Improving the administration of justice with old-fashioned civility

by Edward M. Ginsburg

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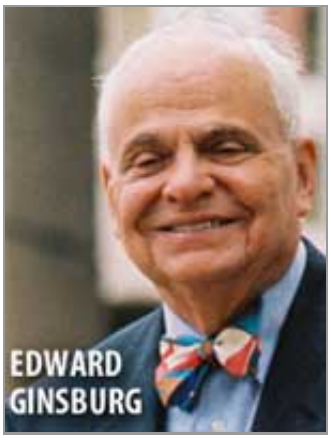

In conjunction with the Flaschner Judicial Institute, the Probate & Family Court recently held an all-day program to explore ways to improve the operation of the court and better serve the public.

Under the leadership of Chief Justice Paula Carey and with the guidance of a very skilled facilitator, the group of 100 judges, lawyers, probation officers, guardians ad litem and others was quickly able to distinguish between the forces outside the court system, over which the court has no control, and the internal operation of the system, which can be improved.

For example, it was accepted as a given that increased poverty, reduced court funding and the ever-expanding concept of family are forces that impact the court but over which it has no control.

However, the court does have the power to control scheduling, by not herding everyone in for motions, contempts and pre-trials at the same time, and insuring that trials go day after day until they are completed.

One factor that was not discussed but kept running through my mind was the importance of civility and professionalism between lawyers in making the court function efficiently.

The facilitator, a non-lawyer from out of state, told the audience that her grandfather had been a lawyer in Boston for many years. When I asked her during the morning break the name of her grandfather, she said Brooks Potter. I remember him well. He was a pillar of the family law bar who practiced for many years at Choate, Hall & Stewart when that firm had a family law department. I told her two stories about her grandfather that illustrate something all lawyers can strive for in an effort to improve the administration of justice.

My first professional meeting with Mr. Potter occurred when, as a young lawyer, I went to his office to discuss the possible settlement of a case in which the equities were stacked against my client. It was before no-fault divorce.

My client, a career naval officer, had gone off with his commanding officer's wife and was dishonorably discharged from the service. His wife of many years and, more importantly, her father — who was funding the divorce proceedings for his wronged daughter — opposed the divorce complaint I filed on behalf of my client, who wanted out of the marriage to marry his new girlfriend.

When I sat down with Mr. Potter, he drew a pie chart on a piece of paper in which he inserted all the assets of the marriage. He then asked me what I thought would be an equitable division. Because of the vulnerable position of my client, I decided that the best strategy was not to make a high demand but to suggest what I really thought was appropriate.

He looked at my suggestion, made a few very minor adjustments, and said that it was fair. He then stated that, because of the wounded feelings of his client and her outraged father, he would need some time to get a signed agreement. When he had the signed agreement, he would call me.

After about three months, I ran into him on the street and inquired about his progress. He looked at me and said, "Not yet." A few months later, with my anxious client checking in frequently, I called Mr. Potter and asked for a timeline. He could not give me one, but told me that when he was ready, I would hear.

About a month later, he called and said he had the signed agreement and, acting on the wife's cross complaint, could go to court.

The second case involved a client whom I met for the first time in the Charles Street Jail. He was a resident of Beacon Hill and had just been sentenced for contempt because he was $8,000 in arrears on a support order. When I visited him in jail on a Friday afternoon, he said that, with the help of his new wife, he could come up with $2,500.

I called Mr. Potter, who represented the former wife who also lived on Beacon Hill, told him the story, and asked what it would take for him to recommend to the judge that my client be released from jail. Being familiar with the history of the case and my client's financial circumstances, he said that if my client actually came up with the $2,500, he would recommend to the court on Monday that my client be

released.

That Saturday night, my wife unexpectedly went into labor and our second child was born prematurely early the next morning. Because I wanted to be with my wife, I asked my father, with whom I practiced and who knew nothing about the case, if he would cover for me. When my father got to court with the $2,500, Mr. Potter was engaged in a heated argument with his client, who wanted her former husband to rot in jail until he came up with the full amount.

Mr. Potter went over to my father and said, "I made an agreement with your son, and I will keep it. If my client fires me, too bad."

When the matter was called in court and the ex-wife stated her position, Mr. Potter said he had made what he considered to be a fair agreement and he stood by it. My client was released, and Mr. Potter was fired by his client.

Several years later, I read in the paper that Mr. Potter had been killed in an automobile accident. I remembered how fair he had been to me. I suspended court proceedings and went to his funeral. The church was packed.

In contrast to Brooks Potter, I remember a lawyer in another case who refused to talk beforehand and insisted on meeting me in court. He introduced himself as a close friend of the newly elected attorney general of Ohio and said that he had never lost a case. He promised to "whip me good" rather than try to negotiate.

During the trial, in which the other lawyer continued to maintain that his client was not in a romantic relationship, I produced a cancelled check from her to her boyfriend with the memo notation: "for sexual services rendered." The other lawyer lost his first case.

I never forgot that case because, for me, it clearly illustrated how arrogant behavior does not benefit the client or the system.

At the most recent dinner of the Massachusetts Probate and Family Inn of Court, the topic of discussion was how to deal with incivility and promote professionalism. All four members of the panel, two judges and two lawyers, lamented the toll on the parties and the system caused by the uncivil and sometimes flat-out dishonest behavior of some lawyers.

One of the panelists, who had long experience with the Board of Bar Overseers, has recommended for some time that Massachusetts, in its Rules of Professional Conduct, follow other states by eliminating the word "zealous" in the phrase "zealous advocacy" so that lawyers recognize their responsibility to the court system and administration of justice, as well as to their clients.

Although judges and lawyers in some situations have a mandatory duty to report reprehensible conduct to the BBO, attorneys are reluctant to be "snitches." The disciplinary process is not only uncomfortable but requires more expenditure of precious time by the wronged and complaining lawyer.

It is tempting to say that the lack of civility between lawyers has increased over the years, or to bemoan the lack of legal talent and attorneys who practice the way Brooks Potter did.

I am not, however, prepared to say that the ratio of civil to uncivil lawyers has changed that much in the last 50 years. What has dramatically changed is the volume and nature of business in the Probate & Family Court. The increased pressure on the contemporary court system is exacerbated by incivility and a lack of professionalism.

It behooves all of us, judges and lawyers alike, to take a stand against uncivil behavior, not only because it is the right thing to do, but because in doing so we improve the administration of justice.

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