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In praise of civility and the social contract

California now requires lawyers to pledge civility, but rules alone can't fix a profession—or a society—that has forgotten the social contract.

By Timothy D. Reuben

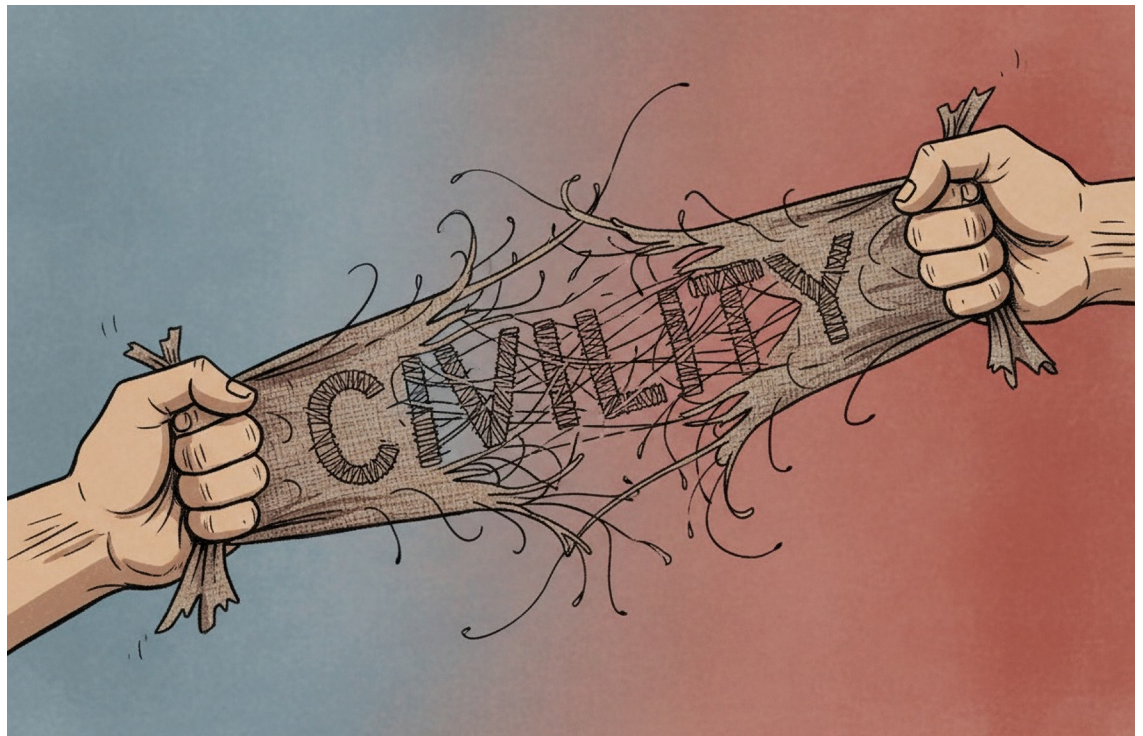
Attorneys are now receiving from the State Bar the following notice of a rule change: “The California Supreme Court has amended rule 9.7 of the Rules of Court: All active licensees and special admissions attorneys—which, for purposes of rule 9.7, includes foreign legal consultants—are required to submit an annual declaration of adherence to the attorney oath.” Simply put, to maintain his or her license, every lawyer must sign a declaration each year stating: “As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.”

The need for civility in legal practice has been much touted recently, but it's not a new idea at all. Back in 2007, the California Bar published Guidelines on Civility and Professionalism, which state:

“As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.” (California Attorney Guidelines of Civility and Professionalism.)

Numerous bar associations and courts adopted these rules, including the Los Angeles Superior Court.

In addition, the California Supreme Court recently approved updates to provisions of the attorney ethics



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code, many of which are directed toward more professional interactions between opposing lawyers. For example, Rule 3.4 is actually entitled “Fairness to Opposing Party and Counsel” and directly requires an attorney to refrain from certain sharp or unfair litigation tactics. Rule 3.2, entitled “Delay of Litigation,” expressly prohibits a lawyer from using “means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.”

Now all lawyers must actually sign a declaration each year promising to be civil. But how have all these efforts towards making the legal profession a kinder, gentler,

and yes more civil business fared? Many agree that there has been little positive change, and arguably civil litigation has actually become even less civil, which is possibly why the Supreme Court created this new mandatory rule.

But isn't law school and the practice too late to try to teach fully grown adults to act respectfully? Doesn't the raging antagonism amongst people of different political viewpoints today suggest that not just lawyers, but everyone should be educated in civil discourse and interaction, a concept fundamental to the social contract?

What is the social contract? It's an idea, a theory about how we

live peacefully and safely together. It's not something that we sign or negotiate, but we all are supposed to know it. Jean-Jaques Rousseau in his famous book of the same name described it as what makes government necessary and legitimate—we give up certain rights so that we can live in a society of laws that protect us and are enforced by the government. The concept of the social contract has evolved through multiple philosophers and thinkers, and it has come to mean that we all implicitly agree to follow rules of common decency and respect. Gee, that's not hard to say—kind of like a modified version of the old golden rule.

Of course, it's more than giving up the right to steal or plunder or kill or hit someone. Recognizing the rights and comfort of others means you change your behavior and act with consideration, that you not be rude. So, you shouldn't continue your cell phone conversation on an elevator with others—not that it's illegal, it's just not considerate of the people in the elevator with you for 10- 20 seconds. Or when you drive, you shouldn't tailgate someone or cut them off. And when somebody expresses a point of view you disagree with, you don't react by slandering or mistreating them. And in a courtroom, you treat your opposing counsel not as some disdainful horrible enemy, but as another colleague doing his or her best to represent a client.

The key to the social contract is that we all follow it. It is not just strictly obeying the law (or civility or ethics rules), but it involves recognizing and respecting others. John Locke and Rousseau posited that "individuals acquire civil rights by accepting the obligation to respect and protect the rights of others,

thereby relinquishing certain personal freedoms in the process." And giving up the "freedom of speech" right to shout at and insult another human being is not much of a relinquishment. Lawyers still can practice the art of persuasion by offering rational argument and even doing so passionately; but intimidation or plain nastiness is unnecessary, whether in law or in society.

Of course, the tactic of intimidation in litigation can be effective—lawyers sometimes obtain favorable settlements or other rights or advantages by traumatizing and scaring the opposing party. But that tactic fails more often than it succeeds and frequently boomerangs back resulting in a less favorable outcome and a stauncher opposition. The intimidation tactic also makes the practice of law more stressful and less satisfying. Simply put, if everyone respects the social contract, everyone wins, even the lawyers.

These things can and should be taught long before adulthood. Religious institutions once were the primary way we taught youngsters morals, but today religion has lost

much of its influence, and many children grow up never being schooled in the basic principles of common courtesy and respect. Frequently the young are encouraged to look up to and praise those who violate the societal norms of conduct, who boldly act badly. A renegade who defies rules is always more exciting and interesting to kids. It is also typical for the media, instead of providing hard facts and intelligent analysis, to engage in hyperbole for political purposes and to both rile up the public or demonstrate profound disdain for our leaders or institutions. Sadly, sometimes this confluence of negative forces can result in gun violence.

We live together in a civil society only by respecting the social contract, and to the extent we ignore it, we tear at the fabric that holds us together and makes us safe. Attorneys can and should set an example of civil discourse, but too often fall woefully short. Will the Supreme Court's new rule make a difference? While well-intentioned, it seems unlikely to change the behavior of those who are habitually rude and disrespectful.

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