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THE CASE FOR COURTESY

On the eve of the most important U.S. Supreme Court argument of his life, Thurgood Marshall joined his adversary for lunch. In itself, this revelation is not all that remarkable. Its context, however, offers a perspective important even now.

Five cases were to be argued, including *Brown v. Board of Education of Topeka*, in December 1953. Marshall had argued before the court on many occasions, usually with success. Yet, no lawyer had appeared in the Supreme Court more often or ably than Marshall's opponent, John W. Davis. Marshall knew him well. While a law student at Howard, Marshall had seated himself in the Court's gallery to hear Davis argue.

Davis was to argue a South Carolina desegregation case at the personal request of his state's governor. It was not an argument about which he was shy; Davis was a product of the deep South and one who espoused, without conflict, that integration was an unacceptable intrusion into the social order of his region.

By 1953, of course, Marshall had racked up numerous victories in the Supreme Court in his measured, thoughtful deconstruction of "separate, but equal." Many of those fights had started in unfriendly southern courthouses where threats of physical violence were ever present. He had made a sometimes lonely trek in the face of cruelty and insult. John Davis was, in many ways, the defender of all that Marshall had suffered and abhorred.

Yet, they had lunch. South Carolina's governor would have been aghast presumably. Marshall's colleagues at the NAACP offices were more than perplexed to know their leader was breaking bread with the epitome of the segregationist. Juan Williams reports in his well-regarded biography of Marshall that the NAACP staffers indeed confronted Marshall and challenged his decision. Marshall explained: "We're both attorneys, we're both civil. It's very important to have a civil relationship with your opponent."

Nothing more was said. The lawyers made their arguments: Davis relying on *Plessy v. Ferguson* and the ways of the old South, Marshall entreating the justices to reshape America's social order. The court's decision, of course, is arguably the most important of the century just completed.

The story is remarkable not only because of the lawyers' conduct, but because there were so many reasons for them to perpetuate what their colleagues expected them to do. Others would not have counseled the kind of civility and courtesy acknowledged in a simple lunch. And, in 1953 at least, that was not a simple lunch. One wonders what restaurant in Washington, D.C. (it was deep South in its own way then) served them and where. Did John Davis, an heir to the Confederacy, actually dine in the "colored" section of a restaurant? This was more than being a good sport for both men.

Such civility is no less important in the modern day. Despite changes in rules and the growth of communication technology, the law is still practiced by human beings whose competitive spirit and outlook

often intrude on the behaviors exhibited in practice. Increasing emphasis and interest in the matter of "civility" is evidenced by the burgeoning literature on the subject, the entreaties (and rulings) of trial and appellate judges, and by those practitioners who hearken back to a more charitable day.

This is not to suggest that professional courtesy and civility have expired. They certainly have not. I recall in my own experience seeing certain professional fees waived on the closing statement of my first real estate purchase. It was no big deal, but I noticed. One of my great privileges was to try two cases with George Craig. We got along well—with occasional disagreements on key points, of course—but George was definitely "old school".

I learned this most clearly as we began trying a case in federal court. I had filed a motion in limine the previous Friday and put the service copy in the mail to George. When he claimed "ambush" on Monday morning, he told the Court that "Mr. McKee knows very good and well that I don't go to the office on Saturday and would not see this motion until this morning." I didn't know that. I thought every attorney with a trial on Monday would be working on Saturday. Finally, George, in high dudgeon, pronounced that my tactic was "shoddy practice." I could almost see the wink in his eye from my vantage point.

The judge considered the motion anyway (it was hardly the sort of issue that would turn a case) and the trial proceeded. At the end of the day, all had left the courtroom except for court reporter Glen Cunningham and counsel. George and I discussed the events of the day and the anticipated testimony of the next. Before leaving, though, I had to get a shot in: "What was it you called me this morning? You said I was shabby." George remembered clearly without the assistance of the reporter. "No, my boy," he said in that avuncular style, "I believe I called the practice 'shoddy'." I feigned hurt feelings. Mused George, "Some things you say for the court, some things you say for the client. That was for my client."

While I'm not big on sizzling letters copied to clients, I understood George's point. We fought hard in the cases we tried and argued vigorously against each other's points. We represented bookends of the legal practice at that time: George was more than 80, I was barely more than 30. I liked George, in part, because he could tell political stories of great fascination (anyone who can begin a story, "Ike and Sherman Adams and I were sitting in the Oval Office . . ." will always have my rapt attention). But I liked George best because he understood that our professional arguments and battles were not about life and death. Keeping perspective, making your case, and accepting the consequences is the essence of what we do.

And so my interest in civility is an invitation to restore the profession to some of the rivalries and practices of an earlier day. We all hear stories about how much more companionable the bar was 30 or 40 years ago. I suspect some of these accounts are founded in nostalgia more than reality, but I think there is strong evidence to support the view that growth of the profession has produced harder hearts and rougher play. Blame can be distributed in lots of places: law schools, judges' tolerance, absence of mentors, ambition, greed, the billable hour, lack of training, inexperience, advertising. Each practitioner would choose one, deny another, but all have played a role.

The local bar perhaps has been spared some of the worst. It seems that the absence of civility is proportional to the size of the bar and community. We all know the horror stories from New York and Chicago. Drop to the Indianapolis bar, and all in Terre Haute have some unpleasant memory of the all-day deposition, objection-laden discovery response, and the scattershot set of production requests. That it could be worse is little comfort. In fairness, my experiences with the Indianapolis bar have been, on balance, extraordinarily positive, but I also see the effects of billing pressures and bad mentoring, especially on the newest generation of attorneys who evidently are well schooled in discovery mechanics but have no earthly idea about courtroom or interpersonal decorum. All of us emerge from school with some cockiness, but it's a remarkable thing to hear a young lawyer pronounce to a mediator exactly what a jury will do with the case when the next one he/she picks will be his/her first.

To me, all the talk of civility is distilled into a case for courtesy. Plain, old-fashioned, "yes sir, no ma'am", hold the door open, respect your elders stuff that your mama tried to teach you as a child. This is challenging, but not impossible, in a profession that calls upon its practitioners zealously to represent their clients. The best lawyers I know—prosecutors, defense attorneys, trial lawyers, and insurance lawyers—have never lost track of the distinction.

If nothing else, we are obligated by oath to pursue the profession **ethically**. Our system of justice calls upon all of its parts to pursue truth and fairness. This applies in every aspect of our personal and professional lives. I make it a point to share this view with new associates in a couple of old *Res Gestae* articles authored by Judge Sarah Evans Barker. One of the points is that the reputation a lawyer makes in

his/her first few years as a professional stay with them for a long, long time. This is true in any profession. I remember a professional baseball umpire telling me the same thing years ago. If a young umpire was weak or indecisive or dishonest or easily intimidated, he could change completely five or 10 years later and still be considered poor. The young attorney must realize that career-long impressions may be created in the earliest and most immature years of that career. Fair or not, that is a truth mentors must transmit.

As a profession, we must commit to encourage young practitioners in our charge to adhere to the rules and to professional courtesy. In so doing, we remind ourselves of the vital nature of these guidelines for our professional lives:

Discovery. Discovery is about learning, not intimidating. Obtain the information needed to evaluate and try a lawsuit. A witness' high school grade point average is rarely a critical fact to a case. Why pursue questions or lines of questioning with no reasonable connection to the case? When lawyers exchange overwrought and excessive discovery requests, the prospect for high emotion and long discovery hearings escalates. I know, for example, that Judge Larry McKinney has a secret list (carried in his head, I think) of lawyers whose cases are immediately placed on strict court supervision from the time of filing. Most lawyers can be trusted to conduct discovery and pre-trial preparation like certain pick up basketball games—call your own fouls, keep your own score. There are those on Judge McKinney's list who long ago demonstrated they need a full-time officiating crew. It is not only uncivil, it's expensive.

Lawyers should guide their clients and themselves to making common sense judgments about discovery—not only about what is needed, but what should be disclosed. This is not advocacy for doing another lawyer's job for him/her. Answer what is asked certainly. There is no requirement for volunteering information, particularly that which is harmful to the client's case. At the same time, hair splitting for the sake of non-disclosure is unseemly.

Depositions should reflect the same courteous atmosphere as one would expect to find in a courtroom. Lawyers inevitably ask hard questions and voices are sometimes raised. Emotions do get high because the issues are often emotional. But it is the lawyer's duty to treat an adversary and a witness with the same deference as if the judge were in the room conducting the deposition. By the same token, the disreputable practice of coaching witnesses by objections or speeches certainly has increased in recent years. Lawyers are well advised to discuss with each other the boundaries of the deposition in advance and, if they cannot agree, solicit the court's intervention in the matter. Certified questions, motions to compel, and requests for sanctions are expensive diversions from the road to justice.

Dealing with diverse persons with different backgrounds is more frequent in the modern era. Sometimes there are language and cultural barriers in the deposition. More often, witnesses are in a highly unusual and even frightening situation. Lawyers are the ones with experience, who know the rules, and who are obligated to create an atmosphere in which information can be imparted. Impatience, asides, and rudeness rarely produce worthwhile information for the case in those circumstances.

As caseloads increase, the issues of scheduling are ever present. It's been a long time since an adversary simply sent me a notice of deposition without consulting me first. I cannot recall doing so ever, although it may have happened under severe time constraints and an absence of communication. Common courtesy should dictate the scheduling and location of depositions.

The Written Word. George Carlin recently observed that advances in technology make communication faster, but not better. In fact, the advent of fax machines and email, while wonderful tools for the practicing attorney, can be misused as well.

Yet, even before the cyber world intruded, we already had seen the kinds of patronizing communications calculated to insult. When I read a sentence such as "I suggest you tell your client . . . ." or "If you were familiar with the law in this area . . . .," I should be forgiven for a high degree of frustration and insult. We have been trained in the use of words and should understand full well the power of language. Misused, language distracts us from what we should be achieving for our client. So, words should be carefully drawn, lines in the sand marked carefully, and sentences designed to outrage our adversaries deleted altogether.

Though it will never go away, I tire, too, of the stinging, declaratory letters advocating for clients in correspondence to adversaries. Such letters falsely presume that the recipient will be swayed. The "cc:" tag line is, of course, the purpose of the letter—a way of communicating indirectly to the attorney's own client that the other side is not pushing them around. Maybe clients are gratified by such letters, but they are hardly reflective of our best professional side. It is entirely possible to communicate, even advocate without taking a strident tone. This is especially hypocritical when the attorneys have just engaged in a

courteous telephone conversation on the subject at hand and then confirm that conversation with flaming correspondence (usually faxed at about 5:30 p.m.).

When barb-laced language works its way into briefs, the attorney invites an even less impressed reader into the fray. Every lawyer by now has read a court opinion or law journal article on the ineffectiveness of trading insults in trial and appellate briefs. Again, the object of the enterprise is to engage and persuade a particular audience—in this case, a judge or judges. Taking shots at the other side, no matter how weak the argument or even contemptuous the behavior, is unjustified. Lately, such conduct also risks sanction and dismissal of the case, hardly the outcome the client seeks.

Another point: return telephone calls. Enough said.

Decorum. Finally, a brief case for the courtroom of an earlier era. Early in my career, I tried a small claim against Rabb Emison in Daviess County. Everyone knows Rabb—a distinguished insurance defense attorney, a former Indiana Bar president, and author of numerous articles in *Res Gestae* (usually espousing the same views expressed here). Rabb is the real article; all of the points of decorum he promotes are certainly reflected in his career. Even in small claims court, Rabb stood elegantly to address the judge each time. He almost snapped his heels coming to attention. He made his case with precision, was ever deferential to his opponent without conceding his case, and shook hands when it was over.

Mine may be a minority view in this era of informality, but it's time for our profession to review again its obligations to the court and the community as examples. The way we dress, speak, write, and act are at the heart of the way others judge us as a profession. **Stand** to address the court. **Listen** without interruption as an opponent makes an argument. **Speak** precisely and courteously when called upon to do so. **Apologize** when circumstances dictate that you interrupt.

I am amazed by the dress of my fellow professionals at times. True enough, we are all far more casual than even 15 years ago. I am relieved when the schedule permits a "casual day" when I can work in a sweater or shirt sleeves. But I think we owe to the Court and the profession an effort to portray ourselves in courtrooms (where others can observe us easily) dressed in the manner they may well expect us to be. When clients ask what they should wear to trial, I do not require them to wear a tie if they do not usually do so. That's phony. But I do tell them I will be wearing a suit and tie and that, consistent with a custom started long ago, will have freshly polished shoes on the first day of trial. I do that for them and because I believe juries should expect that and because I'll be standing where I was trained to stand. It is a privilege to conduct business as a member of the bar, and our dress is an expression of how we feel about that. I'll grant you that's old fashioned and maybe worthy of derision, but that's my take.

My weakness, on the other hand, is a persistent time management problem that sometimes makes me late for hearings. Like most of my colleagues, I am far more likely to be late in appearing before a tolerant judge (fill in your own example) than I am with an intolerant judge (fill in your own example, plus all federal judges). It's still a disreputable practice and one that all should strive to control. No question, circumstances will sometimes dictate tardiness and even unexpected absence. These situations should be promptly communicated. But the regularly tardy lawyer is intruding on the time of many people: judges, court reporters, adversaries, and parties.

Finally, my plea is to give judges a break and <u>stop</u> any *ex parte* communication about the substance of a case. It does not happen every day and may not always happen intentionally, but I know full well the practice continues. I have no question about the integrity of the many judges before whom we practice in west central Indiana. In my judgment, they politely endure an attorney's *ex parte* ramblings in the hope that it will soon end and the substance is promptly dispatched from their memory. No judge wants to come off as imperious or inaccessible by telling an attorney who should know better that his argument should be on the record. That's the responsibility of the attorneys and the good ones know better than to play that game.

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Are we not all errant in some respect? No doubt. After reading this, some attorney will cite for me an example when my letter was strident, my tone rude, when I failed to stand or be properly dressed or have my shoes shined. We are all transgressors in the day-to-day existence we call practicing law. I simply urge consideration of the basic rules of life finding an application in our professional life and making incivility a rare exception. Courtesy is not weakness. In fact, some of the best lawyers I know achieve extraordinary results by practicing with a level of civility counseled here. They are calmer, wiser,

more perceptive, and more persuasive for winning their points on the facts or the law, and not for some other, baser reason.

All of us presumably are in this profession for the long haul. We intend to derive our living from the practice of law for many years to come. That requires interaction with all sorts of people, including other lawyers. Maybe my view is rare, but I genuinely enjoy the company of lawyers. They are smart, well read, multi-faceted folk who can discuss law or politics, sports or culture, books or movies. Removed from the adversarial world, even attorneys in the same case can eat together and drink wine in relative harmony. I've seen it happen (Max Goodwin, incidentally, picked up the tab to the astonishment of those assembled).

It distresses me to see our profession distorted by critics, but it hurts even more when their criticisms have the ring of truth. We are not gladiators; that word does not appear in our oath. We are advocates and part of a distinguished profession that has served mankind for centuries. We should honor it with our conduct. That would be a victory in the case for courtesy.

--Craig M. McKee