

Common Courtesies and Common Sense

by Karen Nordlinger, QC.

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Much has been written about the need for courtesy between lawyers. I approach the subject with some trepidation as a result of the wealth of eloquently expressed material already available. Nevertheless, I do so because it is a subject of fundamental importance to lawyers and, more importantly, to their clients.

I am not a psychiatrist, but I suspect that much of the psychological underpinnings of discourtesy is fear. If we feel insecure, it is more likely that our interactions will be marked by bravado, rudeness and aggression to cover our discomfort. Those psychological issues are, of course, intensely personal ones but it may be necessary to address them if the behaviour is to change.

We are all under tremendous stress in the practice of law today. It is perhaps not surprising that courtesy sometimes takes a back seat to our baser emotions. But the Canons of Legal Ethics say "A lawyer should treat adverse witnesses, litigants and counsel with fairness and courtesy, refraining from all offensive personalities." Notwithstanding that admonition, the Law Society receives many complaints from lawyers of discourtesy, including sharp practice, rudeness and threatening by members. It is a sad commentary on the state of our profession.

I have often heard lawyers saying "it isn't much fun to practise law any more." If that is the case, then surely the breakdown of collegiality of professionals must be some part of the cause. It is true that we are now a much larger bar, some 9,000 members, 8,000 of whom are in active practice, and we are a much more diverse bar. Thus the easy collegiality of professionals who know each other well has to be replaced by some rules of play – but they aren't

difficult, and they have their root in commonsense.

It certainly isn't fun to practice when you receive nasty letters or telephone calls from your "friend". And to ignore the tone of those communications and simply deal with the substantive content takes some strength. I believe, however, that it can be done. In our busy lives, we all get cranky from time to time. I stress, however, that the adage "never apologize, never explain" is not an ethical canon. Often, a brief explanation or apology can do wonders to smooth a relationship, even when it has been very difficult in the past. It is worth doing if we want to practise in a civil profession. Some lawyers continue to fail to provide courtesies to the other side in setting dates or agreeing to adjourn matters when no prejudice would flow from the adjournment. This kind of discourtesy drives us all crazy from time to time.

In addition, some lawyers have a nasty habit of criticizing the lawyer on the other side. This, of course, is intended to increase their stature in the eyes of a client. What it does is to perpetuate the "adversarial" relationship and diminish the client's respect for the profession.

Clients do often talk to each other. Any critical comments made by the lawyer of one client about the lawyer for the other client will eventually make their way to that lawyer. These comments not only harm the relationship between lawyers, making it much more difficult to advance the client's cause, but they impugn our whole profession. Lawyers who engage in this conduct breach both their duty to their clients and to other lawyers.

Of course, a cessation of all these impugned activities would benefit law-

yers. But that is not the main intent. The real reason for maintaining a good relationship with other lawyers is that it is in the interests of the clients. Unfortunately, clients often don't understand that. As a result, they can become disenchanted with lawyers who seem too friendly with "the other side". I am reminded of a short story by Lawrence J Fox called "Doing Well by Doing Good" in which a senior lawyer helps a young inexperienced lawyer with a deposition by showing her how to frame questions and organize documents. He did this because it was clear that the whole thing was going to take an inordinate amount of time to complete, cost his client a lot of money and garner sympathy for the other client. Unfortunately, he did not explain to his client beforehand what he was going to do and why he was going to do it. As a result, he lost the client.

It is our job to help our clients understand why it's in their interests to have a lawyer who is able to communicate civilly with the opposition. They need to be disabused of the notion that we are simply the mouthpieces for their position. And if a client is not prepared to accept that, perhaps it is time to re-evaluate the relationship. Although true civility cannot be legislated, the Law Society is committed to treating complaints of discourtesy between lawyers (and rudeness complaints in general) seriously. I am hopeful that those complaints can be reduced by all of us committing to act as colleagues, not simply adversaries. As Shakespeare wrote:

And do as adversaries do in law –
strive mightily, but eat and drink as
friends.

Taming of the Shrew, Act 1, Scene 2.