HOW TO AVOID THE DOWNWARD SPIRAL OF INCIVILITY

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1. What is the downward spiral of incivility?

As lawyers we must interact with each other to represent our clients. In fact, one of the advantages of legal representation is that the litigants can avoid direct conflict and can resolve disputes on a higher level. All of this is thwarted when lawyers forget their role as representatives of a "profession" and start dueling like unrepresented litigants. It accomplishes nothing, it costs a fortune, it makes the practice of law intolerable and it perpetuates the our low public reputation. This hurts our profession in the courtroom, in the state legislature and in the court of public opinion.

We as trial lawyers must always strive to be part of the solution rather than part of the problem. The downward spiral of incivility describes a situation where one lawyer exhibits disrespectful uncivil behavior and the opposing lawyer takes the bait and responds in kind. This creates an unproductive situation which has nowhere to go but downward. Each uncivil act or response generates another more uncivil reaction until both sides literally crash and burn. This is the downward spiral of uncivility.

2. What can we do about it?

The downward spiral takes at least two parties to develop. One lawyer recently said that it is easy to be civil as long as the other side is civil. Of course, but does that mean that if the side is uncivil you have to respond uncivilly? Does it mean you are powerless to do something? The short answer to both questions is a resounding no.

You have to try to prevent incivility. As an officer of the court you have the obligation to be civil. It all starts with you because you have the power to set the tone for respect.

There is a prevention formula that works and it should be used in every case in your office. The steps are easy:

A. <u>Start each case with a phone call</u>. As soon as you know the identity of your opponent, pick up the telephone and call him or her. Introduce yourself and explain that you would like to establish a good relationship in the case. Do not be afraid to discuss the ground rules. They might include contacting each other before scheduling a deposition so it can be set up at a mutually convenient time and place, stating that if your opponent needs more time to respond to discovery that you will favorably consider it and that if there are any problems, you will call each other before you write

letters and make motions. Not only will this save you time and money, it will save both of you a lot of grief. You will be surprised to find that one courtesy usually generates a responding courtesy just as one insult often generates a responding one. You may also find that you have made a friend on the other side who may even recommend you to others in the future. This early telephone call is one of the best ways to start the tone of respect.

B. Nip written discovery disputes in the bud. Rather than starting a letter writing campaign about an inadequate interrogatory response or response to a request for admissions, start the conversation with a telephone call or a friendly email. There is nothing worse than receiving a threatening letter with discussion of sanctions to begin discussions about written discovery. Of course, you can follow this up with an appropriate letter with a reasonable deadline so you can satisfy any meet and confer prerequisites.

C. Control your temper in a deposition. It is sometimes easy to lose one's temper in the pressure of a live deposition. This can lead to nasty objections and rude comments on the record. This easily can start the downward spiral of incivility. An alternative approach is to state your legal objection and then request that you go off record to see if you can resolve your disputes in a respectful manner. In other words, take a "time out." If this cannot be done, then state your position on the record. If you are dealing with someone who refuses to be civil, consider stopping the deposition and renewing it on another day with videotape. You also have the option of getting the court involved in setting the tone for respect.

D. Avoid writing nasty emails and letters. It is natural in pressure packed litigation for lawyers to get angry on occasion. Instead of immediately writing a strong letter or email when this happens, go ahead and draft it and let it sit for 24 hours. We call this "the 24 hour rule." After this period of time, you may find that your tone was unnecessary and that there is a better way to approach your concern. Also consider asking a colleague to read what you wrote before you send it for his or her input. Not only do these writings perpetuate bad feelings but they can be used against you by your opponent in court. They can be very embarrassing.

E. Avoid gamesmanship. Have you ever received a faxed or Federal Expressed brief on a Friday before a holiday at 5 p.m.? Have you ever received a mediation statement after hours the evening before the mediation? These are usually efforts to put you at a disadvantage and it creates bad will. The Golden Rule applies here as it does in most efforts to treat your opponent with respect. You certainly would not want to be the victim of gamesmanship and you should not do it to others. If you have to serve something late, why not send an email or pick up the phone

and explain the circumstances? When you create the impression that you are trying to take unfair advantage of your opponent it is uncivil behavior. Unless you do something about it, you will harm your relationship with your opponent.

One might argue that the rules allow this type of behavior but there is more to litigation than abiding by the rules. The purpose of litigation is to get a prompt, economical and favorable resolution of the case for your client. You usually can get more with honey than vinegar. Who wants to go to mediation with someone who has played dirty in the case? Your natural reaction is to get back at this person by beating him or her in court or at arbitration.

F. <u>Avoid threats and threatening language</u>. Human nature applies here. If you are threatened you instinctively react defensively and that may include another threat. This is the beginning of the downward spiral of incivility. It is like analyzing how a mess develops; it has to start somewhere. Be very careful of the tone of your language. Using curse words and derogatory language predictably invite a similar response. Loose threats of sanctions also discourage cooperation. There is a difference between outlining your course of action pursuant to the law and a personal or ad hominem attack.

G. <u>Encourage opportunities for face to face interaction</u>. Twenty years ago we were trying a lot more cases and saw each other frequently at the courthouse. We learned by trying cases that incivility does not pay. Now we are trying fewer cases and we rarely see each other in court. We now "appear" at court during a court call so we do not see each other nor do we have time for personal interaction. We now interact by email and telephone calls are rarer. This impersonal interaction makes it easier for people to be rude to one another. If you get to know someone and you know you will be seeing each other frequently it is a lot more difficult to be rude.

The American Board of Trial Advocates provides a place for both sides to meet and interact. This is one of the great advantages of being a member of this national group. It is balanced between plaintiff and defense lawyers. If you are not a member of ABOTA, search for other organizations where you can interact, i.e., Inns of Court and local bar associations. Good relationships with your opponents lead to a less stressful career, increased opportunity for resolution through informal settlement discussions and/or mediation and referrals.

Consider inviting your opponent to lunch or at least a cup of coffee where you can get to know each other. It may be the most profitable time you

spend for your client. You can discuss common ground and stipulations that can streamline your dispute. For example, your opponent may need a certain deposition or medical examination to evaluate the case. It may be too early in the case for him or her to request it. This is an opportunity for you to think outside the box to allow something that will lead to early resolution. Pre-litigation mediations are now done frequently and these types of accommodations may be prerequisites to doing one.

3. What if prevention does not work?

Sometimes you encounter an opponent who cannot be civil. The solution is to avoid engaging in uncivil behavior with him or her. If you engage such a person, you become just another uncivil lawyer.

Techniques to stand up to an uncivil lawyer include the following:

-Educating and/or reminding your opponent of the applicable local civility guidelines or rules;
-Bringing up the uncivil behavior with the court;
-Videotaping depositions;
-Requesting a special master available by telephone who can intercede.

4. Conclusion

Incivility is unproductive and expensive. You should avoid it at all costs. If you follow the preceding preventative formula you will greatly reduce the chances that you will ever get involved in the downward spiral of incivility.