

Honest Lawyers Make Good Lawyers

Thoughts on Ethics and Civility in the Legal Profession

by Justice Richard D. Fybel

EDITOR'S NOTE: This article is based on a speech given by Justice Fybel at the Utah State Bar's Annual Meeting in Newport Beach, California this past July.

I am pleased to offer my thoughts on the subject of civility and ethics in the practice of law. I've been a member of our profession for over 35 years, the first 29 as a lawyer practicing civil business litigation and the last six years as a trial and appellate judge.

In reading briefs and listening to oral argument, I admire the lawyers who discovered and marshalled the facts and then present them in a logical way. I recognize the analysis lawyers engage in as you evaluate your clients' claims and defenses. I recall the business, management and human resource aspects of practicing law. I appreciate the pressures of getting and keeping clients. I know you must vigorously represent your clients' interests with the other side and with the courts in our adversarial system. I know you must maintain integrity and even good temperament in the face of the many challenges you see in your practices on a regular basis. I recognize the competing demands on your precious time – from serving clients to actually going home to spend time with your family. So it is in the context of the real world of legal practice that I address the subject of ethics and courtesy in the legal profession.

The best place to start a discussion of legal ethics is with reference to Abraham Lincoln – whom I so admire as a lawyer, presidential candidate and President. Most know the lore of Lincoln riding the circuit as a lawyer and trying cases for the railroads and a mix of other clients. Lincoln was also an extraordinary appellate lawyer and, by 1850, he was the attorney of record in six cases before the United States Supreme Court. He was an expert on the Constitution. Lincoln used legal analysis of the Constitution in campaign speeches, most notably in his famous speech at Cooper Union in New York City in his effort to win his party's nomination for President. As President, Lincoln wrote the Emancipation Proclamation in what we would now call “legalese” – all to make the point that his actions were authorized by the Constitution. Of course, he also wrote eloquently in the Gettysburg Address and his Second Inaugural.

Lincoln's talents as a lawyer did not stop with his abilities to write, speak and analyze. He was called “Honest Abe” for a reason – it's how he practiced law and conducted his life. In

1850, Lincoln was asked to address a group of new law school graduates and give them advice as they were embarking on careers as lawyers. What did he advise? He said: “[R]esolve to be honest at all events.” (Frank, *Lincoln as a Lawyer* (1961) p. 4.) So, as we talk about civility and ethics in the practice of law, we should recognize that Lincoln formulated the core principle of ethical conduct by lawyers over 150 years ago.

Standards of Professionalism and Civility

In 2003, the Utah Supreme Court approved your state's Standards of Professionalism and Civility. These Standards are in addition to disciplinary codes already in place for members of the Bar. The Standards address issues of “personal courtesy and professional integrity.” These kinds of standards have been traced to Chief Justice Warren Burger's 1984 speech to the ABA criticizing what he perceived 22 years ago as a general decline in professionalism among lawyers. The Standards give excellent, concrete examples of ethics and civility in the context of working within our system of justice, whether in connection with court proceedings or the negotiation of a transaction.

The Utah Standards set forth Utah Supreme Court's expectations for the commitments lawyers must make and abide by in the practice of law. The court defined “civility” as personal courtesy and “professional integrity” in terms of ethics, adherence to agreements, and honesty to each other and the courts. I'm sure each of you has read these Standards and I encourage you to do so again.

Practical Reasons Support Adherence to Ethics

A skeptical lawyer – used to challenging pretty much everything – might say: Sure, I agree with these Standards of Professionalism and Civility and with similar standards promulgated in many other jurisdictions in the country. I even agree that in general if

JUSTICE RICHARD D. FYBEL is an Associate Justice of the California Court of Appeal, District Four, Division Three (Santa Ana); Chair, California Supreme Court Advisory Committee on the Code of Judicial Ethics. At Morrison & Foerster, he was Managing Partner of the Los Angeles office for five years and in firmwide management for three years.



we all followed these Standards, were nicer to each other, our public reputation as professionals would be better and other lawyers might even like me more.

But, our skeptical lawyer asks, why is it in my client's interest and in my interest to abide by these Standards of Professionalism and Civility? Of course, what's best for your client and for you is very much intertwined. Here are some practical reasons why abiding by the Standards is in the lawyer's and the client's interests:

1. Your reputation and, hence, your credibility with other lawyers, courts, administrative agencies and others you deal with will be enhanced. Your reputation affects not just the communications in one case or matter, but all those cases and transactions that follow. Reputable conduct by lawyers as a whole should lead to a better reputation of, and respect for, lawyers in the public mind. The risk of loss of respect has a sort of dead-end street quality to it: It's hard (if not impossible) to overcome a negative reputation. In my speech to Bar admittees in California, I stress the importance of adhering to ethical standards from the first moment of membership in the Bar.

2. Honoring the Standards makes you feel better about yourself and the legal profession – and costs you nothing. Having a courteous and professional relationship with your adversaries actually makes practicing law a more rewarding experience. Getting along with adversaries and establishing a basis of trust between lawyers is nothing new. Over 400 years ago, in *The Taming of the Shrew*, Shakespeare wrote: "And do as adversaries do in law, Strive mightily, but eat and drink as friends." (*The Taming of the Shrew*, act I, scene 2, as referenced in Kempf, Jr., & LaGreca, *Lawyer Civility in the Movies: The Bard of Avon Got It Right* (July/Aug. 2003) *THE BENCHER*.)

But, lawyers ask, what do clients want? In my experience, they generally want to know the following:

1. What is your expertise and experience in the subject matter of the engagement? Are you smart? Are you current on the law? How many similar transactions or cases have you handled? Can you write and speak in a persuasive, coherent way?
2. Will the officers, the members of the Board of Directors or Trustees, the general counsel or lead in-house lawyer, and the owners of the business approve of your hiring? Are you a credible hire? What can I tell them about you that will satisfy their interest in getting outstanding representation? Will they trust you? These questions – and the answers to them – are particularly important today with the welcomed attention to and emphasis on issues of ethical corporate governance.
3. Can I work with you and rely on your opinion? Are you responsive? Can I rely on what you say about the law and the status and proposed strategy for a case (e.g., are you too optimistic, too

pessimistic)? Can others work with you? In the business world, are you a deal-breaker (i.e., a lawyer who will always find a problem, but not a solution)?

4. Will you be honest with me in all respects, including in the evaluation of my predicament? Will you tell me that we have a weak argument and warn me if I start going down the wrong path? Will you propose thoughtful alternatives? Hopefully, you won't have to go to the extreme of actor José Ferrer in the movie *The Caine Mutiny*, who looked at his client and said: "I don't want to upset you too much, but at the moment you have an excellent chance of being hanged." (Kempf, Jr., & LaGreca, *Lawyer Civility in the Movies: The Bard of Avon Got It Right, supra*, *THE BENCHER*.)

5. Do you have good judgment? Do you reach decisions in a logical, reasonable way? Do you make snap judgments? Do you have a temper?

6. What is your experience with the courts? Do you know members of the judiciary? Are you a member of groups that meet with judges? Are you active in the community and the Bar associations? Whom can I call for a reference check? Especially in a close community, people do know you, or of you; they certainly can find out readily.

Some may challenge: these explanations are nice, but I want to get new business now and clients really like tough-guy and tough-gal lawyers. You know, the junkyard dog who attacks, salivates and then attacks some more. Why shouldn't I be the toughest, nastiest representative out there? Who cares about expertise and ethics anyway? I believe this kind of attitude is based on demonstrably false premises.

I do not think of myself as a Pollyanna. I look at these issues with open eyes. Here are my responses to these concerns:

1. I challenge the underlying assumptions that (a) the mean, unethical lawyer wins; and (b) they are better lawyers because of that kind of behavior. I have known lawyers who fit this description and opposed a few of them in my career. I remember them vividly. Quite simply, they don't usually win. Why? Because judges, the other side in transactions, their own colleagues, and others (sometimes their own clients after a while) don't want to work with them and simply don't rely on their judgment and representations. The unethical lawyer is not trustworthy and is not trusted. The ethical lawyer will establish a reputation among judges and his or her representations will be relied upon.

The Rambo, ethically-challenged lawyers are not better lawyers and do not achieve better results for their clients. Persuasion is the lawyer's art and skill. Lawyers need to persuade someone – the other side, a court, or an agency, or their own client. People are not persuaded by obnoxious or unethical tactics. Intimidation is overrated as a litigation tool. It does not work in the widest

range of my experience – from business cases to criminal pleas and trials. Indeed, the success of daily operation of the criminal courts is in large part based on the credibility established between the courts, the prosecutors, the public defenders and the criminal defense bar. It may make for good TV from time to time, but in real life, over time, persuasion by use of reason and appeal to self-interest works best.

2. There are real practical and economic benefits to following ethical professional standards.

- The most obvious benefits are the long-run maintenance and growth of existing clients and expansion of clients by referrals from existing and former clients.
- The junkyard-dog lawyer tends to get hired on a one-shot deal. It's generally unpleasant for a client to work with such a lawyer – even if he or she is yours.
- Important retentions can come from former opposing counsel or parties. This phenomenon surprised – and ultimately pleased – me. The best long-term client – a large regional bank – and the biggest matter – special litigation counsel in the then largest bankruptcy litigation proceeding in the U.S. – both were referred to me by lawyers who used to be on the opposing side in another matter.

3. There is a benefit to you in belonging to a profession that is respected by the public. You can be proud. You won't be the butt of lawyer jokes. Besides, it costs nothing to be nice. It surely is not a sign of weakness. On a much grander and more serious scale, we can be reminded of a quote by Sir Winston Churchill. He was "[c]riticized for using diplomatic language in a message to the Axis powers during World War II." Churchill replied: "But after all when you have to kill a man it costs nothing to be polite." (Brenneman, Jr., *Blueprint for Civility* (July/Aug. 2003) THE BENCHER, quoting Stein, *Civility as an Art Form in Diplomacy and the Law* (1999) COSMOS JOURNAL.) It's always good to have a Churchill quote to put litigation as war in perspective.

My Legal Heroes and Heroines

In looking back over the last 35 years, I have legal heroes whom I was fortunate to practice law with. You do too, or hopefully will in the future. None of these lawyers I wish to highlight would ever be confused with a junkyard dog or a wimp. They serve as shining examples of what lawyers who practice with courtesy and professional integrity can and do accomplish. All were or are widely respected and admired. Here are my legal heroes and heroines:

1. The late Federal District Court Judge Laughlin E. Waters. Lach was the name, senior partner in the law firm of Nossaman, Waters, Scott, Krueger & Riordan, where I started as a summer associate and then worked as an associate and partner for 10


years before joining Morrison & Foerster. Before entering civil practice, he was the U.S. Attorney for Southern California and after he left practice, he was a federal district court judge. As a brand new lawyer, I tried a six-week jury trial case as Lach's second chair. By the time Lach left the practice to join the bench, I would have run through a wall for him. He taught great trial skills by example – jurors loved and trusted him. But more than his skills, he demonstrated human decency, fairness, tolerance, ethics and good cheer in the practice of law. Lach was so modest that it wasn't until a few years before his death, he finally told me the story of his WWII heroics – they were so impressive that there is a statue of Captain Waters in the French town he and soldiers under his command liberated, and he is mentioned by name in Stephen Ambrose's book *Citizen Soldier*. In his farewell address as U.S. Attorney, he said, "For the law, whether civil or criminal, must be administered with firmness and fairness, with compassion and conscience, and the guidelines are not always well marked."

2. Shirley Hufstedler, the first U.S. Secretary of Education, and before that a judge on the Ninth Circuit Court of Appeals and justice on the California Court of Appeal. I had the honor of working with Shirley and her husband Seth – also a fabulous lawyer and person – during my last five years at Morrison & Foerster. Shirley has had a long, illustrious and successful legal career. She has won every award, medal and prize the legal

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profession and the judiciary can bestow for her dedicated public service and excellence in the practice. She continues to work tirelessly in foundation work encouraging innovation in business and on a national commission constructively addressing immigration issues and recognizing the contributions by immigrants in our Nation's history. As a first-generation American, I especially admire her efforts for this cause. Shirley is, quite simply, the best legal mind I ever observed. She is a spectacular writer and she grasps, analyzes and clearly explains complicated issues. Shirley is wonderful to work with: ethical, funny, and still a real challenge to keep up with in both energy and intellect.

3. The late Robert “Bob” Raven. Bob was also a WWII war hero, as a tailgunner. Bob was the chairman for many years of the modern-day Morrison & Foerster. He was an exceptional leader with great vision and common sense. He was always recognized as the person any group wanted to lead it. Bob was the President of both the State Bar of California and the American Bar Association. He was a pioneer for the advancement of women and minorities in the legal profession. As ABA President, in testimony before Congress and in strenuous lobbying efforts, he literally saved the funding for legal services for the poor in this country. Throughout, Bob was ethical and, yes, a genuinely nice man with a ready smile and an unwavering sense of morality.

4. Law Firm Leaders, Lawyers and Mentees. I was also fortunate to practice law with many extraordinary leaders and lawyers, including my mentor Richard Mainland, Charles S. Vogel, Haley Fromholz, Dean Zipser, and former Morrison & Foerster chairmen Carl Leonard and Peter Pfister. Their success was founded on excellence and decency in law firm management and the practice of law. My fondest memories of practicing law were serving as a mentor to new attorneys. I learned many lessons from these women and men and still follow their successes.

What Can You Do?

What can you do to help others and feel better about your profession? Here are a few modest suggestions for you to add value to the profession:

- Help newer lawyers as mentors. Advice and perspective are vitally important. Behavior to emulate is even more important.
- Join an Inn of Court or similar organization to educate newer lawyers. I am an active member of the Ferguson-American Inn of Court in Orange County. The Inn experience has been rewarding to me and the other members. I know that Utah was in the forefront of establishing Inns of Court.
- Donate time to Legal Aid or other legal services for the poor, and to charities.
- Teach a continuing legal education class on substantive issues to other lawyers.

- Become an active member of a state, local, or federal bar association.

Principled Reasons to Adhere to Ethical Standards

I have made many practical suggestions about how lawyers, their clients and the profession benefit from civility and ethics among lawyers. I wish to conclude by making four points of principle on the subject of lawyer civility and ethics:

First, in every other profession, we ask about expertise, good service and personal ability to instill confidence and respect. Would we ever want a surgeon or internist because he or she is mean or unethical? Do we want to hire a car mechanic or insurance agent or real estate broker because he or she is tough to be around or would lie to us? The idea that a discourteous, unethical lawyer is a good thing to be or aspire to be makes no sense to me and is contrary to common sense and our own life experiences in every other area.

Second, the audience – in this instance, the Utah state judiciary – has told the players – i.e., the lawyers – what behavior they expect to see and what behavior they don't want to see. Why not follow their advice and orders? Some say, well, judges don't like these contests of “he or she said – no he or she didn't” and “who-started-this-stupid-letter/e-mail-writing campaign-of-insults anyway?” I believe that eventually the truth comes out. Lawyers need to work with the trial judges to sort out these disputes. Judges need to be sensitive and responsive to the frustrations lawyers feel about being the brunt of discourteous behavior by some lawyers.

Third, when Lincoln was faced with the most significant issue of his era – slavery – and many logical and constitutional arguments were unavailing for political reasons, his response was to argue the conduct was “wrong.” We should act ethically because it's the *right* thing to do. Indeed, even if Standards were never promulgated by your Supreme Court, I believe you would still choose to be an ethical lawyer rather than an unethical one. How do you want to live your life?

Fourth, I close with references to our country's founding: According to Pulitzer Prize winning historian and author Gordon Wood, in his new book *Revolutionary Characters: What Made The Founders Different*, the 18th century Enlightenment had a profound impact on our founders and spread light and knowledge and imposed order and reason. According to Professor Wood, the personal qualities our founders aspired to included politeness, grace, learning and character.

Our founders – who were wise, tough, persistent and courageous – believed civility was a strength – indeed a foundation – along with freedom, liberty and justice – upon which to build our Nation. The benefits of these qualities for the legal profession are as true today as they were for our country in the eighteenth century.