ethics, being well prepared and doing pro bono work.

Why do we confuse professionalism, ethics and civility? First, because they often overlap. Second, because even though these three qualities are distinct, there is a tendency for the lawyer to rate similarly in all categories. There is a tendency for linking. I will get back to the issue of linking of traits; suffice it to say that most of the time ethical lawyers are civil and professional. Unfortunately, some lawyers are not ethical, not civil, nor professional. Ethics and professionalism are very important, but the focus in this article is civility.

What is civility? Or, rather what was civility? As *Trial Magazine* in 1991 states, “Whatever happened to civility? If you're under 50 you're probably running for the dictionary.”²

Civility is courtesy, dignity, decency and kindness. It has been defined in the Virginia Bar Association's Creed as follows:

Courtesy is neither a relic of the past nor a sign of less than fully committed advocacy. Courtesy is simply the mechanism by which lawyers can deal with daily conflict without damaging their relationships with their fellow lawyers and their own well-being.³

* From the *Oregon State Bar Bulletin*—January 1999. Reprinted with permission.

[†] Robert C. Josefsberg, an attorney with the Miami, Fla., firm of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, is past dean of the International Academy of Trial Lawyers. This article is based on his annual dean's address in 1996. The article first appeared in the *Florida Bar Journal* (January 1997) and is reprinted with permission of the author.

¹ Sol M. Linowitz, *The Betrayed Profession* at 228.

² 39 *Trial Magazine* 321 (April 1991).

³ The Virginia Bar Association Creed.

Civility is not inconsistent with zealous advocacy. You can be civil while you're aggressive, upset, angry and intimidating; you're just not allowed to be rude. Unfortunately, some lawyers and the public don't understand the differences.

A Colorado lawyer recently explained why he stopped practicing law: "I was tired of the deceit. I was tired of the chicanery. But most of all, I was tired of the misery my job caused other people. Many attorneys believe that 'zealously representing their clients' means pushing all rules of ethics and decency to the limit."⁴

The civility problem is not new. It has a long history:

An attorney was disbarred in 1883 for conduct unbecoming an attorney when he joined a mob to remove a prisoner from jail and hang him from an oak tree in front of the courthouse. In 1884, a lawyer was held in contempt of court for threatening the examiner during a deposition with an open knife and using insulting and indecent language. A year later, a federal court remarked that lawyers entering the "temple of justice" armed with pistols should be found guilty of contempt of court and disbarred. More recent examples of lawyers and incivility include threatening or using physical violence on opposing counsel, personal attacks on opposing counsel instead of legal arguments disparaging jurors, exchanging invectives and displaying contentious, abusive, obstructive, scurrilous and insulting conduct.⁵

We all hear and read a great deal about civility. But we always assume it's "the other lawyers" who are causing the problem and therefore it's the other lawyers, not us, who have the ability to solve the problem. The sad truth is that we, or at least some of us, just might be part of the problem.

Interestingly, the anguish about the current state of affairs is not over the behavior of a few disreputable lawyers who abuse litigation practices in ways that respectable lawyers from white-shoe firms would not. Rather, the concern is that, like Pogo, big-city commercial litigators have met the enemy in themselves—litigators from the great national law firms are now perceived as very much a part of the problem.⁶

Second, even if it's not our fault, or your individual fault, it will become our fault if we sit idly by and let this travesty occur. Every year's new admittees to the bar are movers and shakers; they are the people who can move mountains in the court systems and in society. With all of this talent, with all of this power, if we fail to act, we will be responsible. We will be responsible for the destruction of our noble profession.

The most frightening measure of what the legal professional has lost is that most Americans do not even remember the trust that society once placed in its lawyers. If a new Alexis de Tocqueville came to America today to study its laws and customs, he could never come up with the idea that the lawyers were the country's natural aristocracy. Lawyers blame the law schools, the law schools blame the lawyers, the judges blame the lawyers, the lawyers say the clients (or their sense

⁴ Sam Benson, *Why I Quit Practicing Law*, Newsweek, Nov. 4, 1991, at 10.

⁵ Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 46 SMU L. Rev. 199,206 (Jan./Feb. 1994).

⁶ Ronald Gilson and Robert Mnookin, 94 Colum. L. Rev. 509,511 (March 1994); *Disputing Through Agents: Cooperation Between Lawyers in Litigation*, 8 Fed. B. News & J. (June 1992).

that they must go the limit for their clients) made them do it. Others blame the culture: It's a jungle out there; ethical standards are down wherever you look. Wall Street brokers who hold themselves out as agents trade for their own account to their client's disadvantage. Even the clergy seem more prone to scandal than they used to be. Why single out lawyers for the loss of ethical fiber at a time when ethical decline is so widespread? Because lawyers are supposed to be the custodians of a community's legal and ethical sense.⁷

It makes no difference that it is a societal ill, that it's not unique to our profession, that everyone is rude. There's rudeness in kindergarten. Everything has changed. If you went to a tennis match 30 years ago, there was dead silence and absolute civility by the participants and the spectators. Chris Everett and Arthur Ashe and the audience behaved perfectly. Have you been to a match recently? It's a jungle out there. Likewise, the practice of law has been described as hockey while wearing suits.

What can we do about this? What can we do about incivility? It's time to stop merely defining the problem and blaming others. I want to discuss with you how we, not the others, not the judges, not the law schools, not the bad lawyers—but how we, you and I, can help solve the problem.

I suggest that there are nine ways that you can improve the environment of civility and if you will do any one, or a few of these, we can start to turn the tide.

1. LAW SCHOOLS

Stop merely (and uselessly) blaming them. Change the law schools. Go to your friendly deans and professors and persuade them, pressure them, bribe them with strings on your gifts and bequests. Tell them not just to teach advocacy, but to teach civility, and while they're at it, have them practice what they preach. A Federal Bar Association study panel concluded:

[T]hat the law school experience plays a large role in fostering an atmosphere that promotes a lack of civility. On this score, the panel noted that the competitive nature of the law school experience, in which class standing and grades are all-important when it comes to landing a good job upon graduation, often influences the young lawyer's approach to practice. Moreover, the Socratic Method employed in legal education often results in the disparagement of the student by the professor. This has the unfortunate consequence of motivating the young law graduate to engage in interpersonal relations that may be aimed at disparaging others.⁸

Get the law schools to make some changes.

2. JUDGES

Again, don't just blame them; work with them, change them and educate them. There are two ways that judges affect civility. First, they are role models. Unfortunately, some judges are rude—not nearly as many as rude lawyers, but there are some judges who are rude to lawyers, witnesses, jurists and everyone else. Don't cover for them. Tell them that you will not accept their incivility. Don't let an Emperor's Clothes mentality permit you to tolerate rude behavior by judges. Everyone around a rude judge becomes rude in court and out of court. “[C]ourts are respected if

⁷ Linowitz, *supra* note 1, at 208.

⁸ 39 Fed. Bar News & J. 302 (June 1992).

they are respectable. Society allocates decisional authority and its functions to the authorities that it accepts. Etiquette is a bridge to acceptance.”⁹

The second way in which judges can affect us is by enforcing the rules and aspirations of the bar. Let that wonderful, tolerant, decent judge know that you want him or her to be tough and intolerant of rudeness. He or she must exercise a greater degree of judicial control and leadership.

The profession’s success in reorienting itself to the principles of etiquette and decorum depends not only upon individual observance of those principles, but also upon each judge’s commitment to upholding, as an exercise of judicial authority, the principles articulated in lawyers’ codes. A judge’s failure to insist upon compliance with the letter and spirit of the behavioral standards governing litigation erodes society’s respect for, and confidence in, the law.¹⁰

3. BE A ROLE MODEL

Don’t just talk about it, live it. Be a role model. Be civil. Don’t compromise our integrity by stooping to the dirty tactics of your opponent. Don’t become one of “them.” As a successful leader of the bar, you already are a role model, whether you like it or not. You’re in a unique situation; young lawyers are watching you. As President Lincoln advised: “As a peacemaker, the lawyer has a superior opportunity of being a good man.” If you want to eliminate rudeness, be gentle. And while you are engaged in this task of being a role model, you are fulfilling a prerequisite of another role—being a mentor. It’s rough to be a mentor if you often challenge your opponent to fist fights. Being a mentor and being a role model go together. The influence that we have on the young members of the bar is immeasurable.

4. MENTOR

This is the most important thing you can do. And it has wonderful effects. Teach. Preach. Be a mentor. At a panel discussion in 1990, a former practicing lawyer, who became dean of Notre Dame Law School, told the panel:

When I graduated from law school twenty-nine years ago, people learned to practice law at the feet of a master. Lawyers would take you under their wing, either within your firm or, in my case, at a government agency and later at a law firm. Even if you went into sole practice, there was someone in town to mentor to you and teach the practice of law. Inevitably, what also was taught was professionalism. . . . Somewhere along the line in the last thirty years, however, lawyering became more expensive. Overhead skyrocketed, reflecting huge increases in the costs of associates’ salaries and training, office space, libraries, computers and so on. Efficiency became a priority, and the mentoring system broke down. The seniors were pressured to increase their billable hours and could no longer afford to spend time with the young people coming in. In the meantime, no one was teaching practice or, incidentally, professionalism. . . .¹¹

There are three stages in your professional life: You learn, you do, you pay back. You should role model in your firm, or outside your firm. Pick one or more young lawyers and start

⁹ Catherine Theresa Clarke, *Missed Manners in Courtroom Decorum*, 50 Md. L. Rev. 945,962 (Summer 1991).

¹⁰ Nov. 1995, New York Bar Association, Committee on the Profession.

¹¹ Linowitz, *supra* note 1, at 128.

teaching them or showing them, not just evidence and advocacy, but civility. It may be time-consuming, but it's worthwhile. Think about the legends who mentored you; realize how warmly you feel when you think about them. It would be nice to give someone else the privilege of feeling that way about you.

Think real hard before you select the person or persons that you want to be your protege. The normal tendency is to select someone like yourself, someone from your background, someone who went to the same or similar school, someone who plays the same sports, someone who can carry you as a golf or tennis partner. That person, it is clear, is wonderful, just like you. But I'd like you to reconsider. That person needs you, but there are others who need you even more. Others who are different than you are.

5. LISTEN TO YOUR CONSCIENCE

When there are disagreements between your conscience and your client, always obey your conscience. Remember that the conflict is between the clients, not the lawyers. You, and only you, not your clients, are responsible for your behavior.

As the competition for clients grows even keener . . . the more willing some members of the profession are to rise, or actually fall, to the client's expectation of appropriate professional behavior. In other words, in many cases it is simply a fear that we will lose our clients if we are not as ruthless and hostile as they expect that causes us to resort to extreme.¹²

Lowering ourselves to our clients' expectation has achieved new highs, or lows.

In Coconut Grove, a suburb of Miami, a lawyer last year took out a \$5,400 billboard ad which said "We Kick Butt." It shows a lawyer in a suit with a briefcase in his hand booting someone's backside. When interviewed by the media, the lawyer explained what he believed clients really want: "They're not looking for a guy who coaches Little League. They don't want a wimp. They want a lawyer who means business, an animal who's going to get the job done, whatever it takes, as long as it's legal. I'm an honest lawyer. I just don't take crap."¹³

Do you realize how appalling this is? Is there anyone here who considers himself "an animal"? Who would be proud of being described as "an animal"? I guarantee you that most of the great advocates in this country have coached Little League.

6. SOCIALIZE

One of our problems is that the bar is getting too large and we don't know each other. That has materially added to the civility problem. It seems that the civility problem is always caused by the "out of town" or "the other guy."

As the size of the bar increases, the more likely it is that a lawyer will never meet up with any given adversary in a second case. Without the fear of running into the same person twice, the fear of retaliation—of being subjected to the same type of offensive conduct that you are giving out—is eliminated. And with it, a major incentive for being civil and professional is gone. That's a sad commentary, but there is a certain truth to it.

¹² Louis P. DiLorenzo, *Civility and Professionalism*, 68 N.Y. St. B.J. 10 (Jan. 1996).

¹³ The Miami Herald, April 5, 1995, at 2B.

Another explanation, which really consists of several combined into one, is what I call the decline in socialization among members of the bar. Attorneys no longer spend the social time with another that they used to.¹⁴

The *Federal Bar journal* reports:

In the Seventh Circuit's urban courtrooms, trial lawyers no longer appear frequently against the same opponent or before the same judge, thereby reducing opportunities for building mutual respect and learning the ethics of an honored profession from seasoned hands. Today's metropolitan lawyer may deal with a particular lawyer, law firm, or judge only once in his or her career. Thus, the incentive to retain cordial relationships often dies because the relationship is not likely to become an on-going one.¹⁵

Socialize and tell everyone in your firm to socialize. Go to bar luncheons, committee meetings, judicial receptions and the like. Make the bar a kinder group by knowing each other. It boils down to one simple concept—it's easier to be nasty to a stranger than to a friend.

7. SPREAD THE WORD

Brand bad lawyers. Gossip. And if the bar is too large, and we do not have a sufficient degree of social and professional interchange, you have to spread the word as to who the bad lawyers are. Make hit lists. Warn your friends. Tell your friends who to watch out for. Don't tolerate the Rambos—brand them! "If we as a profession tolerate such an incivility attitude among some of our practitioners, we cannot expect greater respect from the public."¹⁶

8. ORGANIZATIONS

Join organizations that foster and teach civility. There are many of them in your community. I specifically refer you to the Inns of Court. Membership in the Inns of Court is a great opportunity to teach without the responsibilities of direct mentoring. You can reach 15 or 20 young lawyers in your community by working at the Inns of Court or any similar organizations.

9. WIN

Last, and hopefully not too difficult for all of you, be civil and win. Show them that civility and professionalism and success are not mutually exclusive concepts. Actually, they are linked. Civil lawyers are winners. "The lesson here is that there is a Gresham's Law in litigation. Bad tactics that work drive out honorable tactics that work. The only solution for the legal system is to try to see to it that bad tactics don't work."¹⁷

Show everyone that civility is the trademark of a winner. Every time that you make uncivil lawyers lose, you score a big victory for civility. Every time an abrasive, abusive, hostile, harassing, combative, discourteous, hardball, win-at-all costs, take no prisoners, scorched earth, Rambo lawyers loses, it's a great day for civility. So if you don't have the drive or the ego to win for your client and for yourself, do it for the cause. Winning, and winning the right way, is a great motivation for others to be civil.

¹⁴ DiLorenzo, *supra* note 12, at 9.

¹⁵ Hon. Marvin Aspen, 39 Fed B. News & J. 304 (June 1992).

¹⁶ Frhm. T. Rev. 949, 952, Justice Warren Berger (March 1995).

¹⁷ Vincent Cox, Letter to the Editor, ABA J. (Jan. 1996).

CONCLUSION

If we follow some or all of these nine ideas, or any others that you have, what will be the result? It will be a nicer profession for our firms, our friends, our children and our grandchildren. Just as important, it will be nicer for us. If you spend a lot of your time being abused and harassed by Rambos, it sucks the joy out of practicing law.

The problem with incivility in the legal profession is a love disorder, not a result of working too many hours. Listen to some of the other symptoms that are clustered nearby: the sense that loyalty is eroding within firms; the growth of a sick individuality that says we have to look out for number one because there is no security in relationships; a lingering feeling of emptiness despite material success; the breakup of long-standing partnerships. All of these things have to do with what Sam Keen calls “a deficiency of passions.” So, what to do? Obviously a code of civility cannot rekindle our capacities to love. Rather, we turn to our symptoms for guidance. Incivility itself is pointing the way by directing us to citizenship and householding. The legal profession is suffering from a lack of oxygen; it needs air to fuel the combustion hidden in its heart. The outward move of reconnecting ourselves with the world can provide this missing component. Societal concerns, family affairs, matters of the heart—these are the places to turn. We can’t expect to do it all at once. Little things work best, like listening to a spouse, or calling up a friend just to say hello or spending some time with our dreams.¹⁸

Or, if I may add, coaching Little League.

¹⁸ Benjamin Sells, Stresslines, *The Fla. B. News*, Aug. 15, 1994.

Rules for Making Oneself a Disagreeable Companion

Benjamin Franklin

Printed in *The Pennsylvania Gazette*, November 15, 1750.

RULES, by the Observation of which, a Man of Wit and Learning may nevertheless make himself a *disagreeable* Companion.

Your Business is to *shine*; therefore you must by all means prevent the shining of others, for their Brightness may make yours the less distinguish'd. To this End,

1. If possible engross the whole Discourse; and when other Matter fails, talk much of yourself, your Education, your Knowledge, your Circumstances, your Successes in Business, your Victories in Disputes, your own wise Sayings and Observations on particular Occasions, &c. &c. &c.

2. If when you are out of Breath, one of the Company should seize the Opportunity of saying something; watch his Words, and, if possible, find somewhat either in his Sentiment or Expression, immediately to contradict and raise a Dispute upon. Rather than fail, criticise even his Grammar.

3. If another should be saying an indisputably good Thing; either give no Attention to it; or interrupt him; or draw away the Attention of others; or, if you can guess what he would be at, be quick and say it before him; or, if he gets it said, and you perceive the Company pleas'd with it, own it to be a good Thing, and withal remark that it had been said by Bacon, Locke, Bayle, or some other eminent Writer: thus you deprive him of the Reputation he might have gain'd by it, and gain some yourself, as you hereby show your great Reading and Memory.

4. When modest Men have been thus treated by you a few times, they will chuse ever after to be silent in your Company; then you may shine on without Fear of a Rival; rallying them at the same time for their Dullness, which will be to you a new Fund of Wit.

Thus you will be sure to please *yourself*. The polite Man aims at pleasing *others*, but you shall go beyond him even in that. A Man can be present only in one Company, but may at the same time be absent in twenty. He can please only where he *is*, you wherever you are *not*.

