

# PRESIDENT'S COLUMN

## Civility and Professionalism: Your Responses

On January 29, 2023, the Vermont Bar Association launched a survey on civility and professionalism.<sup>1</sup>

We received an overwhelming response: **699** of you answered.<sup>2</sup> The survey was sent to Vermont lawyers, state and federal judges, court staff, paralegals, and other participants in our legal system. In this President's Column, I provide a summary of your answers, together with additional thoughts and observations shared at our CLE at the VBA's March 31 Mid-Year Meeting in Manchester.<sup>3</sup>

As an initial matter, I want to thank you for taking the time to respond to our survey. Many of you provided detailed (and exceedingly candid) comments,<sup>4</sup> and we truly appreciate it. As you know, we conducted the survey because of a concern that there has been a decline in civility and professionalism among lawyers in Vermont. Your responses – and the sheer volume of your responses – suggest that the concern is not ill-founded. Indeed, we seem to have touched a nerve.

### 1. Are most lawyers civil and professional?

The good news is that **92.69%** of you answered that most lawyers you engage with are "civil/professional" or "very civil/professional."<sup>5</sup> As one of you reported: *The attorneys in my county are always gracious, appreciative, personable and sometimes feel like family!* When asked how you would compare lawyers' civility and professionalism nowadays with when you first began practicing, **12.55%** of you said that things have gotten better, and **58.30%** said things are the same.<sup>6</sup>

Notably, however, **29.15%** of you said that things are worse. Further, **61.22%** of you reported experiencing or witnessing uncivil or unprofessional behavior from a lawyer in the last six months.

### 2. What are the most reported examples of recent bad behavior?

For those of you who experienced or witnessed uncivil or unprofessional behavior in the last six months, we probed further. We offered 12 examples of potential uncivil/unprofessional behaviors for you to report, plus the option to select "other."

Here is what we learned:

- The most reported example of bad behavior is a "sarcastic or condescending attitude," at **59.05%**. You described: *condescending references about op-*

*posing counsel in briefs, as well as condescending remarks about being a 'green' attorney. This issue was especially noted by court staff, who reported that attorneys are sometimes verbally abusive to court clerks. As one of you put it: I am very disheartened at the incredibly disrespectful communication that court staff are subjected to these days from some attorneys. Being rude, condescending, and insulting does nothing to enhance the work that we all need to do together. The point is well taken. Rude and condescending behavior is unacceptable, and employing it, particularly in interactions with court staff, surely does not help you advance your client's cause. Bad behavior is a bad strategy.*

- The next most-reported bad behavior is "inflammatory writing in correspondence, emails, briefs or motions," at **54.96%**. At our CLE, Judge Teachout offered examples of writing that struck her as unnecessarily inflammatory and, in the end, "not effective at all." These include describing the opposition's argument as "preposterous" or "absurd" or "outlandish" or "beyond Kafkaesque," as well as referring to an opponent's statement of fact as "false" rather than as "incorrect."<sup>7</sup> Some might consider these to be potentially close calls.<sup>8</sup> But Mike Kennedy noted that being aware of the court's (or a particular judge's) perception of the effectiveness of such language may well be required by our duty of competence under Rule 1.1 of the Vermont Rules of Professional Conduct.<sup>9</sup> In other words, as Mike always says, "be careful out there."
- The third most-reported example was "misrepresenting or stretching the facts," at **49.57%**. You complained of *hyperbolic or meritless motions loosely grounded in fact*, and there were a number of complaints about attorneys *lying to the court*. Of course, this violates the Rules.<sup>10</sup>

Interestingly, despite being offered 12 choices (which seemed like a large enough number of options at the time), **24.14%** of you checked the "other" box and wrote in your own examples. The most frequent was the failure to return calls or emails or otherwise engage with counsel: *failing to return calls or emails; not responding to*



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*emails or phone calls; no response with no explanation; stonewalling; refusing to engage with me; ignoring repeated communications; and inexcusable delays in responding to correspondence. Also noted were concerns related to behavior during discovery, with respondents complaining about gamesmanship with discovery and attempts to avoid discovery obligations. As one of you reported: Unnecessary disputes over discovery are a major problem. I think they have gotten much more frequent during the many years I have practiced.*

Perhaps most disturbingly, **14.44%** of you reported "sexist comments." *The majority of incivility I have encountered stems from sexism*, observed one of you. Another said: *I've been called a bitch and told that I am 'overly aggressive' and that I need to 'calm down.'* And another complained about *older male attorneys making thinly veiled references to male judges that suggest they are both part of the same old boys' club...when opposing counsel is a younger female attorney*. This is clearly a significant issue that requires further attention. Among other things, it represents a violation of Rule 8.4(g).<sup>11</sup>

Finally, many of you observed that the problem is *thankfully limited to a few bad actors*. Said another: *It seems to be always the same attorneys, and that is just how they do business*. Out-of-state attorneys were singled out as a problem. So were a few practice areas: *It is the absolute worst among the family bar*. At the same time,



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some practice areas seemed less vulnerable to bad behavior: *Most attorneys in my practice area (real estate and transactional law) are kind and collaborative.*

### 3. What are the consequences of incivility and unprofessionalism?

The overwhelming majority of you agreed<sup>12</sup> that incivility and unprofessionalism have severely negative consequences.

Specifically, incivility and unprofessionalism:

- lead to an increase in litigation/transaction costs (**88.20%**)
- tend to prolong discovery and/or negotiations (**89.61%**)
- make the practice of law (or working in the legal arena) less satisfying (**89.95%**)
- harm the public's/client's confidence in the justice system (**91.28%**)
- make it more difficult for matters to reach resolution (**94.53%**)

In my last column, I explained how studies across the country have shown that being civil and professional will make you both a more effective lawyer, and a happier lawyer. The VBA study confirms it once again.

### 4. Why do we engage in bad behavior?

In your responses, you offered some ideas as to why we engage in bad behavior.

One common theme is that *incivility mostly stems from stress*. And it was noted that the *isolation of COVID made this much worse*. Others observed that stress is a problem beyond incivility: *Lawyers being overworked or stressed leads to poor decisions, poor quality of life, and loss of good professionals from the practice*. Attorney wellness is a major focus of VBA and is a requirement under the Rules, so each of us has a responsibility to address it.<sup>13</sup>

Another common answer relates to clients' demands: *Clients appropriately demand that their lawyer represent them as zealously as possible, and appropriately so. Of late, some newer lawyers see this as uncivil or unprofessional when it is precisely the opposite*. Now, the foregoing comment raises a number of issues. Without question, we must serve our clients competently.<sup>14</sup> Even so, the requirement of "zealous advocacy," as such, no longer appears in the Rules (although its remnants remain in the comments)<sup>15</sup>, and there are, of course, a multitude of restrictions as to what we may do in the service of our clients.<sup>16</sup>

The comment also highlights the confounding issue of perception in this area. What looks like incivility or unprofessionalism to one lawyer may appear to be dutiful, diligent representation to another.<sup>17</sup> And then there is the further problem (noted by some of you) of using allegations of

incivility or unprofessionalism as a weapon in the service of clients, when those allegations are questionable at best, or spurious at worst.<sup>18</sup>

### 5. How can we improve?

We asked you what actions, programs, or initiatives might improve civility and professionalism. We received more than 300 responses. Here are some takeaways.

**First**, a significant number of you reported that you would like judges to be more active in curbing bad behavior, saying: *judges need to take a hard line; judges should not ignore uncivil behavior; judges should not be shy about utilizing Rule 11 sua sponte; the court needs to take an active role in policing attorneys who misbehave; incivility could be swiftly & effectively rebuked by judges; most judges just 'let it go' in dealing with motions for sanctions; no trial judge enforces discipline in the proceedings; would like to see judges gently reprimand lawyers who use inflammatory language; greater use of court sanctions; and perhaps some hand slapping by the judge.*<sup>19</sup> When judges have acted, it has been appreciated: *As a young attorney, I interrupted opposing counsel and the presiding judge kindly but forcefully explained that interrupting was not tolerated and counsel was important. I never forgot that lesson.*

**Second**, there was a big push for more social interaction and mixers. You asked for *monthly local lunches for the county bar lawyers*, and other events like the VBA Mid-Year and VBA Annual Meetings. You explained: *I think it is harder to be uncivil face to face, and that social gatherings help people to get to know each other and have better relations*. And as one of you put it: *In my experience, the only thing that improves civility between lawyers is when they have personal relationships with each other outside of the courtroom.*

**Third**, you asked for more CLE seminars on civility and professionalism. There was a split, however, on whether the CLE should be required (comments suggesting *required CLE; mandatory CLE course on civility; mandatory ethical and professionalism training at least once a year for all practicing attorneys and their staff*), or merely offered (comments stating *we certainly don't need more CLE requirements, that much is certain; anything but a civility/professionalism program requirement for CLE*).

**Fourth**, there are some of you who believe that this is mostly a non-issue. We are, after all, lawyers. As one of you put it: *Lawyering is by nature adversarial. If you don't like it, then you should get out*. Others had a slightly different, though related, take on the subject: *everyone relax*.

**Finally**, a significant number of you expressed appreciation that we conducted

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the survey and that we are focusing on this issue. You suggested that continued attention on civility and professionalism will help. Rest assured, we will continue our efforts. We will offer more CLEs, including another two-hour CLE on the topic (with ethics credit!) at the VBA's Annual Meeting in Burlington. And at that meeting, I will be presenting a President's Award for Civility and Professionalism (and I ask you to submit candidates for consideration). We are looking to acknowledge lawyers who have demonstrated the kind of civility and professionalism that not only is expected of us, but that exceeds those expectations. I have asked the County Bar Presidents to nominate candidates, and I have also asked them to consider giving their own awards for civility and professionalism. It is one thing for us to call out bad behavior. But we must also recognize and reward good behavior when we see it.

\* \* \*

A few final comments. You should know that the judiciary is paying very close attention to the concerns revealed by our survey. Mike Kennedy continues to publish and speak on the topic, with a greater sense of urgency than ever; Mike and I will be speaking on the issue at the annual PRB meeting in June. And judges (like Judge Helen Toor) are scheduling benchbars on the issue. We must continue to have thoughtful and candid conversations on civility and professionalism.

I am asking future VBA Presidents to conduct the same civility and professionalism survey at regular intervals in the years to come. I noted at the outset that **92.69%** of you said that most lawyers you engage with are "civil/professional" or "very civil/professional." That's a great number. But I think we can get it to **100%**. We ought to be in a place where everyone can agree that at least "most lawyers" are civil and professional. As one of you observed: *I still believe that lawyers remain among the most honest, ethical and trustworthy professionals.*

We at VBA are committed to elevating the practice of law in Vermont. We are committed to helping you, and to helping you better serve your clients. As always, please be in touch with your thoughts and suggestions.<sup>20</sup>

<sup>1</sup> The survey was based, in significant part, on the 2021 and 2014 surveys conducted by the Illinois Supreme Court Commission on Professionalism (the 2021 results of which are referenced herein as the "Illinois Survey"). We acknowledge with gratitude the generous assistance of Mark C. Palmer, Esq., Chief Counsel for that Commission.

<sup>2</sup> With 2,996 surveys emailed and a response rate of 699 (or 23.33%), our margin of error is, conserva-

tively, +/- 3.2%. Survey results follow this column.

<sup>3</sup> At the Mid-Year, Judge Mary Miles Teachout, Bar Counsel Mike Kennedy, and I presented a CLE seminar entitled: "Civility & Professionalism: Three Perspectives," looking at the issue from the point of view of a judge, bar/disciplinary counsel, and a practitioner. Thank you to the attendees for their active participation. The CLE was recorded and is available for viewing (and for CLE credit) on the VBA website.

<sup>4</sup> Quoted comments are provided in *italics*.  
<sup>5</sup> This is even higher than the Illinois Survey (at **88.7%**).

<sup>6</sup> Only **2.87%** of you described lawyers as "uncivil/unprofessional" or "very uncivil/unprofessional," which is the same as the Illinois Survey (at **2.9%**).

<sup>7</sup> Two comments here. First, a few attendees admitted to using such language with some regularity. Second, Judge Teachout admitted that she is perhaps on the far (conservative) end of the spectrum in her perception of such language.

<sup>8</sup> It seems to me that close calls are as important to discuss as egregious cases. In fact, a few of you suggested that egregious examples of bad behavior aren't all that helpful: *Stop doing presentations/programs that highlight the MOST egregious examples and start talking about the more subtle ones. By focusing on the most egregious, it is easy for people to say they would NEVER behave that way and not see themselves as needing to make a change.*

<sup>9</sup> The Vermont Rules of Professional Conduct are referred to herein as the "Rules."

<sup>10</sup> See Rule 3.3(a) (Candor Toward the Tribunal) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal").

<sup>11</sup> "It is professional misconduct for a lawyer to engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, sex..."

<sup>12</sup> These results are for "strongly agree" and "somewhat agree" combined. Notably, in each instance, "strongly agree" received approximately three times the votes of "somewhat agree."

<sup>13</sup> See, e.g., [www.vtbar.org/attorney-well-being/](http://www.vtbar.org/attorney-well-being/) ("Attorney well-being is a critical component of our duty to represent our clients with competence") (listing resources suggested by the Vermont Commission on the Well-Being of the Legal Profession); Rule 1.1, comment [9] ("Maintaining the mental, emotional, and physical well-being necessary for the representation of a client is an important aspect of maintaining competence to practice law").

<sup>14</sup> See, e.g., Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.")

<sup>15</sup> See, e.g., Rule Preamble ([9], referencing "the lawyer's obligation zealously to protect and pursue a client's interest, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system" (underscore added).

<sup>16</sup> See, e.g., Rule 3.6 (prohibiting trial publicity likely to materially prejudice an administrative proceeding); Rule 4.1 (requiring truthfulness); Rule 8.4(c) (prohibiting dishonesty and deceit); and Rule 8.4(d) (prohibiting conduct prejudicial to the administration of justice).

<sup>17</sup> In fact, there is some divergence of views on "newer/younger" versus "experienced/older" attorneys vis-à-vis civility, with each group being criticized. One comment captured them both, however: *The worst offenders are older attorneys or inexperienced attorneys.*

<sup>18</sup> See, e.g., *Doe v. Exxon Mobil Corp.*, Case No. 1:01-cv-1357-RCL (D.C. Cir., May 12, 2021) (hold-

ing that counsel should not have “impugn[ed] another attorney’s character without reviewing the entire record” and ultimately imposing sanctions of approximately \$300,000 against accusing counsel).

<sup>19</sup> Discovery disputes, again, were highlighted.

You said that judges should be *more receptive to resolving discovery disputes in a way that goes beyond viewing them as just both sides bickering. I believe that many lawyers are reluctant to bring discovery disputes to the judge based on the perception (right or wrong) that judges don’t*

*like to be ‘bothered’ by such squabbles.*

<sup>20</sup> Special thanks to Lisa M. Maxfield, VBA’s Associate Executive Director, for her invaluable assistance.



## VBA Survey on Civility and Professionalism (2023)

### Q1 Most lawyers I engage with are:

Answered: 697 Skipped: 2

ANSWER CHOICES	RESPONSES	
Very Civil/Professional	35.44%	247
Civil/Professional	57.25%	399
Neutral/No Opinion	6.31%	44
Uncivil/Unprofessional	2.44%	17
Very Uncivil/Unprofessional	0.43%	3
Total Respondents: 697		

### Q2 How would you compare lawyers’ civility and professionalism nowadays with when you first began practicing law (or working in the legal arena)?

Answered: 693 Skipped: 6

ANSWER CHOICES	RESPONSES	
Better	12.55%	87
The same	58.30%	404
Worse	29.15%	202
Total Respondents: 693		

## Q3 Have you experienced or witnessed uncivil or unprofessional behavior from a lawyer in the last six months?

Answered: 691 Skipped: 8

ANSWER CHOICES	RESPONSES	
Yes	61.22%	423
No	39.51%	273
Total Respondents: 691		

## Q4 If Yes, please select all that apply

Answered: 464 Skipped: 235

ANSWER CHOICES	RESPONSES	
Indiscriminate use of motions	23.92%	111
Playing hardball (such as not agreeing to reasonable requests for extensions)	31.47%	146
Inflammatory writing in correspondence/emails, briefs, or motions	54.96%	255
Misrepresenting or stretching the facts	49.57%	230
Misrepresenting the law or making baseless legal arguments	34.48%	160
Negotiating in bad faith	20.91%	97
Inappropriate interruptions of others (e.g., clients, colleagues, counsel, judges, witnesses)	31.25%	145
Sarcastic or condescending comments or attitude	59.05%	274
Swearing, verbal abuse, or belittling language	18.97%	88
Inappropriate comments about a lawyer's age or experience	12.72%	59
Racially or culturally insensitive comments	4.74%	22
Sexist comments	14.44%	67
Other (please specify)	24.14%	112
Total Respondents: 464		

## Q5 Please indicate how much you agree or disagree that incivility/unprofessional behavior:Harms the public's/client's confidence in the justice system

Answered: 688    Skipped: 11

ANSWER CHOICES	RESPONSES	
Strongly agree	65.99%	454
Somewhat agree	25.29%	174
Neutral/no opinion	6.25%	43
Somewhat disagree	2.47%	17
Strongly disagree	0.58%	4
Total Respondents: 688		

## Q6 Please indicate how much you agree or disagree that incivility/unprofessional behavior:Tends to prolong discovery and/or negotiations

Answered: 693    Skipped: 6

ANSWER CHOICES	RESPONSES	
Strongly agree	64.79%	449
Somewhat agree	24.82%	172
Neutral/no opinion	9.24%	64
Somewhat disagree	0.87%	6
Strongly disagree	0.58%	4
Total Respondents: 693		

## Q7 Please indicate how much you agree or disagree that incivility/unprofessional behavior:Leads to an increase in litigation/transaction costs

Answered: 695    Skipped: 4

ANSWER CHOICES	RESPONSES	
Strongly agree	63.31%	440
Somewhat agree	24.89%	173
Neutral/no opinion	10.65%	74
Somewhat disagree	0.86%	6
Strongly disagree	0.43%	3
Total Respondents: 695		

## Q8 Please indicate how much you agree or disagree that incivility/unprofessional behavior:Makes it more difficult for matters to reach resolution

Answered: 695    Skipped: 4

ANSWER CHOICES	RESPONSES	
Strongly agree	71.51%	497
Somewhat agree	23.02%	160
Neutral/no opinion	4.46%	31
Somewhat disagree	0.72%	5
Strongly disagree	0.43%	3
Total Respondents: 695		



## Q9 Please indicate how much you agree or disagree that incivility/unprofessional behavior: Makes the practice of law (or working in the legal arena) less satisfying

Answered: 697 Skipped: 2

ANSWER CHOICES	RESPONSES	
Strongly Agree	72.02%	502
Somewhat Agree	17.93%	125
Neutral/no opinion	8.03%	56
Somewhat disagree	0.72%	5
Strongly disagree	1.29%	9
Total Respondents: 697		

## Q10 In what county do you primarily practice?

Answered: 647 Skipped: 52

ANSWER CHOICES	RESPONSES	
Addison	3.25%	21
Bennington	6.03%	39
Caledonia	3.25%	21
Chittenden	34.62%	224
Essex	0.31%	2
Franklin/Grand Isle	4.33%	28
Lamoille	3.09%	20
Orange	0.93%	6
Orleans	2.32%	15
Rutland	8.66%	56
Washington	20.87%	135
Windham	3.86%	25
Windsor	8.50%	55
TOTAL		647

## Q11 Years of experience in the legal profession:

Answered: 694 Skipped: 5

ANSWER CHOICES	RESPONSES	
0-4	9.80%	68
5-9	11.82%	82
10-14	11.53%	80
15-19	11.38%	79
20-24	11.10%	77
25-29	9.37%	65
30-34	10.95%	76
35-39	7.93%	55
40-44	8.36%	58
45+	8.21%	57
Total Respondents: 694		

## Q12 Check the one that best describes your practice setting:

Answered: 694 Skipped: 5

ANSWER CHOICES	RESPONSES	
Law Firm	52.88%	367
Corporation	2.74%	19
Government	15.71%	109
Judiciary	17.44%	121
Academic	0.43%	3
Military	0.00%	0
Legal Aid or Non-Profit	4.47%	31
Not Currently Practicing	3.75%	26
Other (please specify)	4.61%	32
Total Respondents: 694		

## Q13 Which best describes your title/position:

Answered: 687 Skipped: 12

ANSWER CHOICES	RESPONSES	
Associate	10.48%	72
Partner	36.97%	254
Prosecutor	4.51%	31
Public Defender	1.16%	8
Staff Attorney	9.17%	63
In-House Counsel	4.80%	33
Paralegal	1.02%	7
Judge	3.20%	22
Judicial Clerk	6.11%	42
Court Staff	7.57%	52
Other (please specify)	17.32%	119
Total Respondents: 687		

To see the survey data in a different format and in color, see the Survey Monkey website at:  
<https://tinyurl.com/5fx3k5cv>