Dangers of crossing the lines of professionalism and civility in the name of zealous advocacy

By Gregory C. Sisk*

While zealous advocacy is a hallmark of our profession, an excess of zeal can lead us astray and cause us to lose our independence and detachment of professional judgment. This can lead even the finest lawyer to take imprudent steps that, in a quieter moment of reflection, would be appreciated as veering dangerously close to or crossing the line of professional propriety.

In Board of Professional Ethics & Conduct v. Wanek,1 the Iowa Supreme Court observed that the rules of professional responsibility draw “the line dividing zealous advocacy from sharp—and unethical—practice.”

The court appreciates the danger that a lawyer, who too readily attributes malicious motives to an opponent or the opponent’s counsel, may be tempted to engage in questionable behavior toward that adversary. However, it warned in Wanek that a lawyer must beware of developing a cynical attitude toward “‘big city’ lawyers” on the other side and should firmly resist the mind-set that “when it is ‘the little guy’ versus a ‘big guy,’” a little deviation from high ethical standards may be justified. When a lawyer is “swept up in this stereotypical thinking,” the court lamented, he may well find that he “lost his good judgment in the process.”

Adopting an attitude of professionalism, beyond the letter of the ethical rules, is likely to provide a safe harbor for the prudent lawyer. And it’s also just the right thing to do, for the health of both the lawyer and our profession.

Effect on public

Over the past several decades, conferences of judges and leaders in the bar have become concerned that the profession is drifting “away from the principles of professionalism” and that this decline increasingly is “perceived by the public.”2 In 1999, the Conference of Chief Justices, representing the highest courts of every state, adopted a “National Action Plan on Lawyer Conduct and Professionalism.”3 The plan defined “professionalism” in this way:

“Professionalism is a much broader concept than legal ethics. . . . [P]rofessionalism includes not only civility among members of the bench and bar, but also competence, integrity, respect for the rule of law, participation in pro bono and community service, and conduct by members of the legal profession that exceeds minimum ethical requirements. Ethics rules are what a lawyer must obey. Principles of professionalism are what a lawyer should live by in conducting his or her affairs. Unlike disciplinary rules that can be implemented and enforced, professionalism is a personal characteristic. The bench and the bar can create an environment in which professionalism can flourish, . . . [b]ut it is the responsibility of individual judges and lawyers to demonstrate this characteristic in the performance of their professional and personal activities.”

The Iowa Supreme Court also has identified “the concepts of civility and professionalism” as “increasingly important ingredients of modern-day advocacy.”4 The “Standards of Professional Conduct,”5 adopted by the Iowa Supreme Court and codified as a chapter in the Iowa Court Rules, offer a code of civility by which lawyers may live. Under these standards, the lawyer promises, among other things, “to treat all other counsel, parties and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications;” to refuse, “even when called upon by a client to do so, [to] abuse or indulge in offensive conduct directed to other counsel, parties or witnesses;” to “abstain from disparaging remarks or acrimony toward other counsel, parties, or witnesses;” and to “agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients’ legitimate rights will not be materially or adversely affected.”

Civility, not constrained advocacy

Civility does not mean constrained advocacy, nor does it mean that a lawyer should hesitate to call those who have wronged a client to account for that conduct. But firm and clear articulation of misconduct or a failure to uphold an obligation need not and should not involve unnecessarily disparaging words that
deprive another person of dignity.

An accused criminal defendant’s alleged crimes should not be described before the tribunal in vague or euphemistic terms nor should a prosecutor refrain from detailing to the jury the depraved nature of heinous acts. But even a criminal defendant who stands convicted beyond a reasonable doubt of a heinous crime should not be characterized as less than human or as the equivalent of an animal.

Much less should parties to a civil case or witnesses in any matter be subjected to humiliation. The unvarnished truth should be told by the lawyer, as painful as that sometimes may be for others, but name-calling and gratuitous insults are never justified. Courtesy is not an indication of weakness, but rather an affirmation of our professional calling.

Culture of civility

By setting out expectations of professionalism in the new Iowa Rules of Professional Conduct, the Iowa Supreme Court has created space for the development of a culture of civility. While these standards and other exhortations toward professionalism and civility are aspirational, instead of stating disciplinary imperatives that must be obeyed, these principles are not merely precatory. No attorney may excuse adoption of offensive tactics or use of unduly sharp language as the expected, much less the required, actions of a zealous advocate for a client.

For example, Comment 1 to Iowa Rule 1.3 cites to the Iowa Rules of Professional Conduct and further explains that “the lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.” Professor Albert Alschuler similarly emphasizes that “[a] lawyer’s duty of faithful representation does not justify his or her departure from ordinary social norms of civility and fair dealing.”

As another example and as confirmation of these principles, Comment 3 to Iowa Rule 1.4, in language specific to Iowa, states that “the lawyer should also discuss relevant provisions of the Standards for Professional Conduct and indicate the lawyer’s intent to follow those standards whenever possible.”

Four reasons for civility

A lawyer should develop the virtue of civility, particularly showing respect for all other persons encountered during the representation of a client, for four basic reasons:

First, it is simply the right thing to do, not only when we are engaged in the practice of law but especially when we are so engaged. The traditional religions of the Western World have always taught that every person is created in the image and likeness of God, which confers a sacred character on every human being. Modern human rights principles similarly maintain the dignity of every person, irrespective of origin, nationality, gender, race, age or any other characteristic and regardless of what that person has done.

If we as lawyers are to affirm the inherent dignity of every person, we must regard with respect all other persons, including the opposing party, the lawyer advocating for the other side, law firm and court staff, the judge, etc. We fail to uphold the most fundamental principles
of traditional religious faith and of modern human rights if we treat other persons as something less than fully human by disregarding their inherent dignity. If we would allow human dignity to be degraded by our behavior as lawyers, we thereby undermine the foundations of any concept of justice and the rule of law.

Second, no lawyer can be effective and successful in practice or experience a satisfactory life in the law without drawing upon the experiences and wisdom of other members of our profession. New lawyers need mentors, and experienced lawyers need colleagues. The kind of lawyer who would serve as a mentor and encourage us as a colleague is also the kind of lawyer who will abhor and refuse to be associated with a lawyer of tawdry reputation.

By behaving in an unprofessional manner, a lawyer builds walls that leave him or her isolated within the profession. And the lawyer who becomes professionally and socially isolated is well on the way to disciplinary trouble.

Third, when we as lawyers behave offensively, especially in public, we bring discredit upon our profession. This is an injury that we suffer collectively as lawyers. When we are admitted into this profession, we immediately benefit from a tradition of service and a public reputation for intelligence, leadership and advocacy skills. Most of us in the legal profession can think of many occasions in which our words at a public meeting have been used against us or against our colleagues. Likewise, judges have long memories, and also have been known to share a story with their colleagues. The lawyer who behaves abusively toward another lawyer is likely to encounter him or her again. Moreover, lawyers love to tell “war stories,” so the tale of the unprofessional barrister is likely to make the rounds at the bar convention, the law school class reunion, or the continuing legal education program. The day will come when that lawyer will need or desire the cooperation of another lawyer, who quite understandably will be reluctant to extend any courtesy in light of the asking lawyer’s reputation for incivility.

Likewise, judges have long memories, and also have been known to share a story with their colleagues. The lawyer who develops a reputation for sharp conduct or disrespect toward other persons in the courtroom will find that his or her credibility and persuasiveness before the bench has fallen.

Civility improves discretionary actions

To be sure, the fact that a lawyer has betrayed expectations for professional courtesy in the past is no legitimate basis for another lawyer to refuse to cooperate when the law so requires (such as through timely response to discovery requests) or for a judge to withhold a judgment to which the lawyer’s client is entitled. But much of what a lawyer may request of another lawyer or seek of a judge in the course of representing a client falls within the realm of discretion. In those cases, the lawyer being asked to accommodate the asking lawyer or the judge being asked to enter a ruling may choose whether to grant or deny the request. The lawyer who develops a reputation for incivility should not expect that discretionary requests will be positively received.

In summary, in our increasingly contentious and discourteous society, a touchstone of professionalism for lawyers is not merely a luxury or afterthought, but, in your author’s view, has been justifiably enshrined in the new Iowa Rules of Professional Conduct.

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1 589 N.W.2d 265 (Iowa 1999).
2 Commission on Professionalism, ABA, “...In the Spirit of Public Service”: A Blueprint for the Rekindling of Lawyer Professionalism v (ABA 1986).
4 Ragan v. Petersen, 569 N.W.2d 390, 394 (Iowa 1997).
5 Standards of Professional Conduct, Iowa Court Rules, Ch. 33.
6 On expectations of civility as not being a basis for formal discipline, see generally 16 Gregory C. Sisk & Mark S. Caday, Lawyer and Judicial Ethics: Iowa Practice, § 12:4(d)(2) (Thomson-West 2007).