

# Respect in Trying Circumstances



**Gino Dal Pont**  
Professor, Faculty of Law  
University of Tasmania

*Maintaining civility and respect in dealings between lawyers can prove challenging.*

Many in modern Australian society lament what they perceive as a downgrading of basic notions of respect for others. Children no longer respect their parents, and the elderly no longer command the respect they once did, they observe. Of course, if there is a downfall in mutual respect within society, it is unlikely to be the sole province of the youngest generation. That Australia has become a more litigious society – evidenced not only by statistics but punctuated by the heightening of calls in recent times for greater access to justice – may likewise be perceived as a by-product of respect for others being scarcer in supply.

If the above observations are near the mark, can it be realistic to assume that members of the legal profession are immune from the tide? The common law adversary tradition presupposes that lawyers are participants in a fight – reflected in the terminology used (litigation) – between their clients in order to determine who is to prevail. Fighting has rarely been associated with respect owed by one litigant to another; indeed, it is often driven because one litigant has allegedly disrespected the other's rights or entitlements. And nor is fighting commonly linked to any sense of collegiality between the litigants; quite the contrary, rather.

Perhaps it is unsurprising, then, that with the ostensibly changing societal ethos, coupled with the burgeoning size and heterogeneity of the legal profession, many perceive that interactions between members of the legal profession today no longer exhibit the respect or civility that they once did. If so, the rule-based admonition that lawyers ensure that their communications are courteous and do not involve offensive or provocative language or conduct<sup>1</sup> assumes greater relevance today than ever. In its terms, the relevant rule is grounded in maintaining the integrity and reputation of the profession. It explains why lawyers have been disciplined for disrespecting their peers.<sup>2</sup> And it informs the judicial remark that lawyers who do not observe the proper courtesies “run the risk of destroying the confidence and mutual respect which generally distinguishes dealings between members of the legal profession from other dealings in the community”<sup>3</sup>

But the rule is not merely about the profession's reputation and the promotion of professionalism. Underscoring it is the lawyer's duty to the client and, ultimately, the lawyer's broader duty to the administration of justice. Animosity in dealings with an opponent may cloud a lawyer's judgement, and impinge on the quality of the lawyer's advice, and may actually raise an additional, unnecessary hurdle to the resolution of the dispute.<sup>4</sup> To this end, a commentator has opined that:

*“... [c]onduct that may be characterised as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving*

*conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice”<sup>5</sup>*

Of the high standards of behaviour expected of members of the legal profession, this is amongst the most challenging. After all, human nature dictates that a person will not always find another's views and attitudes to his or her liking. In the legal environment, which is overlaid by the lawyer's duty to foster a client's interests contrary to those of the opposing client, the pressures to act uncivilly and disrespectfully are accentuated. And the expectations of clients may add fuel to any existing fire. As the expected civil, respectful and cooperative dealings between lawyers may be notably absent in the attitudes between opposing litigants, it is realistic to assume that some clients may perceive this civility, respect and cooperation as indicative of disloyalty, or at least some failure to fully support the client's position.

To this end, it is interesting to note an American poll revealing that amongst what people dislike most about lawyers – namely “too many unnecessary lawsuits” and manipulation of the legal system “without regard for right and wrong” – seems not too far removed from what respondents like about lawyers, namely “putting clients' interests first” and protecting people's rights.<sup>6</sup> Many are happy to criticise lawyers for being “hired guns” but, when needing a lawyer to represent them in a litigious matter, want nothing other than a “hired gun”, a person who identifies with the client's grievance and attitude towards the opponent. Thus lawyers “receive accolades and denunciations for doing the same thing”, observed a commentator.<sup>7</sup>

The prudent lawyer accordingly will make clear to the client, at the outset of a retainer, that respect, civility and cooperation vis-à-vis the opposing lawyer will ultimately prove more productive, for both the client and the administration of justice, than an approach where client bitterness or animosity towards the opponent translates to the relationship between the legal representatives.

## NOTES

1. Professional Conduct Rules (WA) r20.1.
2. See, for example, *Law Society of New South Wales v Karageorge*, Solicitor's Statutory Committee, 15 July 1987 (involving racist remarks and abuse of other members of the profession as well as members of the public); *Legal Services Commissioner v Winning* [2008] LPT 13 (lawyer expressing himself in a “crude, vulgar, undisciplined way” to others in the legal profession).
3. *Garrard v Email Furniture Pty Ltd* [1993] 32 NSWLR 662 at 667 per Kirby ACJ.
4. See *Granitguard Pty Ltd v Termicide Pest Control Pty Ltd (No 6)* [2010] FCA 381 at [46] per Logan J (speaking in terms of the need for lawyers to “retain a degree of objective detachment” particularly when the clients themselves are bitter rivals).
5. Nagorney KA, 'A Noble Profession? A Discussion of Civility Among Lawyers' *Geo J of Legal Ethics* 1999, 12, 815 at 816–17.
6. Rotunda RD, *Legal Ethics, The Lawyer's Deskbook on Professional Responsibility*, 3rd edn, West Group, 2002, p. 36.
7. *ibid.*