Ten Old-School Ways to Enhance Civility, Professionalism, and Efficiency in Litigation

By John W. Allen

> I have watched with great sadness the decline in esteem held by our society of lawyers. There must be a rediscovery of civility in the profession.

These words were penned many years ago by Supreme Court Justice Sandra Day O'Connor.[1] In recent months, Chief Justice John Roberts cited a concern for "incivility or disrespect" by both lawyers and judges in his 2018 Year-End Report on the Federal Judiciary.[2]

Over the past few decades, I have seen a plethora of civility codes promulgated by a multitude of bar associations, courts, individual judges, and other professional groups. But most of these codes speak more in generalities and platitudes in my opinion, without specific recommendations for best practices by litigators and judges.

The "Rambo" litigation style abounds, and misconduct in deposition sessions and court hearings by lawyers and judges is a common observation by legal professionals and laypersons. The pressures of the practice and lack of mentorship are commonly cited reasons. Even judges and court staff increasingly show a lack of patience and temperament, reflecting their own pressures caused by understaffed, underfunded, and overworked tribunals.

Thus, I present a few specific and practical old-school suggestions.

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Use titles, not names

Address the lawyer as *plaintiff's counsel* or *defendant's counsel*. Of course, the judge is *Judge* or *Your Honor*. Likewise, parties should be *plaintiff* or *defendant*. No names, with one exception: both in court and at deposition, witnesses should be addressed by *Mr.* or *Ms.* with last name only; no one is addressed or referred to by his or her first name.

This is old school, I know. But using third-person titles instead of names creates a positive and constructive distance and does not personalize the adversary process.

Communications (especially emails) should be thoughtful and polite

The temptation to fire off a quick email reply and hit the send button without thinking first is virtually irresistible. This process needs to slow down. One technique is to begin every email with *Please* or *Thank you*. Again, use titles and not names, even in communications to clients about opposing counsel or the opponent.

Meetings and phones still work

In-person meetings and phone calls are still a superior form of communication and much less expensive for clients than emails, letters, or motions. If you don't do it already, try answering your own phone. Don't dodge phone calls, but if you need more time to think about a response, say that and ask to call back later.

Stand when you can, and rarely object

Stand when addressing the court or examining a witness in the courtroom. Many courts don't require this, but most all judges permit it. You will project your position better, and the mere act of standing also signals to your opponent and the court that you wish to say something or make an objection, without talking over anyone. The process of deciding to stand also allows you those few valuable seconds to decide whether the speech or objection is worthwhile.

Unless you're dealing with a truly critical point or evidentiary issue, many objections aren't worth it. Watch two experienced trial lawyers conduct a hearing or trial; there are few objections. They know that most objections aren't really worth it and serve only to call more attention to something that is usually not positive for your client. In addition, most jurors strongly dislike objections, concluding that the objecting counsel is trying to hide something. Many judges reach that same conclusion. Save objections for issues that are significant.

Learn the rules and their reasoning, and cite them by number

Become familiar with the content of all the rules applicable to your case, such as the Michigan Rules of Evidence and the Michigan Court Rules. Don't hesitate to quote them, and reread them often. No matter how many times you've filed a motion for summary judgment or summary disposition, reread the applicable rule each time. Get the latest version of ICLE's *Michigan Rules of Evidence and Trial Objections at a Glance* and make it your constant court and litigation companion; it has most of what you need.

Never say "I *know* the rules," especially in response to or while making an objection. Experienced practitioners and judges

know that this immediately identifies you as a person who does *not* know the rules. Quote the rule and cite it by number along with a brief statement of its substance (the ICLE publication is excellent for that purpose). This is how to show you know the rules. If you can't do this, you don't know the rules.

Depositions are court proceedings, too

With the exception of sitting rather than standing, act like you're in court when at a deposition. Avoid aggressive behavior such as talking loudly or pointing. Use titles and not names for lawyers. Address witnesses as Mr. or Ms. followed by last name only. Don't make speaking objections that are intended to coach what you want the witness to say; everyone knows what you're doing, and it marks your witness as weak, putting blood in your own water. Strong and favorable deposition testimony by your witness comes from proper preparation, not speeches by lawyers.

Meet other lawyers in nonadversarial contexts

Join a bar association or a specialty practice group and attend its meetings, even if they are primarily social events. Have lunch or a cup of coffee with other lawyers. Follow the example of British barristers, who consider dining together an essential part of their profession. By doing so, you will find other lawyers to be more civil in communications and actions toward you and your clients, and more constructive in resolving issues.

Seek concurrence and avoid sanction requests

Before undertaking the time and expense of motion practice, provide to the opponent the order you want, preferably as a Word document and not only as a PDF or printed letter. Sincerely discuss proposed changes. Before seeking sanctions, request remediation from the other lawyer with a specific explanation and grounds together with an opportunity for remediation, using the M-T-W-F approach: meet personally; telephone; write a letter or message; and if all these fail, then (and only then) file a request for sanctions. If it's not worth taking that approach, skip it. Most judges intensely dislike sanctions, and award them only rarely. In reality, sanctions requests are almost always a waste of time and your client's money.

Use three rules of evidence to make court proceedings more efficient

Three of the most ignored examples of this are the notice-to-produce procedure (MRE 1004(3)), using leading questions for foundation facts (MRE 1004), and content summaries (MRE 1006). Lawyers and judges often misunderstand all three.

MRE 1004(3) and its required notice to produce is a rule of evidence, not a rule of discovery. It's triggered by issuing a notice to produce to the opposing counsel if the opponent possesses an original copy of a relevant document, providing notice that the contents will be a subject of proof at the hearing. The noticed party is not required to produce anything, but if the party in possession does not produce the original at the hearing, then you are allowed to admit secondary evidence (e.g., hearsay) regarding its contents. This procedure may be used even after discovery has ended—especially if the document has been withheld—and should be honored by the court.

MRE 1004 makes examination regarding foundation facts a preliminary question to which the other rules of evidence don't apply. Therefore, before offering the ultimate evidence, you can ask leading questions about the foundation facts. This allows you to arrive at offering the subject issue or document much faster.

Summaries are permitted by MRE 1006 and are likely one of the most underused rules of evidence. In this age where every case includes large volumes of emails, text messages, and other documents, the Rule 1006 summary is one of the most efficient tools for expediting hearings. It's necessary that you first make available to the opponent—for examination or copying or both—the originals or duplicates of the documents whose contents are reflected in the summary. The Rule 1006 summary likely offers the greatest benefit for efficiency and speed in any court proceeding. The foundation for the summary is easily provided by numbering the constituent documents, providing those documents to the opponent, and referring to each of them by number in the summary.

Be nice

This advice comes from John Dalton, the character played by Patrick Swayze in the now classic movie *Road House* as he trains a group of bar bouncers. If Dalton and his bouncer colleagues can be nice to rowdies in a cowboy bar, we can be nice to one another in litigation matters. Being nice costs nothing and yields enormous dividends.

Conclusion

Rediscovery of civility in the profession is a responsibility we all share. These old-school ideas may lead to achieving that goal. ■

John W. Allen, senior counsel at Varnum, LLP, has practiced for more than 40 years in litigation and professional responsibility. He is board certified as a civil trial advocate by the National Board of Trial Advocacy, a Top 25 Michigan Leaders in the Law as named by Michigan Lawyers Weekly*, and a Top 100 Michigan Super Lawyer. He has chaired the SBM Ethics and Grievance committees and served as a section liaison to the American Bar Association Professionalism Committee.*

ENDNOTES

1. *O'Connor Chides Lawyers for Rudeness, Large Fees*, The Orlando Sentinel (March 6, 1994) <https://www.orlandosentinel.com/news/os-xpm-1994-03-06-9403060111-story.html> (accessed April 3, 2019).
2. Available at <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> (accessed April 3, 2019).