

From the Judge's Side of the Bench

Lessons in Civility from The Bard and the Bench

by Justice Jesse G. Reyes

“And do as adversaries do in law, Strive mightily, but eat and drink as friends.”¹

In the quest for civility it seems that we in the legal profession are constantly searching for the equilibrium which Shakespeare describes in *The Taming of the Shrew*. But how do we, in real life, reenact this noble scene set forth by the Bard? How do we return to this Elizabethan example of decorum outside the courtroom? The quoted language, I believe, provides us with the answer. For it reflects the notion that lawyers, while representing opposing interests zealously, can nonetheless have professional relationships marked by civility, courtesy and collegiality. Additionally, it could be argued that in this passage, Shakespeare is in essence relating to us the fact that the role of the lawyer is not only that of an advocate but is also that of an officer of the court. Thereby, signifying the means by which to reach this aspirational goal is by conducting ourselves as officers of the court.

While the origin² of “officer of the court” as a title is not entirely clear, its lineage can be traced to England. In fact, it can be said, that the concept of the lawyer as an officer of the court is as old as the common law.³ So, it is conceivable that the playwright was aware of the lawyer’s commitment to the courts when he incorporated this imagery into the play. This ancestral position of the officer of the court can similarly be found in American jurisprudence. In the matter of *In re Griffith*,⁴ Chief Justice Warren Burger stated, “The role of the lawyer as an officer of the court predates the Constitution; it was carried over from the English system and became firmly embedded in our tradition.” While this office may be inherent in our system of justice,⁵ the question becomes what is the nature of this obligation?

Justice Benjamin Cardozo, while serving on the New York Court of Appeals, eloquently set forth his view of the role of a lawyer in our profession. “Membership in the bar is a privilege burdened with conditions. [A lawyer is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.”⁶ This characterization implicitly suggests lawyers, as officers of the court, owe it to the judiciary, the profession and the public to treat one another in a civil and respectful manner, which will reliably lead to enhanced judicial efficiency.⁷ Thus, as described by Justice Cardozo, the lawyer has a duplicative duty to client and court.

While some may find this duality to be problematic, others would say there is no contradiction in being diligent, devoted and dedicated to one’s client while also acting with civility and courtesy. In the words of Justice Anthony Kennedy, “civility is the mark of an accomplished and superb professional[.]”⁸ This notion would require the advocate to do as Justice Antonin Scalia, “I attack ideas. I don’t attack people.”⁹ The lesson to be learned from this statement is that zealous representation can be provided in a civil manner when it is based solely on facts, evidence, logic and reason. On the other hand, the utilization of uncivil obstructive conduct while representing a client may serve to impede the fundamental goal of resolving disputes in a rational, peaceful and efficient manner. The consequences of implementing uncivil behavior can result in extra and unnecessary costs which the client will have to absorb. Such conduct may also ultimately cost the client their case. In the view of Justice Sandra Day O’Connor, “it is not always the case that the least contentious lawyer loses. It is enough for the ideas and positions of the parties to clash; the lawyers don’t have to.”¹⁰ I wonder: did Justice O’Connor have *The Taming of the Shrew* on her mind when she spoke these words about civility?

Overall, we must always be mindful that the adversarial system we work in is not an end in of itself, but rather a means to justice. We must remember that civility is not about agreement, but how we conduct ourselves in the midst of disagreement. To paraphrase Aristotle, “[i]t is not enough to know what to say, one must know how to say it.”¹¹ In keeping with the words of William Shakespeare, we must always be mindful that ours is a noble profession and therefore it is incumbent upon us to proceed in a civil and professional manner both inside and outside the courtroom.

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¹ *The Taming of the Shrew*, act 1, scene 2.

² *Lawyers as Officers of the Court*, Kentucky UKnowledge, By Eugene R. Gaetke, (1989)

³ *Malautea vs. Suzuki Motor Company, Ltd.*, 987 F. 2d 1536, 1546 (11th Cir. 1993).

⁴ 413 U.S. 717, 732 (1973), Chief Warren Burger's dissent.

⁵ *Langen v. Borkowski*, 188 Wis. 277, 301 (1925).

⁶ *People ex rel. Karlin vs. Culkin*, 162 N.E. 487, 489 (N.Y. 1928).

⁷ *Lawyers as Officers of the Court*, By Eugene R. Gatekeeper, 42 Vand. L. Rev. 39, 43 (1989).

⁸ Justice Anthony Kennedy's Remarks at the American Bar Association's 1997 Annual Meeting.

⁹ Antonin Scalia: In his own unforgettable words., <https://www.latimes.com/nation/la-and-scalia-quotes-20160213-story.html>.

¹⁰ Sandra Day O'Connor, *Professionalism*, 76 Wash. U. L.Q. 5, at 9 (1998).

¹¹ Aristotle, *On Rhetoric: A Theory of Civil Discourse*, Oxford University Press.