



CIVILITY IN CONFLICT

Oregon State Bar Intellectual Property Section

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Are Patent Litigators Less Civil?

What is your impression of civility among patent litigators as a whole compared to other attorneys?

- Less civil
- About the same
- More civil

You Lie!

How often in your practice have you or another attorney asserted that another attorney has acted with bad intention (e.g., knew what he said is untrue)?

- Never
- Nearly Never
- From Time to Time
- Frequently

Interrupt

How often in your practice have you or another attorney repeatedly talked over another in a meeting or call?

- Never
- Nearly Never
- From Time to Time
- Frequently

But He Hit Me First!

Is it
sometimes
O.K. to
respond to
incivility with
incivility?

- Yes
- No

Responding to Incivility

If an opposing attorney repeatedly is disrespectful and uncivil, which comes closest to your primary response?

- Even greater effort to stay on the high road (Michelle Obama)
- Push back in a comparably disrespectful manner
- Reach out to offender orally to try to mend the relationship
- Reach out to Judge
- Reach out to colleague of the offender

What is Civility in Conflict?

“Civility is courtesy, dignity, decency and kindness.

It has been defined in the Virginia Bar Association’s Creed as follows:

Courtesy is neither a relic of the past nor a sign of less than fully committed advocacy. Courtesy is simply the mechanism by which lawyers can deal with daily conflict without damaging their relationships with their fellow lawyers and their own well-being.”

Fulfilling a Public Trust: The Professional Lawyer, OSB CLE Seminars, p. 15
(Mar. 17, 2017),

http://www.osbar.org/cle/library/2017/PROF17_Handbook.pdf

Examples of Civility at a Hearing

1. Send opponent ASAP any new case may cite at hearing
2. Teach client and team courtroom decorum rules
3. Arrive early so might narrow dispute w/ opponent
4. Greet opponent team
5. Greet reporter and CRD clerk
6. Take care with courtroom furniture as set up
7. Promptly offer to exchange slides/handouts w/ opponent
8. “May it please the Court”
9. Answer Judge’s questions
10. Never interrupt
11. Trust Judge; don’t waste Judge’s time
12. Be cognizant of reporter. Read slowly. Suggest break (w/o mentioning reporter) if notice reporter struggling.
13. When done, praise opponent’s performance
14. Poker face until 2 blocks away from courthouse

Examples of Incivility

1. Attributing bad intention
2. Disparaging opposing counsel
3. Declining reasonable requests
4. Not seeking reasonable resolution
5. Refusing to explain basis for position
6. Not promptly responding to inquiry
7. Repeatedly interrupting and failing to listen
8. Bringing tiny disputes to Judge
9. Facial expressions at hearing
10. Not providing slides to other side before hearing
11. Not answering Judge's question
12. Monopolizing meeting
13. Attacking speaker not the message
14. Using discovery to harass
15. Noticing depo. of adversary's officer 100 miles from her office

Incivility's Causes and Triggers

1. Bad behavior by opponent
2. Speaker is wrong, and may be believed
3. Your personality
4. Your training
5. Time pressure and other stress
6. Expectations / instructions of clients or fellow attorneys
7. Fear that asymmetric civility will harm client's chances

Training to be Civil

1. Know what matters to winning
2. Persuade yourself that others indeed deserve respect
 - a) Litigation *is* chess but people are not pawns
3. Accept value of compromise
 - a) Offer to negotiate “off the record”
 - b) Just because other side suggested something, doesn’t mean it’s a bad idea
4. “May I pause you?”
5. [Ctrl + F] for “ly” on all near-final work product

Training to be Civil

7. Click Call not Send
8. Get to know the other person
 - a) Reach out to other side early in case to set friendly tone and de-escalation routes
9. Always be prepared, and early
10. Trust the Judge
11. Use humor
12. Apologize when necessary

Responding to Incivility

1. “We disagree. Let’s discuss. When are you free?”
2. 24-hour rule. Take a breath before responding.
3. Disagree agreeably
4. Have a drink with other side
5. Call colleague of the offending attorney
6. Work even harder and smarter to win!

Be Civil to Whom?

- Court and staff
- Opponent and staff
- Other lawyers
- Firm taking over client's matters
- Witnesses
- Jurors
- Client and staff
- Court reporter
- Own Firm
- Everyone

Your Action Items

1. Monitor and improve your own behavior
2. Help others be civil. Mentor. Edit drafts.
3. Thank civil adversaries
4. Reward civility
5. Discuss the topic within your firm or company
6. Ask others to privately speak up when you fall short

Civility in Conflict



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Appendix

OREGON RULES OF PROFESSIONAL CONDUCT

RULE 8.4 MISCONDUCT (a) It is professional misconduct for a lawyer to: (1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law; (4) engage in conduct that is prejudicial to the administration of justice; or (5) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law, or (6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. (7) **in the course of representing a client, knowingly intimidate or harass a person because of that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.**

Oregon's Attorney Oath

“That I will faithfully and honestly conduct myself in the office of an attorney in the courts of the State of Oregon; that I will observe and abide by the Rules of Professional Conduct approved by the Supreme Court of the State of Oregon; and that I will support the Constitution and laws of the United States and of the State of Oregon. *To the court, opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.*”

What is Civility?

- “(1) recognize the importance of keeping commitments and of seeking agreement and accommodation with regard to scheduling and extensions;
- (2) be respectful and act in a courteous, cordial, and civil manner;
- (3) be prompt, punctual, and prepared;
- (4) maintain honesty and personal integrity;
- (5) communicate with opposing counsel;
- (6) avoid actions taken merely to delay or harass;
- (7) ensure proper conduct before the court; ...

What is Civility?

- (8) act with dignity and cooperation in pre-trial proceedings;
- (9) act as a role model to the client and public and as a mentor to young lawyers; and
- (10) utilize the court system in an efficient and fair manner.”

Donald E. Campbell, Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility, 47 GONZ. L. REV. 99, 109 (2011).

Improving Attorney Behavior in IP Litigation and Practice

“[L]awyers who know how to think but have not learned how to behave are [a] menace and a liability, not an asset, to the administration of justice.” Excerpts From the Chief Justice’s Speech on the Need for Civility, N.Y. TIMES, May 19, 1971, at 28.

“[I]ncivility by attorneys helps perpetuate negative perceptions and stereotypes about lawyers and the legal system—namely that lawyers are arrogant, rude, obstreperous, and obnoxious jerks, and the client with the most abhorrent lawyer in the case will prevail.” See Lawyer Bullies, Incivility: On Policing Lawyer Manners, AM. BAR ASS’N (Oct. 2015), <http://www.americanbar.org/publications/youraba/2015/october-2015/the-civility-conundrum.html>

Improving Attorney Behavior in IP Litigation and Practice

Don't take unfair advantage of opponents.

While it's part of the litigation process to capitalize on your opponent's mistakes or inexperience, it's not necessary to deliberately embarrass, humiliate, intimidate or bully an inexperienced or less skilled opponent. Experienced lawyers should model appropriate professional behavior to less experienced lawyers. If we model rude and boorish behavior to less experienced lawyers, we will create the kind of lawyers that make practice more stressful and less enjoyable. Engaging in such inappropriate conduct might cause your opponent to work harder than he or she otherwise would, to the ultimate disadvantage of your client—and make you look foolish in the process.

Fulfilling a Public Trust: The Professional Lawyer, OSB CLE Seminars, p. 4 (Mar. 17, 2017),

http://www.osbar.org/cle/library/2017/PROF17_Handbook.pdf

Practical Situations in IP Litigation

- Written submissions to Court
- Oral Arguments
 - Exchanging demonstratives early
- E-mails and letters to opponent
- Scheduling and extension requests
- Depositions
- Discovering opponent error
- Phone calls and meetings

Practical Situations in Other IP Practice

- Patent or Trademark Examiners
- Legal Assistants
- Transfer of files into or out of office to another firm