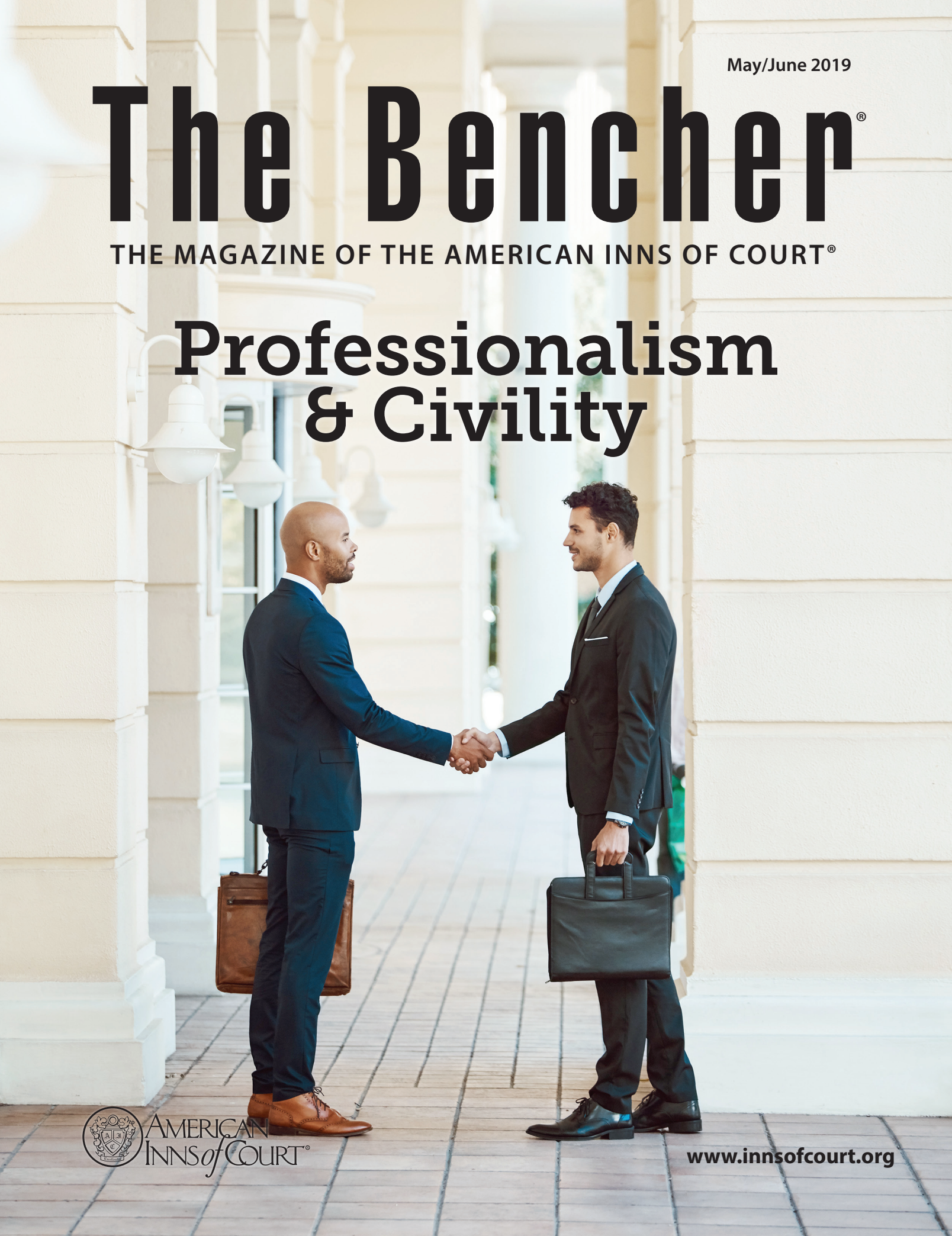
May/June 2019

The Bencher®

THE MAGAZINE OF THE AMERICAN INNS OF COURT®

Professionalism & Civility



American Inns of Court®

www.innsofcourt.org

FROM THE PRESIDENT

The Honorable William C. Koch, Jr.

The American Inns of Court is the only organization in the United States whose sole mission is to promote professionalism, ethics, civility, and excellence in the judiciary and the legal profession. Professionalism and civility are in our organizational DNA because, as Indiana Supreme Court Justice Steven David has noted, they "are the mainstays of our profession and the foundations upon which lawyers practice law."

The growing body of literature addressing different aspects of professionalism and civility in the practice of law reflects an increased awareness of the importance of these topics. What has caused professionalism to be so much on our minds these days? What does the concept of professionalism embody?

The most direct answer to the first question is the concern, perhaps shared more by experienced lawyers and judges, that the practice of law is becoming a contact sport. Accepting this premise as true raises another question: Why has the practice of law become less civil? The practice of law today is more a business than a profession. Law schools are not adequately training students. Judges too often countenance unprofessional behavior by lawyers or even manifest unprofessional behavior themselves. Popular culture reinforces unprofessional stereotypes about the legal profession.

There may be an even more foundational answer: The decline in civility in the practice of law is an unintended consequence of the disconnect between professionalism and professional ethics.

The Canons of Professional Ethics were promulgated in 1908. They contained many broadly moral, practical, and aspirational provisions. The Model Code of Professional Responsibility, first adopted in 1969, separated the general aspirational advice (referred to as "canons" or "ethical considerations") from the specific mandatory conduct minimums (referred to as "disciplinary rules"). This separation, as Professor Benjamin Barton has observed, subjected lawyer conduct to the disciplinary rules and relegated the broader ethical considerations to "food for thought." The disconnect became complete in 1983 when the Model Code's broadly moral and ethical provisions disappeared from the Model Rules of Professional Conduct, leaving only the black letter minimums of lawyer conduct.

When conduct questions arise, the Model Rules prompt legal practitioners to ask only "what am I *allowed* to do?" or "what is the *least* I must do to avoid discipline?" These questions should not overshadow more important ones, such as "what *should* I do?" or "is this the *right thing* to do?" Focusing solely on the black letter minimum rules has eroded professionalism and civility, particularly because the minimum rules are generally under-enforced.

In today's world, there is a profound difference between professional ethics and professionalism. Professional ethics dictate the minimum standards of attorney conduct. Professionalism standards aim higher. Professionalism calls upon us to do the best we can do. As Georgia Supreme Court Justice Harold Clark has explained, "ethics is that which is required and professionalism is that which is expected."

The question remains "what does professionalism mean?" Even though it is an elastic term that evades a satisfactory definition, most of us would say that we know a legal professional when we see one. As was said of Robert B. Fiske Jr., the 2016 recipient of the Lewis F. Powell Jr. Award for Professionalism and Ethics, true professionals elevate the proceedings in which they are involved and inspire others to strive harder to raise their personal bar.

Recent literature on professionalism suggests six attributes shared by legal professionals: **Accountable**—professionals take responsibility for their actions and decisions. **Considerate**—professionals are aware of their actions' effects on others. **Civil**—professionals are respectful and act courteously and cordially. **Humble**—professionals understand that everyone makes mistakes and that no one knows all there is to know. **Collegial**—professionals understand that their obligations to their clients do not trump their obligations to the courts or to the legal profession. **Consistent**—professionals treat everyone, from judges to opposing counsel to subordinates and persons on the street, in the same courteous and respectful manner.

This edition of *The Bencher* contains four excellent articles that I hope will prompt you to consider the vast difference between the ethics rules that define the lowest level of acceptable conduct and the aspirational goals of professionalism and then to recommit yourself to raising your own professional standards and to help others do the same. ◆

At the New York American Inn of Court annual dinner, from left to right, are Magistrate Judge Stewart D. Aaron, U.S. District Court for the Southern District of New York, Inn president; Judge Rowan D. Wilson, New York State Court of Appeals; and Lauren A. Moskowitz, Esq., Inn vice president.

New York American Inn of Court

In January, the New York American Inn of Court in New York, New York, celebrated another successful year at its 13th annual dinner. During 2018, the Inn commemorated the life of Associate Justice Ruth Bader Ginsburg, volunteered at law schools, and celebrated the diversity of the Inn and the profession.

Judge Rowan D. Wilson, of the New York State Court of Appeals was the keynote speaker. He challenged Inn members to commit to reforming the criminal justice system, which keeps inmates incarcerated who might safely and productively be released. Wilson detailed stories of men who committed crimes in their youth and are serving sentences of 25 years to life. According to Wilson, often when the men are up for parole, the parole board allows the details of their crimes to dwarf any progress the inmates may have made. He did not make light of any inmate's crime or say that imprisonment was unjustified, but instead made two points:

1. The parole system should not impose sentences that foreclose the possibility that a 19-year-old offender may be fundamentally different at age 50.
2. Lengthy minimum sentences without a system in place to help ex-inmates re-enter society upon release is a poor business decision.

Wilson's challenge was to "find a life to save." By volunteering time to assist with an inmate's preparation for a parole hearing or clemency papers, Inn members can make a significant difference. Wilson also challenged Inn members to commit to assisting the inmate, if released, to stay on the right path by helping with housing, employment, and education.

Wilson pointed out that because the American Inns of Court's mission is "achieving the highest level of professionalism through example, education, and mentoring," this challenge fits perfectly within that tenet. ◆

Professionalism Month was in April—Plan now for Ethics Month and Civility Month

As a cornerstone of the American Inns of Court, professionalism is important to both our members and the greater legal community. The American Inns of Court promotes professionalism year round through its resources, programs and mentoring. Contact us at professionalism@innsofcourt.org for more information.

Ethics Month is coming in July

Start planning now! We can help! For more information, send an email to EthicsMonth@innsofcourt.org.

National Conversation on Civility

Save the date! The American Inns of Court National Conversation on Civility will be held Saturday, October 26, 2019 in Washington, DC. Details will be announced soon! ◆

IN THIS ISSUE...

Feature Articles

Columns

Regular Features

COVER PHOTO CREDITS: Front: ©iStockphoto.com/gradyreese. Back: ©iStockphoto.com/skodonnell.

George A. McAlmon American Inn of Court

This year, the George A. McAlmon American Inn of Court in El Paso, Texas, was honored to co-sponsor "Vicarious Trauma and Burnout" training for child advocates in El Paso.

The training was held through the Center for Excellence in Advocacy, which is based at the Support Center for Child Advocates in Philadelphia, Pennsylvania. Frank P. Cervone, Esquire, Child Advocates executive director, and Meghan Johnson, MPH, project manager, addressed trauma exposure responses, including vicarious trauma and compassion fatigue and burnout, as well as self-care strategies and organization practices to help improve practices and support staff and volunteers.

The Inn's co-sponsors included the Alternative House Foundation, El Paso Foster Parents Association, and Diocesan Migrant and Refugee Services. The target audience was those who work with children and are exposed to the trauma and tragedy experienced by disadvantaged children. This included foster care and shelter services workers and volunteers, immigration and family law service providers, court-appointed special advocates, and others who advocate for disadvantaged children.

The training was provided in two three-hour sessions, one focused on those in the legal profession, with 68 attendees, and one focused on others in the community, with 67 attendees. The training, which was part of the Inn's mentorship and outreach efforts, was an overwhelming success. Judge Linda Chew, of the 327th Judicial District Court of El Paso County, Texas, and Inn vice president, and Kamie Salome-Smith, Mentorship Committee chair, coordinated the training. ◆

Nominations Sought for American Inns of Court Christensen, Powell, and O'Connor Awards

Each year the American Inns of Court recognizes individuals whose lives—as well as their words and standards—reflect professionalism, ethics, civility, and excellence in the legal community. Please consider nominating someone for the following awards:

The Lewis F. Powell, Jr., Award for Professionalism and Ethics recognizes exemplary service to the legal profession in the areas of professionalism, ethics, and civility.

The A. Sherman Christensen Award honors an American Inn of Court member who has provided distinguished, exceptional and significant leadership to the American Inns of Court.

The Sandra Day O'Connor Award for Professional Service recognizes an Inn member in practice ten or fewer years for excellence in public interest or pro bono activities.

Nominations are due June 1, 2019
For nomination information, please visit www.innofcourt.org and click on Awards and Scholarships.

American Inns of Court®

At the January meeting of the George C. Young Inn, from left to right, are G. Clay Morris, Esq. and Jenna Winchester, Esq. with Mark L. Horwitz, Esq.

George C. Young American Inn of Court

In January, the George C. Young American Inn of Court in Orlando, Florida, held its monthly dinner meeting, in which Pupilage Group Three presented a continuing legal education program called "How to Deal with Difficult Judges." The presentation focused on when a jurist must be recused or disqualified pursuant to Florida law, a review of cases involving judicial misconduct, practical tips for dealing with difficult judges, and important tips for preserving issues for appeal. ◆

Tampa Bay American Inn of Court

Members of the Tampa Bay American Inn of Court in Tampa Bay, Florida, volunteered at Feeding Tampa Bay, helping to sort and serve over 11,600 meals for those in need. Judges, attorneys, and law students worked side-by-side to support Feeding Tampa Bay in its mission to provide food to the hundreds of thousands of food-insecure families in the 10-county area of West Central Florida. ◆

Participants in the joint meeting of the Belmont and Phillips Inns included, from left to right, Hon. William C. Koch, Jr.; Madison C. Crooks; Callie M. Tran, Esq.; Will Ayers; Judge W. Neal McBrayer; Amanda J. Gentry, Esq.; Beau C. Creson, Esq.; John C. Nix; and Kevin C. Baltz, Esq.

Belmont University College of Law American Inn of Court and Harry Phillips American Inn of Court

Debating has long been an important part of the training of new lawyers by the four English Inns of Court. Borrowing a page from their English counterparts, the Belmont University College of Law and Harry Phillips American Inns of Court in Nashville, Tennessee, held a joint meeting of 200 members in February to debate an issue of interest to the Tennessee bench and bar.

The program focused on the validity of Model Rules of Professional Conduct 8.4(g), the anti-discrimination rule adopted by the American Bar Association (ABA) in August 2016. Kevin C. Baltz, Esquire, the president of the Belmont Inn of Court, and William C. Koch, Jr., the president of the Harry Phillips Inn of Court, opened the meeting. To set the stage for the debate, Lucian T. Pera, Esquire, chair of the governing body of the ABA's Center for Professional Responsibility and past president of the Association of Professional Liability Lawyers, discussed the history of the drafting and adoption of Rule 8.4(g).

Three-person teams representing each Inn debated the validity of the rule using a modified Oxford style debate format. Representing the Belmont Inn were Beau C. Creson, Esquire; Amanda J. Gentry, Esquire; and John C. Nix, a student at Belmont Law School. Representing the Harry Phillips Inn were Will Ayers, a student at the Nashville School of Law; Madison C. Crooks, a student at Vanderbilt Law School; and Callie M. Tran, Esquire. Judge W. Neal McBrayer of the Tennessee Court of Appeals chaired the debate.

The proposition being debated was "This House believes that the amendment to Tenn. Sup. Ct. R. 8, RPC 8.4(g) proposed to the Tennessee Supreme Court on Nov. 15, 2017, is invalid." The Belmont debaters argued in favor of the proposition, and the Harry Phillips debaters argued against it. The audience was asked to vote for or against the proposition based on the debaters' skill and persuasiveness. By a very narrow margin, the audience sided with the Harry Phillips team and in favor of the validity of the proposed amendment. ◆

Garland R. Walker American Inn of Court

In January, the Garland R. Walker American Inn of Court in Houston, Texas, hosted a discussion about attorney-client privilege, "Whose Privilege Is it Anyway?" The discussion recognized that keeping secrets is not always easy—as illustrated by the infamous Robert Garrow case in which his two criminal defense attorneys were ostracized for not disclosing the location of the victims' buried bodies.

The program focused on real-life attorney-client situations using skits, discussions of the disciplinary rules, and reviews of case law to provide a comprehensive look at the privilege. The Inn examined when communication with a client is protected and when an attorney may have a duty to disclose otherwise privileged or confidential information.

James J. Alfini, professor of law and dean emeritus at South Texas College of Law Houston, collaborated with two students for the Walker Inn's January presentation.

Guest speaker H. Michael Sokolow, first assistant federal public defender for the Southern District of Texas, presented a special segment on the differences between the attorney-client privilege and work product doctrine, the crime fraud exception to privilege, and how privilege extends to joint defense agreements.

In February, the Inn hosted an event for members to observe oral arguments before the U.S. Court of Appeals for the Fifth Circuit at the Bob Casey Federal Courthouse in Houston. More than a dozen Inn members met in the morning in the courtroom of U.S. Bankruptcy Judge Jeff Bohm, where appellate lawyers Jonathan G. Brush, Esquire and William R. Peterson, Esquire led a discussion of the cases to be argued, including discussions of strategy for the advocates and predictions of questions the judges were likely to ask.

The group watched oral arguments in two cases and then gathered for lunch with the Fifth Circuit panel and their law clerks. Judges Jennifer Walker Elrod, Don Willett, and Kyle Duncan discussed their responsibilities as appellate judges and the value of oral argument. After the judges and their law clerks left, Brush and Peterson discussed significant events and questions from the argument. ◆

Call for Authors: Write an article for *The Bencher*!

September/October 2019
Disasters and Emergency Preparedness
Deadline: June 1, 2019
Has your legal practice been affected by a natural disaster or catastrophic emergency? What lessons did you learn and what steps can be taken to protect your practice from the unexpected? What are the ethical implications and what advice would you give others to be prepared in the future? How can lawyers help other lawyers in a disaster situation and how can the courts assist? What examples of professionalism in these situations can you share with us?

November/December 2019
Communication in the Age of Social Media
Deadline: August 1, 2019
Social media offers opportunities to market and communicate, but may also raise ethical concerns and issues for judges and lawyers. What has been your experience with social media (positive or negative)? How have you avoided any potential pitfalls associated with its use?

For more information please visit www.innsofcourt.org/bencher.

Richard Linn American Inn of Court

The January meeting of the Richard Linn American Inn of Court in Chicago, Illinois, featured speaker Arin N. Reeves, PhD, a leading researcher, author, and adviser in the fields of leadership and inclusion. Reeves led a fireside chat, "Talkin' 'bout My Generation: Effective Communication among Generations in the Workplace." The discussion ranged from different characteristics associated with Baby Boomers, Gen Xers, and Millennials, to insights about the respective generations' preferences related to technology, performance reviews, and work styles. Reeves offered tips on how the three—and soon to be four, with Generation Z on its way to the workforce—generations can peacefully coexist and build stronger work teams by leveraging their strengths. Reeves's most interesting points were:

Panelists, from left to right, Arin N. Reeves, PhD, and Linn Inn members David R. Bennett, Esq.; Molly D. Mosley-Goren, Esq.; Kevin Dam, Esq.; and Joseph T. Kucala, Jr., Esq.

Millennials (those born between 1981 and 1996) overtook Baby Boomers (born between 1946 and 1964) as the largest portion of the U.S. workforce in 2015 and will remain the largest workforce segment for the foreseeable future. Baby Boomers now have roughly equal workforce representation to those from Generation X (born between 1965 and 1980), and the Baby Boomers' portion will continue to decline as more of them retire.

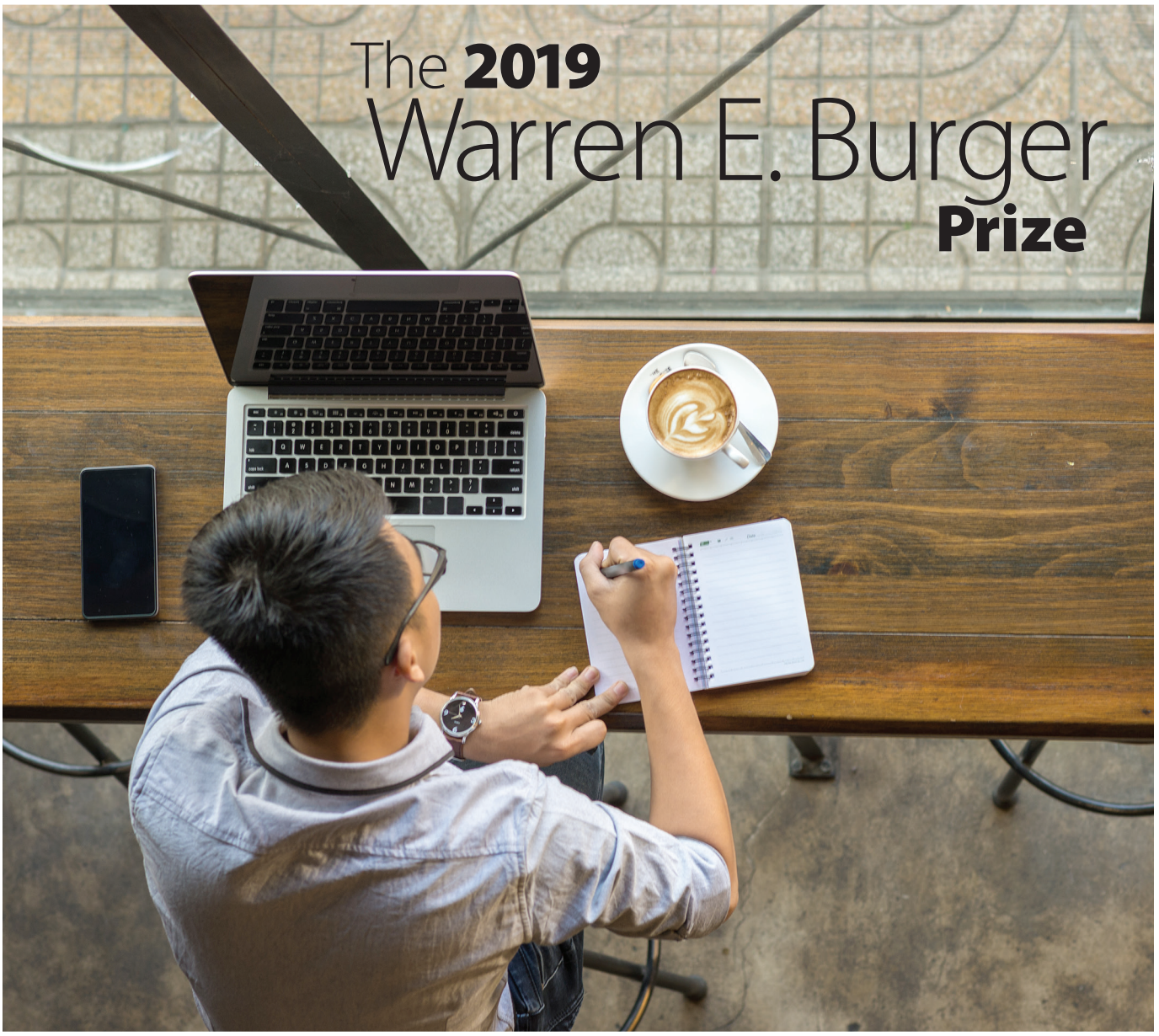
Younger generations—Millennials and Generation Z (born after 1996)—tend to be more comfortable with technology, having largely grown up with mobile communication and the internet. These younger generations also grew up with far more structure than Baby Boomers or Generation X, such as scheduled playdates, structured team sports versus pick-up games, and greater amounts of before- and after-school scheduling. Consequently, they tend to favor more structure in the workplace, such as more formal feedback and review channels. Attitudes on diversity and inclusion tend to be evolving with younger generations as well, but perhaps not as much as people assume.

The differences among generations are in communication styles and preferences, not identity. Millennials are no less loyal or hard-working than their Baby Boomer or Gen X colleagues, but their behaviors can (and often are) perceived as such based on a misinterpretation of these communication differences.

The presentation gave Inn members fascinating insights into a topic that affects everyone's day-to-day experience but does not always get the attention it deserves. ◆

Linn Inn Alliance

In October 2018, members of several different American Inns of Court who were in Washington, DC for a separate event, gathered for a reception sponsored by the Linn Inn Alliance. Each year, lawyers and judges interested in patent, trademark, and copyright law visit D.C. for the American Intellectual Property Law Association annual meeting. The Linn Inn Alliance reception was well-attended with about 50 Inns of Court enthusiasts. It was a welcome opportunity for participants in the various Inns to meet and socialize. One attendee even received guidance and recommendations for the creation of a new intellectual property Inn in Miami, Florida. Inn members in the DC area were joined by members from Boston, Massachusetts; Minneapolis, Minnesota; Pittsburgh and Philadelphia, Pennsylvania; Chicago, Illinois; New York, New York; and Austin, Texas. ◆



The **2019** Warren E. Burger **Prize**

The American Inns of Court Warren E. Burger Prize is a writing competition designed to promote scholarship in the areas of professionalism, ethics, civility, and excellence.

You are invited to submit an original, unpublished essay of 10,000–20,000 words on a topic of your choice addressing the issues of excellence in legal skills, civility, ethics, and professionalism.

The author of the winning essay will receive a cash prize of $5,000 and the essay will be published in the *South Carolina Law Review*. The 2019 Warren E. Burger Prize will be presented during the annual American Inns of Court Celebration of Excellence at the Supreme Court of the United States in Washington, DC in October 2019.

Submissions are due July 1, 2019.

American Inns of Court®

home.innsofcourt.org/burgerprize

Status as Facebook Friend Not Per Se Basis to Disqualify Judge

A divided Florida Supreme Court recently ruled that a trial judge who is a Facebook "friend" with an attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification. In the case of Law Offices of Herssein and Herssein, P.A. v. United Services Automobile Association, 2018 WL 5994243 (Fla. Nov. 15, 2018), the court cited a majority of the cases that have considered the issue in support of its conclusion and declined to follow a minority of cases and ethics committee opinions that reached a different result.

This column highlights the court's opinion and does not attempt a comprehensive review of this topic, although the highlighted opinion surveys cases around the country that have addressed the issue, as well as referencing commentary and other sources.

The narrow issue addressed was whether a motion to disqualify should be granted on the sole basis that an attorney appearing before a trial judge is listed as a "friend" on the personal Facebook page of the trial judge. A Florida intermediate appellate court framed the issue as "whether a reasonably prudent person would fear that he or she could get a fair and impartial trial because the judge is a Facebook friend of a lawyer who represents a potential witness or a party to the lawsuit."

Legal Standard for Disqualification

The court began its analysis with a recitation of the general legal standard for disqualification of a judge in Florida. The applicable statute in Florida requires a good faith allegation that a person would "not receive a fair trial on account of the prejudice of the judge." The purpose of the disqualification statute is designed to keep the courts free from bias and prejudice as well as to ensure confidence in the judicial system—but also to prevent the disqualification process from being abused or used for some other reason not related to providing for the fairness and impartiality of the proceeding.

The court referred to several dictionary definitions of the term "friend" and observed that, as commonly understood, friendship exists on a broad spectrum. Some friendships are close and others are not.

Under Florida law, the general rule is that the mere existence of a friendship between a judge and an attorney appearing before the judge, without more, does not reasonably convey to others the impression of an inherently close or intimate relationship. And, in Florida, an allegation of mere friendship between a judge and a litigant or attorney, standing alone, does not constitute a legally sufficient basis for disqualification. Likewise, Florida cases have found that membership in the same church or status as a neighbor or former classmate are not per se legally sufficient reasons to disqualify a trial judge.

The court reviewed the history of Facebook, which was launched in 2004 as a social media and social networking service. Some sources estimate that Facebook currently has over 2 billion active users. The court discussed the procedure for becoming a "friend" on Facebook and acknowledged that a Facebook "friend" may or may not be a "friend" in the traditional sense of the word. A Facebook "friendship" could range from intimacy to a complete stranger, and it is possible to be a Facebook "friend" with animals and even with inanimate objects.

Court's Holding

Relying on a majority of the court decisions and opinions of state ethics panels that have addressed the issue, the court held that "no reasonably prudent person would fear that she could not receive a fair and impartial trial based solely on the fact that a judge and an attorney appearing before the judge are Facebook 'friends' with a relationship of an indeterminate nature."

The court recognized the factually intensive nature of its holding and that in some circumstances the specifics of a friendship between a judge and a litigant, lawyer, or other person involved in a case may require disqualification of the judge. The limited conclusion in this case clarified that not every relationship characterized as a friendship provides a basis for disqualification, and there is no reason that a Facebook "friendship"—which could involve strangers—should be singled out for a per se disqualification. This case featured a concurring opinion that strongly urged judges not to participate in Facebook at all. A vigorous dissent urged the view that having a lawyer as a Facebook "friend" undermines confidence in the neutrality of a judge and warrants recusal by a judge in order to avoid the appearance that a party would not receive a fair and impartial trial. ◆

Francis G.X. Pileggi, Esquire, is a litigation partner at Eckert Seamans Cherin & Mellott, LLC, in Wilmington, Delaware. He comments on key corporate and commercial decisions and legal ethics rulings at www.delawarelitigation.com.

PHOTO CREDIT: ©iStockphoto.com/Kameleon007

Attorneys and the #MeToo Movement—
Where Do We Go from Here?

By Ann M. Goade, Esquire and Portia B. Scott, Esquire

The stories of women being insulted, minimized, humiliated, sexually harassed, and worse have exploded in recent years, becoming more prominent with the #MeToo movement. Certainly, the practice of law is not immune to the injustice of gender bias and discrimination. Ask any female attorney who has been in practice for more than a few months about her own experience and you will most likely hear stories that seem unbelievable in a profession that prides itself on being the Guardians of Justice.

Here is a true tale from our own trove of personal experiences: One of the authors was arguing, and winning, against a discovery objection in front of an established, reputable judge. The other attorney, as his entire argument, placed his elbow on the Bench, leaned in and said conspiratorially to the judge, "Ya know, judge, giving this little lady a law license is like giving a loaded gun to a toddler." Aside from appreciating the rather pleasing alliteration, the attorney should have been offended, insulted, and indignant. Instead, it was all she could do to not laugh out loud. This man's time was long gone—or so she thought.

She knew the male judge was not a fool and would ignore the sexism, the condescension, and the attempt to undermine her legal prowess with what the other attorney thought should pass for wit. Of course, the judge ruled in her favor and, with a questioning look, invited her to ask for censure of

the other attorney in some way. She merely shook her head; it would do no good.

Whether received with humor, resignation, indignity, defiance, anger, or a combination of them, sexism continues to thrive in the practice of law—in the courtroom, in the office, and in our professional organizations. For women to be effective, we must avoid appearing too weak and undemanding or, as equally toxic to our clients, too "shrill." After all, our clients' money, livelihoods, or even at times their freedoms are at stake. Just as having Barrack Obama serve as president of the United States for two terms did not end racism in America, having three women justices on the Supreme Court of the United States has not ended our battle against sexism.

The #MeToo movement has, however, helped to open the conversations we must have about our expectations, our experiences, and our long road ahead. None of us were taught in law school to be disrespectful to other attorneys, to the court, or to our staff. That behavior would have been learned long before we entered school but perhaps reinforced during and after. One of the authors was propositioned by her law professor, telling her he would "have" her prior to graduation and, if she were willing, she would get an "A" in his class. Naturally, she took her "C."

Thirty-five years ago, there were no rules (at least none that were followed) regarding the treatment of female attorneys. A pat on the behind, a lewd remark, and worse, these were just the day-to-day indignities that went along with the practice of law. It was no protection if a female attorney knew her case and the law and came prepared to argue it. If opposing counsel was an older man, then she was likely to be subjected to ridicule and what today would be termed sexual harassment, but what has always been boorish or even criminal. Being the only woman, or one of very few, in a firm meant in order to keep a job she had to grit her teeth, move past the behavior, and more often than not, make the coffee.

Even proving oneself did not provide cover. One of the authors, having graduated from a prestigious school with honors, was offered a job at a large, successful firm involved in some of the tobacco litigation. The description during the interview was that the lead attorney wanted a really good legal secretary and thought a new "girl attorney" would be best because on top of her law degree she could type and deal with the other new "girl attorneys" in town.

And if you happened to win your legal argument, it oftentimes could be worse for you and/or your client. The male entitlement that pervaded the practice of law was akin to trying to join a fraternity, knowing you were uninvited and unwelcome.

Fast forward 30 years and we ask, "What's changed?" Is it that the old guard has retired? Is it that the insulting and demeaning treatment of women as the oddity in school (or the work environment) was merely the result of us actually being oddities? Is it that the old boys' network was just so entrenched as to cultivate a culture of intolerance and entitlement? The answer is none of those, but that there is, finally, an awareness that was not there even a few years ago. That awareness is aided by the fact that women now make up more than one-half of law school graduates.

Remember that civility is not just for the courtroom: We must strive to incorporate it into all aspects of our lives.

Remember that civility is not just for the courtroom: We must strive to incorporate it into all aspects of our lives. We must ask ourselves, what is the practice of law? Is it a tool we use to obtain a specific result? Perhaps it is a beast of burden upon which we load our sense of self-worth, our income, and our identity or perhaps it is a friend that has given us strength, identity, and support over the years. Is it our boss, dictating what we must do and when? Whatever it is to each of us, the practice of law is also an opportunity to improve our world.

Our colleagues today have hopefully been taught that there is no circumstance in the legal workplace in which sexual harassment is to be tolerated. This country is a changing place, and the legal profession must change and improve with it. All people deserve to be treated with respect; all of us want to be treated with civility. So, how do we get there?

Becoming part of the conversation is a huge start. We must ask each other what can be done to increase civility, dignity, and the respect we show to the world and each other. When there is an example of poor behavior, acknowledge it. By refusing to accept sexism and all the prejudices that word connotes, we rise above it and become civil.

We all have our parts to play. We all can do better. And we all should remember that each year our law schools graduate young men and women who will, in large part, be looking to their elders in determining their own future codes of conduct. ◆

Ann M. Goade, Esquire, is an attorney licensed in Florida, Missouri, Tennessee, Illinois, and The Supreme Court of the United States whose practice primarily consists of family law mediation. Portia B. Scott, Esquire, is an elder law attorney practicing in Martin County, Florida. Goade and Scott are both members of the Justice Major B. Harding AIC in Stuart, Florida.

PHOTO CREDIT: ©iStockphoto.com/CherriesJD

Professionalism and Civility

By Brian McFadden-DiNicola, Esquire

As a family law practitioner, I am very frequently advised of the personal transgressions of people who were, very recently, very personally involved. These personal transgressions can range from perceived financial misdeeds to proven adulterous liaisons. The hurt stemming from these transgressions is clear and palpable. The need for some proverbial "pound of flesh" is similarly clear and palpable. Some of these clients try to use us as the tool to obtain that pound. This is so frequent that at a recent meeting of my local bar association, one of the presiding judges cited attorneys taking on the persona of their clients as one of the top mistakes lawyers make.

Our professionalism and civility requires that we deny our client's attempts as often as possible and, when we have given in to the temptation, we should apologize for our digression.

Our clients, hurt and aggrieved as they are, can tempt us to treat our adversaries, and, more specifically, their clients, in an uncivil manner, subjecting them to belittlement or commentary that does not befit our offices. For example, the cuckolded husband calls his future ex-wife various colorful names in my office and demeans significant aspects of her life, in not-so-subtle attempts to unnecessarily win me over to his side of the arguments. I say unnecessarily because we have been hired to be on "his side of the arguments," irrespective of the colorful elements. Our job is not to then blindly use the personal to impact the professional, but to use the personal where it impacts the professional and to resort to what the law is, not what the personal is.

I have, in family law practice, seen far too many times attorneys become the tools their clients are using to extract some form of revenge on their spouse. This can range from needless commentary in the hallway intended to be overheard to unproven, unsubstantiated allegations asserted as if the truth in front of judges. It can similarly be unfriendly, unprofessional conduct purposefully aimed at opposing counsel, as if the litigant's disagreements have become the attorney's personal disagreements. The point of these antics may be to pressure a litigant through fear of embarrassment in court, to improperly sway a judge through false narratives, or to put on a show for clients to somehow prove to them that we are on their side.

Our job, as advocates, is not to present false narratives but to present truthful narratives in the light most favorable to our client. Our job, as advocates, is to present that truthful narrative in a way that it is going to be most receptively received. If the narrative is shrouded in the more colorful elements, tainted with the personal invective our clients may have for their adversary, I am reasonably certain it will not be received in the most receptive fashion. In fact, I have heard time and again from judges I regularly appear in front of that they do not want to hear the histrionics that have little to no impact on the law.

We, as professionals, do not have to resort to what is tantamount to name-calling. We do not have to give in to our clients' desire to have us as their egos in professional attire. We do not have to be unprofessional or uncivil to our professional adversaries. We do not have to unnecessarily lambast an adverse litigant or subject them to rude or uncivil behavior. Engaging in any of the foregoing does not make our case any better, does not make the presentation of our case any better, does not make it any easier to settle our case, and does not make any settlement terms more favorable to our client.

Our clients, hurt and aggrieved as they are, can tempt us to treat our adversaries, and, more specifically, their clients, in an uncivil manner, subjecting them to belittlement or commentary that does not befit our offices.

I believe that many attorneys in our profession are afraid that the display of civility, or the refusal to take on the ego of their client, will cause them to lose clients, lose their client's faith and trust, or cause them to have a professional identity as a "pushover." These fears, I believe, are unfounded. I further believe that acting on these fears probably causes the results that attorneys are seeking to avoid by giving into the fears and taking on the roles of the client. I would ask you to think of the most professional example of an attorney you know and then ask yourself if that lawyer's business is suffering from a lack of clientele. I very seriously doubt it. The same does not hold true for the unprofessional, uncivil attorneys we all know. I know that my typical thought for those attorneys is, "how do they maintain their practice doing what they do," and I frequently wonder how long they will be able to keep it up without running into trouble or running out of clients. I know which practice I would rather have.

As you consider what professionalism and civility mean, I ask that you also reconsider whether the tactics you have taken have helped or hurt your cases. Honesty to yourself about your own professionalism and civility is a necessary task to ensure we are being the professionals we want to be and the professionals we want our adversaries to be. ◆

Brian McFadden-DiNicola, Esquire, is a partner at Hoagland, Longo, Moran, Dunst & Doukas, LLP, in New Brunswick, New Jersey. He is certified by the Supreme Court of New Jersey as a matrimonial law attorney and is a member of the Aldona E. Appleton Family Law American Inn of Court.

PHOTO CREDIT: ©iStockphoto.com/wildpixel

"Can't We All Just Get Along." Civility Across the V.

By Daniel R. Karon, Esquire and J. Philip Calabrese, Esquire

What part of our job makes us most miserable? What part makes us want to quit? Here is a hint: It has to do with lawyers.

Tell your friends that lawyers are required to take continuing-education classes not only on the law but also on alcoholism and substance abuse. Most other jobs do not require courses like ours. Add that our divorce rate is sky high and that of all jobs, lawyers rank fourth in suicide.

Law has its stressors. What job doesn't? But what is it that uniquely qualifies our profession for heightened misery—misery to the point that lawyers who have left the practice jokingly (yet seriously) brand themselves "recovering"?

Our nonscientific thesis posits that our unhappiness comes from incivility. We believe this incivility derives from a mutual demonization, objectification, and vilification that, these days, seems baked into the art of advocacy.

Civility is a topic that we frequently discuss within ranks or at Inns of Court but never with our opposition. These discussions, therefore, tend to stoke their own fire because when a group of lawyers agrees with itself, nothing understanding or conciliatory tends to emerge.

Why are opposing lawyers so uncivil to each other? We think it stems from a shared misconnection, sowing a reciprocal misunderstanding, that leads to communal meanness.

It is not a fundamental misconception. We are all people with families and mortgages. We all work hard to send our kids to school and to perfect our vision and version of the right thing.

We instead perceive our professional misconnection and resulting incivility as centering on the previous paragraph's last point—our vision and version of the right thing. To unpack our thesis—that lawyers do not understand or consider their opponents' vision or version of the right thing—we looked inward. We did

this because we believe much of our misconnection and incivility derives from misperceiving (or ignoring) the other side's goals, purposes, and motivations.

To validate our theory, we crafted an experiment. We—a plaintiffs' class-action lawyer and a class-action defense lawyer—examined ourselves. We asked what we believed our opposition thought about us and how our opposition judged us. Afterward, we presented this self-portrait to each other for assessment to see how accurate we were.

From this exercise, we hoped an understanding might emerge about what plaintiffs' and defense lawyers think of each other. From this understanding, we hoped to draw comparisons and recognize contrasts. We hoped to reveal an understanding that would demonstrate how similar we are and why, based on these similarities, there exists no basis for the incivility that infects our profession.

How Dan Believes the Defense Bar Perceives the Plaintiffs' Bar

I, Daniel Karon, am a class-action attorney. I believe the defense bar thinks plaintiffs' lawyers fall into two principal camps: serious lawyers and "shakedown" lawyers.

Serious lawyers file cases such as those against VW diesel emissions, Enron, and Exxon Valdez. They are technically competent, ceaselessly committed, and creative.

Shakedown lawyers file cases such as those involving Subway footlong sandwiches, Starbucks iced coffee, and Ford truck coupons. They walk the CVS aisles looking for lawsuits concerning products whose labels, in their expert opinion, do not hold up. They file a dozen alleged food-mislabeling cases, hoping one will stick because one settlement will pay their yearly expenses.

Serious lawyers politick cases in ways that would dazzle Congress and make John Grisham wince, blithely horse-trading inventories and bargaining leadership. After all, there is a reason the bestselling novels and Hollywood blockbusters are about us. And, of course, we are all rich, only flying commercial when our private jets are down for repair.

Finally, despite serious lawyers' acumen, we are largely, if not exclusively, profit-driven. Nevermind that our cause is existentially valid; any true purpose is pure pretext. It's the money that drives us.

What the Real Plaintiffs' Bar Looks Like

That is what I believe the defense bar largely thinks of my practice. Phil has read my remarks and has largely confirmed them.

> Why are opposing lawyers so uncivil to each other? We think it stems from a shared misconnection, sowing a reciprocal misunderstanding, that leads to communal meanness.

Now, here is the truth. I am not a "shakedown" lawyer, so I cannot speak to how they perceive themselves or think anyone else does. I can only agree with defense counsel's perception of them.

As for serious lawyers, only a smattering of us fit the defense bar's stereotype. Serious lawyers are not viciously entrepreneurial, we do not place politics over plaintiffs, and we are not purely profit-driven. We are not uniformly rich, we do not all fly private, and we are not fodder for the next Grisham novel.

Instead, we put everything on the line for what we believe in. We risk our families' comfort and security, often, these days, for the same wages we could make doing hourly work, that is, if we won. We teach, we lecture, and we write because we think our message of fairness, accountability, and responsibility is essential and worth sending.

Every morning, we dread the possibility that a bill has been proposed that will put us (and defense counsel) out of business. So we lobby Congress and testify on Capitol Hill, doing our part (typically as one witness of four) to save the ever-dwindling bucket of rights that remain for consumers, which, of course, include defense lawyers and the real people who work at corporations.

We have made a life choice not to stand idle while the next defective product kills someone or the next Ponzi scheme guts a retired couple's savings. That is why we bristle when someone paints us with the same ugly, entrepreneurial, profit-driven brush as they do shakedown lawyers. Indeed, we work to discourage shakedown lawyers from filing cases that would advance congressional efforts to eviscerate consumers' rights and our shared practice.

How Phil Believes the Plaintiffs' Bar Perceives the Defense Bar

I, Phil Calabrese, defend businesses in class-action and product-liability cases. The plaintiffs' bar thinks we defense lawyers have it easy. We have clients who pay us monthly, allowing us to have lucrative

Continued on the next page.

Can't We All Just Get Along *continued from page 15.*

practices and extravagant (or at least comfortable) lifestyles with little risk.

We command vast resources that include legions of associates, paralegals, and secretaries, around-the-clock docket clerks and word-processing departments, and industry resources and online tools—all enshrined in lavish offices bedecked in weekly floral arrangements and rotating artwork.

> Sure, our process is an adversarial one. But adversarial need not mean uncivil. Every day should invigorate us because every day carries the prospect of doing something great for our clients.

According to the plaintiffs' bar, our clients leverage these resources to mount a vigorous, but mostly frivolous, defense to generally meritorious claims. We fight for every scrap of ground—removal, standing, dismissal, Twombly, ascertainability (is that even in Rule 23?), interlocutory appeals, and more.

We have never seen an unobjectionable discovery request, we rarely produce all relevant discovery, we feign mistake when we intentionally fail to produce relevant documents, and we file endless motions, whether on discovery issues, Daubert, or summary judgment. Our game is one of delay and driving up costs, hoping to break plaintiffs' counsel's will and spirit and to outlast their resources.

On the merits, we know the Federal Rules of Civil Procedure better than we know our children, and we deploy these rules to distract from the real and substantial harm that our clients have done.

When it comes to taking a deposition or arguing a motion, maybe a few of us have decent stand-up skills. Even fewer of us have any meaningful trial experience. But our focus on procedure and discovery distracts from these weaknesses and the largely indefensible merits of every plaintiff's case.

Supporting all of this are our well-heeled clients, whose wealth is only exceeded by their depth of personnel and resources available to educate us about the lawsuit's factual and legal background that we will never disclose to the extent it damages our client's case.

At bottom, our clients seek to make a buck by selling shoddy products, marketing deceptively, or engaging in other behavior so egregious that its illegality is obvious to anyone who is not a defense lawyer.

What the Real Defense Bar Looks Like

I have shared these perceptions with Dan, and he tells me I am right. He tells me large swaths of his bar perceive my practice largely along these lines.

Like most generalizations, this portrait has some kernels of truth, but it mostly misses the mark. The businesses we represent employ many people. These businesses and their people make positive contributions to society. They make the products we love and use every day. They build our cars, produce our food, and make our country wealthy.

They do all this at great cost, with great risk, and in the face of myriad challenges and obstacles. Often lawsuits challenge a product or practice at the core of a company's success. This makes the case personal for the real people whose product or practice is targeted.

Do some companies engage in shady or illegal practices? Of course. But these companies—these people—are the exception. The problem is too many cases have too little merit and do little more than impose cost with little benefit to customers or society. In these circumstances, litigation feels more like legalized extortion than the administration of justice.

As for our litigiousness, the burdens of discovery are generally asymmetrical. Most plaintiffs have few, if any, worthwhile documents. Plaintiffs' counsel often lack any idea how difficult and costly harvesting documents or identifying custodians can be, particularly in large organizations with high turnover and frequent acquisitions and where plaintiffs' allegations span decades.

In many cases, plaintiffs' counsel has had months or years to investigate their claims before filing suit, so it should not surprise them that defense counsel and its clients need time too. And the motions that plaintiffs' lawyers complain about protect rights and interests important not only to defendants but also to plaintiffs. Though plaintiffs' counsel might prefer that defendants confess judgment and pay a fee, there is nothing wrong with insisting that plaintiffs carry their burden of proof.

Every time plaintiffs' lawyers describe the risk they face, we and our clients hear two things: First, plaintiffs' counsel do not appreciate the risks and costs to defendants. To the contrary, we often perceive plaintiffs' counsel as part of a calculated strategy to force settlement of a defensible claim.

Second, plaintiffs' counsel has little appreciation for how much the economics facing law firms have

changed in the past 10 years. Even meritless claims can net plaintiffs' counsel more fees than defense counsel, to say nothing of the increased risk of fee disputes and malpractice claims that accompany unfavorable results.

The defense bar is not a band of heartless mercenaries who defend the indefensible for the right price. It is a group of thoughtful lawyers doing their jobs, protecting people and businesses who deserve it, and encouraging accountability where necessary and appropriate.

Deconstructing Our Stereotypes and Encouraging Civility

So plaintiffs' lawyers believe defense lawyers are heartless functionaries, while defense lawyers think plaintiffs' lawyers are opportunistic greed mongers. Is it any surprise that we are so uncivil to each other?

But we need not be this unhappy. When a case begins, pick up the phone (yes, the phone) and introduce yourself to the other side. If you are in the same city, invite your opposing counsel to lunch. If you are in different cities, arrange a drink or dinner after the next deposition or hearing. If you do any of these things, you will see how much you share in common and how ardently you want to help your clients.

Sure, our process is an adversarial one. But adversarial need not mean uncivil. Every day should invigorate us because every day carries the prospect of doing something great for our clients. If we keep in mind that we are similar people, just on different sides of the v., our profession can go a long way toward recapturing the civility—and the happiness—that once defined the art of advocacy and the practice of law. ◆

Daniel R. Karon, Esquire is a class-action attorney with Karon LLC in Cleveland, Ohio. He chairs the American Bar Association's National Institute on Class Actions and teaches complex litigation at Columbia Law School. He is a member of the William K. Thomas American Inn of Court. J. Philip Calabrese, Esquire is a partner at Porter Wright Morris & Arthur LLP in Cleveland, Ohio. He co-chairs the firm's class-action, multidistrict litigation, and mass-action practice. His practice includes defending businesses in class-action and product-liability cases. He is a member of the Judge John M. Manos American Inn of Court.

PHOTO CREDIT: ©Stockphoto.com/Studio-Annika

Civility and the Inns of Court

For the last two years, the American Inns of Court designated October as Civility Month. As part of the focus on civility, we hosted a panel on the Traditions of Civility on October 20, 2018. Panel member, The Right Honourable Lord Justice Nicholas Patten, addressed the evolution of civility within the English Inns of Court. We have excerpted some of his thoughts below on how civility became a cornerstone of the English Inns of Court.

How did civility become a cornerstone of the English Inns of Court?

There is a widely held belief that for much of their history, education at the Inns of Court extended beyond legal training to embrace much wider accomplishments. As a result, many members of the aristocracy attended the Inns to acquire polish and refinement. The first mention of this educational role for the Inns is in Fortescue's "De laudibus legum Angliae" (written between 1468 and1471 and circulated in manuscript before appearing in print in 1543). Fortescue referred to both the Inns of Court and the Inns of Chancery providing, in addition to their legal education, "a kind of academy of all the manners that nobles learn," i.e., training in singing, dancing, and "all games proper for nobles." Fortescue claimed that most nobles devoted their vacations to studying the law, Scripture, and the chronicles. "This is indeed a cultivation of virtues and a banishment of all vice," Fortescue said.

This description would be a perfect quote to demonstrate the centrality of "civility" in the education provided by the Inns, were it not questioned by later historians.

W.C. Richardson, for instance, pointed out that descriptions of the Inn's education programmes, such as the report by Nicholas Bacon, Thomas Denton, and Robert Carey on the status of legal education in England (c. 1540), make no reference to this.

What is undoubtedly true, however, is that the Inns fostered activities beyond the legal curriculum, and these can be characterised as teaching "civility." The place of drama at the Inns in the early modern period is well-known thanks to the first performance of Shakespeare's "Twelfth Night" in the Hall of Middle Temple in London, England. All the Inns, however, produced plays, masques, and revels in the 16th century and early 17th century.

Theatre in this period was more than just a civilised pastime. Contemporary theatre had a strong moral and didactic framework, upholding the existing social order and civic virtues. Even in the most gruesome Jacobean tragedy, vice is not allowed to go unpunished. The masques of the early 17th century followed strict conventions where chaos and the overturning of the natural order in the anti-masque would be resolved with the restoration of the natural order of things in the main masque. Even the licensed misrule of the revels ultimately strengthened the existing social order.

Teaching/enforcing 'civility' indirectly

Daily life in the Inns of Court was (and still is) regulated by many rules and customs, which can be characterised as promoting civility. These include:

- the requirements for keeping dining terms and the act of communal dining,
- insistence on respect for the hierarchy of the Inn,
- the corporate life of the Inns as an alternative to the temptations of London nightlife,
- decorum in dress, and
- the provision of libraries covering a broad range of subjects, particularly the classics.

The civilising effects of communal dining

Living and dining together was seen as an essential element of mediaeval universities. The same was true of the Inns of Court, where most of the legal instruction took place in Hall after meals. All the Inns attached great importance to dining communally, and this is reflected in the punishments levied on members who failed to attend.

The benefits of communal dining were summarised by the Benchers of Middle Temple in 1640 who viewed the "holding together in commons the company of this Fellowship in their public hall, as a thing wherein principally consisted the common honour, and the peculiar good of every particular member, and without which a company so voluntarily gathered together to live under government could hardly be termed a Society."

Hierarchy

As with many organisations, each Inn of Court has always had its own settled hierarchy, which helps underpin respect for senior members and, by extension, for the institution itself.

For instance, at a Council in Lincoln's Inn on Ascension Day in 1520, following an adjudication over the respective seniority of four barristers, "it is ordained the every gentleman of this company give to other due reverence according to their ancienties and use due order and silence in their communications and arguments within this house," according to "Black Books," Volume 1.

Seniority among Benchers is determined by the date on which each individual was made Bencher. Seniority among barristers is determined by date of call.

The Inn's 1949 dining regulations demonstrate how apparently straightforward rules like this have still produced enough social conundrums for the lawyers to really get their teeth into:

> Rule II (a). Barristers admitted ad eundem shall have precedence according to the date of their admission to the Inn.
>
> Rule II (b). Four Barristers may dine together in a Mess so long as that Mess are content to take precedence according to the seniority of the junior of the said four Barristers.
>
> Rule VIII. No Barrister is to leave the Hall until the Benchers have withdrawn unless by permission of the Treasurer or Acting Treasurer.

The regulations go further, and it should be no surprise that a community of lawyers specified mechanisms on how to resolve any disputes. Thus, for instance, after the Butler has given "one stroke of the Mallet exactly at the time appointed for dinner … no Barrister who has taken his chair at Table may be displaced by any other Barrister on the ground of precedence or otherwise" (rule III).

In addition, "any question of precedence may be referred to the Under-Treasurer who shall settle the question when required to do so."

Continued on the next page.

By 1949, some of the regulations sounded antiquated—e.g., "Cloaks, Hats, Spurs, Swords and Daggers and any disorderly conduct are forbidden in Hall" (rule XII)—and many of the more convoluted rules have fallen into abeyance. Nonetheless, the essential rules and customs remain to this day to uphold the civilized nature of dining in Hall.

Communal life removing temptations

The importance of keeping commons was partly to remove members from temptations outside the Inn. This was explicitly stated in the Middle Temple General Orders of 1664. By neglecting commons during vacations "gentlemen of the Inns of Court are often drawn to frequent ordinaries [i.e., taverns], gaming-houses, and other places of disorder whereby the neglect of their studies, if not the corruption of their manners is occasioned."

Interestingly, the concern with discouraging members of the Inn from nearby temptations lasted until well into the 20th century and also extended to non-members also resident in the Inn. The celebrated artist/calligraphers Edward Johnston and Eric Gill leased a flat in the Inn between 1902 and 1903. Gill later recalled how they were "bound by the rules and regulations of the house. The gates were shut at a certain hour every evening; boundary walls secluded us from the frivolities of the streets. There was a tacit agreement understood and accepted by all tenants of the Inn to conform to a certain unwritten but recognizable rule of dignity and decorum."

Decorum in dress—sumptuary regulations

As with many organisations, the Inn still demands decorum in dress at its functions. In the past, the Inn has been very detailed in what it prescribes.

The mid-16th century, for instance, saw a prolonged campaign across the Inns of Court against the wearing of beards. In February 1542 Council declared "none of the Fellowes of the said House … shall wear a beard in the said house, and who so doeth shall pay double commons." Fines were levied on members who ignored this proscription in the following years; indeed one member was reprimanded "for his over much speaking at the Bench in defence of wearing of beards."

In the following decade, detailed regulations were made concerning costume —incidentally providing an interesting insight into contemporary fashion. In 1557 Lincoln's Inn forbade all but knights to wear "in their doublets or hose any light colours except scarlet or crimson or wear any velvet cap or any scarf, or wings on their gowns' sleeves, upon pain to forfeit the first default 3s.4d., the second expulsion without redemption." Inner Temple meanwhile forbade "white jerkins, buskins or velvet shoes, double cuffs on their shirts, feather or ribbons on their caps."

Sumptuary regulations—which were very common in the 16th and 17th centuries, are usually attributed to a desire to reinforce social distinctions by restricting opulent attire to the highest social orders. In the case of the Inns, however, an explicit link is made between sobriety in dress and civility.

The judges' orders issued in 1614 and reissued in 1630 and 1664 all consider the issue of costume (article 12). The 1614 version is most detailed:

"For that an outward decency in habit and apparel is an ornament to all societies and containeth young men within the bounds of civility and order, It is ordered that no gentleman of any House of Court or Chancery shall come into ye several Halls, Chapels and places of public prayer with hats, cloaks, boots, spurs, swords or daggers or shall wear long hair: upon pain to undergo several penalties contained in the orders of the several Houses, which are strictly to be put in execution."

The provision of libraries covering a broad range of subjects—particularly the classics

Although the records of Lincoln's Inn include mention of a library in 1475, the libraries of all the Inns of Court are known to have been quite limited in scope initially. Even by 1646, the date of the first catalogue of Lincoln's Inn, the library only had 292 volumes of printed books. Interestingly, 214 of these titles were on subjects other than law—mainly theology, history, and philosophy. This may of course be attributable to the random nature of bequests to the library, but it does suggest that the Inn placed great importance on the liberal arts.

This was certainly demonstrated in 1676 both by Sir Matthew Hale's bequest of his manuscript collection and the Inn's response. Hale's collection is that of a true Renaissance man, learned in many fields, not just the law. The Inn was also well aware of the importance of this bequest, commissioning a portrait of Hale to hang in the library in recognition of his gift.

In the years that followed, the library continued to collect widely in many disciplines. As with many libraries, it had a strong collection of classical literature. A knowledge of the classics was not just the hallmark of the educated man, but also, of course, the source for many theories about what constitutes civility and civilisations. ◆

Create A Connection

The American Inns of Court has a reciprocal visitation agreement with the four Inns of Court in London, England and King's Inn in Dublin, Ireland. Members of American Inns of Court, with a letter of introduction from the national office, can visit, tour, and dine at any of the Inns.

For more information, visit our website at home.innsofcourt.org/visitation or call (703) 684-3590.

English and Irish Inns of Court Visitation

American Inns of Court

TECHNOLOGY IN THE PRACTICE OF LAW

Kevin F. Brady, Esquire

When Your Data Is Held Hostage

This is not an email you want to see in your inbox:

Ransomware attacks are escalating and if you think only big companies are the targets, think again. The top targets of ransomware are professional service firms, such as law firms and accounting firms, because they tend to under-invest in IT security, have weak or no backup policies, and have almost no tolerance for data loss. You might be putting all of the data on your computer at risk unless you take steps to avoid this disaster.

What Is Ransomware?

Ransomware is malware or a virus that infects your computer and prohibits you from accessing the data stored there. In this type of attack, thieves attempt to extort money from their victims not by removing data from your computer but by encrypting or locking down the data so victims cannot use it without downloading a "key" from the attacker to unencrypt or unlock the data.

The attacks start out as innocent-looking emails referred to as "phishing emails" because they masquerade as a communication from a company generally familiar to the victim. It is imperative that the victim believe that the email is a valid communication from an authentic and familiar business for the fraud to be successful. The email may reference a problem, such as a security breach, and implore the victim to click on a link and change or verify personal information, such as addresses, financial information, passwords, etc. Once the victim clicks on the link, the individual is redirected to a website that is hosting the ransomware and the virus is automatically downloaded to the victim's computer without the person taking any further action.

Kevin F. Brady, Esq. is of counsel in the firm of Redgrave LLP in Washington, DC. He is the immediate past president of the Richard K. Herrmann Technology AIC in Wilmington, DE.

Without access to the key, it is nearly impossible for the victim to gain access to the data. The preferred cryptocurrency for ransomware remains Bitcoin, but privacy-focused coins such as Dash are trending.

To make a bad situation worse, even when you pay the ransom and download the key to unencrypt your data, instead of unlocking the data, new malware might infect your data in different ways (with a subsequent demand for ransom). The FBI will not make a recommendation whether to pay the ransom, and data security experts are split on whether to pay. Everyone does agree that the best approach is to be proactive and take steps now—before any attack—to minimize the risk of loss of your data.

What's the Answer?

Back Up Your Data Often. It is critically important to back up your data often so that you are never at risk of losing critical information. While creating backups will not prevent a ransomware attack, it will lessen the damage. Experts recommend you back up your data to a local hard drive and store the hard drive at your office or home. If you have a good backup, you have the option to ignore the ransom demand and instead go to an IT professional who can identify and remove the infected files from your computer. You can then replace the infected data with your data from the backup media. If you do not have a good backup, that option is unavailable and paying the ransom may be your only viable option.

Think Before You Click. The user plays a pivotal role in defeating this attack by thinking before clicking. If you are unsure, do not click. Instead, ask your IT department or experienced IT professional for help.

Use Antivirus Software and Keep It Up-to-date. Whether you are talking about a business computer or home computer, make sure you have updated antivirus software.

Hit the "Time Out" Button. If you think you have been the victim of a ransomware attack, disconnect your computer or device from the internet and contact an experienced IT professional for advice. Staying connected to the internet only makes it easier for the attacker to access your information. If you have an iPad or iPhone, put the device in "airplane mode" and the device will be free from external influence. ◆

Mean Tweets: Professionalism and Courtesy in the Practice of Law

Program No: P14047

Presented By: Louis M. Welsh American Inn of Court, San Diego, CA
Presented On: September 21, 2017
Materials: Script, Articles, Handouts, Video
CLE: Approved

Summary

Using the popular *Jimmy Kimmel Live* parody, "Mean Tweets", as its foundation this program, "Mean Tweets: Professionalism and Courtesy in the Practice of Law", is a humorous and edifying discussion and analysis of the prevalence of "mean" language in the legal profession and its proliferation in electronic communications. The program began with presenters reading, as if from Twitter on an iPhone, short comments that are real-life examples of uncivil and unprofessional comments made by opposing counsel. The types of comments were grouped into two main categories: bias and condescending/rude/threatening. The readings were recorded prior to presentation, with a faux brick wall background. Computer editing was used so that the text would scroll across the screen as "tweets" were read. In the live presentation a moderator addressed how these comments are pervasive in the legal profession, analyzed biases, and discussed best responses and the promotion of civility.

Roles:

Moderator(s) ..... Masters
Readers ..... Associates, Barristers
Provide real-life examples ..... All Levels

Agenda:

Introduction ..... 10 min.
Part I: Bias (watch recorded tweets and discuss) ..... 20 min.
Part II: Equal Opportunity Condescension, Rudeness & Threats .. 20 min.

Recommended Physical Setup:

Computer and Projector

Submit your Inn Programs!

Submitting your programs to the Program Library helps us deliver convenient, meaningful and up-to-date program information to Inns and other Inn members. Each program meeting of the Inn year is the perfect time to collect program materials for submission.

Electronic submissions are encouraged; please include all materials necessary for other Inns to restage the program. These materials might include a script, supporting documents, research materials, or any handouts.

When submitting a program please include a Program Submission Form, which can be downloaded from our website home.innsofcourt.org. Each program submitted to the national office adds to the Program Library and helps your Inn along the track to Achieving Excellence.

If you have any questions please call 703-684-3590 or send an e-mail to programlibrary@innsofcourt.org.

The national program library is an important service offered to the Inn membership by the Foundation. This Program Spotlight highlights the best of the program library as an offering to spark your own program creativity. If you would like to order any of the featured programs, please visit our website at www.innsofcourt.org or send an e-mail to programlibrary@innsofcourt.org.

AMERICAN INNS OF COURT • 225 REINEKERS LANE, SUITE 770 • ALEXANDRIA, VIRGINIA 22314

The Bencher

The Bencher is the flagship publication of the American Inns of Court and is published six times a year. The purpose of *The Bencher* is to provide a regular communication link among the national office, Inns, and members of the American Inns of Court. Contributions are welcome. Feature articles or news items must be submitted to the editor and will be reviewed for suitability and may be edited for content or to fit. *The Bencher* accepts paid advertising. The presence of advertising in no way implies that the American Inns of Court either has any relationship with the advertiser or endorses the product or service advertised, unless so indicated in the body of the advertisement or elsewhere. Please submit content to Rita Zimmerman, Editor, at rzimmerman@innsofcourt.org. Address changes should be made online at www.innsofcourt.org or sent to Howard Hurey at hhurey@innsofcourt.org.

ADDRESS CHANGE?

Contact Howard Hurey at (571) 319-4706 or hhurey@innsofcourt.org

CONNECT WITH US!

www.innsofcourt.org
www.facebook.com/AmericanInnsofCourt
www.twitter.com/InnsofCourt
www.LinkedIn.com