

# Civility and Professional Ethics

BY JUDGE JOHN L. KANE, JR.

*[Editor's Note: John L. Kane Jr. is a Judge of the U. S. District Court for the District of Colorado. He was nominated for the Court by President Jimmy Carter. The nomination was confirmed by the Senate on December 15, 1977. He assumed senior status on April 8, 1988. The text of this Article was the subject of a talk by Judge Kane before the Denver Law Club on May 12, 2006.]*

A great deal of emphasis is placed by the courts and the organized bar on the subject of civility. Few topics, if any, begin with the essential issue of definition. So we need to ask: "What is the definition of 'civility'?" How often do you find yourself in a disagreement only to discover that you and the other participants are not talking about the same thing? How often are you in a meeting or court session and find that what someone else is saying and what you are thinking are like ships passing in the night? How often do you find yourself asking, "Wait a minute, what is it I am trying to say?"

My experience as a judge has taught me that most disputes are based on confusion in language and usually resolve themselves when the issues are clearly defined. The answers to questions do not matter so much as what the questions mean.

Most of 20th Century philosophy was devoted to the search for meaning in language. Law, I suggest, is applied philosophy. It is not surprising therefore that the essential problem in law is that of definition. (I once wrote an article on how courts attempt to define the term "reasonable doubt" and came to the intentionally ludicrous conclusion that no court has succeeded in formulating an intelligible definition. The lead sentence in my article was, "I don't know what reasonable doubt means, and I can prove it.")

The most frequently violated rule of definition in briefs, judicial opinions and statutes is the rule against tautology. In the simplest of terms, this rule proscribes defining a word by using that same word in the definition. The American Bar Association once spent a small fortune funding a task force to report on professionalism. The report was hundreds of pages long and publicized with great ballyhoo, yet not once in all its splendor did it define the term which was the subject of the report. Even dictionaries violate this rule. Incredibly, the second definition of the word "tautology" itself as listed in Merriam Webster's Collegiate Dictionary, Tenth Edition, is: "a tautologous statement." In almost every conversation about contemporary politics and policy, the terms "liberal" and "conservative" are thrown about with reckless abandon. People will say that everyone knows what those words mean and yet the truth is that nobody does. Even more confusing, the meanings can change from sentence to sentence and sometimes even from phrase to phrase. Whatever meaning there is has to be extrapolated from context and by then it is too late for any purposeful statement to have been made. And if you think "liberal" and "conservative" are troublesome, try using that infamous four-letter word L-O-V-E and see what happens.

So, to avoid all this nonsensical waste of time, let us begin, unlike most of what you have read or listened to about today's topic, with some definitions. I don't ask that you necessarily agree with the definitions I

will develop, but only that you accept them for the purpose of understanding just what it is that I am saying.

Those who live in a city should be grateful to our language. In ancient times people who lived in a city were supposed to be more civil in their manners and more civilized in their behavior than those dwelling in the countryside and hinterlands. Both of these words, -- "civil" and "civilized", are derivatives of the Latin term *civis* which means, "one who lives in a city." City folk regarded themselves as more cultured and well-housebroken. English also borrowed the Latin word *urbs*, which likewise means city, and created the word "urbane" which describes the smooth manners and sophistication that were presumed to be characteristic of a civilized community. (If any of you happens to be a New Yorker, take limited pride in the term "Gotham" because it comes from the name of a village in Nottinghamshire, England noted for the blundering stupidity of its inhabitants.)

Understanding words requires a trip to the Oxford English Dictionary. It defines "civility" as the state of being polite (that is, following social conventions), "considerate" (that is thinking before acting), "refined" (that is being precise) and "educated" (which is to say having developed intellectual and moral powers.) But "civility" means more than manners or politeness. It is the self-discipline produced by thought and practice that enables one to live in a community without offending others or violating established norms of behavior. This is the definition I will be using.

We also must distinguish between the term "ethics" and the specialized term "professional ethics." The two are clearly not the same. Aristotle defined ethics as "a state of character displayed in good actions." He taught that the repetition of actions develops habits of behavior by which we identify character. If those actions are good, i.e., moral, then good character develops.

The optimum public result of developing good character is that ethical behavior occurs naturally and eventually becomes a matter of habit. Behaving ethically becomes a normative response. The training and repeated actions that mold and correct one's mental faculties in order to acquire this habit form what is called discipline. The discipline of ethics is thus an integral part of civility and it is impossible to practice civility without being ethical.

A "Canon of Ethics" is a rule of discipline intended to set one on a prescribed course of conduct. The term "legal ethics" means the pursuit of the moral values inherent in legal practice. Some of the rules of professional ethics are not ethics at all, but rather negative proscriptions, many of which are overly simplistic. I am not suggesting that such rules are unnecessary, but there is a danger of confusing rules of professional conduct with ethical principles. The former prohibit and the latter command.

Let me put it this way: Most of the so-called ethical problems you face in practice can be answered with a few aphorisms. The first, unless of course your mother was Cruella DeVille or Lizzy Borden is this: "What would your mother tell you to do?" Another is this: If you have to ask, then don't. A third bit of folksy wisdom that will keep you out of trouble is: If it ain't so, don't say it, and if it ain't right, don't do it.

There are, of course, legal ethics issues that evade these simplistic statements, but most grievances against lawyers and disciplinary actions involve procrastination, lying to a client by saying something is done which isn't, and, the ticket to disbarment, spending other people's money. One hardly hears of

grievances involving betraying a client's confidences and the most frequent violation, sheer incompetence, is almost never prosecuted. Lying to judges, citing bad law, and suborning witnesses are seldom grieved. Rather, judges usually deal with such matters by admonishing the lawyer and letting other judges know to beware. Thus are reputations lost.

Some of the most serious professional ethics issues never see the light of day. These are the ethical conundrums that have no right answer. They usually occur when two ethical postulates conflict, and under those circumstances most lawyers and judges agree that you should obtain the best advice you can and then follow your conscience. For example, what do you do when your client surprises you by testifying on cross-examination to a critical matter and you believe he is giving a false answer?

Another example is told by a Florida lawyer who was interviewing a client accused of stabbing his spouse. The client handed him a letter opener he said he had found in his jail cell. He told the lawyer to get rid of it because it was dangerous and contraband. The lawyer never said how he handled that one, and frankly, I'm not sure I would ever want to know.

Consider this example: You have a client you've represented in numerous matters for a number of years. You've known her to be a very smart and capable businesswoman. She has no family and lives alone. For reasons not entirely clear, her business decisions become less smart, and her instructions to you are contrary to her own best interests. The situation worsens and you suggest as subtly and diplomatically as possible that she should get a medical or psychological evaluation. She nearly fires you and tells you to mind your own business and do as she instructs you to do, or she will get another lawyer who will. Your experience and best judgment tell you that she has changed for the worse, but she doesn't come near the standards for a determination of incompetency and appointment of a guardian. What do you do? There is no hornbook answer.

Though civility isn't often discussed in terms of ethics, it should be very clear that it is unethical to be uncivil. In terms of professional ethics, it is likewise unprofessional to be uncivil. It is in fact a violation of the oath of admission. Every lawyer admitted to practice swears that he or she will abstain from all offensive conduct. The Bar's creed clearly states: "I will abstain from all rude, disruptive, disrespectful, and abusive behavior and will at all times act with dignity, decency, and courtesy." There is no exception to the civility requirement. There is no time when abusive behavior or lack of courtesy is acceptable for a member of the legal profession. Never.

Some lawyers will say, "I treat my opponents as well as they treat me." That is just not good enough. Litigants can be expected to have their emotions override their reason and do things out of anger, frustration or peevishness, but the very function of a lawyer is to stand between the client and his own destructive impulses. Lawyers are expected to act with grace and good judgment under conditions of extreme stress. It is essential for a lawyer to step back from the exigencies of the moment and think calmly for the client's benefit. Being uncivil means that a lawyer is out of control.

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*This is Part I of Judge Kane's talk. Part II will be published in July*