SUPREME COURT
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Justice Philip McMurdo
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"Civility and Professional Courtesy"

Everyone in this room would agree that we lawyers should conduct ourselves with civility and professional courtesy. But at once several questions arise:

- What is the content of this requirement of civility and professional courtesy?
- Why do civility and courtesy matter?
- In our profession, should this be a legal requirement or just an acknowledged norm of behaviour?
- What should be the sanctions, if any, for incivility?
- Is there a risk of over regulating incivility and with what consequences?
- Why does incivility occur?
- Is it becoming more frequent?

These questions and others have been extensively discussed and debated within North American legal communities since the mid 1980s. There has been what is described there as a "crisis of civility" in the legal profession and those who have advocated for higher standards and the enforcement of those standards have been described as the "civility movement".[1] This is said to have originated with statements by former Chief Justice Warren E Burger and former American Bar Association President John C Shepard that the American Bar was "moving away from the principles of professionalism and that it was so perceived by the public".[2] As this civility movement developed, it became concerned with the wider question of professionalism, beginning with a landmark publication by the American Bar Association in 1986.[3]

The many jurisdictions within the United States developed their own codes of conduct to meet this concern of declining professionalism, the first of which was published in 1992 by the Seventh Judicial Circuit.[4] This report set out certain "standards for professional conduct in litigation", which were given effect by requiring all lawyers who sought to practise in courts within the Seventh Federal Judicial Circuit to certify that they would comply with those standards.[5]

It appears that in much of the extensive discourse on this subject, by leaders of the practising Bars, academics and judges, the subject of civility was treated as extending beyond matters of etiquette to all conduct which was considered to be detrimental to

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1 See eg Kathleen P Browe, 'A Critique of the Civility Movement: Why Rambo Will Not Go Away' (1994) 77 *Marquette Law Review* 751.

2 Ibid 753.

3 American Bar Association Commission on Professionalism, Report to the Board of Governors and the House of Delegates of the American Bar Association, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, 1986 <http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley_Commission_Report.authcheckdam.pdf>.

4 Committee on Civility of the Seventh Judicial Circuit, Report to the Chief Judge of the United States Court of Appeals, June 9 1992 < http://www.ca7.uscourts.gov/civility.pdf>.

5 Browe, above n 1, 754.

the provision of the professional services of the lawyer and, in the context of litigation, to the administration of justice. So, for example, it was extended to concerns about deliberate delaying tactics used by litigation lawyers, the abuse of the discovery process and what has been commonly criticised as "over zealous advocacy" or "Rambo litigation".

There has been a marked divergence of views in the United States and Canada on the subject. The civility movement has certainly had its opponents and some of their arguments have had some substance. In particular, the point has been made that a confusion between civility and the several ethical duties of a practising lawyer can obscure "the ethical principles at play".[6]

Still, many commentators have identified the fundamental importance of civility, in that strict sense, to the conduct of litigation in an individual case and more generally, to the administration of justice. In particular, the risk which incivility poses to judicial independence and the rule of law has been identified.[7] Prominent Australian judges have forcefully made this same point, to which I will return.

The requirement of civility: its content

As Chief Justice Spigelman said in 2006,[8] civility is not limited:

> "to matters of etiquette and manners. The core element of civility is the manifestation of respect for other persons. In the Western tradition, civility has long been accepted as a public virtue manifest in signs of respect to strangers in language, etiquette and in tempering the assertion of self-interest …
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> Civility remains on daily display in our courts and throughout the legal system. All legal practitioners must, and generally do, treat judges, clients, witnesses and each other with respect. We must all ensure that proper conduct remains a principal characteristic of our legal discourse. Ours is a profession of words. We must continue to express ourselves in a way that demonstrates respect for others."

So civility and professional courtesy are themselves professional obligations. In many circumstances, a breach of these obligations will coincide with a breach of concurrent ethical obligations. But importantly, as Chief Justice Spigelman and others have said, they go beyond matters of mere etiquette and manners.

This requirement of civility and professional courtesy is reflected in the Australian Solicitors Conduct Rules. Rule 4.1.2 requires a solicitor to "be honest and courteous in all dealings in the course of legal practice". Rule 5.1 requires a solicitor to not engage in conduct which is likely to be prejudicial to, or diminish the public confidence in the administration of justice or bring the profession into disrepute. The potential for a breach of a concurrent ethical obligation exists under Rule 32.1, by which a solicitor must not make an allegation against another practitioner of

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6 Alice Woolley, 'Does Civility Matter?' (2008) *46 Osgoode Hall Law Journal* 175, 176.

7 See eg Judge Paul L Friedman 'Taking the High Road: Civility, Judicial Independence, and the Rule of Law' (2001) 58 *NYU Annual Survey of American Law* 187.

8 Chief Justice J Spigelman, (Address delivered at the Annual Opening of Law Term Dinner of the Law Society of New South Wales, Sydney, 30 January 2006) < http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman_speeches_2006.pdf>.

unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide and in the belief on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it. A breach of that rule by the making of a groundless allegation of misconduct against another practitioner would also offend the required standard of civility.

Critics of the civility movement have contended that civility is a vague and undefinable concept.[9] To the extent that this criticism has substance, it hardly requires the abandonment of any quest for civility. Civility is one example of a norm of conduct which is well understood conceptually, although its application can be arguable in individual cases. In that respect, the term civility is no more problematical in its application than, say, negligence or unconscionability.

The content of civility, in the context of legal practice, is affected by the purposes which it serves. It is also affected by the concurrent legal and ethical obligations of the practitioner. Therefore there is no inherent inconsistency between the requirement for civility and the lawyer's obligation to advance, within other ethical constraints, the client's interest.

That these several duties are reconcilable is exemplified by rule 21.2 of the Australian Solicitors Conduct Rules which provides that:

> "21.2 A solicitor must take care to ensure that decisions by the solicitor to make allegations or suggestions under privilege against any person:
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> 21.2.1 are reasonably justified by the material then available to the solicitor;
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> 21.2.2 are appropriate for the robust advance of the client's case on its merits; and
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> 21.2.3 are not made principally in order to harass or embarrass a person."

I have mentioned the many codes of conduct on this subject in North American jurisdictions. I instance the voluntary standards adopted by the District of Columbia Bar[10], of which the first three, in my view, illustrate the core of what is meant by civility in this context:

> "1. Except within the bounds of fair argument in pleadings or in formal proceedings, we will not reflect in our conduct, attitude, or demeanor our clients' ill feelings, if any, toward other participants in the legal process.
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> 2. We will not, even if called upon by a client to do so, engage in offensive conduct directed toward other participants in the legal process. Except within the bounds of fair argument in pleadings or in formal proceedings, we will abstain from

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9 See eg Monroe Freedman, 'Civility Runs Amok' *Legal Times*, 14 August 1995, 54.

10 DC Bar, *D.C. Bar Voluntary Standards of Civility* < http://www.dcbar.org/bar-resources/legal-ethics/voluntary-standards-for-civility/general.cfm>

> disparaging personal remarks or acrimony toward such participants and treat adverse witnesses and parties with fair consideration. We will encourage our clients to act civilly and respectfully to all participants in the legal process.
>
> 3. We will not bring the profession into disrepute by making unfounded allegations of impropriety or making ad hominem attacks …"

Why do civility and courtesy matter?

They do matter for several reasons. The first is that incivility in our profession, as in any workplace, affects productivity. This was recently illustrated by a research paper published in the Harvard Business Review which polled 800 managers and employees in 17 industries about incivility in the workplace.[11] The majority of the respondents reported that their work performance had declined as a result and that incivility affected creativity and motivation.[12]

The second reason comes from the nature of the work done by the legal profession. It is not simply our profession which suffers from incivility. But there is a particular importance for civility and courtesy in our profession, because lawyers are concerned so often with the resolution of conflict. Much of a lawyer's work involves the representation of a client whose interests are adverse to another lawyer's client. The resolution of such conflict is promoted by dialogue and an ability to understand the other's position in order to contradict it effectively. Civility and professional courtesy promote a type of discourse which is more conducive to the effective resolution of legal conflicts, both in and out of court.

A critical importance of civility is in its relation to reason. Professional discourse, in and out of the courtroom, should be reasoned so as to be effective. Incivility inevitably leads away from rationality and balance and the necessary understanding of the adversary's position.

Of course, it is the lawyers' duty, within proper bounds, to strongly pursue the client's interest. But most clients want their disputes resolved, and the client's prospects of reaching the resolution are enhanced by civility and courtesy on the part of its lawyer.

If a judge has to deal with incivility in court, he or she is diverted from a consideration of the factual and legal issues in the case. If a practitioner receives an unduly offensive letter from the other lawyer in the case or transaction, he or she is diverted from the task of responding to whatever was the proper purpose of the correspondence. These diversions can take time and involve expense to the lawyer and/or the client.

Insofar as court advocacy is concerned, incivility is never conducive to persuasion. I suppose that there is still a sub-group of the Bar which looks to distinguish itself by overly aggressive advocacy. Some individuals readily come to mind but will not be named here. In a sense, there is a niche market for this group, because they attract briefers of the same mould who in turn are likely to appeal to those clients who think that their interests will be served by heavy-handedness and rudeness rather than

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11 Christine Porath and Christine Pearson, 'Incivility at Work Takes its Toll', *Harvard Business Review,* January – February 2013.

12 Ibid.

thoughtful advocacy. The ongoing survival of this group does not contradict the fact that incivility is bad advocacy. What a client might like to hear said in court by its advocate need not be persuasive. In over 30 years of appearing in or conducting courts, I have yet to see rudeness make a difference to the winning of a case. On the other hand, it says much of the strength of our justice system that incivility by an advocate does not often lose the case for the client. But I sense that it does happen.

At this point, I will indulge myself with a recollection about a mediation which I conducted when I was at the Bar. It was a commercial case of some kind: the parties were not multinationals, but they were substantial businesses. Each was represented by counsel who either were or were to become silks. One of them (A) arrived a few minutes before the other (B). When I asked A whether there was anything which I should know about the case which I had not read in the brief, he helpfully informed me that A and B had not spoken to each other for several years. Of itself that called for some departure from the Mediator's Handbook. Still, I commenced the mediation in the usual way, by having each of the participants introduce themselves around the table and asking the plaintiff's counsel (A), to summarise his case in the usual way. As he began, B, with much dramatic effect, removed the *Courier-Mail* from his bag and proceeded to read it. I had seen enough to decide I should not allow B to speak. I sent the barristers back to their respective corners and spent the morning settling the case by talking only to the solicitors and the parties. It could be said that this was a case where incivility did promote a settlement. But that was only by the rude barrister being removed from the process.

Civility is required of all participants in the court process, including the court itself. All of us have had experience of the angry or rude judge. Judicial incivility is especially detrimental to the fair and expeditious determination of litigation, firstly because the angry or rude judge is much more likely to make a mistake. Secondly, the behaviour of the judge can be detrimental to the performance of the advocate. The very best and experienced advocates can still perform well in these conditions. But for the most part, the representation of the client's interest, as well as the advocate's assistance to the court, is very likely to be diminished by rudeness from the Bench.

Thirdly, there is the impact upon the standing and authority of the court from the incivility of the judge. Our long developed system of justice, with its constitutionally independent courts transparently upholding the rule of law, rightly enjoys the general confidence of the public as a means of fairly, legitimately and dispassionately resolving legal conflict. That confidence is liable to be diminished if courts act without civility and, in particular, in a manner which suggests a disrespect for one or more of the participants and indeed for justice itself. Some litigants may expect or prefer their lawyers to be uncivil, but nearly all of them expect the court to be rational, open minded and fair. Incivility from the Bench can be very damaging to those perceptions, to the detriment of the authority of courts which derives in substantial part from society's confidence in and acceptance of the exercise of judicial power.

Justice Kennedy of the United States Supreme Court, in an address to the American Bar Association in 1998, said that for the rule of law to thrive, we must insist on three fundamental principles: the responsibility of the individual, rationality in the legal profession and in the courts, and civility. Civility, he said, is "the mark of an

accomplished and superb professional but it is more even than this. [It] is an end in itself".[13]

A further requirement of judicial civility, which may not be of immediate interest to this audience, is the need for civility between judges of a court and between courts, particularly at different levels of the appellate hierarchy. Intemperate criticism by a higher court of a lower court can be conducive to a diminishing respect for courts in general, as an apparent departure from the high standards of fairness and moderation which society should expect from its courts.

In these many ways then, civility by all participants in the administration of justice, and more generally by lawyers in all parts of their practices, is essential to the legitimate and efficient resolution of conflict. Society is right to demand civility from its courts and from its legal profession.

Regulation of behaviour

Much of the discussion in North America has involved the issues of whether there should be a legal requirement of civility and whether the regulation of incivility has risks for the interests of clients and of the justice system.

Much of this debate has centred upon whether a requirement of civility compromises the discharge of a lawyer's duty to the client in an adversarial system. Accepting that there is an overarching duty owed by the lawyer to the court, there is then the lawyer's duty to the client and to the promotion of a case which to others may seem an outrageous or immoral one. The climate of litigation is essentially hostile and often requires the pursuit of a result which, if established, could be devastating for the defendant's business or an individual's life. It is thought that civility could unduly intrude, by requiring the pulling of punches which ought to be thrown. If so, it is said, the interests of justice according to law could be compromised by an undue emphasis on civility.

To an extent, these reservations about the regulation of incivility have some basis. But as I have endeavoured to explain, civility on the one hand and the productive pursuit of the client's interests on the other (at least in a way which is consistent with other ethical obligations, the substantive law and the laws of procedure) are not irreconcilable. On any proper analysis, there is no significant threat, from the regulation of incivility, that other ethical obligations will be compromised. And nor will the *proper* interests of the client be compromised. It is therefore appropriate that Australian solicitors are bound by rules of conduct which require standards of civility and courtesy. As was said in one American case (which has become notorious for the bad behaviour of the attorneys): [14]

> "… zealous advocacy does not equate with 'attack dog' or 'scorched earth'; nor does it mean lack of civility. … Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive."

The appropriate sanctions for this misconduct obviously depend upon its nature and extent. Sadly, there is a sufficient body of cases in Australian jurisdictions to provide

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13 Associate Justice Anthony M Kennedy, 'Law and Belief' (Address to the American Bar Association, San Francisco, 2 August 1997).

14 In *Re Marriage of Davenport*, 194 Cal.App.4th 1507 at 1537.

many examples of the sanctions imposed upon lawyers in this context. There is a helpful collection of some of those cases in a paper presented by Ms Lynda Muston in 2006, which can be found on the website of the Office of the Legal Services Commissioner of New South Wales.[15] The cases are usefully categorised by the author against the descriptions:

- using offensive or provocative language, including swearing at a client or fellow practitioner;
- discriminating against a client or a fellow practitioner;
- physically intimidating, threatening or assaulting a fellow practitioner or a client;
- physically intimidating, threatening or assaulting a witness;
- making statements (without justification) during proceedings that are disrespectful or which allege dishonesty or impropriety to the court or fellow practitioners;
- using offensive and intimidatory language in correspondence to fellow practitioners, clients or opposing parties;
- using offensive and intimidatory language in correspondence towards investigating authorities; and
- sexual misconduct.

Why does incivility occur and is it becoming more frequent?

Many explanations are offered in answer to the first of those questions. One is the increasing burden of legal practice, through rising costs, overpopulation of some areas of the profession and the growing complexity of some areas of legal practice. Another is the growth of the legal community so that lawyers are not known to each other personally, which is said to detract from a sense of collegiality.

It is said that the commercialisation of legal practices, exemplified by corporations conducting legal practices (some of which are publicly listed corporations) has led to a departure from a more gentlemanly era.

I accept that most of those things have been contributors. In particular, the apparent cultural shift, at least in some areas of the profession, to commercialism from professionalism is a development which is likely to have had some effect.

But the demands of some clients for excessively zealous representation are nothing new and there has always been some misconduct of this kind, at least in my time in the law. When I was a solicitor in the 1970s, there were some notorious individuals and firms in this respect around Brisbane, notwithstanding that the legal community was a small fraction of its present size and most people knew each other.

And it must be said, without any suggestion of irony or self-satisfaction, that there was a high level of judicial incivility in those days compared with the present. Justice

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[15] Lynda Muston, 'Civility and Professionalism - Standards of Courtesy' (Paper presented at the Conference of Regulatory Officers, Sydney, November 2006) <http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/civility_professionalisam_standards_courtesy.pdf>

Keane has spoken about this period when he, not long before I, commenced practice. He has recalled that "in those days [courts] were universally presided over by men. These men were usually very angry - about something, which usually eluded everyone else. Those courts were usually so unpleasant as to put one in mind of the Royal Navy of Nelson's era, described by Winston Churchill as a place of 'rum, sodomy and the lash!'"[16]

The behaviour of judges has mostly improved, a phenomenon which has many explanations, not the least of which, as Justice Keane has also observed, is the more recent representation of women in the judiciary.

But I have to say that as a matter of impression rather than from evidence, the incidence of incivility amongst practitioners has increased. I do not suggest that there is a "crisis of civility". But it is fairly apparent that the incidence is on the rise, for which there is a number of apparent explanations.

One contributor has been technology. The medium of email is a particularly dangerous form of communication, because it permits the author, in the apparent security of his or her office, to type and send a message more quickly than its potential consequences can be considered. And email may prove not to be the worse medium, because for much the same reason, the use of social media could prove yet more dangerous.

Most importantly, there is a broader general environment of incivility in public discourse. I will not attempt to explain that phenomenon. But it has certainly affected much of what is said and written about courts. There is now an incidence of unthinking and emotional criticism of judges and courts by some sections of the media, some interest groups and some politicians which, I suggest, did not occur in the 1970s.

For example, the frequent criticism by some politicians and some parts of the media about the level of sentencing by criminal courts is a relatively recent phenomenon. It has corresponded with the relatively recent political trend towards mandatory sentencing, sometimes accompanied by purported justifications from politicians which personally attack the attributes and attitudes of judges as a class or individual judges. Courts are not immune from criticism. But that criticism should be courteous, rational and respectful. It should be directed to what is relevant - the legal merit of a court's decision and not to the irrelevant, such as the previous political affiliation of a judge.

Chief Justice Allsop of the Federal Court of Australia has recently and compellingly spoken of this incidence of incivility.[17] Speaking last month, his Honour said:

> "The rule of law … requires clarity, precision and order; but it also requires civility, reason, fairness and justice.

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[16] Chief Justice P Keane, 'Advocacy: The View from the Bench' (Keynote address delivered at the Australian Lawyers' Alliance Queensland State Conference, Gold Coast, 15 February 2013) < http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1534&Itemid=35>

[17] Chief Justice J Allsop, 'Civility, Reason, Fairness and Justice, and the Law' (Speech delivered at the Opening of the Law Tern Service, Sydney 12 February 2014) < http://www.fedcourt.gov.au/publications/judges-speeches/chief-justice-allsop/allsop-cj-20140212>.

> By 'civility', I mean manner of human expression and social intercourse that provides the environment for the exchange and debate of conflicting ideas. It is an environment of manners and peaceful willingness to see views and ideas of others.
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> … To do so impairs civil society's capacity to deal with difficult issues, and so impairs good government."

His Honour went on to explain how the "arbitrariness of mandatory sentencing" could be traced in part to a lack of civility in political discourse, contributing to "laws lacking a degree of reasoned (as opposed to impassioned) response".

Of course courts have not been the only targets of uncivil commentary. It can at least be said for politicians that they do not exempt each other from incivility. And it can also be said that there are examples of the same trend in other areas, such as the behaviour of some of our most well-known sportsmen.

But most relevantly for our profession, there is the tendency towards the immoderate and unreasoned criticism of the institution of courts and of the various branches of the profession who serve the administration of justice.

To my mind, this makes it especially important that we preserve our own standards.

I conclude then with these words of Chief Justice Spigelman:[18]

> "In a complex society such as ours relationships of civility, tolerance and trust cannot be established or maintained only on the basis of interpersonal relationships. They must be institutionalised. That is what has happened in the law. The institutions for the administration of justice, both in the courts and in the legal profession, operate on the basis of well recognised rules of proper conduct. Our legal system and profession has much to be proud of in this respect. We must ensure that it remains so and hope that others learn from the ability of this profession to resist the decline in civility apparent elsewhere in society."

[18] Spigelman, above n 8.