Civility and Effectiveness

BY ANDREA BRENNEKE

Why civility? Because it works, it is effective, and it is essential to the core of who we are as human beings and what we do as lawyers. Let’s face it. We’ve not only chosen a profession that deals with conflict, we work within a system that resolves conflicts, and finds “truth,” through adversarial proceedings. What we do, and how we do it, really matters for our clients, ourselves, and the broader community.

Some roll their eyes and dismiss civility as superficial politeness; an unimportant manners exhortation; trivial in the face of urgent needs, injustice, violation, and ongoing crises and conflict. I invite you to consider civility as a portal to an even deeper exploration, not just of right action and doing, but of being. Perhaps civility evokes the very essence of humanity, the capacity and longing for deep and meaningful connection, the fundamental foundation of each and every human relationship that is the glue of civilization itself. The practice of civility in the face of conflict is, then, an essential practice.

In litigation, effectiveness often is defined as “winning” — aggressive advocacy on behalf of our clients that accomplishes real results. Yes. But is there an inherent conflict between effective work as a litigator and civility? No. Acting with civility enhances effectiveness. Let’s examine how.

Conscious action within the conflict

Effectiveness as a human being requires a grounding in civility, respectful communication, comfort in relationship, and emotional intelligence. Effectiveness in any profession is enhanced by one’s own personal development and maturity, integrity, confidence, and the capacity to understand and collaborate with others. As lawyers, it is easy to look at “opposing counsel” and observe how others’ incivility actually exacerbates conflict between the parties, with the lawyer becoming part of the problem. We can compile a list of ineffective, uncivil behaviors that we have observed in our profession: raised voices; ranting; demands; threats; disrespect; name-calling; dismissive bias; allegations or reports of immigration status of witnesses; blame and assignment of ill motive to others; making assumptions; personalizing issues; disdain of other parties, attorneys, and witnesses and their contributions; unilateral action where collaboration is anticipated and beneficial; focus on issues intended to embarrass and humiliate.

The effective lawyers I know litigate aggressively and with civility; they obtain necessary information through discovery and present powerfully at trial while also taking every opportunity available to build relationship, show compassion, reveal vulnerability, seek understanding, act collaboratively, and explore ways to find mutually beneficial and effective resolutions of the underlying conflict. They solve problems, rather than making them.

Let me celebrate some of the more notable expressions of civility I’ve experienced within litigation and the effectiveness of that approach.

At her deposition, one defense attorney connected with a mother by expressing genuine sadness for the loss of her daughter and revealing that one of his close family members also was a victim of a crime. He acceded to my requests that questions relating to traumatic events be asked at the end of the deposition to avoid triggering PTSD. Throughout the litigation, and it was hotly contested, the relationship between the defense attorney, the plaintiff, and her legal team continued to deepen through mutual respect, collaboration regarding process/scheduling, and willingness to explore underlying interests important to the plaintiff; these resulted in meaningful non-monetary agreements related to changes in policy and training, a commitment to a memorial honoring the daughter, as well as a substantial financial settlement. How can this be effective from a defense perspective? Because this client’s motivation was not about the money, and anything less than addressing underlying issues and needs for change would not have resulted in a settlement.

Another defense attorney connected with a terminated employee at her deposition by sharing that he understood the challenges of her disability because someone close to him recently was diagnosed with the same condition. He demonstrated this, in action, by accommodating her needs in the deposition itself. This built goodwill and resulted in enhanced cooperation in the proceedings.

I’ve enjoyed collaborative problem-solving about all aspects of a case, from discovery planning to settlement. Attorneys working together can effectively engage in efficient conflict resolution directly and honestly by sharing ideas, exploring the interests and perspectives of the clients, making real offers and meaningful responses, and considering all possibilities for creative problem-solving.

Defendants who are willing to be civil in the face of conflict, who seek to understand the underlying needs and take actions that restore the broken relationships, those who engage in self-reflection and take responsibility — through an apology or a change to policy or training that will help ensure that what happened to the plaintiff will not happen again — are effective in negotiating mean-

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ingful settlements that promote healing and goodwill between the parties and restore the sense of well-being of the community at large. This is civility at its best, as it restores right and meaningful relationships and recognizes the ongoing webs of connection.

Consciousness of connection beyond the conflict
At an expanded level, “civility” is the consciousness of civilization, humanity, and the interconnections between people. Underlying any conflict are vulnerable people with needs that have not been met, meanings that have not been understood, harms that have not been redressed, pain over separation and division that has not been healed, power that has not been shared.

This consciousness of connection has a practical angle: at least while the dispute is active, the conflict between the parties directly connects them and impacts those in the community touched by that conflict. There is a “conflict community.”

It is effective and inspiring to support clients in their choice to cultivate community healing and deepening of relationship through conflict. For example, two parents made a substantial contribution from the settlement of their civil rights case to the Washington State Coalition Against Domestic Violence to create a game to educate communities regarding teen domestic violence and effective response; on the anniversary of their daughter’s murder, the police and sheriff’s department, school officials, and community members gathered to play the game and learned how to avoid such tragedies in the future. This honored Dayna Fure’s memory and restored community.1 The family also holds a memorial fundraising run every year to fund a scholarship in Dayna’s name.

Siblings and master woodcarvers are devoting themselves to creating a memorial totem pole to erect in Seattle in celebration of their native carving tradition and to honor their slain brother who was shot by a Seattle police officer while walking with the tools of his art and trade.2 The City of Seattle is facilitating this by donating the space for this community art and healing process and by allowing installation at the Seattle Center (provided maintenance fees are raised by the project). Contributions toward the maintenance fund and the raising of the pole can be made through the Potlatch Fund, www.potlatchfund.org (designate for the John T. Williams Totem Pole Project).

In a medical negligence case, the institutional defendant agreed to revamp a series of procedures and protocols to prevent future injuries, held a memorial service with its staff and family to honor the deceased patient in the space he was cared for, and renamed that wing of the building in his honor and with a commemorative plaque designed by his widow.

As lawyers, we can help to cultivate healing and connection through engagement of conflict. Alternative dispute resolution has become part of the normal case schedule in family law and civil litigation; the lawyers and mediators committed to mediated settlements consistently find ways to resolve disputes that would otherwise go to trial. Organizations and groups committed to restorative justice are making structural law reform changes that hold individuals accountable for harm but continue to value them as members of community, deal with the needs of all members of a conflict community, and effectively reduce recidivism.3 Lawyers committed to cooperative and collaborative law, especially in the family law context, are developing systems and networks to represent clients and resolve conflicts in more collaborative ways. Restorative Circles4 and other restorative justice practices enable communities to develop compassionate justice systems to engage their own conflicts and find their own solutions. Compassionate Seattle and the Compassionate Action Network have launched a pilot project to create a restorative justice system in Seattle based on Restorative Circles, and seek your involvement.5 This project captures some of the momentum established when family members of the late John T. Williams, Police Chief John Diaz, other representatives of the Seattle Police Department, and members of the community engaged in a restorative circle in the immediate aftermath of the shooting and created an action plan designed to build trust and relationship among the family, the Native American community, and the police.6

Suggestions for support and engagement
In the interest of civility and mindfulness issues, the newly formed Washington Contemplative Lawyers may provide inspiration, with meetings the last Wednesday of each month at the WSBA offices in Seattle from 8:15 until 9:00 a.m. Consider becoming involved in the creation of a restorative justice system in Seattle based on Restorative Circles. Join the Restorative Circles Seattle pilot project.7 Workshops are scheduled December 3, 2011, and February 10, 2012. To register, go to www.spiritualliving.org/classes or in person at the Center for Spiritual Living Seattle.

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Andrea Brenneke’s passion for justice drives her employment law, civil rights, sexual harassment, and violence against women practice at MacDonald Hoague & Bayless. She facilitates restorative circles and supports communities in developing compassionate justice systems that both engage conflict and deepen connections among their members. She is also a certified LR 39.1 mediator. Brenneke was honored by her peers as one of “Seattle’s Top 152 Lawyers,” Seattle magazine, January 2005. She has been recognized as a “Super Lawyer” in Washington Law and Politics.

EDITOR’S NOTE: This marks the conclusion of the Raising the Bar: The Promise of Civility in the Legal Profession series. Robert’s Fund is collaborating with Bar News to produce a new series, “Rallying the Role Models: Studies of Civility in the Legal Profession.” Several articles will be published in the course of 2012.

NOTES
3. See, e.g., Center for Children and Youth Justice (juvenile justice reform), ccyj.org.