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Session 2

**Civility and Safety:
A Panel Discussion
with Judges and
Attorneys**

Moderator: Hon. R. Michael Waterman, St Croix County Circuit Court, Hudson

Panelists:

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Hon. Michael R. Fitzpatrick, Wisconsin Court of Appeals District IV, Madison

Ben K. Kempinen, Clinical Professor Emeritus, U.W. Law School, Madison |

Lynn R. Laufenberg, Gingras, Thomsen & Wachs, Milwaukee

Hon. Kristy Yang, Milwaukee County Circuit Court, Milwaukee

About the Presenters...

Practicing and focusing on criminal defense law since 1994, **Patrick Cafferty** has earned a listing in Wisconsin Super Lawyers Magazine as a Wisconsin Super Lawyer[®] from 2008 through 2022, top 50 in State and top 25 in Milwaukee area. He's also been listed in Best Lawyers in America every year since 2012 and has lead counsel in 100+ jury trials. He's been married for 30 years with 4 children and has participated in youth Basketball, Volleyball and Soccer Coach.

Michael P. Crooks is a shareholder with the firm of von Briesen & Roper, S.C. His main areas of practice are commercial litigation, legal malpractice, medical malpractice, accounting malpractice, insurance defense and coverage issues, bad faith litigation, products liability work, premises liability, defamation suits, breach of contract, personal injury defense and third-party recovery. He also spends about 35% of his time mediating cases. Mike received his B.A. degree, cum laude, from the University of Notre Dame and his J.D. degree, cum laude, from the University of Wisconsin. Since law school, he has lectured for the State Bar's "Building Your Practice" series, for the Wisconsin Judicial College, for the Civil Trial Counsel of Wisconsin on litigation issues and municipal immunity, for the Wisconsin Law School on mediation, discovery practices, and various other litigation related topics for many other groups.

Hon. Michael R. Fitzpatrick serves on the Wisconsin Court of Appeals and has served as the Presiding Judge in the District IV Court of Appeals. Before that, he served as a Circuit Judge in Rock County for nine years. He has been elected by Wisconsin's Judges to the Wisconsin Judicial Council, the Wisconsin Civil Jury Instruction Committee and, previously, to the Board of Directors of the Wisconsin Trial Judges Association. Judge Fitzpatrick also serves on the faculty for the Wisconsin Judicial College. He frequently speaks at seminars for Judges and attorneys. Judge Fitzpatrick was recently elected to membership in the American Law Institute, the organization whose members draft the Restatements of the Law. Prior to taking the Bench, Judge Fitzpatrick was a partner at the Brennan, Steil & Basting Law Firm where he chaired the Litigation Practice Group and handled intellectual property disputes, insurance coverage litigation, and product liability cases in federal and state courts throughout Wisconsin and the United States. While in private practice, Michael Fitzpatrick earned the highest possible rating for legal acumen and ethics from the legal rating service Martindale-Hubbell and was three times named one of Wisconsin's Super Lawyers in Business Litigation in the years before he took the Bench. Judge Fitzpatrick has also served two terms on the Wisconsin State Bar Committee on Professional Ethics, was President of the Western District Bar Association, and served as President of the James E. Doyle Chapter of the American Inns of Court.

B. K. Kempinen is a cum laude graduate of the University of Wisconsin Law School and taught at the Law School from 1976 until his retirement in January of 2018. In addition to teaching the first-year criminal law curriculum and a number of related courses (Trial Advocacy, Professional Responsibilities, and Advanced Substantive Criminal Law), Prof. Kempinen was involved in several of the Law School's clinical programs, including serving as interim director of the Legal Defense Project; working as a supervising attorney in the Frank J. Remington Center's Legal Assistance to Institutionalized Persons Project (LAIP); and, from 1990 until his retirement, acting as director of the Remington Center's Prosecution Project. Prof. Kempinen has also been involved in both trial and appellate litigation in the criminal law area, has taught at the National Institute of Trial Advocacy, has participated in a variety of conferences and continuing legal education programs during the past two decades, served on the Wisconsin Supreme Court Ethics 2000 Committee, and is the chair of the State Bar Ethics Committee.

Lynn F. Laufenberg concentrates his practice in personal injury litigation and appellate law. He is a 1972 honors graduate of the University of Wisconsin -Platteville and received his J.D. cum laude from Marquette University Law School in 1975. After serving for one year as a clerk to the Hon. Bruce F. Beilfuss of the Wisconsin Supreme Court, Mr. Laufenberg entered private practice in Milwaukee, Wisconsin. He was elected to the Board of Governors of the State Bar of Wisconsin in 2007 and served two terms. He is a past member of the Board of Directors and past Chair of the Litigation Section and past Chair of the Section Leader's Council of the State Bar of Wisconsin. He is also a past President of the Wisconsin Association for Justice (formerly the Wisconsin Academy of Trial Lawyers) and has been a member of its Board of Directors since 1988. He received the Association's Robert L. Habush Trial Lawyer of the Year Award in 2006. Mr. Laufenberg has been certified by the National Board of Trial Advocacy as a Civil Trial Advocate and has been elected to membership in the Wisconsin Chapter of the American Board of Trial Advocates. He has served as President of that organization. He is a frequent presenter on trial and appellate advocacy for the State Bar of Wisconsin, WAJ and other sponsors of continuing legal education programs for attorneys and judges. He has also served as an Adjunct Professor of Law at Marquette University Law School and has authored numerous articles for WAJ, State Bar and AAJ publications on a variety of tort law and trial practice issues. After leading his own firm for 17 years, Mr. Laufenberg joined Gingras, Thomsen & Wachs, LLP, in 2016.

Judge Waterman was appointed to the St. Croix County Circuit Court in 2015. He received his undergraduate degree from Muhlenberg College in Allentown, Pennsylvania and his law degree from Hamline University School of Law in St. Paul, Minnesota. He currently serves as a judge on the Commercial Court in the Tenth Judicial District, and he is a member of the Civil Jury Instruction Committee. He teaches appellate advocacy at Mitchell Hamline School of Law. Prior to joining the bench, Judge Waterman had a civil litigation practice in Hudson, Wisconsin. Contact Information: michael.waterman@wicourts.gov

Judge Kashoua Kristy Yang is a circuit court judge in Milwaukee County. She was elected to the bench on April 4, 2017, becoming the first Asian American judge to be elected in Wisconsin without appointment, and the first elected judge of Hmong ethnicity (without appointment) in the United States. On April 4, 2023, Judge Yang was re-elected to a second term. She is currently assigned to the Civil Division – Large Claims, and previously was assigned to Children's Court and Criminal Misdemeanor Court. Prior to ascending to the bench, Judge Yang was a private practice attorney representing individuals in family law, worker's compensation, and social security disability matters. From 2013 to 2016, she was nominated and selected as a Super Lawyer Rising Star.

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What is civility?

The word “civility” means formal politeness and courtesy in behavior or speech. For legal professionals, civility means more than being nice. For them, civility includes:

- Treating adversaries with courtesy and respect.
- Making reasonable accommodations with scheduling.
- Being prompt, punctual and prepared.
- Communicate honestly.
- Avoid actions that delay proceedings or harass others.
- Act as a role model for clients, other lawyers and the public.
- Utilize the courts for meritorious matters.

As the saying goes, treat others as you would have them treat you.

Lawyers are expected at all times to display a cordial and respectful demeanor. Lawyers should vigorously represent their client, while being mindful of the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. Lawyers must refrain from making disparaging, demeaning or sarcastic remarks, and they must abstain from uncivil, abrasive, abusive, hostile or obstructive conduct. In their written and spoken words, lawyers have the responsibility to display courtesy, good manners and dignity. Abusive and disparaging remarks provide no tactical advantage and, in fact, are counter-productive.¹

A judge's conduct should be characterized at all times by courtesy and patience toward all participants. Judges owe all participants in a legal proceeding respect, diligence, punctuality, and protection against unjust and improper criticism or attack. Judges must not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.

¹ Comm. on Civility of the Seventh Federal Judicial Circuit, Final Report, 143 F.R.D. 441, 448 (1992).

While endeavoring to resolve disputes efficiently, judges must be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice, and recognize that a lawyer has a right and a duty to present a cause fully and properly in a fair and impartial hearing.²

Is incivility a new problem for lawyers and judges?

Incivility is not new to the legal profession, and yet, it is impossible to identify the origins. Legal folklore includes examples of everything from verbal epithets to hostile and aggressive behavior. A 1992 survey by the State Bar's Bench/Bar Committee found that eighty percent of the responding state circuit court judges said they had encountered courtroom incivility.³ There is abundant anecdotal evidence that incivility continues to exist, and probably has become worse.

Over the past several decades, the legal profession has engaged in a “civility movement” intent on stemming the decline of professionalism among lawyers and judges. Federal Rule of Civil Procedure 11 was created to stem frivolous lawsuits, but the 1983 amendments gave courts the ability to impose sanctions to discourage dilatory and abusive tactics.⁴ In 1990, the Seventh Circuit formed a committee to study litigation practices and present solutions for incivility. In 1996, Wisconsin adopted the uniform standard of courtroom courtesy and decorum, SCR 62.02. Numerous other states have enacted civility codes.

What are some of the consequences of uncivil behavior?

Incivility can have a variety of immediate and adverse consequences, both formal and informal.

Incivility may result in a referral to the Office of Lawyer Regulation or the Judicial Commission. Incivility may constitute a breach of ethical standards, and both bodies have imposed discipline for such misconduct.⁵

² *Id.* at 451.

³ *Schultz v. Darlington Mut.*, 173 Wis. 2d 907 n. 3, 499 N.W.2d 300 (Ct. App. 1992).

⁴ 2A James W. Moore, et al., *Moore's Federal Practice* ¶ 11.01[4] (2d ed. 1993).

⁵ *See, e.g., In re Disciplinary Proc. Against Coe*, 2003 WI 117, 265 Wis. 2d 27, 665 N.W.2d 849; *Matter of Disciplinary Proc. Against Woldt*, 2021 WI 73, 398 Wis. 2d 482, 961 N.W.2d 854.

Courts may impose sanctions for incivility. Trial and appellate courts have the statutory and inherent authority to enforce civility in the courtroom.⁶ Courts can impose monetary sanctions or sanctions that affect the merits of a client's case such as stricken pleadings, facts deemed admitted, exclusion of evidence, or limits on discovery. In *Aspen Services, Inc. v. IT Corp.*, the prevailing party was entitled to attorney's fees under the terms of the contract, but because counsel's incivility unreasonably protracted the litigation, the court awarded roughly half.⁷ In *Chevron Chemical Co. v. Deloitte & Touche*, the court granted judgment as a sanction for incivility.⁸

Incivility has intangible costs too. The judicial system suffers by wasting limited judicial resources, increasing the cost and length of litigation, and lowering the public's perception of the judicial system.

Individuals suffer too. Incivility causes unnecessary stress and anxiety, which can adversely affect quality of life and personal relationships. Incivility can lead to career dissatisfaction among lawyers and judges, and premature exits from the profession.

Perpetrators of incivility lose too. Incivility does not improve the case or the client's chances for a favorable outcome. Uncivil attorneys expose themselves to court sanctions and other liabilities. They lose credibility with judges and colleagues. They are held in low esteem within the profession.

Clients also experience harm from incivility. When an uncivil lawyer loses the respect of the court and when the uncivil lawyer's antics overshadow the substance of the legal arguments, the client is the ultimate loser. It has been noted, "A lack of civility can escalate clients' litigation costs while failing to advance their interests or bring them closer to their ultimate goal of ending disputes."⁹

⁶ *Aspen Services, Inc. v. IT Corp.*, 220 Wis. 2d 491, 497, 583 N.W.2d 849 (Ct. App. 1998).

⁷ 220 Wis. 2d 491, 494, 583 N.W.2d 849 (Ct. App. 1998).

⁸ 176 Wis. 2d 935, 501 N.W.2d 15 (1993).

⁹ Comm. on Civility of the Seventh Federal Judicial Circuit, Final Report, 143 F.R.D. 441, 445 (1992).

What are the legal standards for civility?

The legal standards for civility are found in several supreme court rules. The one most directly on point is SCR 62.02, Wisconsin's uniform standard of courtroom courtesy and decorum. Adopted in 1996, the rule seeks to enhance the administration of justice by promoting good manners and civility among all who participate in the administration of justice in Wisconsin. However, the standards of SCR 62.02 are not part of the Rules of Professional Conduct and are not enforceable by the Office of Lawyer Regulation.¹⁰ But, trial and appellate courts may look to SCR 62.02 as a basis for imposing sanctions for incivility during litigation.¹¹

SCR 62.02 STANDARDS.

(1) Judges, court commissioners, lawyers, clerks and court personnel shall at all times do all of the following:

(a) Maintain a cordial and respectful demeanor and be guided by a fundamental sense of integrity and fair play in all their professional activities.

(b) Be civil in their dealings with one another and with the public and conduct all court and court-related proceedings, whether written or oral, including discovery proceedings, with civility and respect for each of the participants.

(c) Abstain from making disparaging, demeaning or sarcastic remarks or comments about one another.

(d) Abstain from any conduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive.

(e) While in court or while participating in legal proceedings, dress in a manner showing proper respect for the court, the proceedings and the law. Judges shall wear black robes while presiding on the bench except when exceptional circumstances exist.

(f) Advise clients, witnesses, jurors and others appearing in court that proper conduct and attire is expected within the courthouse and, where possible, prevent clients, witnesses or others from creating disorder or disruption.

(g) In scheduling all hearings, meetings and conferences, be considerate of the time schedules of the participants and grant reasonable extensions of time when they will not adversely affect the court calendar or clients' interests.

(h) Conduct themselves in a manner which demonstrates sensitivity to the necessity of preserving decorum and the integrity of the judicial process.

(2) Judges, court commissioners and lawyers shall be punctual in convening and appearing for all hearings, meetings and conferences and, if delayed, shall notify other participants, if possible.

(3) Lawyers shall do all of the following:

(a) Make all reasonable efforts to reach informal agreement on preliminary and procedural matters.

¹⁰ SCR 62.01; *Geneva Nat. Community Ass'n, Inc. v. Friedman*, 228 Wis. 2d 572, 584, 598 N.W.2d 600 (1999).

¹¹ *Aspen Services, Inc.*, 220 Wis. 2d at 497, 583 N.W.2d 849.

- (b) Attempt expeditiously to reconcile differences through negotiation, without needless expense and waste of time.
 - (c) Abstain from pursuing or opposing discovery arbitrarily or for the purpose of harassment or undue delay.
 - (d) If an adversary is entitled to assistance, information or documents, provide them to the adversary without unnecessary formalities.
 - (e) Abstain from knowingly deceiving or misleading another lawyer or the court.
 - (f) Clearly identify for the court and other counsel changes that he or she has made in documents submitted to him or her by counsel or by the court.
 - (g) Act in good faith and honor promises and commitments to other lawyers and to the court.
- (4) Adherence to standards of professionalism and courtesy, good manners and dignity is the responsibility of each judge, court commissioner, lawyer, clerk, and other personnel of the court who assist the public.

In addition to the standards of courtroom courtesy and decorum under SCR 62.02, lawyers are bound by the Attorney’s Oath and the Rules of Professional Conduct, many of which are associated with lawyers’ duty to be civil.

The Attorney’s Oath reflects every lawyer’s solemn promise as a condition to the privilege of practicing law in Wisconsin. Parts of the oath relate directly to civility including the promise to maintain respect for the courts of justice and judicial officers, and the promise to “abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness.”

Violating the Attorney’s Oath constitutes professional misconduct and is subject to discipline by the Office of Lawyer Regulation.¹² For example, in *In re Disciplinary Proceedings against Johann*,¹³ an attorney was disciplined for asserting that two judges had engaged in “biased, deliberate, illegal, malicious, knowing, and fraudulent interference” with the custody of her child and that they engaged in the “illegal and malicious destruction of [her] life.” The Court concluded that the attorney’s statements violated the Attorney’s Oath by which an attorney swears to “abstain from all offensive personality,” among other things.

SCR 40.15 Attorney’s Oath.

¹² SCR 22.001(9).

¹³ 216 Wis. 2d 118, 574 N.W.2d 218 (1998).

I will support the constitution of the United States and the constitution of the state of Wisconsin;
I will maintain the respect due to courts of justice and judicial officers;
I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense, except such as I believe to be honestly debatable under the law of the land;
I will employ, for the purpose of maintaining the causes confided to me, such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;
I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with my client's business except from my client or with my client's knowledge and approval;
I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;
I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice.
So help me God.

The Rules of Professional Conduct include several ethical standards that are associated with lawyer civility. These rules include:

- 20:3.1 – Meritorious claims and contentions
- 20:3.2 – Expediting litigation
- 20:3.3 – Candor to the tribunal
- 20:3.4 – Fairness to opposing party and counsel
- 20:3.5 – Impartiality and decorum of the tribunal
- 20:3.9 – Advocate in nonadjudicative proceedings
- 20:4.1 – Truthfulness in statements to others
- 20:4.2 – Communication with person represented by counsel
- 20:4.3 – Dealing with unrepresented person
- 20:4.4 – Respect for rights of 3rd persons
- 20:8.2 – [False statements about] Judicial and legal officials
- 20:8.3 – Reporting professional misconduct
- 20:8.4 – Misconduct

Professional misconduct means more than violating the Rules of Professional Conduct or the Attorney's Oath. Professional misconduct also includes harassment "on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities."¹⁴ What constitutes harassment may be determined with reference to anti-discrimination legislation and interpretative case law.¹⁵

¹⁴ SCR 20:8.4(i).

¹⁵ SCR 20:8.4(i) Wisconsin Committee Comment.

What is a judge's role in maintaining civility?

Judges are responsible for upholding the integrity and independence of the judiciary.

SCR 60.02 A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. This chapter applies to every aspect of judicial behavior except purely legal decisions. Legal decisions made in the course of judicial duty on the record are subject solely to judicial review.

To maintain integrity and public confidence, judges must maintain decorum, order, and respect in their courtrooms, for themselves and all those appearing before them.

SCR 60.04 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY.

...

(d) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity and shall require similar conduct of lawyers, staff, court officials and others subject to the judge's direction and control. During trials and hearings, a judge shall act so that the judge's attitude, manner or tone toward counsel or witnesses does not prevent the proper presentation of the cause or the ascertainment of the truth. A judge may properly intervene if the judge considers it necessary to clarify a point or expedite the proceedings.

What are some options for responding to incidents of incivility?

Common experience confirms that, left unchecked, incivility begets more incivility. The problem will not go away if it is ignored. To the contrary, the uncivil actor will probably become emboldened.

Referrals to Ethics Boards. It is professional misconduct for a lawyer to violate the rules of professional conduct; violate a statute, supreme court

rule, supreme court order or supreme court decision regulating the conduct of lawyers; or violate the attorney's oath.¹⁶ When incivility rises to the level of attorney misconduct, aggrieved persons may file a complaint with the Office of Lawyer Regulation. Complaints for judicial misconduct may be filed with the Wisconsin Judicial Commission.

Judicial intervention. Trial and appellate courts have the statutory and inherent authority to impose sanctions for failure to comply with procedural statutes or rules and for failure to obey court orders.¹⁷ This authority includes enforcement of the courtesy and decorum standards of SCR 62.02 and the rules of professional conduct of SCR 20.¹⁸

Judicial sanctions are largely a matter of discretion. Sanctions both penalize the offender and deter future misconduct.¹⁹ Judges must use their authority with restraint and should consider whether there are less severe sanctions that would adequately deter and punish the misconduct.²⁰ Responses could include:

- Verbal or written admonishments.²¹
- Protective orders.²²
- Prohibit filing of motions.²³
- Findings of contempt.²⁴
- Stricken pleadings.²⁵
- Treating facts as admitted.²⁶
- Exclusion of evidence.²⁷
- Monetary sanctions, such as costs or attorney's fees.²⁸
- Revoke *pro hac vice* privilege.²⁹
- Striking claims or defenses.

¹⁶ SCR 20:8.4

¹⁷ *Chevron Chemical Co. v. Deloitte & Touche*, 176 Wis. 2d 935, 946-47, 501 N.W.2d 15, 20 (1993).

¹⁸ *Aspen Services, Inc.*, 220 Wis. 2d at 497, 583 N.W.2d 849.

¹⁹ *Chevron Chemical Co.*, 176 Wis. 2d at 946, 501 N.W.2d at 20.

²⁰ *Schultz v. Sykes*, 2001 WI App 255, ¶ 10, 248 Wis. 2d 746, 638 N.W.2d 604.

²¹ *U.S. Bank Nat. Ass'n v. City of Milw.*, 2003 WI App 220 n. 4, 267 Wis. 2d 718, 672 N.W.2d 492.

²² Wis. Stat. § 804.01(3).

²³ *Puchner v. Hepperla*, 2001 WI App 50, ¶ 9, 241 Wis. 2d 545, 625 N.W.2d 609.

²⁴ Wis. Stat. § 785.01.

²⁵ *Geneva Nat. Cmty. Ass'n, Inc.*, 228 Wis. 2d 572 at 586, 598 N.W.2d at 607.

²⁶ Wis. Stat. § 804.12(2)(a).

²⁷ *Milwaukee Rescue Mission v. Milw. Redev. Auth.*, 161 Wis. 2d 472, 490, 468 N.W.2d 663 (1991).

²⁸ *Schultz v. Sykes*, 2001 WI App 255, ¶ 46, 248 Wis. 2d 746, 638 N.W.2d 604.

²⁹ *Filppula-McArthur ex rel. Angus v. Halloin*, 2001 WI 8, ¶ 37, 241 Wis. 2d 110, 622 N.W.2d 436.

- Entry of judgment or dismissal of claims.³⁰

Self-help remedies. Most incidents of incivility do not reach adjudicative bodies like an ethics board or a judge. Some may choose to shrug-off incivility and ignore it, but there are some simple strategies lawyers and judges may use to reduce incidents of incivility.

- Relationship building: it's hard to be uncivil to someone you have a good relationship with.
- Stay calm and mindful: rudeness or over-reaction may worsen the problem.
- Call it out: tell the offender what behavior is unacceptable or wrong.
- Be solution-driven: beneath the incivility is a problem that needs a solution.
- Defend colleagues: create a unified front against uncivil behavior.
- Promote civility: be a role model for professionalism, even in the face of someone else's bad behavior.

³⁰ *Chevron Chemical Co.*, 176 Wis. 2d at 946, 501 N.W.2d at 20; *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 266, 470 N.W.2d 859 (1991).