

CIVILITY 201



Standard #1

- * Lawyers may not reflect their clients' ill-will
- * and must treat all participants in a courteous and dignified manner.

Standard #2

- * Lawyers must tell their clients that civility is not only required but actually more effective.

Standard #3

- * Lawyers cannot

- * impute improper motives to other attorneys or to the court,
- * use hostile or demeaning words, or
- * disparage an adversary unless it's relevant.

- * Examples:

- * “Counsel has fabricated facts to support her position.”
- * ***Ad hominem*** comments.
 - * Name calling of any kind, profane or not.
 - * “You’re heartless.”
 - * “Counsel apparently can’t read.”
 - * “He’s crazy!”
 - * “You’re new, so let me tell you how it’s done.”

Peters

v. Pine Meadow Ranch Home Ass'n, 2007 UT 2

- * “Good judges never fabricate evidence because the actual evidence is the foundation for their decisions.”
- * “This was no innocent mistake.”
- * “Turning from the actual evidence to the evidence fabricated by the Court of Appeals,....”
- * “A cynic would say that once a Court decides to fabricate evidence, there is no limit to the problems it can solve.”

Consequences in *Peters*:

- * Affirmed the result of the court of appeals,
- * Awarded attorney fees,
- * Limited the court of appeals' decisions to the facts of the case, and
- * Deemed the court of appeals decision to be without precedential effect.
- * But sanctions were based on URAP 24(k), and not on the Standards.

Consequences in *Peters*:

- * **“The egregiousness of counsel’s conduct has led to sanctions that have directly caused a detrimental result for his clients.”**
- * Ya think?

Standard #4

- * Lawyers cannot attribute to counsel a position they haven't taken or create a "record" of something that has not occurred.
- * Writing a letter to opposing counsel that mischaracterizes an event and then attaching that letter as evidence that the event happened as described.

Standard #4

Straw man arguments are uncivil and **highly** ineffective.

- * Jill: “We should clean out the closets. They are getting messy.”
- * Bill: “We just went through the closets last year. Do we have to clean them out every day?”
- * Jill: “You just want to keep all of your junk forever, which is just ridiculous!”

(<http://www.nizkor.org/features/fallacies/straw-man.html>)

Standard #5

- * Lawyers cannot seek sanctions lightly.
 - * Or how about constantly *threatening* sanctions?
 - * Ending every letter with:
“If you fail to comply with the requests made herein, we will apply for sanctions.”
 - * Rule 11 requires notice and an opportunity to cure, so some attorneys are constantly providing this notice so that sanctions can be sought at any time.

Standard #6

- * Lawyers must keep their promises and the commitments that are reasonably implied by the circumstances.

Standards ## 7-8

- * When reducing oral understandings and court orders to writing, lawyers must do so accurately and call attention to any additions or changes.
 - * Plea agreements
 - * Stipulations
 - * Proposed Orders
 - * **“Permission to prepare an order reflecting a ruling from the bench should not be treated by either party as an opportunity to negotiate for a ‘wish list’ of preferred terms.”** *Robinson v. Baggett*, 2011 UT App 250, n. 14.

Standard #9

- * Lawyers cannot dangle the potential of settlement to prevent the other side from preparing for trial.

Standard #10

- * Lawyers must try to resolve undisputed or easily proven matters, unless there is a sound advocacy basis for not doing so.

Standard #11

- * Lawyers must avoid ex parte communications.

Standard #12

- * Lawyers cannot share their letters and e-mails with the court unless:
 - * they're relevant *and*
 - * evidentiary foundations are satisfied.

Standard #13

- * Lawyers cannot time their filings to minimize opposing counsel's time to respond.

Standard #14

- * Lawyers must tell their clients that, when it comes to reasonably accommodating opposing counsel, the lawyer is the boss.
- * Lawyers cannot seek delays for tactical advantage.

Standard #15

- * Lawyers must consult and cooperate with each other when scheduling hearings and depositions.

Standard #16

- * Lawyers cannot seek a default without notifying opposing counsel, if known, unless clients' legitimate rights could be adversely affected.

Arbogast Family Trust v. River Crossings, LLC,

2010 UT 40

- * Complaint filed and served.
- * Negotiations ensued.
- * Plaintiff told Defendant to file an Answer in next 20 days.
- * Defense counsel didn't file an Answer but did send an e-mail asking to discuss the direction of the lawsuit.
- * Plaintiff's counsel ignored the e-mail and got a default judgment.

Arbogast Family Trust v. River Crossings, LLC,

2010 UT 40

- * Supreme Court affirmed default judgment.
- * But it also unanimously held that Plaintiff's counsel violated Standard 16.
- * Justice Durrant wrote a concurring opinion urging that Standard 16 be included in the Utah Rules of Civil Procedure.
 - * Durham and Parrish joined in concurrence.

Standard #17

- * Lawyers cannot use or oppose discovery as a weapon in itself.

State v. Doyle, 2010 UT App 351

- * Prosecutor
 - (1) Failed to respond to a discovery request for plea agreements of co-defendants, and then
 - (2) Filed a belated objection asserting they were not discoverable.
- * At trial, thinking his secret was safe, prosecutor asked co-defendant witness, “Were you ever given a deal on your charges in exchange for your testimony today?”
- * Witness answered “No.”
- * But witness **had** received a deal for her testimony (though not a very generous one) from the very prosecutor who asked the question.

State v. Doyle, 2010 UT App 351

- * Held:

- * Prosecutor violated Rule 16 (discovery)
- * Prosecutor violated the Rules of Professional Conduct.
- * **And** prosecutor violated Standards of Civility.
- * But no *Brady* violation because defense discovered the plea deal and used it (to the prosecutor's humiliation) at trial.

State v. Doyle, 2010 UT App 351

“Prudence dictates that all parties—especially prosecutors and others in the business of justice—ought to err on the side of disclosure. Clearly, the better practice for the State is to disclose in a timely fashion any evidence conceivably required to be disclosed under *Brady* rather than to find itself in the awkward position of having to rationalize and defend nondisclosure on appeal.”

Results of Nondisclosure in *Doyle*

- * Prosecutor was humiliated at trial.
- * Prosecutor was humiliated on appeal.
- * Attorney General's office (undoubtedly) didn't even try to defend the prosecutor's misconduct.
- * Prosecutor (probably) disciplined by the Bar.
- * Prosecutor (probably) lost career opportunities.
- * But prosecutor won the trial.

Standard #18

- * Lawyers must behave in a deposition as would be appropriate before a judge.

Standard #19

- * Lawyers cannot use creative or restrictive interpretations of words in discovery requests to avoid disclosing evidence during discovery.



State v. Doyle

- * Prosecutor took the artful position that he hadn't suborned perjury because this wasn't really a "deal":
 - * She was charged with 2 first-degree felonies.
 - * She pled guilty to 1 first-degree felony.
 - * She received a 5-to-life sentence.

Standard #20

- * Lawyers cannot authorize or encourage anyone else to violate the Standards of Civility.

Are Standards of Civility Binding?

- * “We have sought to encourage the bar to aspire to professionalism and civility in the practice of law through our adoption of the Standards of Professionalism and Civility. **While these standards are not binding, we encourage members of the bar to study and follow them.**”

Peters v. Pine Meadow Ranch Home Ass’n, 2007 UT 2.

But . . .

- * 7 months after *Peters*, the Supreme Court amended the Attorney Oath.

Utah Attorney Oath

"I do solemnly swear that I will support, obey and defend the Constitution of the United States and the Constitution of Utah; that I will discharge the duties of attorney and counselor at law as an officer of the courts of this State with honesty, fidelity, professionalism, **and civility**; and that I will faithfully observe the Rules of Professional Conduct **and the Standards of Professionalism and Civility** promulgated by the Supreme Court of the State of Utah."

If it's in the Attorney Oath . . .

- * South Carolina Approach

- * Adopted a rule authorizing discipline for violations of the Attorney Oath.

- * *In re White*, 707 S.E.2d 411 (South Carolina, 2011)

- * Counsel wrote a letter calling town leaders “pagans,” “insane,” and “pigheaded”
 - * “[The Town Manager] has no brains and it is questionable if he has a soul. Christ was crucified some 2000 years ago. The church is His body on earth. The pagans at Atlantic Beach want to crucify His body here on earth yet again.”
 - * 90 days suspension

If it's in the Attorney Oath . . .

- * Nebraska Approach

- * We don't need a rule that says you can't violate the attorney oath.
- * *State ex rel. Counsel for Discipline v. Sipple*, 660 N.W.2d 502 (Neb. 2003).
 - * Counsel settled client's worker's comp claim for \$150,000. Client didn't want to settle that low.
 - * Client fired counsel. Counsel tried to sabotage client's ability to get a higher settlement.
 - * Held: violated Rules of Professional Conduct **and** Oath.
 - * 2 year suspension.

If it's in the Attorney Oath . . .

- * Delaware agrees that no separate rule is required to enforce the Attorney Oath.
- * Quoting court records from the very first Delaware lawyer admitted to the Bar in 1676:

“Upon the petition of Thomas Spry desiring that he might be admitted to plead some people’s cases in the court, etc. The worshipful Court have granted him leave so long as the Petitioner Behaves himself well and Carrys himself answerable thereunto.” *In re Abbott*, 925 A.2d 482 (Del. 2007)

- * So far, exactly **no** state supreme courts have held that violations of the Attorney Oath are immune from sanction unless a separate rule authorizes it.

What do our Rules of Professional Conduct say?

Utah Rule 14-509

It shall be a ground for discipline for a lawyer to:

- (a) violate the Rules of Professional Conduct (i.e., Chapter 13 of the UCJA);**
- (b) willfully violate a valid order of a court or a screening panel imposing discipline;**
- (c) be publicly disciplined in another jurisdiction;**
- (d) fail to comply with the requirements of Rule 14-526(e) (terms of suspension);**
or
- (e) fail to notify the OPC of public discipline in another jurisdiction in accordance with Rule 14-522(a).**



So do the Standards' have any teeth?

- * Yes, if a judge wants them to.
- * Courts have inherent power “not derived from any statute or rule” to
 - * “make, modify, and enforce rules for the regulation of the business before the court”
 - * “maintain and protect the integrity and dignity of the court” and
 - * “control and protect its officers, including attorneys.” *Griffith v. Griffith*, 1999 UT 78, ¶ 13.
- * This power is separate and distinct from the contempt power. *Bernard v. Wasserman*, 855 P.2d 243 (Utah 1993).



What can a court do to address incivility?

- * Levy monetary sanctions,
- * Exclude evidence, and
- * Disqualify counsel. *Featherstone v. Schaerrer*, 2001 UT 86, ¶ 16.
- * Strike pleadings/briefs. *Superior Receivable Services v. Pett*, 2008 UT App 25, ¶ 12.

When will a court impose sanctions for incivility?

- * The less severe the violation, the more likely you'll get a warning.
 - * E.g., disparaging comments, ad hominem attacks.
- * Court formally adopts Standards of Civility in the case, rendering any future violations subject to sanction.
 - * This also renders future violations punishable by the State Bar under rule 3.4(c) of the Rules of Professional Conduct
 - * A lawyer may not “knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.”

When will a court impose sanctions for incivility?

- * But the more severe the violation, the less likely you'll get a warning first.

In the 4th District we've seen these sanctions :

- * Formal imposition of the Standards of Civility on counsel.
- * **Requiring a letter of apology.**
- * Requiring counsel to read the Standards of Civility together with his client.
- * **Restricting an attorney's participation in a case (the client had multiple attorneys).**
- * Disqualification (removal) of an attorney from the case.
- * **Striking the entirety of a pleading.**
- * Monetary sanctions.

Bryner v. Lindberg, 2008 UT App 53

- * Judges imposed Standards of Professionalism and Civility on a *pro se* litigant.
- * Litigant asked appellate court to “set Petitioner free from the unconstitutional restraints upon his freedoms.”

Joy Huish Astle Trust v. Melton (Provo case)

- * “a shameless and totally dishonest attorney in the pocket of and eager to advance the goals (legal and otherwise) of his shameless and dishonest client”
- * “What transparently disingenuous hogwash. What a fraud.”
- * **Consequence: Formal adoption of Standards of Civility.**
- * URCP 10(h) and URCrP 33(a) could have brought the striking of the entire brief, just like in *Peters*.

Croasmun v. Roberts (Provo case)

- * Referring to opposing counsel's facts, "That is a lie."
- * Referring to opposing counsel's arguments as "absurd," "spurious," "outrageous," and "nonsense." "There are stronger words than nonsense" that could be used.
- * "Does she think that I have not read the depositions?"
- * **Consequences: (1) read Standards and explain them to client, (2) write a letter of apology.**

Ohio Casualty Insurance v. Young Pontiac, Cadillac, GMC (Provo case)

- * **Plaintiff's counsel used inflammatory and derogatory language in briefing and arguments.**
- * Judge issued ruling adopting Standards of Civility.
- * **Plaintiff's counsel violated the Standards again (by disparaging opposing counsel).**
- * Judge issued an Order to Show Cause why counsel should not be removed from the case.
- * **Counsel sought a writ from the Supreme Court to cancel the OSC hearing. Failed.**
- * Counsel failed to appear at OSC.
- * **Consequence: Counsel was removed from the case.**

Gunn Hill Dairy v. Los Angeles Dept. of Water & Power (Nephi case)

- * Jury trial regarding the effect of a low electrical current on cows' production of milk.
- * **Plaintiff's counsel gives Defense expert a novelty pen with 1.5V AAA battery and asks him to click it.**
- * The novelty pen had a transformer that converted the battery's DC current to AC current, creating a shock measuring 750 volts.
- * **The expert clicked the pen and received a strong jolt.**
- * **Consequences: restricted the attorney's future involvement in the case and fined him \$3,000 (\$2,000 in attorney fees and \$1,000 in damages to the expert witness)**

So where does that leave the Standards?

- * They remain aspirational.
- * But their violation usually results in other rules being violated too.
- * And courts can, in the exercise of their inherent powers, give them teeth---with or without warning.

Closing advice

