

THE PRACTICE

Tougher Measures for a Continued Lack of Civility

Rules designed to stop rude behavior that persists in the profession are passing constitutional muster.

BY AARON BAYER

For years, courts and bar organizations have grappled with the decline in civility among lawyers. Courts increasingly have adopted explicit rules requiring civility and searched for effective ways to enforce those requirements.

Civility is hardly a new concept in the profession. The Model Rules of Professional Conduct make it a violation to “engage in conduct that is prejudicial to the administration of justice.” The Preamble to the Rules states that lawyers must resolve conflicts that arise in practice “while maintaining a professional, courteous, and civil attitude toward all persons in the legal system.”

In 1996, the Conference of Chief Justices adopted a resolution calling for the high courts in each state to take the lead in encouraging professionalism among attorneys. Many states established professionalism commissions in response. A number of states, including Arizona, Georgia, Florida, Illinois, New Jersey and North Carolina, have established peer-review panels to hear complaints about violations of standards of civility and professionalism.



ISTOCKPHOTO/ID-WORK

But incivility has persisted. Some states have adopted codes and standards that go beyond the rules of professional conduct. Pennsylvania’s Code of Civility, for example, requires lawyers to treat “all participants in the legal process in a civil, professional and courteous manner at all times” and “abstain from making disparaging personal remarks or engaging in acrimonious speech or conduct.”

Similarly, Utah’s Standards of Professionalism and Civility require “personal courtesy and professional integrity.” New York’s Standards of Civility require lawyers to be “civil in all professional dealings” and to “speak and write civilly and respectfully in all communications.”

But these codes are really guidelines and statements of principle that—unlike rules of conduct—are not to be enforced

by sanction or disciplinary action. The same is true of civility standards adopted by some federal courts. The Standards of Professional Conduct of the U.S. Court of Appeals for the Seventh Circuit and the Civility and Professionalism Guidelines of the U.S. District Court for the Central District of California emphasize how essential civility is in the administration of justice but make it clear that their standards depend on voluntary adherence and cannot be the basis for sanctions or penalties.

A growing number of states have added an explicit pledge of civility to the oath that all lawyers must take upon admission to the bar. South Carolina began this trend in 2004, when it modified its oath to require new members to “pledge fairness, integrity and civility, not only in court, but also in all written and oral communications.” In the ensuing years, a number of other states have adopted similar civility oaths, including Arkansas, California, Florida, New Mexico, Nevada and Utah.

In general, these oaths are also not enforceable. South Carolina, however, went a step further—amending its professional-conduct rules to provide that a violation of the civility oath is itself grounds for discipline. In 2011, the South Carolina Supreme Court squarely addressed the constitutionality of sanctioning an attorney for vio-

lating the civility oath. In *In the Matter of Anonymous Member of the S. Carolina Bar*, the court recognized that lawyers are not entitled to the same First Amendment protections as laypeople because lawyers are subject to ethical restrictions that may require them to abstain from otherwise constitutionally protected speech.

CHALLENGES REJECTED

The court rejected challenges to the civility oath based on vagueness and overbreadth, noting that “a person of common intelligence does not have to guess at the meaning of the civility oath” and that “there is no substantial amount of protected free speech penalized by the civility oath.”

The South Carolina court relied on a 2006 Michigan Supreme Court decision in *Grievance Administrator v. Feiger*, which rejected similar First Amendment challenges to disciplinary action based on an attorney’s misconduct and unprofessional behavior, including unfounded attacks on opposing parties and judges. The court held that its rules were not unconstitutionally vague. As the court put it, “invi[te] the sodomization of a judge” and similar statements by Feiger “do not come close to the margins of the ‘civility’ or ‘courtesy’ rules.” The supreme courts of Florida and Illinois have similarly rejected First

Amendment challenges to their rules.

Courts have found a few other avenues to give teeth to attorney standards of conduct and professionalism. For example, in *Westcott Agri-Products v. Sterling State Bank*, the U.S. Court of Appeals for the Eighth Circuit affirmed the denial of attorney fees based on counsel’s behavior during discovery, ruling that the district court has “inherent power” to promote civility by lawyers and that it is “not unjust to hold a client responsible for its attorney’s misconduct.”

The appeals court “commend[ed] the district court’s efforts to enforce civility, professionalism, efficiency, and integrity in those privileged to be members of the bar.”

One type of unprofessional conduct—the filing of frivolous claims and lawsuits—has been enforceable through Rule 11 of the Federal Rules of Civil Procedure. A bill introduced in Congress in 2011 and again in 2013, the Federal Lawsuit Abuse Reduction Act, would amend Rule 11 to make sanctions for frivolous filings mandatory and remove the ability to avoid sanctions by withdrawing a challenged claim within 21 days. Some are concerned, however, that the bill might have the counterproductive effect of stimulating motions for mandatory sanctions as a litigation tactic—exactly the type of conduct the civility movement is trying to stem.



AARON BAYER is a member of the appellate and complex legal issues group at Wiggin and Dana in Hartford. Prior to joining the firm, he served as deputy attorney general of Connecticut and counsel to U.S. Senator Joseph Lieberman. He can be reached at abayer@wiggin.com.