

## The Case For Civility Among Attorneys

By **Anna Sanders**

Law360 (October 24, 2022, 4:35 PM EDT) -- Florida attorneys Michael Ehrenstein and Christopher David were far from friends when they found themselves locked in bitter litigation once again.

"We had butted heads and battered and bruised each other in court for years. And this case was as acrimonious as a case could be between our clients," Ehrenstein told Law360 Pulse. "While we were always professional, we weren't friendly."

But a twist of fate and a four-day road trip during this case would change all that.

In Portland, Oregon, for a deposition, the rivals were about to fly back to Florida on the morning of Sept. 11, 2001, when the first plane crashed into the World Trade Center. Stranded at the airport with all flights grounded, Ehrenstein and David set aside their differences and decided to drive some 3,250 miles home together. Crowded into the last available rental car, the lawyers listened to the radio for news about the attacks, ate fast food and were forced to finally get to know each other.

There's more to this job than just the win and just the fighting.



Christopher David

Fuerst Ittleman David & Joseph

"We talked about all that stuff that in our line of work you never learn about somebody because they're just that SOB on the other side trying to keep you from getting what you want," said David, a partner at Fuerst Ittleman David & Joseph PL. "But there's more to this job than just the win and just the fighting."

They may not go hunting together — Ehrenstein prefers to fish — but the attorneys still keep in touch even when they're not fighting in court. And they believe the road trip showed them how attorneys and the legal profession can benefit from kindness and civility.

"I learned that zealous advocacy didn't mean that we had to abandon our humanity, we could

become friends," Ehrenstein said. "It was a big lesson for me. He's been kind at times when he didn't have to be kind. ... We can still be decent human beings to each other, even if we're kicking each other's teeth in in the courtroom."

### 'As Rare as an Albino Whale'

The legal industry is perhaps one of the most combative professions by design. Attorneys are called upon to help resolve bitter disagreements, handle terse negotiations and even navigate life-and-death criminal investigations. With millions at stake and lives on the line, many attorneys don't see civility as a priority.

"It's about as rare as an albino whale," civil trial lawyer Demetrios Anaipakos of Alavi & Anaipakos PLLC said.

Two New York attorneys were **ordered to pay thousands of dollars** and attend a course on civility this summer for "uncivil and obstructive behavior" after making hundreds of improper objections during a deposition in a contract dispute. Another pair of litigators from Philadelphia had to pay a share of opposing counsel's legal fees for **being rude during a deposition** last year, when they told the other attorneys "be quiet," "shut up," and "stupid question." And an Ohio lawyer was suspended earlier this year partially for insulting a judge with a variety of coarse vulgarities during a bar association holiday party.

In one recent high-profile spat, a lawyer for conspiracy theorist Alex Jones was **warned by a Texas judge** to dial down his conduct during a July trial after he referred to those representing the parents of a 6-year-old murdered in the 2012 Sandy Hook school shooting as personal injury attorneys and said one litigator was "dishonest." When the judge suggested Jones' attorney review the Texas attorney code of conduct regarding courtroom decorum and left the room, he got close to opposing counsel's face, called him a liar and flipped him off.

Rude, angry and discourteous behavior like this often makes waves in the legal industry, but less is said about courteous attorneys and the quiet, unseen moments of civility between those on opposing sides of cases, deals and other matters. And while attorneys acknowledge their field is full of jerks — for lack of a better word — the colleagues who are gracious, kind and professional may have the most impact.

### Profiles in Civility

DUI trial lawyer Jay Tiftickjian said the "stereotype of lawyers is that opposing counsel can be very un-cordial."

But once when Tiftickjian was just starting out as a criminal defense attorney, he had to drive from Denver to a rural part of Colorado for a case and the local prosecutor went out of her way to invite him to her office to discuss the case, even making a fresh pot of coffee. They resolved the case that day in court and she sent him a thank you card in the mail the following week, acknowledging his politeness and expressing appreciation for his positive attitude and respect.

"It didn't feel like I was going to a courthouse for a case, it felt like I was being invited into somebody's home and welcomed," Tiftickjian said. "I've been practicing for over 20 years now, and that's always stuck out to me." He said he's treated people with kindness on the job ever since and that this approach has helped him resolve cases quicker and more efficiently, "getting better results upfront instead of having to play the game back and forth."

Sharing a coffee also helped personal injury trial attorney Hunter Shkolnik of Napoli Shkolnik PLLC get to know an attorney outside the courtroom as they fought against each other in a drawn-out case. So when a law society vetting his once-adversary for admission recently called Shkolnik, he praised the attorney.

"He and I could literally almost hit each other physically in the courtroom, we were that much at each other's throats with the jabs back and forth," Shkolnik said. "But I was more than happy to give him this glowing recommendation."

Sometimes this civility extends beyond hashing out the particulars of ongoing cases and deals.

After his mother died of coronavirus in 2020, Rumberger Kirk & Caldwell PA partner Patrick Delaney said an attorney at a large injury firm was the first to personally reach out and offer his condolences despite only ever having litigated one case with him. The Morgan & Morgan attorney even emailed others at his firm to let them know about the loss and recommend they give Delaney space and time to handle pending cases.

"That was just something that immediately took a concern off of my plate," Delaney said. "It also kind of gave me a little bit of a heads-up that I should probably take a step back myself to take care of whatever else we had to go through."

And displaying basic decency doesn't mean attorneys have to soften their stance for their clients.

On the eve of a major hearing, Anaipakos was bucked off a horse that got spooked by a chihuahua and ended up in the hospital. He said Gillam Smith LLP partner Melissa Smith immediately agreed to move the hearing and regularly checked in on his recovery. In other cases opposite Smith, Anaipakos said they're able to speak candidly about "what our clients really wanted and try to find some common ground." Smith didn't immediately return an email seeking comment Monday.

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Demetrios Anaipakos

Alavi & Anaipakos

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When Wittliff Cutter PLLC partner María Amelia Calaf had to file an expedited appeal before the Fifth

Circuit over Memorial Day weekend, she sought advice from an attorney who was opposing counsel in another case she worked a few weeks earlier. Calaf said Wright Close & Barger LLP partner Raffi Melkonian "generously" answered her questions about appellate procedure.

"What was unique here is that unlike in trial-level cases where the parties have many opportunities to repeatedly interact over long periods of time, here we only had a few, short interactions and had not had much of a chance to develop a rapport," Calaf told Law360 Pulse. "He could have easily ignored me or just sent a two line email directing me to an appellate rule, but he took the time to do a call and share sample materials."

Melkonian said he prefers "practicing in a world where opposing lawyers can be civil and collegial with each other even while landing hard blows in court."

"If I can help do that with my own behavior, then I think that's important to do," he told Law360 Pulse.

For many attorneys, these interactions put in starker contrast the all-too-common incivility that can be pervasive.

Greenberg Glusker Fields Claman & Machtinger LLP corporate and finance attorney Andrew Apfelberg said people in his line of work "are really sort of jerks to each other." But during one matter that closed this summer, he was able to develop a "mutual understanding" with Waller Lansden Dortch & Davis LLP deals lawyer Roddy Bailey.

"It was really wonderful," Apfelberg said. "At a certain point, our clients got sideways with one another, and he and I were able to broker the peace and help them find a way forward. A lot of times attorneys would not do that, and it was just an incredibly nice experience."

Bailey echoed the same sentiment about Apfelberg, stressing that his firm's approach is designed to close deals.

"We have certain client positions that we need to take or need to have go in our clients' favor, but we also need to get a deal closed," Bailey told Law360 Pulse. "As such, being zealous for our clients, and also thoughtful and courteous and reasonable, while at the same time focusing on getting a deal closed, is the way that we try to practice."

On a different deal that closed a few weeks after the matter with Bailey, opposing counsel fought about giving notice over email and even the placement of a semicolon.

"Lawyers aren't trained to acknowledge emotions of their own, of the other parties, or to invite emotion," Apfelberg said. "So if all you're left with is being an aggressive pit bull or getting lost in the ego, it's a disaster."

## **The Rise of Incivility**

Attorneys couldn't pin down exactly why civility in the legal profession feels so exceptional these days, but they have their theories.

For one, the U.S. hasn't been this politically divided since the Civil War, a dynamic only exacerbated by a global pandemic that has seemingly pitted individual freedoms against serious health concerns. Like most Americans, attorneys and their clients are angry, frustrated and emotionally run-down.

"It can be that sides of the bar often socialize separately and don't typically know each other personally outside the context of adversary matters. It can be that lawyers are not truly mentored anymore the way they traditionally used to be in the professionalism and high civic component of being an advocate," said Karina Sterman, a partner at Greenberg Glusker. "It can be that the types of people who often gravitate toward litigation specifically have something to prove and therefore externalize their aggression on strangers. It can be that judges are so overworked that they have no bandwidth to intervene in 'mere' instances of incivility and therefore it perpetuates unchecked. It could be all the above."

Attorneys may also allow years of acrimony from one case or matter to spill into a courtroom. And the use of electronic communication in legal work — which has only increased since the pandemic began — can also make the "other side" seem less human.

"I know way too many attorneys that are keyboard warriors," Delaney said. "So whatever they're writing is filled with terse words and vinegar."

Some attorneys said that their younger colleagues also see their work as "war" without the pesky nuance of real human experience. This is at least partially because younger attorneys don't get to try a lot of cases and are instead brought up on depositions and fighting motions, according to Shkolnik.

"I'm not saying it's not war," Shkolnik said. "But even after Wile E. Coyote and Road Runner are trying to kill each other all day long, at 5 o'clock they can go have a drink, shake hands and be friends and cordial."

Los Angeles white-collar criminal defense lawyer Mark Beck said some prosecutors today, particularly younger and greener ones, are less inclined to make informal, good-faith "handshake" agreements than in the past.

"You could stick your neck out because you expected something in return in good faith," Beck said. "But there is this tendency now to make everything so formal and to remove the part of it that involves trust."

And some clients and even firms expect their attorneys to be antagonistic to the other side.

"Our profession encourages logic, it doesn't encourage emotion," Apfelberg said. "Emotion is almost viewed as weakness ... and some feel that unless they're super aggressive, people are going to think they're weak."

Calaf said it's up to members of the bar to educate clients on the difference between advocacy and incivility.

"Litigation is by definition antagonistic," she said. "Our clients expect us to zealously advocate for them, and in doing so often mistake unreasonableness and aggressiveness for advocacy."

The portrayal of attorneys in fiction and mainstream news doesn't help, especially when lawyers themselves are hungry for the spotlight, Tiftickjian said.

"When an attorney has their own personal gain that they're mostly concerned about, that's when the incivility usually comes out," he said.

There's only so much of a jerk you can be in a small community before the reputation gets around.



Andrew Apfelberg

Greenberg Glusker

The practice of law has also expanded to where deals, cases and other matters can span multiple jurisdictions, making one-on-ones between attorneys harder and lessening the impact of developing a reputation as someone who's difficult to work with. And while attorneys practicing in one area of law in the same city or state may get to know each other throughout their careers, there's less community and "self-policing" between those who see each other less often.

"There's only so much of a jerk you can be in a small community before the reputation gets around," Apfelberg said. "But if I'm working on a deal with an attorney I may never interact again, it's way easier to be a jerk."

### **Bars Renew Focus on Civility**

Some attorneys said encouraging civility may become increasingly challenging since the pandemic because hybrid work has further decreased in-person interactions. But others said the proliferation of videoconference calls from home, as well as the understanding that times are tough for everyone, may have helped.

"The advent of Zoom and seeing people in their homes, as opposed to just nastygrams going back and forth, may have softened it a little bit," Shkolnik said.

The American Bar Association urged the use of civility codes twice since 1988 before endorsing specific guidelines for litigation conduct in June 2020. "A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms," the guidelines say.

The Florida Bar's oath has included a pledge of fairness, integrity and civility in all communications since 2011. "The Texas Day of Civility in the Law" was established in 2017 to remind legal

professionals that the Lone Star State's lawyer's creed includes the promise to act ethically, professionally and civilly. And in 2019, the New York State Bar Association approved updated standards of civility, incorporating technological advances since their original 1997 adoption and expanding them to include transactional practices and non-litigation settings.

In 2014, the California State Bar attorney oath of admission was updated to include the promise to "strive to conduct myself at all times with dignity, courtesy and integrity." But, believing incivility actually increased since then, the California Lawyers Association and the California Judges Association formed a task force that issued a report in 2021 recommending additional training on civility for judges and attorneys, an annual civility oath for lawyers, and new rules making repeated uncivil behavior professional misconduct subject to Bar discipline. The State Bar is considering the proposals.

## **Cordial and Constructive**

Whether or not these efforts lead to increased civility, attorneys said the benefits of courtesy in the legal profession extend far beyond courtrooms and the avoidance of sanctions.

Attorneys can pass along legal work to competitors they've worked well with in the past, knowing the client they're conflicted from representing is in good hands.

Apfelberg said he and Sklar Kirsh LLP co-chair Jeffrey Sklar are on opposite sides of deals "50% of every assignment" but they frequently refer matters to each other after developing a collegial relationship.

"It makes me feel more secure in making that referral," he said. "Civility can actually turn into a beneficial relationship for the attorneys."

Sklar said having colleagues who are close friends makes practicing law "more enjoyable and fulfilling," acknowledging that sitting opposite an attorney one knows and trusts is "a balancing force."

"While you may not agree on all of the issues, you know that your counterpart is a good person with integrity who will seek to achieve a reasonable outcome," he said. "When Andrew Apfelberg and I are opposite each other, we each know that the other will provide reasonable advice to the clients and seek a resolution that both parties can live with."

Olshan Frome Wolosky LLP partner Mitchell Raab and DLA Piper partner Adam Brenner have referred clients to each other and even made a presentation together about venture capital finance after working together for the first time opposite each other in a tense startup matter.

Brenner said DLA Piper isn't focused on "scoring points."

"One of the great things about working in the emerging growth and venture capital ecosystem is the collegiality of so many attorneys," he said through a firm spokesperson. "While on the opposite side of a financing transaction, Mitch was constructive in working to a solution that benefited both of our clients in the deal."

Raab said attorneys like him who have lived through the financial turmoil of 2008 may better recognize the importance of civility in corporate counseling.

"The proper functioning of markets and the ability of parties to come together and transact is not something to be taken for granted, and something that using all of our tools as counsel and advisers can help bring about," Raab said. "An ingredient in that has to be civility and kindness."

While Beck was defending a client on fraud charges in federal court, he realized his team forgot to attach signature pages to juror questionnaires the morning before jury selection. The two senior prosecutors kindly offered to print them before the judge took the bench.

Beck later referred one of the prosecutors a case where a Los Angeles gallery was accused of selling one of his clients a phony Picasso. The prosecutor took the case, and Beck's client ultimately got

restitution.

"Courtesy doesn't mean weakness, and courtesy isn't for the purpose of not upsetting the judge or not upsetting the other side," Beck said. "The goal is to upset the other side, turn them upside down, but how you go about it is the question."

Ehrenstein and David also acknowledged there will always be underlying conflict between attorneys on opposing sides, even if those disagreements are civil.

"It's the nature of the beast," David said. "But how escalated that conflict gets has a lot to do with the lawyers."

Ehrenstein said he's optimistic that there's fewer useless squabbles at the higher levels of the profession.

"We shouldn't be bickering with each other over things that are unimportant," he said. "We need to spend the time and effort and money to properly train the next generation to be courteous and civil and why that's important, or the system just doesn't work."

--Editing by Brian Baresch.

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