

ENFORCING CIVILITY IN AN UNCIVILIZED WORLD¹

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“That man is guilty! That man there is a slime! He is a slime! If he is allowed to go free, then something real wrong is goin’ on here!”

“Mr. Kirkland, you’re out of order.”

“You’re out of order, you’re out of order! This whole trial is out of order!”

Al Pacino as Arthur Kirkland in *And Justice for All*³

We have all seen the entertainment industry’s impressions of the legal profession. Fired up attorneys in court yelling at witnesses, belittling their opponents, and battling the judge hammer and tong over every perceived slight or unfavorable ruling. Despite the artistic license entertainment writers take in creating these characters for the screen, we know all too well the caricature of the uncivil attorney has a basis in reality and in many cases is not far off the mark. We live in an increasingly disrespectful and competitive world, and our profession is not immune from the general discourtesies that permeate society. The nature of our adversarial system of law can also foster an environment where it is often believed antisocial behavior can get you noticed and get results.

But does the adversarial system necessarily require incivility on the part of the participants? Does the fact that each party enters a matter with the intent to triumph over the other side require disrespect of one’s opponent? Winston Churchill did not think so. After the Japanese bombing of Singapore and Hong Kong in 1941, Winston Churchill dispatched a letter to the Japanese Ambassador announcing that a state of war existed between England and Japan. After noting the acts of aggression, Churchill’s letter ended with these words: “I have the honour to be, with high consideration, Sir, Your obedient servant, Winston S. Churchill.” Churchill commented in his memoirs, “Some people did not like this ceremonial style. But after all when you have to kill a man it costs nothing to be polite.”⁴ Clearly, the ability to maintain civility can be accomplished, even under the most adversarial situations.

The efforts of ABOTA have long been at the forefront of promoting civility in the legal profession.⁵ ABOTA’s Principles of Civility provide the benchmark for establishing a

¹ Updated July 17, 2013 and December 8, 2014.

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³ AND JUSTICE FOR ALL (Columbia Pictures 1979).

⁴ WINSTON S. CHURCHILL, THE SECOND WORLD WAR, VOL. III, CH. 32 (1950).

⁵ Along with our sponsors and contributors: JAMS Foundation, ABOTA Foundation, American Inns of

framework for civility in all aspects of the legal profession. As a result of the efforts of ABOTA, members in state and local bar associations and courts throughout the country, a quiet revolution has been taking place as bar associations and courts seek to put a greater emphasis on civility in the legal profession. Rules of civility, often based upon ABOTA's Principles of Civility, have been adopted in a vast majority of states, as well as county bars and federal courts.⁶ As of August 2012, forty-two out of fifty states have adopted professionalism codes.⁷

In the mid-1990s, the incivility in the profession that had come to bear from the quest for "zealous" representation began to be called into question. As noted in a law review article in 1994, "Zealous [a]dvocacy is the buzz word which is squeezing decency and civility out of the law profession. . . . [It is] the modern day plague which infects and weakens the truth-finding process and which makes a mockery of the lawyers' claim to officer-of-the-court status."⁸ In response to the quest for more civilized dealings in the practice of law, in 2003 the Arizona Supreme Court eliminated the obligation of attorneys to be "zealous" advocates of their clients in favor of a duty to "act honorably" in furtherance of their client's interests.⁹ Indiana, Louisiana, Montana, Nevada, New Jersey, Oregon and Washington have likewise omitted all references to zealousness in their rules, preambles, and commentaries.¹⁰ Similarly, Canon 7 of the prior Model Code of Professional Responsibility included a charge to "represent a client zealously." This language was removed when the Model Rules were adopted.¹¹ The Preamble now provides in [9]: "These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."

A critical aspect of the move toward civility in the legal profession has been the inclusion

Court, American Association for Justice, Association of Defense Trial Attorneys, Defense Research Institute, Federal Bar Association, Federation of Defense and Corporate Counsel, National Center for State Courts and International Society of Primerus Law Firms.

⁶ See PROFESSIONALISM CODES, American Bar Association, August 2012, *available at* www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html.

⁷ *See id.*

⁸ Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 Marq. L. Rev. 751, 767 (1994).

⁹ See ARIZ. R. SUP. CT 42 PMBL. ¶ 9 ("These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while acting honorably and maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.").

¹⁰ See INDIANA RULES OF PROF'L CONDUCT, *available at* http://www.in.gov/judiciary/rules/prof_conduct/; LOUISIANA RULES OF PROF'L CONDUCT, *available at* <http://www.ladb.org/Publications/ropc.pdf>; MONTANA RULES OF PROF'L CONDUCT, *available at* www.montanabar.org/associations/7121/files/ethicsrulecomparison.pdf; NEVADA RULES OF PROF'L CONDUCT, *available at* <http://www.leg.state.nv.us/courtrules/rpc.html>; NEW JERSEY RULES OF PROF'L CONDUCT, *available at* <http://www.judiciary.state.nj.us/rules/apprpc.htm>; OREGON RULES OF PROF'L CONDUCT, *available at* www.osbar.org/_docs/rulesregs/orpc.pdf; WASHINGTON RULES OF PROF'L CONDUCT, *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC.

¹¹ *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT (1983).

of a civility requirement in the attorney oath. In 2003, the South Carolina Bar amended its lawyer's oath to include the following: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."¹² In Utah, the attorney's oath was modified to include promises to "discharge the duties of attorney . . . with honesty, and fidelity, professionalism, and civility" and to "faithfully observe . . . the Standards of Professionalism and Civility."¹³ Other states have also recently amended their attorney oaths to incorporate similar language, recognizing the need for civility in all aspects of the practice of law. These include New Mexico¹⁴ ("I will maintain civility at all times"), California¹⁵ ("As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."), as well as Florida,¹⁶ Louisiana,¹⁷ and Arkansas,¹⁸ which all follow the South Carolina model ("To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court but also in all written and oral communications."). ABOTA members actively participated in bringing about these results.

Efforts by the ABA have also contributed.¹⁹ Other states with civility components in their oaths include Arizona,²⁰ which while not specifically referring to civility in its oath, does reference adherence to the state bar's "Lawyers Creed,"²¹ which in turn instructs attorneys to advise clients regarding the need for civility ("I will advise my client that civility and courtesy are not to be equated with weakness") and to act courteously and civilly ("I will be courteous and civil, both in oral and in written communication"); and Ohio²² ("I will conduct myself with dignity and civility and show respect toward judges, court staff, clients, fellow professionals, and all other persons"). Likewise, Hawaii²³ recognizes the need for civility in the practice of law, albeit with a slightly less broad scope ("I will conduct myself with dignity and civility towards judicial officers, court staff and my fellow professionals"). In all, nine states have now modified their attorney oaths to specifically include reference to the requirement of civility in the practice of law.

In addition to the specific references to civility in the attorney oaths, several other states

¹² Available at www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=402&subRuleID=&ruleType=APP.

¹³ See *Preamble: A Lawyer's Responsibilities*, in UTAH RULES OF PROF'L CONDUCT.

¹⁴ NEW MEXICO RULES GOVERNING ADMISSION TO THE BAR (N.M.R.A.) R. 15-304, available at http://www.nmcompcomm.us/nmrules/NMRules/15-304_3-30-2010.pdf.

¹⁵ Rule 9.4, California Rules of Court, available at http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_4

¹⁶ Available at www.floridabar.org/tfb/TFBProfess.nsf/basic+view/04E9EB581538255A85256B2F006CCD7D?OpenDocument

¹⁷ Available at http://www.lascba.org/lawyers_oath.asp

¹⁸ AR R ADMIS Rule VII(G) (2012)

¹⁹ See *ABA Recommends Creeds for Bar Associations*, ABA J., Jan. 1989, at 58, for a discussion of the model lawyer creeds proposed by the ABA's Young Lawyers Division and the ABA's TIPS section.

²⁰ Available at www.azbar.org/membership/admissions/oathofadmission

²¹ Available at www.azbar.org/membership/admissions/lawyer'screedofprofessionalism

²² Available at www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf#Rule1

²³ Available at www.courts.state.hi.us/docs/court_rules/rules/rsch.htm#Rule_1.5

have included reference to other definitional analogs to civility, such as courtesy and respect. The oaths of Alaska²⁴ (“I will be candid, fair and courteous before the court and other attorneys”), Colorado²⁵ (“I will treat all persons . . . with fairness, courtesy, respect, and honesty”), Minnesota²⁶ (attorneys shall conduct themselves “in an upright and courteous manner”), Delaware²⁷ (“with all good fidelity as well to the court as to the client”), and Virginia²⁸ (attorneys shall “courteously demean” themselves) all include specific references to being courteous, which, as any dictionary will confirm, is the touchstone of civility.²⁹ Thus, in addition to the nine states directly referencing civility in their oaths, these five “analogous” oath states make certain the modern trend of law is moving swiftly toward a standard of civility that is made clear to attorneys from the moment they take the oath of their respective jurisdictions.³⁰

The next inevitable step in the progression toward more civility in our profession is a decision on how to enforce the civility provisions that have been enacted and to which lawyers are urged to follow. While there have always been professional sanctions available for violating rules of professional conduct, is there more that should or could be done to enforce civility in the profession?

Following up on the issue of enforcement of civility, the Utah Supreme Court has created what is believed to be the first program in the country of professionalism counseling for members of the Utah Bar.³¹ Specifically, the program functions through a board of five counselors, appointed by the Utah Supreme Court, who generally counsel and educate members of the Bar concerning the Standards of Professionalism and Civility.³² The Court intended the counselors to serve a four-fold purpose: 1) to counsel members of the Bar in response to complaints by other lawyers or referrals from judges, 2) to provide counseling to members of the Bar who request advice on their own obligations under the Standards of Professionalism and Civility, 3) to provide CLE on the Standards, and 4) to publish advice and information relating to the work of the counselors.³³ Of these functions, it is the

²⁴ Available at www.courts.alaska.gov/bar.htm#5

²⁵ Available at www.cobar.org/index.cfm/ID/1653/CLPE/Colorado-Attorney-Oath-of-Admission/

²⁶ Available at www.revisor.mn.gov/statutes/?id=358.07

²⁷ See *In re Abbott*, 925 A.2d 482 (Del. 2007).

²⁸ See *Zaug v. Virginia State Bar ex rel. Fifth Dist.-Section III Comm.*, 737 S.E.2d 914, 918 (Va. 2013).

²⁹ See *Civility Definition*, <http://www.merriam-webster.com/dictionary/civility> (last visited June 25, 2013) (defining “civility” as (2)(a) “civilized conduct; especially : courtesy, politeness”); BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “legal etiquette” as “professional courtesy that lawyers have traditionally observed in their professional conduct, shown through civility and a strong sense of honor”).

³⁰ Michigan is a state that does not include civility in its oath. However, it enforces civility through rules of professional conduct. See *Grievance Adm’r v. Fieger*, 719 N.W.2d 123 (Mich. 2006) (attorney reprimanded for violating rules of professional conduct requiring civility. The Court further upheld a constitutional challenge involving MRPC 6.5(a), which provides that “[a] lawyer shall treat with courtesy and respect all persons involved in the legal process.”).

³¹ See Utah Supreme Court Standing Order No. 7, issued January 9, 2008, effective April 1, 2008, available at <http://www.utcourts.gov/resources/rules/urap/Supctso.htm#7>.

³² *Id.*

³³ *Id.*

counseling function that is most critical to the notion of enforcing civility in the profession.

The goal is to provide a method in which incidents of incivility or unprofessional conduct could be reported and addressed. The focus, however, would not be punitive in nature, but rather, educational. In responding to a complaint from a fellow attorney or judge, the counselors may issue a written advisory to the offending lawyer, or may simply counsel with the lawyer in a personal meeting, with the goal of educating the offending lawyer as to alternative modes of practice in harmony with the Standards. In conjunction with this direct contact with offending attorney, the counselors would publish an annual report concerning the Standards it has interpreted, as well as periodically publishing selected portions of its advisories in the Utah Bar Journal for the benefit of practicing lawyers.

Courts around the country have also entered the fray to find a way to enforce what were initially seen as non-binding suggestions on civility. For example, in the Fifth Circuit case, *In re First City Bancorp. of Texas, Inc.*,³⁴ a “zealous” lawyer referred to opposing counsel, which included an Assistant U.S. Attorney, as a “stooge,” a “puppet,” a “deadhead,” and an “underling who graduated from a 29th tier law school.”³⁵ The bankruptcy court in which the case was originally heard did not agree with the lawyer’s tactics and slapped him with a \$25,000 sanction.³⁶ When the lawyer appealed to the Fifth Circuit, he argued that his behavior was an appropriate trial tactic, allowing him to recover more money for his clients and giving him the upper hand in settlement negotiations.³⁷ The Fifth Circuit disagreed, affirming the lower court’s decision that the lawyer’s conduct was “egregious, obnoxious, and insulting.”³⁸ The \$25,000 sanction was deemed appropriate and upheld by the Court.³⁹ A quick search of case law will reveal numerous examples where courts around the country have begun to draw lines regarding incivility in the practice of law.⁴⁰

In the Utah Supreme Court case *Peters v. Pine Meadow Ranch Home Ass’n.*, the petitioners were appealing an appellate court affirmation of a trial court’s grant of summary judgment to a homeowners’ association regarding the enforceability of its covenants, conditions, and restrictions (“CCR’s”).⁴¹ Rather than reach the issues raised in the appeal, the Utah Supreme Court focused on the petitioners’ briefs and the uncivilized language and tone of the briefs to affirm the holding of the lower court.⁴² Specifically, the court noted:

³⁴ 282 F.3d 864 (5th Cir. 2002).

³⁵ *Id.* at 866.

³⁶ *Id.*

³⁷ *Id.* at 865.

³⁸ *Id.* at 866-67.

³⁹ *Id.* at 867.

⁴⁰ *See, e.g., GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 193 (E.D. Penn. 2008) (fining attorney \$13,026.00 for actions during deposition described as hostile, uncivil and vulgar); *Hagen v. Faherty*, 66 P.3d 974, 979-80 (N.M. Ct. App. 2003) (admonishing attorneys for uncivil behavior in briefs, bemoaning ““culture of belligerence”“ that has taken root in legal system); Steven Kreytak, *Lewd Gesture Gets Lawyer 90 Days in Jail*, AUSTIN AMERICAN STATESMAN, Apr. 17, 2008.

⁴¹ 151 P.3d 962 (Utah 2007).

⁴² *Id.* at 962.

petitioners' briefs . . . are replete with unfounded accusations impugning the integrity of the [court below]. These accusations include allegations, both direct and indirect, that the [court of appeals] panel intentionally fabricated evidence, intentionally misstated the holding of a case, and acted with improper motives. Further, petitioners' briefs are otherwise disrespectful of the judiciary.⁴³

Instead of ruling on the merits of the petitions, the court dismissed the petition and ordered the offending attorney to pay the other side's attorney fees, which at the time had amounted to approximately \$17,000. In sum, the court noted if attorneys continue to adopt the "scorched earth" approach to advocacy, they do so at their own peril.⁴⁴ In choosing to disregard the petitioners' briefs, the *Peters* court relied on Rule 24(k) of the Utah Rules of Appellate procedure, which provides:

All briefs under this rule must be . . . free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken . . . and the court may assess attorney fees against the offending lawyer.⁴⁵

Further, in arriving at its decision, the court noted the Utah Standards of Professionalism and Civility⁴⁶ as well as Rule 8.2 of the Utah Rules of Professional Conduct. Rule 8.2 provides, "A lawyer shall not make a public statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge."⁴⁷

As case law develops in this area,⁴⁸ the inclusion of the requirement of civility in attorney

⁴³ *Id.*

⁴⁴ *Id.* at 967 (warning that inappropriate conduct could lead not only to sanctions, but also to ineffectiveness as an advocate).

⁴⁵ *Id.* at 964.

⁴⁶ Standard 3 of the Utah Standards of Professionalism and Civility ("USPC") provides, "Lawyers shall not, without an adequate factual basis, attribute to . . . the court improper motives, purpose or conduct." www.utcourts.gov/courts/sup/civility.htm. Standard 1 of the USPC provides, "[L]awyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner." *Id.*

⁴⁷ *Peters*, 151 P.3d at 964 (quoting UTAH RULES OF PROF'L CONDUCT 8.2(a)).

⁴⁸ See generally, Judith D. Fischer, *Incivility in Lawyers Writing: Judicial Handling of Rambo Run Amok*, 50 Washburn L. J. 365 (2011) (detailing case law regarding incivility in written legal documents). Utah courts continue to address the need for civility in all areas of the practice of law, as recent case law makes clear. See, e.g., *Arbogast Family Trust v. River Crossings, LLC*, 238 P.3d 1035 (Utah 2010) ("[w]e encourage lawyers and litigants to follow [the Utah Standards of Professionalism and Civility]"); *Featherstone v. Shaerrer*, 34 P.3d 194 (Utah 2001) ("Courts are endowed with the inherent authority to regulate attorney misconduct"); *Robinson v. Baggett*, 263 P.3d 411 (Utah Ct. App. 2011) (citing the Utah Standards of Professionalism and Civility as authority); *State v. Doyle*, 245 P.3d 206 (Utah Ct. App. 2010) (stating conduct of all lawyers "should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms"); *Superior Receivable Services v. Pett*, 191 P.3d 31 (Utah Ct. App. 2008) (reiterating *Peters* holding incivility may warrant sanctions and will often diminish a lawyer's effectiveness); *Advanced Restoration, LLC v. Priskos*, 126 P.3d 786 (Utah Ct. App. 2005) (noting "[d]erogatory references

oaths has also resulted in court imposed sanctions for violations. In the case *In re Abbott*, the Delaware Supreme Court cites to the attorney oath (“with all good fidelity as well to the Court as to the client”) as a basis for publicly reprimanding a lawyer who, among other things, accused fellow counsel of fabrication.⁴⁹ As a leader in the charge to add civility to its oath, so too are South Carolina Courts pushing hard against attorneys who violate their oath.⁵⁰ In 2011 alone, three South Carolina Supreme Court cases dealt with sanctions imposed against attorneys for uncivil actions in violation of the South Carolina Rules of Professional Conduct and the Attorney Oath.⁵¹ These cases dealt with various instances of attorney incivility in both oral and written forms, but all indicate the South Carolina Court’s intent to enforce sanctions for violations of the oath and the standards of civility attorneys have sworn to uphold.

In re Anonymous Member of South Carolina Bar provides a good example of this direct approach.⁵² For the benefit of the bar, the Court took this opportunity to address the increasing complaints of incivility.⁵³ In upholding the disciplinary panel’s decision regarding sanctions, the Court noted, “Respondent took the lawyer’s oath which includes the following clause, ‘To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in written and oral communications’” It then commented, “[a]n e-mail such as the one sent by Respondent can only inflame the passions of everyone involved, make litigation more intense, and undermine a lawyer’s ability to objectively represent his or her client.”⁵⁴

The Court went on to hold:

In this case, there is no question that even a casual reading of the attorney’s oath would put a person on notice that the type of language used in Respondent’s “Drug Dealer” e-mail violates the civility clause. Casting aspersions on an opposing counsel’s offspring and questioning the manner in which an opposing attorney was rearing his own children does not even near the margins of the civility clause. . . . Moreover, a person of common intelligence does not have to guess at the meaning of the civility oath.⁵⁵

In over ruling due process and First Amendment challenges, the Court stated:

to others or inappropriate language of any kind has no place in an appellate brief”).

⁴⁹ 925 A.2d 482 (Del. 2007).

⁵⁰ See ABA J., Jan. 2013, at 32-40.

⁵¹ See *In re White III*, 707 S.E.2d 411 (So. Car. 2011) (attorney sanctioned for written correspondence suggesting opposing counsel had “no brains” and questioning if “he has a soul,” among other derogatory remarks); *In re Anonymous Member of South Carolina Bar*, 709 S.E.2d 633 (So. Car. 2011) (attorney sanctioned for derogatory remarks regarding opposing counsel’s family unrelated to the matter at hand), and, *In re Lovelace*, 716 S.E.2d 919 (So. Car. 2011) (attorney sanctioned for threatening and then slapping defendant during a deposition).

⁵² 709 S.E.2d 633 (So. Car. 2011).

⁵³ *Id.* at 635.

⁵⁴ *Id.* at 637.

⁵⁵ *Id.*

The interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other in the manner in which Respondent attacked [opposing counsel]. Such conduct not only compromises the integrity of the judicial process, it also undermines a lawyer's ability to objectively represent his or her client.⁵⁶

Besides including civility in its lawyer's oath, South Carolina took a step further, and in 2004 amended Rule 7 of the Rules for Lawyer Disciplinary Enforcement to include that violation of the lawyer's oath is grounds for discipline.⁵⁷ Other states, like Kansas and Nebraska, although lacking a provision requiring civility in their oaths, do also include a provision that violating the oath is grounds for discipline under the rules of professional conduct.⁵⁸ Such an expressed provision is not necessarily a disciplinary requirement for acts of incivility. As noted above, the Delaware Supreme Court has enforced the lawyer's oath without such a corresponding rule of professional conduct.⁵⁹ And other courts have also disciplined attorneys for violation of their oath, without such a provision in the rules of professional conduct.⁶⁰

These cases in South Carolina, Delaware, Utah, and elsewhere indicate the sea of change taking place within our profession, where civility in the practice of law is no longer tempered by notions of "zealous" or "aggressive" representation. By moving the civility requirement into the attorney oath, lawyers are now on notice that zealous representation must be accomplished within the context of civility.

In June 2013, the Florida Supreme Court adopted procedures for, among other things, enforcing principles of civility as set forth in the *Oath of Admission to The Florida Bar*, *The Florida Bar Creed of Professionalism*, and *The Florida Bar Ideals and Goals of Professionalism*. In so doing, the Florida Supreme Court rejected the prior passive academic approach to civility problems, stating further and more concrete actions are now required. Entitled a *Code for Resolving Professionalism Complaints*, 2013 WL 2435539 (Fla.), any person may initiate a complaint either telephonically or by written request. Depending on the severity of the complaint, resolution can be pursuant to a local professionalism panel or through the Florida Bar offices. Such a resolution may be informal or include diversion, admonition and even disciplinary action.

ABOTA has long championed civility and it appears that both bar associations and courts are

⁵⁶ *Id.* at 638.

⁵⁷ See <http://www.sccourts.org/courtOrders/HTMLFiles/2004-09-22-01.htm>.

⁵⁸ See, e.g., <http://www.ksd.uscourts.gov/rule-83-6-1-professional-responsibility/>; *State ex rel. Counsel for Discipline v. Sipple*, 660 N.W.2d 502 (Neb. 2003) (attorney subject to discipline under both the rules of professional conduct and for violation of attorney's oath).

⁵⁹ See *In re Abbott*, 925 A.2d 482 (Del. 2007).

⁶⁰ See, e.g., *State ex rel. Counsel for Discipline v. Sipple*, *supra* @ fn. 53.

ready to step in and force the issue where efforts at self-policing have apparently failed to achieve the desired results. ABOTA's efforts in encouraging jurisdictions to include civility as part of their attorney oaths are showing positive results with numerous jurisdictions moving in this direction. Every ABOTA Chapter should continue to urge their respective states to: 1) adopt enforceable principles of civility, 2) modify attorney's oaths to eliminate "zealous" advocacy and require adherence to principles of civility, 3) establish judicial precedence enforcing those principles, 4) create a counseling program and a panel or board to handle complaints, and 5) further the goal of civility education by devoting a part of any CLE requirement solely to those principles.⁶¹ As recognized by the Utah Supreme Court, education is the key component to any successful effort to enforce civility. As attorneys learn what is expected in the practice of law, the "culture of belligerence,"⁶² like the typewriter and carbon paper, will become a relic of a bygone era.

⁶¹ See, e.g., RULES GOVERNING THE UTAH STATE BAR 14-404 (requiring active attorneys to take three hours of ethics or professional responsibility CLE credits per reporting period, one credit of which must be in the area of professionalism and civility).

⁶² See *Hagen v. Faherty*, 66 P.3d 974, 979-80 (N.M. Ct. App. 2003).

Utah Standards of Professionalism and Civility

To enhance the daily experience of lawyers and the reputation of the Bar as a whole, the Utah Supreme Court, by order dated October 16, 2003, approved the following Standards of Professionalism and Civility as recommended by its Advisory Committee on Professionalism.

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

Lawyers should exhibit courtesy, candor and cooperation in dealing with the public and participating in the legal system. The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We expect judges and lawyers will make mutual and firm commitments to these standards. Adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this State. We further expect lawyers to educate their clients regarding these standards and judges to reinforce this whenever clients are present in the courtroom by making it clear that such tactics may hurt the client's case.

Although for ease of usage the term "court" is used throughout, these standards should be followed by all judges and lawyers in all interactions with each other and in any proceedings in this State. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards. Nothing in these standards supersedes or detracts from existing disciplinary codes or standards of conduct.

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.
2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.
3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.
4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.
5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.
6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.
7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.
8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.
9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining

other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

11. Lawyers shall avoid impermissible ex parte communications.

12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

1 Preamble: A Lawyer's Responsibilities.

2 [1] A lawyer is a representative of clients, an officer of the legal system and a public
3 citizen having special responsibility for the quality of justice. Every lawyer is responsible
4 to observe the law and the Rules of Professional Conduct, shall take the Attorney's
5 Oath upon admission to the practice of law, and shall be subject to the Rules of Lawyer

6 Discipline and Disability.

7 Attorney's Oath

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

14

Utah Supreme Court Standing Order No. 7

(As to establishment of a program of professionalism counseling for members of the Utah State Bar)

Effective April 1, 2008

The Court intends to establish a board of five counselors (hereinafter the “Board”) to counsel and educate members of the Bar concerning the Court’s Standards of Professionalism and Civility (hereinafter the “Standards”). Specifically, the Board’s purposes are: (1) to counsel members Of the Bar, in response to complaints by other lawyers or referrals from judges; (2) to provide counseling to members of the Bar who request advice on their own obligations under the Standards; (3) to provide CLE on the Standards; (4) to publish advice and information relating to the work of the Board.

Board Composition

Appointees shall serve on a volunteer basis and will be appointed based upon stature in the legal community and experience in legal professionalism matters. A minimum of one of the five appointees shall have transactional experience, and at least one attorney shall have small firm or sole practitioner experience. Board members shall serve for staggered terms of no fewer than three years for continuity and so that each Board member has the opportunity to develop expertise on the Standards. The Court will appoint one of the Board members as chair The Board shall generally sit in panels of three to deal with issues presented to the Board.

Submission of Complaints and Questions to the Board

The Board is authorized to consider complaints by lawyers concerning the professionalism of other lawyers, referrals from judges, and questions about professionalism from practicing lawyers. The Board shall not consider questions or complaints from clients or members of the public.

If a lawyer wishes to lodge a complaint with the Board concerning the conduct of another member of the Bar, the complaint must be in writing (i.e., by letter or email) and signed by the complainant. The Board shall not consider anonymous complaints about lawyers. Questions or requests for counseling from a lawyer concerning his or her own conduct need not be in writing but may be made by telephone or a personal visit with members of the Board. Referrals from judges may be directed by telephone.

Procedure

The Board is authorized to develop its own procedures based upon this Standing Order, the purposes for which the program is established, and upon the Board’s experience. Adherence to formal rules of procedure or evidence is not required.

Panels should generally resolve complaints about the conduct of an attorney within thirty days of the complaint. Resolution may be by written advisory to the lawyers involved or by a face-to-face meeting with the lawyers. Written advisories should reference individual Standards.

Confidentiality

The contents of any statement, communication or opinion made by any participant in the program shall be kept confidential except that members of the panel are permitted to communicate directly with lawyers or clients involved in the dispute concerning the application or interpretation of the Standards. Also, the panel is permitted to disclose the general nature of the situation (without identifying names or facts) and its advice to the members of the Bar and the public in reports and Bar Journal articles. Additionally, the members of the panel may communicate with supervisors in firms and agencies whose lawyers have been the subject of a complaint.

The Duty of Good Faith

Attorneys seeking the assistance of the Board shall do so only in good faith and not for the purposes of harassment or to attain a strategic advantage. The Board is authorized to terminate any proceeding or referral that it believes has been initiated or utilized in bad faith or for an improper purpose.

Publication

The Board shall report amorally to the Court concerning its operation, the Standards it has interpreted, the advice it has given, and any trends it believes important for the Court to know about. It should also make suggestions to the Court as to needed changes to the Standards.

The Board shall periodically publish selected portions of its advisories in the Utah Bar Journal for the benefit of practicing lawyers. Published advisories shall be redacted to eliminate the names and identifying factual details of the cases considered by the panels. Also, the Board shall maintain a web page under the auspices of the Court or the Bar that provides a database of its advisories.

FOR THE COURT:

January 9, 2008

Christine M. Durham Chief Justice

Complaints should be sent to:

Matty Branch
Appellate Court Administrator
Utah Supreme Court
P. O. Box 140210
Salt Lake City, UT 84114-0210
mattyb@email.utcourts.gov