Incivility
An Insult to the Professional and the Profession

If you do not already know from personal experience, unprofessional behavior comes in many different forms.

Consider the following anecdotes. Several years ago, a lawyer in Illinois was criticized by that state's review board for writing letters to opposing counsel and others using words such as "fool, idiot, perp, boy, honey, sweetheart, sweetie pie and baby cakes." This same lawyer also asked correspondents to place five letters "in that bodily orifice into which no sun shines." There are also cases where lawyers have made racist remarks as well as remarks insulting and degrading certain religions. In a deposition in New York, a female associate was called "little lady," "little girl," and a "little mouse," and told to "pipe down," "be quiet," and to "go away" when she merely was doing her job representing a fourth-party defendant.

For many years now, there has been a perception that incivility, rudeness, and the use of offensive tactics among lawyers are on the rise. Many courts, columnists, legal journal authors, and conference organizers have focused on professionalism and civility, or the lack thereof, in the practice of law. In addition, several aspirational "civility codes" have been adopted, indicating that the "legal profession deems itself to be in crisis."
While both professional and unprofessional behavior can be readily identified when witnessed, various authors have attempted to define professionalism, which is also known as civility. One author, struggling with the difference between ethics and professionalism, states that "the basic distinction between ethics and professionalism is that rules of ethics tell us what we must do, while professionalism teaches us what we should do." The U.S. District Court for the Southern District of New York explained that "[c]ivility refers to 'more than surface politeness; it is an approach that seeks to diminish rancor, to reconcile, to be open to nonlitigious resolution.'" Civility is inconsistent with "Rasta" lawyering, which includes:

- a mindset that litigation is war and that describes trial practice in military terms;
- a conviction that it is inevitable in your interest to make life miserable for your opponent;
- a disdain for common courtesy and civility, assuming that they are ill-suited for the true warrior;
- a workbook for manipulating those and engaging in revisionist history;
- a hate-trigger willingness to free off unprovoked motions and to use discovery for intimidation rather than fact finding;
- an urge to put the trial lawyer on center stage rather than the client or his or her cause.  

It seems to be easier to define incivility rather than to define civility or professionalism. Incivility has been quite concisely described as "[f]all manner of adversarial excess. Personal attacks on other lawyers, hostility, boorish behavior, rudeness, insulting behavior, and obstructionist conduct all fall under the general rubric of incivility." The question is, then, what are the boundaries of civility? When does incivility rise to the level of the unethical, and when is it just harmless rudeness or acceptable behavior? What behavior is so egregious that it is sanctionable; and, on the other hand, what can lawyers "get away with" under the rubric of zealous representation? According to one commentator, "The courtroom is marked by a variety of boorishisms that delineate sanctioned misconduct, but only some of them are bright lines. Others become visible only once crossed." Indeed, courts do not have an easy time determining what behavior is sanctionable and what behavior should be treated as reckless representation. As the U.S. Court of Appeals for the Second Circuit has remarked:

We are cognizant of the unique dilemmas that sanctions present. On the one hand, a court should discipline those who harass their opponents and waste judicial resources by abusing the legal process. On the other hand, in our adversarial system, we expect a lawyer and his or her adversary to pursue a claim zealously within the boundaries of the law and ethical rules. Given these interests, determining whether a given conduct falls beyond the pale is perhaps one of the most vexing and unenviable tasks for a court.

The Second Circuit also noted in another case that the language and conduct of attorneys must be considered in the context of what is currently acceptable in public discourse, which is difficult to identify with exactness.

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presented show that it is difficult to identify when threatening language actually becomes unprofessional.

Third, we review some cases involving bad-faith litigation through the assertion of baseless claims, inappropriate accusations, and name-calling. This is an area where lack of professionalism seems slightly easier to identify.

After focusing on certain instances of abusive tactics, we discuss whether we can or should live with these attacks. Finally, we review some solutions that have been proposed to keep litigants and about to a minimum, or even to eliminate them completely.

Vicious and Obstructive Depositions

Probably the most infamous example of abusive speech and abuse during discovery is the statement, threats, and insults made by a well-known Massachusetts plaintiff, lawyer in the high-profile case of Paramount Communications Inc. v. QVC Network Inc. In an affidavit to its opinion on the merits of the case, the Delaware Supreme Court, raising the issue, noted, "as part of its exclusive supervisory responsibility to regulate and enforce appropriate conduct of lawyers appearing in Delaware proceedings," scolded the Texas attorney for an "assaulting lack of professionalism and civility that is worthy of special note."

The attorney who was neither a member of the Delaware bar nor admitted pro hac vice, personally represented one of the defendants, Paramount, who was a witness in a deposition that took place in Texas. As noted by the Delaware Supreme Court, depositions are the "natural battleground" where much of the litigation actually occurs. As depositions are the device for revealing and challenging all of the factual allegations central to the case, much litigation can result from the abuse of depositions. There are several examples of the criticized attorney's abusive and unprofessional conduct throughout the deposition.

First, the attorney attempted to obstruct his adversary's ability to question the witness and peppered his attacks with obscenities and personal insults. When the witness was asked a question, the examining attorney was told that the attorney was going to "beat him down if he didn't go on to [next question]." The attorney at issue then proceeded to call the examining attorney an "amateur" and warned, "You can ask some questions but get off of this. I'm tired of you. You could get a mugger off a neat wagon." After the attorneys went back and forth, the attorney told his opponent to "shut up," and that the deposition was going to end in one hour, "period." He attacked his adversary's skills, commenting that he had "no concept" of what he was doing. He eventually administered the examining attorney to question the witness further. "Don't even talk with this witness."

Such abusive behavior was not new for this attorney, who once Showed another attorney into the wall outside of a courthouse.

The Delaware Supreme Court, viewing the Houston attorney's behavior asEnteous and unacceptable, and with "lack of regard and convulsion," found that he abused him in a Delaware proceeding. He responded in the press with vulgarities and insults, stating, "I'd rather have [the] more to say than go to Delaware for any reason," since, he believes, the Delaware Supreme Court has authority for "exceptional lawyers" like himself.

Corruption and Threats

According to National Law Journal journalist Richard E. Zylinder, the "mugger rhetoric" has now been replaced by a new classic in incivility. The U.S. District Court for the Southern District of New York ordered a New York litigated to pay $50,000 in sanctions for...
In addition to threats of reputation damage and adverse publicity, threats of physical violence arise more often than we would like to think.

his conduct during a case, most notably, for his pejorative letter threaten- ing the prospective defendant (who was an attorney) with the "legal equivalent of a psychologic exam" and a "trimming" of his reputation if the claims were not settled prior to filing the complaint.10

In addition to these threats, the district court found that the attorney made a sham offer to settle; threatened to add a RICO claim; threatened to sue the defendant individually and to seek discovery of his personal finances, threatened to send a letter to the court accusing the defendant of criminal conduct if he did not submit to plaintiff's demands; made good on his threat to "tear" the defendant's reputation by contacting a reporter before trial and supplying the reporter with documents and information; and repeatedly attacked the defendant's reputation as an attorney, calling him "a lawyer who . . . has acted in a manner that shames all of us in the profession," "a disgrace to the legal profession," and "slimy."11

The attorney at issue argued that his tactics were examples of proper zealous and aggressive representation and that he always acted reasonably and appropriately. The court disagreed:

A lawyer's duty to represent his client zealously does not permit him to extort his adversary or permit his offensive and denounc- ing remarks or to engage in a course of conduct intended to coerce a settlement through improp- reseal and harass- ment. Although a lawyer must represent his client zealously, he must do so within the bounds of the law. An attorney is a profes- sional and an officer of the court, not a hired gun or mercenary whose sole motivation is to win or an attack dog whose sole pur- pose is to destroy.12

On appeal, the Second Circuit reversed the district court's ruling, concluding that the attorney's con- duct was not sanctionable.13 The circuit court found that to impose sanctions under the authority of 28 U.S.C. § 1964(e) or under the court's inherent power, the "trial court must find clear evidence that (1) the offending party's claims were entirely meritless and (2) the party acted for improper purposes."14 Regarding the "psychologic exam" letter, the court held that although this letter was hostile, and the refer- ence to protocology was "repug- nant," it is "reflective of a general decline in the decorum level of even polite public discourse," and, therefore, less than sanctionable.15

The Second Circuit also found that the attorney's threat to "tear" the defendant's reputation was not sanctionable. According to the court, "An attorney is entitled to warn the opposing party of his intention to assert colorable claims, as well as to speculate about the likely effect of those claims being brought."16 Moreover, the circuit court held that the subject attorney's characterizations of the defendant in, among other things, a glance to the police were mere "colorful tropes" and "not necessarily injurious to disclose."17

In a similar case, also involving an effort to induce settlement, this time by threatening adverse publicity, the Second Circuit also reversed a district court judge's $50,000 sanction against a Wash- ington, D.C., attorney.18 In a pretrial letter, the attorney at issue wrote:

This is a matter of extreme sensitivity because, in the absence of any satisfactory resolution of our differences, the lawsuit will be filed in New York within the next ten days. . . . If this contro- versy enjoys public view

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with the filing of our lawsuit and the inception of the lawsuit proceeding, it will sooner or later be a 
gross injustice to individuals who have been suing Israeli sovereigns, in particular, and 
non-Israeli defendants, in general, for damages to their. Of course, such a suit will be
brought in a court of law. Under the totality of the circumstances, the appellate division 
held that the motion court's imposition of sanctions was proper. The judge repeatedly
required the motion to be repeated, then the motion papers submitted were "utterly useless." 
The appellate division imposed a further sanction on the attorney for the presentation of 
the appeal, where the "appellate briefs submitted by plaintiff's attorney, completely devoid of relevant
discussion, [were] voidly reflective of the appeal's utter lack of even 
suitable merit." In addition, the 
sanctioned attorney also repeated the damage caused by his adversary, made 
"baseless, serious accusations against the motion court, [made] unproven accusations against 
defendants, especially mischaracter-
ized the record and [made] no ref-
ence to record adverse authority." 
This New York attorney was dis-
sbarred from the Appellate Division, 
Second Department, as well as from the 
Southern District of New

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York. These disciplinary actions followed disbarment from the United States Supreme Court, which occurred when the attorney called the Second Circuit chief judge "chief injustice" in his petition for certiorari.

Still another lawyer was suspended for making unfounded accusations in a personal dispute he had with a former employer. The attorney was suspended for filing a motion containing vulgar language and false accusations of bribery, calling and sending faxes to clients of his former employer accusing her of fraud, a thief, and a liar, and alleging that she did not pay her bills and in a deposition, accusing her of giving him a venereal disease.

Calling the judge an opposing attorneys' names or making unfounded, odious, or inappropriate remarks about them seems to be unprofessional or worthy of discipline in many instances. As the U.S. District Court for the Southern District of New York noted, "In the ordinary litigated matter, the court and counsel are not involved except in their professional capacities, and irrelevant personal or ad hominem attacks on them merely distract from the merits of the litigation." Thus, where an attorney told a judge, "you are corrupt and you stick," he was sanctioned.

Another attorney in New York was disciplined by speculating that opposing counsel was involved in organized crime.

Inevitably Hurts the Profession
Can we live with discovery abuse, threats, bad-faith claims, occu- sations, and name-calling? Is it necessary evil and a mere reproach of the adversary system? We do not believe so. Zealoussness is no excuse for vulgarity, insulting, and unprofes- sional actions. Even attempting to label such actions and words as maliciously chauvinistic and mocks the true meaning of this concept. In Pennsylvania, the Delaware Supreme Court explained that unprofessional ends where the client's cause is no longer advanced.

Search for a lawyer or law firm in New York is proper and fully consis- tent with the fine enforcement of skill and professionalism. Indeed, it is at work of professionalism, not weaknesses, for a lawyer merely able to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process. A lawyer who engages in the type of behavior exemplified by Mr. Jannal in the recent record of the Leibin deposition.

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is a person properly representing his client, and the client's cause of action is not advanced by a letter which engenders in unprofessional conduct of this nature.\textsuperscript{9}

Where language or tactics have no identifiable purpose other than to distract, confound, delay, criticize, or attack (opposing counsel), the client's interests have been abandoned. Judge Chin, the district court judge who wrote opinions in the Renton and Susan cases discussed above, aptly stated, "Although an attorney must represent his client zealously, he cannot be a 'vanguard.'\textsuperscript{10}

Some believe that we should not and cannot live with the professional misconduct that occurs around the nation. In the words of the Honorable Sidney Day O'Connor:

'The justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration, stress-down, good or bad, is useless when the contributors are time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public's eye.

... In my view, invincibility dis- serves the clientele because it wastes time and energy—time that is billed to the client or hundreds of dollars an hour, and energy that lawyers spent working on the case than working over the opponents.'\textsuperscript{11}

Short-Term and Long-Term Solutions

It seems that most of us would agree that the legal profession would be more enjoyable and effective without threats, name-calling, and Rambo tactics. But how do we get control over the intrusive, abusive, and vituperative speech that seems to plague our legal system? There are several "Rambo-Aid" that can fix a problem as soon as it occurs. While many of these remedies may be the fastest and best way to solve individual problems, they probably do not do much in the way of deterrence or prevention. Thus, as possible solutions are reviewed below, it is important to question whether the remedy is a short-term Band-Aid or a mechanism of protection against future attacks.

Report bullies. The examining attorney in the Paramount deposition stated that while he was "granted" that the court addressed the abuse, it was not his intention to "seek relief" from the court.\textsuperscript{12} Lawyers are not as willing to report unprofessional behavior as they should be.\textsuperscript{13} As one law professor has advised:

Lawyers must stop their petrity about Rambo depositions. Not only should they report name-calling, denouncing gestures, and personal threats occurring during depositions to judges and bar disciplinary committees, but they should create an atmosphere in their firm where young associates will feel comfortable to caution about their encounters by opposing attorneys in depositions.\textsuperscript{14}

In Paramount the court had to raise the issue of the Texas attorney's unrecalled behavior in the open. Lawyers should help the courts and the bar associations make their litigation environments livable. Some suggest that every attorney should keep a "Rambo file," documenting all instances of unprofessional conduct in a case.\textsuperscript{15} Such a file could be useful at the hearing to impose sanctions and penalties.\textsuperscript{16} According to the professor quoted above, "When Rambo behavior begins to cost money, then it will stop.'\textsuperscript{17}

Communicate with the court. Some authors advocate for the judge on call' system to help lawyers when they feel themselves engaged in a deposition or other out-of-court proceeding that has gone wrong. This service can be provided by magistrates\textsuperscript{18} or in other areas, judges would be rotated, just like on-call physicians.\textsuperscript{19} The judge on call would be available for ex-parte telephone hearings in which he would have the authority to make immediate rulings.\textsuperscript{20}

The Delaware Supreme Court specifically subscribed to such a solution in Paramount. The court advised that when misconduct occurs outside its presence, "the aggrieved party should reenact the deposition and engage in a dialogue with the offending lawyer to obvi- ate the need to call the trial judge. If all else fails and it is necessary to call the trial judge, sanctions may be appropriate against the offending lawyer or party, or against the complaining lawyer or party if the request for court relief is unjustified.\textsuperscript{21}

The court reminds attorneys that "Delaware trial courts are not 'phone call away' and would be responsive to the plight of a party and its counsel bearing the brunt of such misconduct.\textsuperscript{22} The court could then turn to the discovery rules for the proper remedy whether a protective order or other imposition of sanctions.\textsuperscript{23}

Record the abuse. The above tactics displayed in Paramount represent a multitude of depositions over the objection and abusive tactics used during depositions. In an interview conducted by Inside Litigation, litigants were asked to identify the most difficult situations in conducting and defending depositions.\textsuperscript{24} Attorneys said that the biggest problems from the perspective of the examining attorney are various forms of obstruction, including speaking objections and instructing the witness not to answer questions.\textsuperscript{25} From the perspective of defending depositions, attorneys said that the biggest prob-
The true panacea is education, awareness, self-monitoring, and conscience.

Conclusion

Finally, we submit that while standing up to bullies, enlisting courts for assistance, and putting intrusive on the record are ways to stand-Aid the problem of attacks and verbal abuse, the true panacea is education, awareness, self-monitoring, and conscience. An expansive reflection on civility suggested:

Early and continuing education. While standing up to bullies, reporting Risho behavior, putting uncivil behavior on the record, and involving the court are ways to define uncivil situations already in progress, education may help to prevent unprofessional behavior. One author suggests that rather than enacting a written civility code, "what is needed is the rebirth of a written, or universally accepted, code of conduct adhered to by an earlier generation of lawyers." Such an unwritten code would encourage the bar and lawyers to return to self-regulation of lawyers' conduct. Bar associations could promote discussions about uncivil behavior by hosting events that encourage participation among the attorneys. In this way, lawyers could become educated or reinforced in the significance of civil conduct. Continuing legal education programs could also be useful forums for educating lawyers on civility. Finally, law schools should discuss the problem of uncivil behavior and use the use of inactive and abusive tactics. Students should be taught to think about their own conduct and what they expect of themselves and others before they even become attorneys.

As lawyers and judges, we live out who we see by our actions. Professionalism is not something to do at the office or take off with our suits and our ribbons; our behavior continuously demonstrates who we are. We can improve our own lives and those of our clients, opposing counsel and parties and the community in a whole, if we simply remember that our part in the system gives us tremendous power, to make life better for every citizen. . . . If every lawyer and judge would analyze every action we take in light of the goal of ensuring that the system works fairly and efficiently for everyone, questions about professionalism would simply disappear—and tremendous good would result for our community.

As one commentator so aptly stated, we will know when professionalism returns to the practice of law when we begin to hear, in common usage, the phrase "ethical as a lawyer." This is a worthy challenge for our profession and a profound concept to carry with us at all times.

Notes

2. Id.
3. Id., citing examples of an attorney who was suspended for 18 months after referring to courtroom deputies as "bimbos" and "shut your muppets out" and another attorney who was reviewed after making anti-Semitic remarks in a letter to opposing counsel.
6. See Renssen v. Cansev & Cognac, 70 F. Supp. 2d 415, 414 (S.D.N.Y. 1999) ("In recent years, much concern has been expressed by the bench and bar over the rise of 'Rambo' tactics in litigation and the lack of civility in the practice of law.").
7. Id. at 418. Links to over 100 of those codes are available at www.aban.org/professionalism/policies.html.
9. Id. at 472 (quoting Frank X. Meanor, Jr., Professionalism: Claiming a Different Course for the New Millennium, 73 TUL. L. Rev. 2041, 2043-44 (1999)).
11. Id. (quoting Robert N. Sivler, Why Hardball Tactics Don't Work, 74 A.B.A. J. 78, 79 (Mar. 1985)).
13. Courts have justified their sanctions against unprofessional and uncivil lawyers under the Federal Rules of Civil Procedure (Rules 30 and 37), 28 U.S.C. § 1927, and courts' inherent power to
regulate conflict. Caty, supra note 4, at 588–94. In addition, accord lawyers cannot be subject to discipline unless a par-
ticular state's version of the Code of Ethics. Certain 7. Various disciplinary rules prohibit tactics that merely "tax the mili-
tude or maliciously injure another." Id. While a number of "victory" codes have been adopted around the nation, they are more subjectively in nature, providing guidance to courts. Id.

14. Richard F. Ziegler, The Price of Bu-
15. Schludicine Nucera & Co., Inc. v. Estate of Andy Warhol, 194 F.3d 323,
341 (2d Cir. 1999).
16. Ravon v. Chiaro & Cancio, 221 F.3d 71,
79 (2d Cir. 2000) (noting that an attorney's reference to a psychology exam was "offensive and disrespectfully lack-
ing in grace and civility" because "reflective of a general decline in the decorum level of even public displays.
17. See Ravon, 70 F.Supp. 2d at 435 ("The bar should take note, as this case can-
not be expected to foreclose other par-
ticular situations where Judges and jurors do not act like humans.").

19. 617 A.2d 54 (Del. 1993).
20. id. at 52 n.23.
21. id. at 52.
22. id. at 53.
23. id. at 55 n.34 (quoting Hall v.
Christina Precision, 150 F.R.D. 525 (E.D. Pa. 1993)).
24. id. at 53–54.
25. id. at 54.
26. id. at 54.
27. Bertha Sapien, Judicial Abuses by
Delaware Court's Blue Team, LAW., Feb.
28. Pugino, 637 A.2d at 55.
29. id. at 56.
30. id. at 53.
31. id. at 53.
32. id. at 56.
33. Sapien, supra note 27.
34. Ziegler, supra note 14.
36. id. at 417.
37. id. at 417–18.
38. Ravon, 221 F.Supp. at 78.
39. id. at 79.
40. Id.
41. Id. at 80.
42. Id. at 82.
450 (2d Cir. 1999).
44. Id. at 453.
45. id. at 459.
47. id.
Div. LEXIS 3224 (Nov. 1, 2002).
49. Anthony Lam, Queens Attorney He
cited with Sanctions on issues, N.Y.L.J.,
LEXIS 10229 at *3–4.
51. id. at 54.
52. id. at 55.
53. The court was particu-
larly disapproving of this situation's fail-
ure to cite adverse authority since he was involved in a case addressing many of the same issues only weeks earlier, and was aware of such adverse authority.
54. Lam, supra note 49, in re Teddy L.
Moore, 177 F.Supp. 2d 191 (D.N.Y.
2001).
55. Lam, supra note 48, in re Teddy L.
Moore's motion for sanction of dismis-
sal and reinstatement to the Bar of the Supreme Court was denied in 2007.
577 U.S. 46, 2007 LEXIS 3716
(February 26, 2007).
58. Schnaken & Connors, supra note 1.
59. id. at 420.
60. id. at 421.
61. id. at 54.
62. id. at 54.
63. id. at 57.
64. id. at 57.
65. id. at 57.
66. id. at 57.
67. id. at 57.
68. id. at 57.
69. See Shaw, supra note 18. For-
testing that one commenter stopped a deposition to call the Magistrate when her questions began relating to a crime.
70. Caty, supra note 4, at 593–94.
71. id.
72. Harris, 637 A.2d 55 n.31.
73. id. at 55.
74. id. "Streetwise" could include exhaus-
tion of defenses or services awaited from at-