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PRESIDENT'S PAGE

BY TIMOTHY S. TOMASIK

How Electronic Tigers Can Ruin Their Reputations with the Click of a Button



Why don't lawyers talk on the phone anymore? Why is it so rare now to meet with opposing counsel to discuss a new case? While technology has certainly increased the pace and improved the practice of law, electronic communications have become the number one hotspot for lawyer misbehavior and incivility. This must change.

The Illinois Supreme Court Commission on Professionalism 2021 Survey reported that the most frequently reported flashpoints for incivility are found in text messaging, email, and other such written correspondence. Nearly 40% of those surveyed said they "occasionally" encounter unprofessional conduct in such communications, and some reported that they "frequently" find unprofessional language and threats in electronic communications. All of us have a responsibility to take action to correct this escalating problem that is tarnishing our profession, not only by not engaging in it ourselves, but by teaching others to do the same. As a mentor taught me, "If you wrestle with a pig, you'll both get muddy, but the pig will enjoy it."

It is critical that every lawyer possess the

ability to effectively communicate not only with other professionals, but with people from every walk of life. Dexterity in communicating in face-to-face scenarios with clients, witnesses, and the public is a requisite of good lawyering, and a skill that lawyers historically developed early in their careers and fine-tuned over the course of their lives. This included everything from conflict resolution capabilities to "soft skills" such as appropriately expressing empathy for and understanding for those involved in disputes. Sadly, these critical skills are vanishing from our profession.

In the years leading up to the pandemic, I began to see a sharp decline of effective communication and the use of these skills, especially with new and younger lawyers. According to the ABA, "soft skills are personal qualities that allow you to communicate with other people." They include not only people and social skills, but also character and personality traits. They may also include emotional intelligence, the ability to work with a team, and attitude. The ABA emphasizes that soft skills are what make you, you. They are the skills you develop through "life experiences, past jobs, and struggles you face." The International Bureau of Education defines soft skills as indicating a set of intangible personal qualities, traits, attributes, habits, and attitudes that can be used in many different types of positions. Examples include empathy, leadership, sense of responsibility, integrity, self-esteem, self-management, motivation, flexibility, social ability, time management, decision making, and, of course, communication.

Civility Costs Nothing, Buys Everything

More and more frequently before the pandemic, I noticed younger lawyers lacking

the ability, or apparent desire, to resolve routine discovery disputes or even discuss matters over the phone and in face-to-face conversations. By the same measure, simple case management orders and court orders that counsel would traditionally work out in the courtroom or hallway were more frequently spiraling into uncivil and unprofessional confrontations. Many new lawyers seem to lack the ability to go off the record, meet and confer, and resolve a discovery dispute amicably. All of these are skills that are vital to being a successful lawyer.

All lawyers must be mindful of our responsibility to mentor young lawyers in the importance of developing soft skills. I believe most lawyers would agree that the notable drop in the soft skills we see in younger lawyers is due to lawyers now heavily relying on technology for communication. Smart phones, tablets, and computers have replaced phone calls, face-to-face meetings, and a cup of coffee or business lunch to discuss a solution to a problem. Electronic communication makes it is easier to misunderstand the meaning of another. It is easier to doubt their good intent. And it is easier to allow your own behavior to slip into incivility. It is also easier to make careless mistakes in such communications. Compounding matters, electronic messages are often sent at night or over the weekends. In many instances the sender unreasonably expects an instant response. This is simply not professional and contrary to effective communication practices.

The practice has become more problematic with most court calls in Illinois being conducted by Zoom. For decades, lawyers young and old, would work out problems with opposing counsel in the hallways or conference rooms of our courthouses. Lawyers would take advantage of talking to the judge in the courtroom rather than filing motions. The shift to remote practice has prevented lawyers from having regular face-to-face discussions in the courthouse or in law firm conference rooms where disputes have historically been resolved. The heavy reliance on technology has resulted in lawyers hiding behind emails and text messages,

and in many instances sending uncivil communications over trivial disputes that could easily be resolved over the phone or in a face-to-face meeting. There is now a whole generation of lawyers who attended law school online and are now practicing from home.

Mentorship Needed

As experienced lawyers, we need to mentor these “keyboard warriors” and “electronic tigers” from engaging in these sorts of improper electronic missives that in most instances do not address or resolve the problem, but only make it worse. We need to train new lawyers in the “soft skills” of lawyering: how to effectively conduct a phone call, a face-to-face meeting, have a cup of coffee, or an informal conference with the court.

I was trained early in my career to never engage in conduct that would be inappropriate in the presence of a judge. Over the past few years, more than a few times, I was copied on emails where lawyers were quarreling about scheduling and discovery. These emails contained unprofessional language and essentially amounted to bullying – shockingly, all on an email chain that was originally generated by the Court with a judge copied. Sometimes the lawyers did not even take the time to check the addressees. Obviously, this highly unprofessional behavior burdened judges with stepping in to stop the misbehavior and redirect the parties to resolve the dispute.

As an example, in January 2022, the IARDC recommended a three-year suspension of attorney Felipe Nery Gomez for sending “threatening and harassing” emails to seven attorneys during pending litigation. In his emails, Attorney Gomez referred to opposing counsel as “scum,” “liar,” “idiot,” “active criminal,” and “targets,” and threatened them with litigation and sanctions. The Hearing Board concluded that Gomez violated Illinois Rules of Professional Conduct Rules 4.4 (a) and 8.4 (d). Rule 4.4 (a) states that in representing a client, “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtain-

ing evidence that violate legal rights of such a person.” The Board also found that Gomez violated Rule 8.4 (d), which states that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.” The Gomez matter involved emails sent to male attorneys, but such conduct often targets female attorneys as well.

Bullying... or Advocacy?

Jayne Reardon, the prior Executive Director of the Illinois Supreme Court Commission on Professionalism, last January authored a brilliant article: “Bullying Does Not Pass for Advocacy in Illinois.” In this article, she discussed research demonstrating “that there is a pattern in uncivil communication in Illinois, and it isn’t a pretext of advocacy: it’s straight up bullying, and it often targets females.” In further researching the uptick in uncivil emails, the Illinois Supreme Court Commission discussed an alarming pattern of bullying of female attorneys by their counterparts and concluded that: “It can be assumed that this bullying, which is far from zealous advocacy, has been used to intimidate and belittle female attorneys.” The Supreme Court Commission cited to several instances where male lawyers made disparaging comments against female lawyers and were disciplined for violating Rule 4.4 (a). This unacceptable trend must be reversed.

As we exit the pandemic, we all realize that technology has advanced the practice of law and is not going anywhere. But accepting that fact does not also mean accepting incivility in practice. We must do what we can to keep what was good and most useful in traditional practices and apply them in modern practice. By the same measure, we need to be reminded that we all have an obligation to properly train new and young lawyers in the art of developing face-to-face communication – “soft skills.” It is this vital skill set that some writers say makes up 85% of what lawyers do in the practice of law. We all have an obligation to train young lawyers, improve civility, and stop bullying when we see it (hopefully, before it even occurs). ■