

CABA Journal
August, 1998

Cover Story/Professionalism

***66 PROFESSIONAL ATTITUDE**

A U.S. District Court Judge in Philadelphia Says Civility Matters for Lawyers (and That Includes Judges), Both as Professionals and as Citizens

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When a congressman achieves national celebrity by calling the president of the United States a “scumbag,” we have reason to know that we live in uncivil times. Uncivil times are the best of times to discuss **civility**.

A good point of departure is the address on “Law and Belief” that Justice Anthony Kennedy delivered at the American Bar Association's 1997 Annual Meeting. The occasion for the address was the bestowal of the ABA Medal on Justice Sandra Day O'Connor, Justice Kennedy's “close friend and splendid colleague.” Justice Kennedy's address was keyed to Justice O'Connor's “abiding belief in the law.”

Justice Kennedy's thesis was that, paralleling and protecting the written Constitution, is “the constitution with a small ‘c’”—the unwritten constitution that “comprises the whole condition of our society, with all the conventions, customs and beliefs that are the distinguishing mark of a free people.”

Undergirding that “other constitution” are certain principles that command our shared allegiance “if the formal Constitution and its rule of law are to be secure.”

Justice Kennedy discussed three of those undergirding principles:

- Responsibility of the individual. “Individual freedom presupposes individual responsibility.”
- Rationality. “The idea of rationality is that a group of citizens united in law can examine a problem with adequate information and come to a reasoned, common conclusion.”
- **Civility**. The justice said that **civility** “is related to rationality,” but it has independent and crucially important resonance:

“It is not some bumper-sticker slogan, ‘Have you hugged your adversary today?’ **Civility** is the mark of an ac-

complished and superb professional, but it is even more than this. It is an end in itself. **Civility** has deep roots in the idea of respect for the individual.

“We are **civil** to each other because we respect one another's human aspirations and equal standing in a democratic society. We must restore **civility** to every part of our legal system and public discourse. **Civility** defines our common cause in advancing the rule of law. Our honest and decent citizens must be persuaded to devote themselves to public life, but they will be reluctant to do so if our discourse is not marked by civility.”

Inspiring Belief in the Law

It is evident that Justice Kennedy was speaking to the members of the association in their dual roles-as lawyers and as citizens: “Despite our historic strength and prestige, the profession and the nation face a difficult and most urgent task. Each of us in this assembly today must feel its weight. Our task is no less than to reaffirm and reassert our country's belief in the law.”

The lawyer-whether practitioner, government official, professor or judge-who tramples on civility undercuts belief in the law.

*67 The litigator need not hug an adversary. But to treat an adversary with advertent discourtesy-let alone with calumny or derision-is a form of incivility that rends the fabric of the law.

The same damage is done when a litigator, discomfited by a court's ruling, charges the court not simply with legal error-an expectable and not inappropriate reaction, and one that can be spelled out in the petition for rehearing or the brief on appeal-but with malignity. (See also “It Didn't Please the Court,” *ABA Journal*, May 1998, page 20.) Whether or not sanction-able, a verbal assault of this kind is not only counter to client interest; it corrodes the judicial process.

Indeed, when an attorney irresponsibly attacking a judge is one who exercises-and appears to be giving voice to-weighty political authority (a district attorney, a senator or even a president), there is an added dimension of impropriety, namely the potential such an attack has for subverting judicial independence. (See also Stephen B. Bright, “[Political Attacks on the Judiciary](#),” 72 *N.Y.U. L. Rev.* 308 (1997).)

When, for whatever reason, an attorney unwarrantably impugns a judge's probity or good faith, the breach of **civility** is deplorable. When the reverse happens-and, most emphatically, when the target of a judge's unjustified polemic is a lawyer practicing in the judge's court-the harm to **civility** may be even more serious. This for the reason that the judge, speaking from a privileged sanctuary, is acting the bully and dishonoring the robe.

(So, too, with the appellate court that uses the vehicle of a published opinion to speak dismissively of the temperament or the work product of a judge farther down in the judicial hierarchy. When appellate judges use caustic aspersions to ornament their disagreements with each other, the bullying ingredient is absent but the wound to civility is nonetheless real.)

Both the despot judge and the zealot attorney need remind themselves that all members of the bar are engaged in a common enterprise-that it is our joint obligation, and joint privilege, to see to the better working of the legal order.

It is no longer the case, as it was in lawyer Lincoln's day, that judge and counsel ride circuit together. But the essence of that camaraderie remains.

An old-fashioned, but nonetheless meaningful, expression of that camaraderie is the long-standing practice of the judges of the 4th U.S. Circuit Court of Appeals based in Richmond, Va., who come down from the bench after oral argument to shake hands with counsel.

*68 That quaint ritual of civility may be seen as continuing reaffirmation by the bench of what, 85 years ago, a New York lawyer named Benjamin Cardozo said to his colleagues at the bar on being sworn in as a state court judge: "I will do the best I can in the performance of the common task in which we are all engaged-the great and sacred task-the administration of justice."

Summoning Us to Advance the Nation's Purposes

Discourtesies that sully the brotherhood and sisterhood of the bar are a significant aspect of the incivility Justice Kennedy has warned us against. But the justice plainly had more than professional good manners in mind. "Our profession and our law are mirrors of America. The profession is a mirror of the nation's heritage, its present condition, and its destiny," the justice said.

In these words, and in his injunction to the American legal community to "reaffirm and reassert our country's belief in the law," Justice Kennedy has summoned us to recognize-and accept present responsibility for exercising-the paramount role of lawyers in defining and advancing the nation's purposes.

The justice's summons is a compelling one. It asks us to understand that ensuring the integrity of the legal framework of a free society is no less important today than it was in 1776 or 1787 or 1865.

In these closing years of the 20th century, too many American lawyers have lost a sense of connection with George Wythe and Thomas Jefferson and James Wilson, with James Madison and Alexander Hamilton and John Jay -and even with Lincoln.

At a time when lawyers are leaving the profession in record numbers, and when lawyer-bashing is standard fare, it is increasingly hard to credit the notion that there was a time in our history when, as Alexis de Tocqueville observed in 1835, "the lawyers form[ed] the only enlightened class whom the people do not mistrust."

Because of the high esteem in which they were held, the lawyers were "naturally called upon to occupy most of the public stations," de Tocqueville said in *Democracy in America*.

It seems improbable that at any foreseeable time in the future lawyers will again occupy a position of esteem comparable with that described by de Tocqueville.

In the Jacksonian America that was de Tocqueville's laboratory, governmental constraints on ordinary life were (as contrasted with today) relatively infrequent and unobtrusive.

Such modest governing as went on was chiefly at the level of the state, county or town. The federal government was remote-personified principally by village postmasters, such as the youthful, pre-lawyer Lincoln. In an environment of that sort, it was possible for lawyers to be seen more as facilitators than as interferers. Today's law-at every level-is, necessarily, too intricate and too pervasive to permit lawyers, qua lawyers, to win many popularity contests.

The challenges the American community confronts today may not have the drama of declaring independence or writing a constitution or deciding what measures are called for to bind up the nation's wounds after a civil war.

But today's challenges-nurturing democracy and strengthening political and economic stability abroad; and,

domestically, managing the economy to promote the general welfare; enhancing the nation's public health and safety; renewing our schools; preserving the environment; and, above all, actually realizing America's linked goals of equality and freedom-are no less deserving of the dedicated efforts of every American, including lawyers.

And lawyers have special skills-of problem-solving, and of consensus-building-to bring to these tasks.

Problem-solving and consensus-building are exercises in **civility**-steps in the creation of the *civitas*, the **civil** state of our ideals. In recent years we seem to have taken fewer such steps. Apparently preferring division to community, we shy away from joint purpose.

We have permitted-perhaps even encouraged-the deflation of the authority of the great political parties; indeed, many of us routinely don't bother to vote. We have increasingly channeled our political energies into the formation of constituencies of narrow definition-whether economic, sectarian, ethnic, generational, ideological or other-clamorously laying claim to exclusive dominion over the high moral ground. And in looking down from this high ground we tend to view rival constituencies not as competing interests that may also have legitimate claims but as enemies to be extirpated.

Building a Civil State

It is high time for us to bend our energies anew to the more difficult task-the necessary and proper task-of building the **civil** state adumbrated in the Declaration of Independence and the Constitution.

We may look for guidance to another lawyer named Kennedy. The guidance is to be found in a speech Robert Kennedy made in Cleveland 30 years ago-on April 5, 1968. It was the day after Martin Luther King Jr. was killed. Two months and one day after Robert Kennedy spoke these words, he, too, was dead:

“The question is not what programs we should seek to enact. The question is whether we can find in our own midst and in our own hearts a leadership of humane purpose. ...

“Surely this bond of common faith, this bond of common goal, can begin to teach us something. Surely we can learn, at least, to look at those around us as fellow men, and surely we can begin to work a little harder to bind up the wounds among us and to become in our own hearts brothers and countrymen once again.”

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