

# Emotional contagion and the civil lawyer

Charles Dickens' 1853 novel *Bleak House* begins with an account of *Jarndyce and Jarndyce*, an endless legal case mired in the “mud and fog” of the English Chancery courts. As told by Dickens, *Jarndyce* was “about a will and the trusts under a will—or it was once. It’s about nothing but costs now...” The goals of the parties, the merits of the case, the truth, and any sense of justice had all been long forgotten. All that was left were passions, hatred between parties, anger among counsel, and legal bills. For Dickens, the case was a fiction rooted in a very real flaw of the English legal system: The adversarial process can cause everyone involved to lose perspective and spiral into endless self-destruction. The nature of the legal profession is that this *incivility* among colleagues is fostered all too easily, and can have substantial negative consequences for all involved.

As a progeny of the English common law, Canada’s system of justice is also an adversarial one, where lawyers are taught in law school that the surest path to truth is through pitting opposing counsel against one another in a dispute.

Incivility not only contributes to increased costs for the client, but it can decrease the quality of life and efficacy of lawyers within the profession. Of concern, then, is the risk of uncivil behaviour leading to accusations of malpractice, either due to animosity between client and lawyer or due to actual detrimental consequences from uncivil strategy or conduct.

## Civility in a post-COVID world

Recently many Ontario lawyers have observed a degradation in civility within the profession. In 2023, in response to anecdotal references from members citing a decline in civility following the COVID-19 pandemic, the Toronto Lawyers Association produced a comprehensive *Report on Civility and Professionalism in the Legal Profession*. As part of this report, a survey found that 68% of lawyers had sometimes or frequently experienced incivility within the profession, and 69% of Ontario lawyers agreed or strongly agreed that civility had declined within the profession. Lawyers cited negotiating in bad faith, inflammatory communications, and a general condescending attitude from others as examples of this growing incivility.

In coordination with the Toronto Lawyers Association, LAWPRO organized an online seminar on the topic of civility, with contribu-

tions from legal management consultant Deborah Glatter, lawyers Sandra Forbes and Edona Vila, and LAWPRO claims counsel Kathryn Shani. This program, now available online, discussed how we can improve civility in our interactions with colleagues and opposing counsel while increasing our effectiveness and avoiding malpractice risks. Below are some takeaways from this program.

## The claims risks of incivility

Taking unreasonably hard positions in negotiations, or aggressive tactics in court, can backfire if they lead to extended proceedings and unnecessary costs—costs that clients may feel are their lawyer’s fault. For example, LAWPRO has seen many claims recently where a party attempts to gain an advantage by noting the opposing party in default or obtaining a default judgment too quickly. Default judgments are particularly prone to being set aside by a court absent egregious conduct or unreasonable delay on the part of the defendant. As such, parties that quickly obtain such a default judgment soon after a period for response has passed, and particularly those that then oppose setting aside such a judgment by consent, have been criticized by courts for sharp practice and uncivil litigation. Forcing the other party through litigation hoops is often seen as a waste of court resources, and parties that pursue such hardball tactics are often faced with large costs bills when a court holds those parties responsible for the wasted time and effort. Clients faced with paying such a bill will often reasonably question whether their lawyer erred in taking such positions.

<sup>1</sup> Alen M. Isen et al., “Positive Affect Facilitates Creative Problem Solving”, *Journal of Personality and Social Psychology*, 1987, vol 52, No. 6

<sup>2</sup> Riskin A, Erez A, Trevor A, et al. The impact of rudeness on medical team performance: a randomized trial. *Pediatrics* 3 Sep 2015; [www.pediatrics.org/cgi/doi/10.1542/peds.2015-1385](http://www.pediatrics.org/cgi/doi/10.1542/peds.2015-1385).

At the end of the day, it is in the lawyer's self-interest, and the client's interest, to pursue negotiations, interactions, and disputes with empathy and understanding. Not only are indulgences often returned, but efficient proceedings and interactions benefit all parties. The client may ask for posturing and aggression, but what the client actually *wants* is success.

## Civility with colleagues

Civility is not only a priority when dealing with clients and opposing counsel, it's also key for building effective teamwork and relationships within the law firm itself.

In 1987, a study at the University of Maryland<sup>1</sup> found that a positive environment, by watching a few minutes of a comedy film, or positive reinforcement, such as receiving candy, facilitated group problem solving, whereas a negative environment, such as having to watch a few minutes of a documentary on upsetting subject matter, impaired problem-solving abilities.

A different Israeli study in the medical field found that rude comments from others adversely affected a doctor's diagnostic and procedural performance.<sup>2</sup> In that study, the Israeli professionals were exposed to comments from an American "expert" denigrating the hospital and Israeli health care in general, while a control group were exposed to only "neutral comments." The control group performed within expected parameters, whereas the group exposed to the "rude" comments performed so poorly it was "potentially harmful practice."

Incivility and unprofessional behaviour do not only reflect poorly on us and reduce quality of life and enjoyment of the profession, but negatively impacts the quality of our work. We should note, then, how our work environments can impair the abilities of those around us (and ourselves).

The good news is that there are simple things we can incorporate into our work and practice to increase the civility of ourselves, our offices, and our colleagues.

## Civility and professionalism

Civility is a choice. It is conduct, not a characteristic. When we improve behaviour, we improve outcomes. Choosing to lead with empathy and curiosity, and avoiding heated communications, ensures relationships and interactions won't be derailed by frustration and animosity, making our clients, our colleagues, and ourselves much happier.

## Don't engage in heated communication.

It can be easy to let emotion take control in high-pressure circumstances. Receiving an upsetting, rude, or frustrating email from another individual can trigger a negative response on our own part. It's always a good idea to take a beat, wait a few hours or even a day if possible, clear your mind, and return to the correspondence when cooler facilities prevail. If things get heated in a phone call or meeting, taking a break or returning to the discussion at a later date can help keep things on track.

## Be curious, not critical.

Don't rush to judgment of those around you. Mistakes by others, upsetting comments, tardiness, or even perceived rudeness can sometimes have innocent explanations or be the consequence of a misunderstanding.

## Use "I" statements, not "you" statements.

If you believe a colleague, subordinate, or opposing counsel has made a mistake or has been uncivil themselves, it may be appropriate and even necessary to discuss the situation. When doing so, it's important to use "I" statements that centre your feelings, thoughts, and experiences, such as "I was offended by this statement" or "I was frustrated by this situation," rather than "you did or said this negative thing." "You" statements that seem to presume another person's intentions or thoughts invariably cause others to become defensive and confrontational.

## Remember that we all contain multitudes

We all make mistakes, and we can all sometimes stumble in our interactions with others. No matter our efforts, sometimes we fail to make a good first impression. That's why it's important not to fall victim to the "fundamental attribution error," or the "horns and halos" effect. We will often categorize others, without even realizing it, as high or low performers. When we do so, we can fall victim to giving these so-called "high performers" (in our own eyes) the benefit of the doubt, while giving no such benefit to others. Take time to remember that we are all whole people with both flaws and features. When we are "curious and not critical", and not quick to judgment, we can better understand the actions of others and avoid animosity and argument. ■

---

*This article is based on the contributions of Deborah Glatter, Sandra Forbes, and Kathryn Shani. To view the entire program on civility, please see [practicepro.ca/cpd](http://practicepro.ca/cpd)*

## Emotional contagion: How our actions affect the civility of others

*Preventing incivility in your own behaviour can help bring about a more positive work environment for yourself as well as others. This is not simply expecting kindness to be reciprocated, but is an observable psychological phenomenon known as "emotional contagion".*

*Studies show that most individuals will subconsciously mimic the emotional state presented by others. When someone smiles at us, we instinctually smile back. The act of smiling triggers a psychological response: we actually, and immediately, feel happier, calmer, and better situated to solve problems. Our colleagues, clients, and opposing counsel may not realize it, but deliberate efforts to present ourselves as happier and more positive will, in turn, make them happier and more civil.*