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# A CALL FOR ETHICS AND CIVILITY IN GOVERNANCE AND LITIGATION: CHANGING CULTURE AND INCREASING ACCOUNTABILITY

*Aloke Chakravarty\**

## INTRODUCTION

Civility is under attack in boardrooms, conference rooms, and courtrooms. This is not surprising as these public spaces are reflections of a broader society that appears more polarized, less accountable, and more competitive.<sup>1</sup> In some ways, it's understandable that public institutions might be more susceptible to the pressures of incivility, despite the fact that they are frequently subject to higher legal standards than the public at large. In many cases, corporations owe disclosure requirements and fiduciary obligations to other stakeholders, including employees, constituents and clients. Government officials and officers of the court also typically bear duties to act honorably, if not also politely.<sup>2</sup> Ethics and civility are essentially the tools to project and protect honorable conduct in these affairs, which share a public interest.<sup>3</sup> Because of this disproportionate societal influence, government officials, corporate officers, and litigators are uniquely suited to be a bulwark against expedience at the expense of ethics; it is time to insist upon the highest ethical and civil conduct in these public spaces.

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\* The author has been a prosecutor in local, state, federal and international courts. The views and opinions expressed are the author's own and are not reflective of the position of any government, agency or entity.

<sup>1</sup> See Weber Shandwick, *Civility in America 2016: U.S. Facing a Civility Crisis Affecting Public Discourse & Political Action*, <https://www.webershandwick.com/news/article/civility-in-america-2016-us-facing-a-civility-crisis> (KRC Research and Powell Tate revealed that 95% of the American public is concerned about the state of civility. Through the recent election season, an overwhelming majority of likely voters saw the lack of civility in America as diminishing American stature).

<sup>2</sup> See, e.g., MASS. GEN. LAWS. ANN. ch. 156D, §8.30 (West 2004) (stating that in addition to common law duties, some states have specifically enacted constituency laws which mandate fiduciary obligations to corporate stakeholders); see also David A. Grenardo, *Making Civility Mandatory: Moving from Aspired to Required*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 239, 244 (2013) (providing an extensive and fully comprehensive discussion on mandatory civility in the law in some jurisdictions).

<sup>3</sup> While the definitions of ethical behavior and civil behavior can be discussed at length, for purposes of this essay they are used to capture a moral code of conduct that includes respect, politeness and courtesy.

Civility should be recognized as the sign of strength that it is. This is not a quaint question of sensibility. Creating independent institutions with integrity and courtesy has long been a bedrock principle of American democracy and it has frequently been under threat. John Adams, then a famed litigator, foretold:

I fear that in every assembly, members will obtain an influence by Noise, not sense. By Meanness, not Greatness. By Ignorance, not Learning. By contracted Hearts, not large souls. I fear too, that it will be impossible to convince and persuade people to establish wise regulations . . . There must be a Decency, and Respect, and Veneration introduced for Persons in Authority of every Rank, or We are undone. In a popular Government, this is the only Way. . . .<sup>4</sup>

Over the past century, our population has grown and migrated, the diversity of our country has increased, the information age and the Internet have allowed self-selecting media-participation and we face myriad social frustrations that are palpable. At this moment in American history, Adams' admonition is particularly prescient.

As experienced during the financial crisis around the last Presidential transition, governance of America's public companies and governmental institutions forms an important pillar of this country's strength and resilience. Corporate cultures are largely responsible for this reputation, strengthening our standing at home and abroad. Likewise, governmental institutions, with some exceptions, have longstanding reputations for fairness and uniformity.<sup>5</sup> The American economy relies upon the predictability, fairness, and lawfulness of these institutions, as they have outsized power in this country and ultimately play a critical role in supporting national security.

Considering the significance of this correlation, a national public-private initiative to strengthen ethical governance and civil discourse is a low-cost, high-return investment in America, sure to yield broader dividends. While many adopt this culture of civility naturally and without the need for regulation or legal risk, there are others who choose to ignore these norms for politics or profit.<sup>6</sup> Consequently, ethics and civility must be more than merely

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<sup>4</sup> JOHN ADAMS, LETTER OF JOHN ADAMS TO JAMES WARREN, (1776), <http://founders.archives.gov/documents/Adams/06-04-02-0052>.

<sup>5</sup> Cf. Dylan Matthews, *Everything You Need to Know about the IRS Scandal in One FAQ*, WASHINGTON POST BLOG May 14, 2013 [https://www.washingtonpost.com/news/wonk/wp/2013/05/14/everything-you-need-to-know-about-the-irs-scandal-in-one-faq/?utm\\_term=.be014bdd24a6](https://www.washingtonpost.com/news/wonk/wp/2013/05/14/everything-you-need-to-know-about-the-irs-scandal-in-one-faq/?utm_term=.be014bdd24a6).

<sup>6</sup> See, e.g., Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N. Y. TIMES, Sep. 13, 1970, <http://www.umich.edu/~thecore/doc/Friedman.pdf> (stating that for a generation, many

aspirational goals in corporate governance. They should become clear and enforceable norms. This can be achieved in a bi-partisan manner, without intrusive government, but only through focused initiative to change the way these organizations operate. Good things can come from ending fractiousness and cultivating cultures of civility with private-sector partners, government components, and among the Bars. At the same time, enforcement mechanisms must be empowered as well. There is incentive for organizations to act cooperatively on both of these objectives. Though the lines are sometimes unclear, the notion of ethical conduct implies conduct that is beyond the reach of legal restrictions and government oversight, and organizations will want to keep it that way. Consequently, regardless of its ability to enforce ethical norms, because the government is accountable to the People, it can play a valuable role in encouraging and supervising efforts to encourage ethical behavior.

#### I. INVEST IN AN INITIATIVE TO ENCOURAGE CULTURES OF ETHICS AND CIVILITY

Organizations whose cultures respect ethics and civility are more successful and ultimately benefit Americans. They allow productivity to grow, people to thrive and institutions to flourish amid innovation and possibility. Organizational decisions are usually not limited by law, but rather, rely on business objectives and ethical clarity. Consequently, values like mutual respect, self-determination, and equal opportunity are among those that fuel successful companies as well as public administration. The law is silent about most affairs of man, and so it is with many of the internal workings of companies, public administration, and among lawyers. Hence, it becomes increasingly imperative that these institutions strengthen their commitment to ethics and civility to avoid disputes in the first place and to settle them when necessary.

In their work on the effects of incivility to businesses, Porath and Pearson brought into focus the massive internal and external costs of even rare

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have disputed the notion of any social responsibility to the public of corporations aside from maximizing shareholder profit); *but see, e.g., Burwell v. Hobby Lobby, Inc.*, 134 S.Ct. 2751, 2771 (2014) (“Modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so”)(indicating that corporate law, such as the business judgment doctrine, has developed to recognize that corporations may make myriad decisions in the best interests of the shareholders that may not be directly and immediately quantifiable).

incivility in organizations.<sup>7</sup> In addition to finding damaged customer relationships and brand value, Porath and Pearson documented the viral nature of incivility on the workforce and corporate productivity.<sup>8</sup> They found that worker productivity, creativity and team cohesion suffered.<sup>9</sup> In their broad-based study, 48% of workers who had received uncivil treatment at work, in any form, intentionally decreased their effort at work, and 38% of those workers “intentionally decreased the quality of work”.<sup>10</sup> Even if not intentional, 80% of workers who had received uncivil treatment lost work time thinking about the incivility; a similar percentage said that they decreased their commitment to the organization.<sup>11</sup> The employees were in essence disenfranchised, and as such, they wielded the power they perceived to have, even if that too, might violate the ethical code.

Ingenuity, and by extension, innovation, also suffered. Another experiment found that individuals who had been treated rudely were 30% less creative than those who had not been.<sup>12</sup> In addition, merely witnessing incivility done to others decreased performance on cognitive exercises by 20%, and those witnesses were half as likely to assist individuals unconnected with the rude behavior as those who had not witnessed the rude treatment.<sup>13</sup> Porath and Pearson found that executives and managers spent an average of 13% of their time dealing with the effects of a single incident of incivility among employees.<sup>14</sup> Perhaps most importantly, they determined that having just one offensive employee, especially when critically placed, could diminish organizational productivity, workforce and client base.<sup>15</sup> This makes a strong business case for investing in an initiative to encourage work cultures of ethics and civility.

Laws and regulations are not the only tools to compel organizations to be governed by codes of professional, social, and corporate responsibility.<sup>16</sup>

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<sup>7</sup> Christine Porath & Christine Pearson, *The Price of Incivility*, HARV. BUS. REV. (Jan.–Feb. 2013).

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See The Sarbanes–Oxley Act of 2002, 15 U.S.C.A. §7201 § Ch. 98 (West 2002) (demonstrating that legislations, such as the Sarbanes-Oxley Act, has dramatically changed the auditing and compliance mechanisms in public companies). Because of disclosure and testing requirements, among others, many companies now have high-level investment in transparency and audit committees, use of internal and external

Institutional stakeholders, such as financiers, competitors, customers, and shareholders can insist upon ethical norms, regardless of their enforceability, and should in order to increase goodwill and corporate citizenship. Because these norms are sometimes difficult to articulate precisely, and their effects are difficult to quantify, corporate ethical rules have often been undervalued. The same holds for ethics components in the public sector, despite the fact that the public interest is more clear. For these reasons, industry groups, professional associations, shareholders, and other external watchdogs are important foils to public organizations. The government, too, should play a larger role in advocating and shepherding industry governance to articulate meaningful, self-imposed ethical standards and to commit to creating cultures of ethics and civil behavior at all levels of an organization.

## II. PROVIDE RESOURCES AND ENCOURAGE MORE ROBUST ETHICS ENFORCEMENT FROM GOVERNMENT AND INDUSTRY

While the point of having an ethical culture is to have voluntary commitment, in order to reach everyone, there must be renewed focus on accountability as well. That unethical conduct within organizations is frequently attributable to individual bad actors, does not diminish the importance of addressing the cultures that might tempt or enable such behavior. Corporations should be held accountable too, especially when they defeat the ends of justice. Where ethics are ignored in organizations, the results are predictable and destructive not only to the organization, but also to individuals within the ambit of the conduct, if not also to the general public. Strengthening and enforcing oversight mechanisms to implement cultures of ethics and civility in organizations will not only increase honorable behavior, but will also decrease the need for microscopic regulation or legislation, help prevent the frequency and catastrophe of lapses, and ultimately encourage and empower institutions to police themselves using carrots rather than sticks. At the same time, the sticks should be big enough as to create meaningful deterrence. Internal enforcement arms should receive additional resources, intelligence-driven priorities should be articulated clearly by leadership, and organizational reporting of ethical lapses should be mandated and audited. For

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tests and compliance systems and fail-safes to prevent personal civil and criminal liability. These procedures were implemented because of legislation and serve transparency and decrease the risk of fraud. However, legislation sets a legal floor rather than an ethical set of norms and aspirations. Leveraging the existing tools of compliance by adding supervision tools to ensure that an organization is not only accounting legally, but also operating ethically across components, should be an industry-generated mandate rather than the function of new legislation.

governmental and external enforcement by independent accreditation bodies akin to Bar counsels, these same principles apply, but there must be a well-known sliding scale of consequences as viable alternatives to criminal prosecution or debarment in order to incentivize disclosures. Of course the most egregious offenders, and when appropriate, the organizations, must be punished. Finally, more cases must be brought so that the message is clear and pervasive.

Although they can be the practical first principles to guide the organization through difficult business problems, organizational ethical codes are too often relegated to narrow issues such as conflicts of interest rather than on broader organizational interests. Valuing organizational ethics must be top-down, clear, intuitive, reinforced, and consistent with customary moral norms. Several steps can be taken to strengthen the clarity, breadth, and acculturation of ethical codes and to reinforce them with education and systems of feedback: technical assistance on how to do so can come from public-private partnerships; ethical behavior needs to be prioritized, modeled by organizational leaders, discussed frequently, and measured; disclosure of lapses should be included as an ethical obligation, and the mechanism should be easy and without reprisals; leaders should build a workforce through prioritizing ethics and civility in hiring, and through ongoing training, should reward feeder institutions that provide and train those workers; internal and external consultant auditors and self-critical analysis committees should be brought in and given broad-ranging access to operations; ethics officers must be empowered with resources and given sufficient status in organizations;<sup>17</sup> outside counsel should be sought where able; accreditation and certification standards should be established in the industry where they are appropriate; finally, long-term good behavior should be rewarded. As examples, tax incentives and preferred contractor status can be afforded to spur companies to adopt best ethical practices.<sup>18</sup>

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<sup>17</sup> See Paula A. Tuffin, *Effective Compliance and Ethics Programs Under The Amended Sentencing Guidelines*, AMERICAN BAR ASS'N NEWSL. June 24, 2010, <http://apps.americanbar.org/buslaw/committees/CL925000pub/newsletter/201007/tuffin.pdf> (proving that enforcement regimes work, ethics officers started appearing in corporate America in the early 1990s, when the Federal Sentencing Guidelines for corporations went into effect. The guidelines, like many government enforcement regimes, gave preferential treatment to companies with effective compliance and ethics programs during prosecutions for white-collar crimes. Too often, however, these positions were feckless or circumvented, so they must be empowered by governance boards to be given meaning).

<sup>18</sup> See DEFENSE INDUSTRY INITIATIVE, <http://www.dii.org/> (last visited Dec. 30, 2016) (after widespread defense contractor fraud in the 1990s, the private sector created an industry ethical watch group called the Defense Industry Initiative which promoted best ethical practices and helped clean up certain types of fraud).

At the same time, enforcement bodies, whether they be internal such as ethics officers, or if they are government agencies or industry groups, should actively try to deter unethical and uncivil conduct.<sup>19</sup> Intentional bad behavior should not be ignored, even when the incidents are relatively minor. Enforcers should be empowered to sanction, proportionate to the offense, the most egregious violators of ethics and civility. This could mean anything from private reprimand or remedial education to dismissal or criminal prosecution, and all tools in between. Because the opportunities for ethical lapses have increased, and there are fewer opportunities to detect them, enforcers need more regular access to the operations of their subject organizations, more resources to investigate, more automated tripwires, and clear mandates for independence. Fundamentally, self-disclosures and unpredictable auditing are likely to lead to detection of lapses in ethical rules as early as possible in the life cycle of unethical conduct, rather than after the harm starts coming to light. Some of this will result from the increased institutional measures that encourage ethical behavior, but those prophylaxes may also yield evidence for enforcers to intervene earlier. Increasing accountability for lapses and reporting lapses, regardless of how they are routed or their outcomes, will create more deterrence than if the perception of the risk of detection is low. Making internal and external ethics officials more active and visible is likely to increase the deterrence.

### III. LAWYERS SHOULD ASPIRE TO BE THE MODEL FOR CIVILITY AND ETHICS

A final thought about the important role of advocates in an ethical secular life. Lawyers should be the primary exponents of ethics and civility.<sup>20</sup> Nowhere is this more important than in the courtroom, where our entire system of conflict resolution is put to the test within the view of the public eye. In this space, those who implement how the law is applied define our aspirations about how society ought to resolve conflicts. There are many reasons for the

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<sup>19</sup> The federal government has already adopted some of these practices, through auditing entities like the Congressional Government Accountability Office, Inspectors General and more robust Ombudsmen and ethics officers throughout government agencies. For some agencies, particularly for those for whom integrity is their currency, Offices of Professional Responsibility and Inspection components allow for strong pro-active investigation of suspected misconduct. Such internal affairs components, when empowered and apolitical, can help inculcate a culture of integrity, while also bringing commensurate sanction for lapses.

<sup>20</sup> See MODEL RULES OF PROF'L CONDUCT, Preamble: A Lawyer's Responsibility (AM. BAR ASS'N 2014), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html).



decline in civility in the courtroom, but regardless of whether we try to remove those drivers; we can increase the incentives for ethical behavior.<sup>21</sup>

When litigants exhibit unethical and rude behavior, we evince the primal origins of conflict resolution rather than the science of reason and intelligence, emotional though it may be, that courtrooms protect. Our cool reflection of applying facts to the law, especially when jurors are involved, is a social marvel of our age. It is against this profound backdrop upon which we should view the petty invectives and rudeness that characterize too many interactions in court—between litigants, and often with the judiciary—and more importantly, the public perception of them. The only way to restore the perception of the reality that relations within the Bar are predominantly cordial and productive interactions that are focused on the interests of their clients is, as with organizational governance, to invigorate a carrot and a stick. The Bar must renew encouragement of cultures that reward ethical and civil conduct, and enforcement arms should be empowered to investigate those who fall short. Generating more reporting about allegations of ethical lapses earlier in the life cycle of the repair process is likely to increase detection and disposition of these violations before they metastasize. In this way, Bar organizations are already much more advanced in terms of reporting and investigation mechanisms than corporate or governmental organizations and should be models in this regard.

Reporting lapses, however, remains a cultural hurdle. Lawyers often speak the mantra of “what comes around goes around” as the imperative to remain ethical and civil as lawyers, or they threaten that one’s bar license might be at risk through unethical, if even uncivil, behavior. Despite these ingrained law school admonitions, only a small minority of ethical and civility breaches appear to ever be brought to the attention of an appropriate authority. Those who do learn of a breach, perhaps a superior or a colleague, often balancing the interests of the accused against the gravity of the violation, frequently do not

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<sup>21</sup> See Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 104–05 (2011) (stating that there are many reasons for the perceived decline in civility in the legal profession, including: ignorance of the need for civility, the natural tendency to mirror an uncivil society, law firms by fostering “win at all costs” cultures, lawyers overweight of their duties to their clients versus the profession, lawyer salary pressures, lawyer advertising, failure of law schools, the infrequency of personal contact among attorneys (and hence fewer long-term consequences of bad behavior), increased unsupervised contact between lawyers, less camaraderie in the bar (whether as a result of diversity or not), increased malpractice suits, decreased mentoring, greater misuse of discovery, commercialization of practice, increased competition for clients, decreased client loyalty and the intrusion of non-legal firms into historically lawyer space).

report them. In some cases, the offender is the presiding judge, for whom there is little risk of consequence. Although issues often result in some reputational harm to the lawyer, without some mechanism for consolidation, whistleblower incentives, data tracking, trend analysis, or promulgating guidance on expectations, lawyers are largely left to police themselves in an unclear jungle. While this is frequently sufficient deterrence, there needs to be a vigorous enforcement possibility in order to alter bad behavior and create a transparent ethical culture. There's no reason to believe the business of law is immune to the same destructive influence of incivility as it is in corporate and public governance.

Increasing focus on ethical and civil behavior in the powerful organizations of the American fabric is likely to carry-over to an awareness of the importance of civility to the broader masses. Doing so not only makes business sense, but it is the right thing to do, and the right time to do it.