

MIDDLE GROUND: A DISCUSSION ON CIVILITY BETWEEN OPPOSING COUNSEL

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The dictionary definition of middle ground is “a position between two opposite opinions in an argument, or between two descriptions.”³ It also happens to be the name of the second location operated by Thomas Lord as a playing field—now referred to as “Lord’s Middle Ground”⁴ since the building of the present location for Lord’s Cricket Ground in 1814.

Matthew Crouch began working as an attorney for the Harris Central Appraisal District⁵ in 2014, defending the District in state courts regarding challenges to property tax values. Niral Gandhi is a founding partner of the Dallas-based firm of Estes & Gandhi, P.C.⁶ and represents plaintiffs in challenging property tax values throughout Texas. Matthew and Niral would find themselves as opposing counsel on anywhere from ten to twenty cases annually, with more cases being heard in settlement conferences. Matthew would act as the “attorney in the room” on dozens of other cases where Niral and his law partner would be acting for the plaintiffs. Matthew and Niral met for the first time during a multi-day settlement conference in 2015 and, through their best practices in civility, found common ground between them that helped establish

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3. *Middle Ground*, CAMBRIDGE ENG. DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/middle-ground> (last visited Dec. 18, 2023).

4. *Lord’s*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Lord%27s> (last visited Dec. 18, 2023); see also *MCC Beat Hertfordshire in First Match at Lord’s*, LORD’S, <https://www.lords.org/lords/our-history/father-time-wall/1814-mcc-beat-hertfordshire-in-the-first-match-at> (last visited Dec. 18, 2023).

5. Homepage, HARRIS CENTRAL APPRAISAL DISTRICT, <https://www.head.org> (last visited Dec. 18, 2023).

6. *Share Holders and Attorneys*, ESTES & GANDHI, P.C., <https://www.estesgandhi.com/new-page-78> (last visited Dec. 18, 2023).



a solid working relationship, which lasted throughout Matthew's eight years at the District and beyond.

The common ground started with discussing cricket. Before long, Niral and Matthew were chatting about the Indian Premier League ("IPL")⁷, players, and various matches occurring during the IPL season, many of which were being played during the settlement conference days.

In the preamble to the Laws of Cricket ("Laws"), there is a discussion about the "Spirit of Cricket"⁸—officially incorporated into the Laws at L41.1—which requires team captains to ensure their teams play within the "Spirit of Cricket."⁹ This includes the following guidelines on conduct:

Respect your captain, team-mates, opponents, and the authority of the umpires.

Play hard and play fair.

Accept the umpire's decision.

Create a positive atmosphere by your own conduct, and encourage others to do likewise.

Show self-discipline, even when things go against you.

Congratulate the opposition on their successes, and enjoy those of your own team.

Thank the officials and your opposition at the end of the match, whatever the result.¹⁰

Similarly, attorneys must abide by the Rules of Professional Conduct in their own jurisdictions.¹¹ Some attorneys also adopt additional codes, which may not be mandated in their jurisdictions, but serve as aspirational guidance for attorney conduct. The Texas Attorney's Creed is one example, as is the Professional Creed of the

7. Homepage, INDIAN PREMIER LEAGUE, <https://www.iplt20.com/> (last visited Dec. 20, 2023).

8. *Preamble to the Laws: Spirit of Cricket*, LORD'S, <https://www.lords.org/mcc/the-laws-of-cricket/preamble-to-the-laws-spirit-of-cricket> (last visited Dec. 18, 2023).

9. *Unfair Play*, LORD'S, <https://www.lords.org/mcc/the-laws-of-cricket/unfair-play> (last visited Dec. 18, 2023).

10. *Preamble to the Laws: Spirit of Cricket*, *supra* note 8.

11. See MODEL RULES OF PRO. CONDUCT r. 8.5 (AM. BAR ASS'N 1983).

American Inns of Court.¹² The American Bar Association further provides a webpage dedicated to all of the Professional Codes by state as a resource for attorneys.¹³

Following Matthew's departure from the District, he and Niral got together to discuss the practicalities and realities of their respective positions as adversaries and whether there be grounds to act with civility while constantly battling on opposing sides. This article is a compilation of those discussions from two very different sides of a case, yet both working towards a common "middle ground."

HOW CAN CIVILITY AND ADVERSARIAL POSITIONS CO-EXIST?

Niral Gandhi (NG): Civility *is not the same as being agreeable*. In fact, it is because there is an anticipation of conflicting opinions that makes civility more important in a profession designed to be adversarial. The legal profession is an easy one for attorneys to become vested in their position. An attorney's job is to advocate for their client within the rules and the laws set forth by statutes, the rules of governance, and the rules of the court. In most situations, opposing counsel may have a different, but also reasonable, understanding of the law, rules, facts, court findings, and other things, which can make the two attorneys have adversarial positions in a case. However, none of these adversarial positions require the attorneys to act uncivilly towards one another.

Matthew Crouch (MC): The co-existence of civility and adversarial positions could be the default starting place for things, and should be as attorneys—a place where adopting a scorched earth policy from the get-go simply cannot be reasonable. Start with the basic role of lawyers—as attorneys, one of our primary roles is to act on behalf of a client and that necessarily means being capable of holding a line somewhere. The Model Rules of

12. *The Texas Lawyer's Creed—A Mandate for Professionalism*, (SUP. CT. OF TEX. & COURT OF CRIM. APPEALS 1989); *The American Inns of Court* <https://www.txcourts.gov/media/276685/texaslawyerscreed.pdf>; *Professional Creed*, AM. INNS OF CT., https://www.innsofcourt.org/AIC/About_Us/Professional_Creed/AIC/AIC_About_Us/American_Inns_of_Court_Professional_Creed.aspx (last visited Dec. 19, 2023) .

13. *Professionalism Codes*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes/ (last updated Mar. 2017).

Professional Conduct (“MRPC”) preamble sets out three roles of lawyers, and the first role is as a representative of a client.¹⁴ Several additional roles come with being a representative of a client and a main role is that of an advocate.¹⁵ An advocate “zealously asserts the client’s position under the rules of the adversary system.”¹⁶ Advocacy does not stop with this though—it is tied to the role of lawyers as negotiators. “As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.”¹⁷ The notion of honesty is foundational, yet one not guaranteed in practice.

A great description of the opposing strain of these positions comes from a Canadian attorney who wrote:

The tension between being civil and being a forceful and fierce advocate is one more stress added to the many other aspects of our legal profession that cause stress - - pressure of billable hours; pressure to collect fees; long hours; the detailed and exacting nature of our work accompanied by severe consequences if performed otherwise; increasingly, the expectation of a quick turn around; conflicted and sometimes emotionally disturbed clients; files which often involve the most troubling of human emotions; and an adversarial environment where a fellow lawyer is paid to attack you and your client, to try to prove you wrong and sometimes stupid, all in front of your client who is expected to pay you for your brilliance, abilities and advocacy.¹⁸

It is an easy step to take from being zealous to dropping any pretense of civility and unfortunately, it is easy when you start representing clients in a defense or plaintiff situation on a regular basis. An us versus them mindset can almost become a point of doctrinal instruction in certain jobs and, in those cases, zealous can overtake civil easily.

Co-existence of these principles requires self-awareness and emotional intelligence. Knowledge of how you act and react as an attorney, what buttons can get pushed, what do you do when that

14. MODEL RULES OF PRO. CONDUCT, pmb. para. 1 (AM. BAR ASS’N 1983).

15. *Id.* pmb. para 2.

16. *Id.*

17. *Id.*

18. Ron Profit, *Civility in the Legal Practice: Practical Tips*, CANADIAN BAR ASS’N (July 16, 2014), <https://www.cba.org/Publications-Resources/CBA-Practice-Link/Young-Lawyers/2014/Civility-in-the-Legal-Practice-Practical-Tips?lang=en-ca>.

happens—knowing these things makes civility easier to achieve, because you know the traps that go in opposite directions.

HOW DO YOU USE YOUR KNOWLEDGE OF AN OPPOSING COUNSEL WHEN YOUR CLIENT HAS AN AGGRESSIVE OR WHAT SEEMS TO BE IMMUTABLE POSITION THAT CAUSES YOUR CLIENT'S CASE AND CIVILITY TO CLASH? DO THE RULES OF PROFESSIONAL CONDUCT REPLACE CIVILITY IN THOSE CIRCUMSTANCES, OR CAN THEY BE HARMONIZED?

NG: As much as possible, it is critical to harmonize representation for your client and civility. The American Bar Association's MRPC begins its preamble with a statement that "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."¹⁹ The Texas Rules further add that "[l]awyers, as guardians of the law, play a vital role in the preservation of society."²⁰ Although there may be situations where balancing the interests of the client and the greater good may be difficult, it is the attorney's charge to act as the competent intermediary between the client, the court, and/or opposing counsel. In fact, it has also been mandated by the Texas Supreme Court and the Court of Criminal Appeals when they jointly promulgated the Texas Lawyer's Creed, which mandated professionalism amongst the attorneys in the state in 1989.²¹ In my experience, however, civility and client relationships have rarely been an issue as long as the client is informed on the process and the plan.²² If a client is aware of the procedures and the progress of the case, there tends to be harmony with civility and the client's case. Having knowledge of opposing counsel also aids in determining the strength of your case. Part of being an advocate is to provide your clients with the risks and likelihood of success so that they can make informed decisions on how and when to proceed

19. MODEL RULES OF PRO. CONDUCT, pmb. para. 1 (AM. BAR ASS'N 1983).

20. TEX. DISCIPL. RULES OF PRO. CONDUCT, pmb. para. 1 (STATE BAR OF TEX. 2022).

21. THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM, (SUP. CT. OF TEX. & COURT OF CRIM APPEALS 1989).

22. See MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 1983) (setting forth the communication requirements for attorneys with clients).

with their case.²³ Knowledge of opposing counsel, the judge, court, jury pool, experts, and other parties all impact this risk/reward calculation.

MC: At some point, civility and the MRPC have to be harmonized. If they cannot be, then what I have failed to do is larger than me or my client. Looking at the practicalities of this though, as an attorney, one of my jobs is to advise my client of the practical, real-world, rubber-meets-the-road implications of their rights and obligations.²⁴ That advice includes more than just the applicable law, but other considerations. While the MRPC discuss “moral, economic, social and political factors,”²⁵ to me these include practical considerations as well, like drawing on experiences, either mine or my colleagues, with local courts and judges so that I could advise whether there are litigation risks that affect the claims. My task as an advocate is to be able to advise on both the strengths and weaknesses of my client’s position.

The benefit of knowing who the opposing counsel is in any specific type of litigation comes from getting to know them as a person and as an advocate. The more time I spend with them, the more I can understand whether the position they are taking is one that has merit and how the courts will look on that position. If I have worked with an opposing attorney on a regular basis, I can advise my client of any additional risks as a result. Sharp, smart attorneys who can see the strengths and weaknesses on both sides can make for a challenging adversary, and that can be useful to know in advising my client appropriately.

That being said, there have been times when my client, or my client’s representative, and I had loud discussions, arguing back and forth on the merits of the positions of all parties. Just as often, opposing counsel with whom I’ve had frequent interaction had their own patterns and methods. Experience taught me that I could draw on past interactions with opposing counsel to anticipate issues and find common ground in resolving the issues. Once the scope of the issues could be narrowed, there was a little breathing room which could often be used to bring things back to a more civil place in attempting to negotiate resolutions.

23. *See id.* at r. 1.4(b) (stating that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

24. *See* MODEL RULES OF PRO. CONDUCT, pmb. para. 2 (AM. BAR ASS’N 1983).

25. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS’N 1983).

*HOW DO YOU DEFINE CIVILITY AS A
PLAINTIFF/DEFENSE ATTORNEY?*

NG: Surprisingly, I have found that not all individuals define civility the same. For me, my concept of civility is derived from various religious and historical texts that all follow the same concept: do unto others as you would like them to do to you. This is found in most (if not all) religious teachings (see “the Golden Rule” under Matthew 7:12, The Mahabharta Anusasana Parva 113, etc.) as well as most ethics guides. Although this can be difficult to relate to law, I strongly believe that most lawsuits are because the plaintiff truly feels that they have been harmed and most defendants truly believe the plaintiff has not been harmed. With that understanding, many cases can be resolved purely by communicating opposing theories to the parties.

MC: My primary job has been as a defense counsel for about 10 years now, representing governmental entities. So, how I define civility relates to my own role—my client has a function that helps society in ways that many people do not understand, and misunderstanding the functions of these entities is more common than not. So, I try and view my role as having both internal and external facets. Internally, I have clients who expect certain results. Sometimes, when you are representing an entity like an agency or corporation as a client, there are separate internal units who may have similar goals but have different requirements as to how those are accomplished. I have been lucky because I represent clients who are very conscientious about ensuring their duties are fulfilled in a manner that the general public can trust and rely on being applied fairly and equally, even in litigation. At the same time, there are times when an error gets made somewhere along the way. That is the nature of life and happens to any entity. So, sometimes it is a matter of explaining how the error can be fixed and, in other cases, it is a matter of handling that through resolution of litigation.

From an external-facing stance, a big part of my role as the attorney that is acting in a manner where unrepresented parties I encounter are met with civility and professionalism, whether in a litigation stance or not, such that they come away from the experience with a better view of my client, if possible. Sometimes, that is a matter of helping these parties and acting as an educator. Occasionally, it is acting as a counselor, helping them understand

if there was an error on their part, and explaining how those facts interplay with the law. Even if the result is not in their favor, I try to aid in helping them understand more about the entire process than they did before and do so with a sympathetic ear.

*WHAT ARE YOUR PERSONAL BEST PRACTICES TO ACT
WITH CIVILITY IN A PROFESSION WHICH IS DESIGNED
TO BE ADVERSARIAL?*

NG: Civility and confrontation are not mutually exclusive. I have related that to youth sports as a way to remember this. The other day I went to my daughter's soccer match, which ended up being 40 minutes of nonstop action with both teams playing their hearts out. At the end of the game, both teams lined up to give "high-fives" to the other team. There was no animosity to be seen even though both teams had opposing goals (no pun intended) throughout the entire game. Bringing back to the introductory cricket theme, this can also be seen at the highest level after international and IPL matches where opposing players chat and high five once the games are completed. This is a reminder of what most adversarial professions are supposed to be. Confrontation with opposing counsel is what the legal profession is about, but it must be done with respect for them and the process.²⁶ As a firm, we often discuss heated cases internally so that we can remind each other not to become too vested in any given argument. Outside of that, however, I am not sure if there is a "personal best practice" for me regarding this except for periodically reminding myself of this and by separating my home and office.

MC: I have to divide these into two pots: one for the day job, and one for my own personal self. For the day job, I sometimes have to step back and take a breath. It is easy to spiral into the easily entrenched positions as adversaries, attacking arguments and facts, but it is a slippery slope on occasion. Sometimes stepping back and breathing for a few moments allows a chance for rational thought to take the place of verbal sparring and to see if there is a way to get things back on track. Within the law, I also have pursued law-related activities and volunteer projects, like volunteering for local Legallines.²⁷ By participating in these

26. MODEL RULES OF PRO. CONDUCT, pmb. para. 5 (AM. BAR ASS'N 1983).

27. Local bar associations will sometimes hold sessions or provide a service where members of the public can call in and ask legal questions which are answered by attorneys

activities, whether bar-sponsored or not, I get to know a broader base of people involved in the legal profession and that has helped me in numerous ways, not the least by hearing about other people's experiences in the profession and learning from that.

As for the second pot, when I leave the day job, I try to separate what I do as an attorney with who I am outside of that. I have several hobbies, none of which engage the same areas of my brain as the ones I use when I am serving as an attorney. Plus, these hobbies have the added benefit of exposing me to people outside of the usual suspects of attorneys I end up litigating with on a regular basis. Those interactions help remind me that there is life outside of the law and that I do not have to maintain the adversarial mindset that I have to use when litigating. I have let this help guide some of my practices in the day job, and it has proven to be helpful in reducing some of the inherent tensions that come from litigating.

*WHAT DO YOU DO TO LAY A FOUNDATION WITH AN
OPPOSING COUNSEL TO MAKE THE FIRST CASE(S) YOU
HAVE EASIER? DO YOU DO THE SAME WITH ALL
OPPOSING COUNSELS OR IS THAT INDIVIDUALIZED?*

NG: I found that most of my initial communications with opposing counsel are not related to the issues of the case. It can be difficult to find common ground related to the issues at hand, but that difficulty typically does not extend to matters outside of the case. Speaking about the issues immediately creates tension in the room well before the actual arguments begin. Instead, by discussing something non-confrontational, you can begin to build some common ground with opposing counsel. Building common ground provides an avenue to make future communications more comfortable, even if adversarial. I typically would treat all opposing counsel the same. We are all peers in the industry trying to achieve the best results for our clients but also trying to get the correct overall result. I historically have found that most opposing counsel all want the same thing; however, when we find opposing

volunteering their time and expertise. *See generally* LegalLine, HOUS. BAR ASS'N, <https://hba.org/index.cfm?pg=LegalLine> (last visited Feb. 13, 2024); LegalLine, DALL. BAR ASS'N, <https://www.dallasbar.org/index.cfm?pg=legalline> (last visited Feb. 13, 2024); LegalLine, TARRANT CNTY. BAR ASS'N, <https://www.tarrantbar.org/?pg=LegalLine> (last visited Feb. 13, 2024); LegalLine P.M., Phila. Bar Ass'n, <https://philadelphiabar.org/?pg=YLDLegalLine> (last visited Feb. 13, 2024).

counsel that are not acting under the same premise, it really does not change my approach to them or the case.

MC: That is a matter of putting my best practices into effect from the get-go, combining the practice of civility with the role of attorney. I personally find it helps when I am able to talk to opposing counsel or a pro se party. I can find out quickly a lot about the difficulties of a case and what kinds of early resolution opportunities exist, if any. I try to do that with every opposing counsel, often with a quick introductory call if possible. Communication is a major part of what we do and trying to establish good lines of communication early on helps, especially if there is a solid chance that the case may be tricky, or if there will be multiple cases over time. If I have not dealt with them before, communication is a blank slate, which can be useful. Even if I have been told horror stories about them, I start with the blank slate if possible. If their behavior later proves to be in line with what others have said, usually I am more disappointed in them than anything. Nonetheless, I strive to remain civil.

*DOES CIVILITY EVER STOP? IF IT DOES, CAN IT BE
REGAINED?*

NG: Civility is a mindset that should not begin or end with the profession. I have also found that individuals tend to desire a civil community over an adversarial one. Along those lines, several years back my brother and I ran our own experiment where, as we drove in our residential subdivision, we waved at all of the other drivers, pedestrians, bicyclists, children playing on the street, and anyone else we saw. Our subdivision was quite large, and we were fairly new to the area, so we hardly knew any of our neighbors at the time. At first, a few waved back; however, as we continued to do this for a few months, we found most of the community waved back not just at us, but at the other community members as well. This minor change proved to me that civility is an act anyone can choose to do regardless of who is receiving it.

That being said, civility can stop since not all attorneys (or people for that matter) believe in civility as a requirement. In addition, maintaining civility requires discipline and can be very difficult, especially when provoked. However, if civility is lost for a brief period, it can be regained over time. It may be a difficult and

arduous task since once a trust is broken, it will be difficult for others to trust again.

MC: Civility certainly can stop, and even if it is replaced, to me there is always a worry that it can be lost again. I have been guilty of this once in a while. For example, there have been times where I learn that an attorney who I see or have as an opposing counsel had their license to practice suspended for failing to keep up with Continuing Legal Education (“CLE”) requirements. I have seen this happen, both when I was a law clerk and in practice, each with different results. I think in both cases, it speaks to civility. When I was a law clerk, a relatively young attorney got suspended for failing to keep up with his CLE requirements. Opposing counsel in his cases had no issue with continuing cases to allow him a chance to catch up on his CLEs and get reinstated. I think a big function of that being allowed to happen was because of how this attorney got along with opposing counsel and the court. In contrast to that, a much more senior attorney who was lead opposing counsel to my client on a number of cases had his license administratively suspended twice during the pandemic. This attorney and I butted heads on several occasions in litigation. Unlike the attorney in the prior instance, this attorney kept acting as though his license had not been suspended at all (the bar would retroactively reinstate him once he caught up). I ended up drawing a hard line and refusing to negotiate settlements with this attorney until he was reinstated. My ability to maintain civility with that opposing counsel was reduced to the bare basics. I refused to use his first name in any conversations and would only refer to him as “Mr. [Last Name],” because that is the bare minimum of courtesy I would show him if we were in court. Can civility be regained? Yes, but it requires effort on both sides.

*HOW DO YOU MAINTAIN CIVILITY WITH OPPOSING
COUNSELS? HAS THIS CHANGED SINCE THE PANDEMIC?*

NG: The world has changed after the pandemic, and I have found that maintaining civility has become more difficult after the pandemic for various reasons. First, pre-pandemic most of my initial communications with opposing counsel were not related to the issues of the case at hand. It can be difficult to find common ground related to the issues at hand, but that difficulty typically does not extend to matters outside of the case. Building common

ground provides an avenue to make future communications more comfortable, even if adversarial. Since the pandemic, however, the initial “ice-breaking” communications are more difficult. Second, email is a great tool, but it also comes without context. It is sometimes difficult to understand the context the sender intended when reading an email, which in turn may alter the way the email is interpreted. Finally, there is a lack of downtime now when communicating about an issue. Pre-pandemic, if you were to attend a mediation, court hearing, settlement conference, or other meeting, there is typically some time prior to the event beginning where you can discuss. Post-pandemic, the majority of communication occurs by phone, email, or Zoom, all of which most individuals are trying to get to the point of the initial contact as quickly as possible. The lack of downtime from the task at hand has made it more difficult to find the common grounds that were more common in the past.

MC: Maintaining civility starts with being friendly, not just polite. Getting to know opposing counsel as a person, not an adversary. At the outset, it is finding common ground, and using that as a way to build a working relationship and a basis for trust in representations made during negotiations and litigation. Like with Niral, it was discussing multiple topics and eventually finding things we both enjoyed, such as cricket. With other counsel, it has been stories about travel, cooking, hobbies, which live shows we have enjoyed and why. Building that kind of working relationship takes time, as well as multiple experiences with the opposing counsel. Each interaction can be built on little by little until you have established mutual respect and a good working relationship. This approach helped tremendously during the pandemic, as a lot of how things used to be done got pushed aside. For example, we used to have multiple days of settlement conferences with opposing counsel and client representatives from both sides, where we would get to know each other over a solid period of time. In fact, we would refer to it as “conference season” and we would often begin in the autumn and continue, with various law firms at different times, until late spring or even into the early summer. The conferences switched to virtual or phone conferences, and many of those relationships took hits almost immediately, because you lost a lot of the casual conversation which would take place when you were handling things in person. That aside, with

opposing counsel that I frequently interacted with, the adjustments were definitely easier.

*WHAT HAPPENS WHEN BEING AN ADVERSARY TRUMPS
CIVILITY?*

NG: This is a trick question in my opinion since being an adversary is not related to civility. Often there are situations where both attorneys and clients are not willing to back down from their positions because they feel strongly about it. Although settlement is a common outcome now due to the rising costs of litigation,²⁸ the original (and still true) purpose of the judicial trial process is to provide an outcome for two immutable positions. In such situations, being an adversary is a critical part of the litigation process; however, just as critical is the ability to maintain professionalism with the judge, jury, witnesses, opposing counsel, and all others involved. Early on in my career I was taught that no matter the fierceness of the trial or hearing and no matter the outcome, you should end the day willing and able to take opposing counsel out for drinks at the nearest bar.

MC: There have been times when an opposing counsel has attacked, either individually or as a whole, the working staff at the agency I represent. In those circumstances, I admit my buttons get pushed, as I personally believe there is no need to make such attacks and I cannot recall any times I have resorted to making those attacks myself. In the few cases I can recall where opposing counsel has made those kinds of personal attacks, I have sometimes had anger overtake civility and my voice raised to defend my client and its staff. Dialing it back down takes effort on my part, as the opposing party certainly had no interest in doing so. I can think of at least one circumstance where a plaintiff's attorney did apologize for the attack during a call. In that case, I had challenged this attack and was able to de-escalate things. That I had to do this at all still sticks in my mind and I keep it as a measure of behavior on my part.

The bigger worry comes from times when I have dealt with an opposing counsel who: 1) had horror stories told to me about how

28. See Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone*, 101 JUDICATURE 26, 28 (2017) (noting only "approximately 1 percent of all civil cases filed in federal court are resolved by trial."); see also *id.* at 33 (noting that "the prohibitive costs of hiring a lawyer to handle those disputes, have contributed to the decline of trials.").

they handled cases; and 2) ended up acting in accordance with these stories, sometimes more than once. In those cases, I had to act in manners less casual and easy-going than with counsel where there is a good relationship, and more of a formalized, following rules-to-the-letter politeness, a lesson I was taught by one of my law professors as a first-year student. For example, instead of using first names, counsel in those cases will always be “Mr./Ms. Counsel” and nothing else. That is because I cannot trust that being more than that minimal level of civil will not end up hurting, either my client or myself as an attorney. There is a part of me that definitely feels sorrow for those moments, given the number of attorneys I have met and worked with who do not act that way.

*WHAT HAPPENS AT THE INTERSECTION OF THE LAW,
DUTIES TO CLIENT, WORKING WITH THIRD PARTIES
SUCH AS EXPERTS OR INTERNAL PERSONNEL, AND
CIVILITY? WHAT KIND OF INTERSECTION IS IT AND HOW
DO YOU HANDLE IT?*

NG: Being an attorney can be a true juggling act. An attorney is required to be a fiduciary and advocate for clients, a colleague with opposing counsel, a seeker of social justice, and a custodian to the court.²⁹ In addition, some attorneys may also be involved in their firm operations which include administrative tasks, marketing, and a host of other hats as well. Further, with ever-changing technology, it seems that communication has only sped up with emails, text messages, social media, and other mediums. The demands of an attorney sometimes come at the cost of civility. Although I do not have any sage advice on the proper approach to handle the workload, my approach has been to surround myself with as strong of a team as possible and continue to be transparent with my clients, the court, and opposing counsel to the extent possible.

MC: There is a balancing act that occurs when you are trying to manage those potentially conflicting interests at that point, and the risk is throwing civility aside to accomplish the goals of the client. There is not a one-size-fits-all approach in these cases, in part because of the individual personalities that exist. As a lawyer, you could be trying to act as a go-between for different groups from

29. See MODEL RULES OF PRO. CONDUCT, pmb. ¶¶ 1, 2, 5, 6, 9, 10 (AM. BAR ASS'N 1983).

your own client³⁰ while at the same time, dealing with opposing counsel and their arguments. You have to learn to communicate in different methods, depending on who you are dealing with. Again, the key is to remember the best practices of civility and keep putting them to use.

*WHAT ARE YOUR BIGGEST PITFALLS TO CIVILITY AS A
PLAINTIFF/DEFENSE ATTORNEY?*

NG: Individually, my biggest pitfall to civility is to not become “over-vested” in a case. As stated before, over-vesting may cause attorneys to become more emotional due to an individual pressure to win instead of advocating for the client. This can lead to losing composure and civility in the process. My primary legal practice is one where my clients typically rely on my experience and expertise to determine a fair settlement or conclusion on the case. However, I often found myself pushing for a position only to find that the client was willing to settle at a much less aggressive position. Over time, I have found more importance in communicating with clients on their goals and positions in advance to ensure we advocate their positions correctly. This also helps maintain composure with opposing counsel since you are advocating your client’s position instead of your own.

MC: One of the biggest pitfalls is listening to what other people tell you about opposing counsel. It can be a trap. With an us versus them mentality, adversarial tactics can easily be justified at the expense of civility. At the same time, if the opposing counsel acts in a manner that fits every description you have been given, how much of a trap does it become? A massive one, in fact. I even resort to reminding myself of phrases such as “strive mightily, but eat and drink as friends”³¹ and “the better angels of our nature” (as a hard lesson from history) as ways to remind myself that even if the opposing attorney will not act in a civil manner, then it is incumbent on me to strive even more to do so.

30. An example would be taking policy directives from client executives and relaying them to internal technical staff and ensuring legal compliance is accomplished while hearing and attempting to resolve the frustrations of the staff, whether those frustrations are directed internally or towards opposing parties.

31. William Shakespeare, *The Taming of the Shrew*, Act. I, sc. 2. This is a lesson learned from years of being a part of the American Inns of Court and the civility practices encouraged there.

*HOW MUCH OF A ROLE DOES KNOWING OPPOSING
COUNSEL PLAY IN YOUR CASE ANALYSIS?*

NG: Most attorneys work in a field where they meet certain opposing counsel regularly. In my practice area, we often will know opposing counsel even before we file the petition to the court. Knowing opposing counsel typically *does not* affect the case analysis prior to filing the lawsuit, but it *does* impact the case preparation once the lawsuit is filed. Some opposing counsel understand the overall goal that all parties are seeking to achieve whereas others tend to take a more technical approach to the law. Although neither is improper, knowing opposing counsel is important on how to handle a case.

MC: A decent amount if I actually know the opposing counsel. I can tell whether it is run-of-the-mill or whether this will involve something unique that will take more effort than other cases. In getting to know opposing counsel over time, I learned that some attorneys seemed to take on cases that would be challenging, and that knowledge is useful, especially when I have a good relationship with that person. In fact, in a practice where I would see the same plaintiffs and attorneys in subsequent years, I got to know instinctively whether a case would be problematic or not. For example, this got to a point of common practice with some opposing counsel where attorneys and internal client representatives would agree to mediate cases at the outset of the litigation. This came from hard experience, knowing the challenges both sides would have and how, in prior years, delaying mediation made things more difficult for both sides.

*WHAT DO YOU DO IF YOU DO NOT KNOW THE OPPOSING
COUNSEL?*

NG: It is important to open up the lines of communication with new opposing counsel as soon as practicable. The conversation can be about the case issues, but more often it is to build a connection as two colleagues in the same profession. This concept again goes back to not seeing opposing counsel as an adversary, but instead a colleague that is serving an adversarial interest.

MC: If I do not know the opposing counsel, I start with politeness and a little humor. Sometimes a little self-deprecation can open a door, even when it is not factual. Ask questions—that

is one of the things we are trained for: investigating. Ask questions as though you were getting to know them as a person, and for no other reason than that. Before you know it, you will likely have found some things in common and there is a lot you can build off with that. Hobbies, cooking, foods, restaurants, where they like to travel, whether they have kids—these help you get past some of the ingrained adversarial stance and build a better relationship.

WHAT ARE THE INITIAL STEPS YOU TAKE WHEN YOU GET A NEW CASE AS A PLAINTIFF/DEFENSE ATTORNEY?

NG: A vast majority of the lawsuits filed in my firm are from clients that we have previously worked with administratively or in prior litigation. For those, conflict checks and conforming with Texas Disciplinary Rules of Professional Conduct Rule 3.01 are fairly straight-forward.³² However, for new claims that arrive at our desk, we begin with a quick conflict check and a more detailed internal review of the claims made by the individual. If we determine the claims are frivolous or not in line with our understanding of the law, we decline engagement.³³ For example, we have had potential clients attempt to use an incorrect valuation methodology or use a methodology that goes against the generally accepted appraisal practices to defend their position. In these situations, although it would not be against the disciplinary rules to accept the case, our firm has chosen to not engage such properties. Once we confirm these two areas, we complete a more thorough conflict check and engage the client for the appeal.

MC: Two-fold. One is the basic case analysis process. What kind of case is it, what are the issues, what are the immediate risks I can tell from the initial pleadings and file? I am lucky in that the tax litigation I do helps hem the scope of many potential issues, but as in any practice, you will be faced with some curveballs now and again. The second step for me is finding out whether I am dealing with someone who is represented. If they are, do I know the opposing counsel?

32. TEX. DISCIPL. RULES OF PRO. CONDUCT r. 3.01 (ST. BAR OF TEX. 2022).

33. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 1983).

HOW DOES CIVILITY INTERACT WITH THIRD PARTIES?

NG: The purpose of law is to get to the correct social justice outcome. Although that statement is as difficult to accomplish as it is vague, it seems to be the overall goal of law. The reason this can be difficult is that not everyone has the same definition of social justice, or the “socially proper” result may not be in the interest of that individual or entity. As such, it is the attorney’s job as advocate and counselor to speak to their clients and potential clients about the possible risks, benefits, and the law even if it is against the client’s interest³⁴. As mentioned earlier, the field that I work in has a 60-day statute of limitation,³⁵ which is far quicker than most other lawsuits. Often, I will receive a call from a potential client that is beyond the 60-day statute. In those situations, I must inform them there is nothing that can be done because they are statutorily barred from proceeding in the lawsuit. Most of them tend to argue with me that it is unjust and unfair that they are not getting their right to proceed with their claims. In those situations, I cannot afford to lose my civility even if their argument is futile. Instead, I must empathize with their position and hope they understand the predicament they are in is not something that can be fixed.

MC: Interacting civilly with third parties is a must as an attorney, especially one who represents tax authorities. Attorneys are not popular in the public eye. Taxes are not popular in the public eye. Both play vital roles. So, when I am dealing with third parties, my role is to ensure that civility is a regular practice. I want them to come away with a good impression, both that the client and their representative (myself included) are doing good and responsible work. This goes to some of the core requirements of the MRPC.³⁶ Acting in accordance with the rules does not change depending on who I am dealing with, or whether I am acting as a lawyer in that moment. If I am at a restaurant enjoying a night off, taking photographs on a road trip, or playing drums at a jam session, I am still a lawyer underneath it all and my underlying conduct and behavior has to be in accord with the rules I am sworn to uphold.

34. See MODEL RULES OF PRO. CONDUCT r. 2.1 cmt. 1 (AM. BAR ASS’N 1983).

35. TEX. TAX CODE § 42.21(a) (2022).

36. See MODEL RULES OF PRO. CONDUCT r. 4.4(a) (AM. BAR ASS’N 1983).

WHAT ARE YOUR PERSONAL ORIGINS OF CIVILITY?

NG: My origins of civility come from my parents, specifically my father. My parents owned a restaurant in California and later a hotel in Texas. I always admired how much respect my father gave to everyone he met, including customers, employees, vendors, and others. It was by watching him that I saw it was not only possible, but crucial to balance being firm about your business decisions while remaining civil with others. I specifically remember a customer that came into our hotel one night with a reservation that we did not have. I remember him yelling at my father for wrongfully cancelling the reservation and how he did not have anywhere to go. After what seemed like 30 minutes of complaining, all while my father stood and empathized with the patron, my father asked him to look up the phone number that they called. It turned out that the number was for another hotel in town and my father promptly provided him with directions to that property. The interesting thing about this story is that I asked my father why we did not provide a room when the customer needed one and we had rooms available. My father responded that it would not be fair to the other hotel that had the reservation. It was here I learned that civility is not something that is meant arbitrarily but should be shown to everyone, even competitors.

MC: When I think about civility, I think about my parents and their jobs. More specifically, my father, who was a school district administrator. Early in my life, he taught me lessons about how he interacted with people in ways that I have adopted over my own career. For example, one of his lessons came from something he learned—if he had the chance, he re-arranged his office so that the desk was not between where he sat and where any visitor would sit. He learned that clearing space and removing the desk allowed for better communication, as there were no impediments between him and whomever he needed to talk to. Another lesson he taught me has some very direct implications when I am called on to provide advice on or help create policy of some sort. He taught me that he would at least include and consider, even if he would not adopt, positions which he disagreed with and, in many cases, found deeply distasteful to himself personally. As he said, if you cannot at least hear these ideas, even if they will be rejected, then any decision made cannot be said to have been fair.

One of the most important lessons I learned as a young lawyer came from an experience I had working as a volunteer law clerk at the Minnesota Tax Court. I watched a short trial conducted by Judge Raymond Krause. On one side was an assistant attorney general, armed with all the litigation paperwork he needed. The opposing party was pro se, who had no paperwork, no files, documents or anything, having lost them in a fire. Legally, the ultimate decision was obvious once the trial had concluded. As we were leaving the courtroom, Judge Krause pulled me aside and asked me, "Why do you think we did that?" I don't remember what I said, though I probably attempted something intelligent. He said "We did that because it gave him the opportunity to be heard. We gave him the respect of listening to his arguments in court and the chance to be heard and to say what he needed to say, even if the law was not in his favor. He might know that he will not win, but he is leaving knowing that he was given that respect and opportunity to be heard." That lesson stuck with me and has affected me in many ways. Often, a client or opposing party, especially unrepresented parties, are dealing with a system that frustrates and stymies. Many times, my role is as a counselor in those circumstances—letting them talk and say what they need to say. Someone willing to listen and not interrupt, who can at least empathize with their frustrations while using this as an opportunity to help them understand why the law is what it is in this particular circumstance, whether it helps them or not. One of the biggest benefits that comes from acting in this manner is that it helps create a better understanding and appreciation of the rule of law, and if my being patient helps with that, so much the better.

*HOW DO YOU TEACH CIVILITY? DOES IT MAKE A
DIFFERENCE WHO IS LEARNING THE LESSON?*

NG: Speaking from my reference point only, I believe civility can only be taught by example. I highly doubt there can be enough situational examples to put in a book to cover all aspects of civility. Overall, it is a mindset and a choice that can only be learned by witnessing. Much like a language or other skill, I do feel that younger individuals have a better chance of grasping civility than older individuals; however, civility is a lesson that is open to anyone willing to learn. In addition, I do not think civility is a skill

that is ever fully mastered. I feel that everyone should always strive for civility, but also be open to improve when possible.

MC: I cannot speak for how we each individually learn, but I think civility has the benefit of being taught by examples, whether positive or negative. The ethics opinions are rife with negative examples, as are the news stories of attorneys behaving badly in discovery, depositions, or in court. Sadly, you do not get many reported positive examples. Those, I think, come more from personal experiences and lessons, such as those passed on by professors, judges, and mentors. I hate to think that the adage “it’s hard to teach an old dog new tricks” is true, and I personally push myself to keep learning in ways I had not before. That is certainly required under the Rules of Professional Conduct anyway—for example as a lawyer, I have to keep up with changes in technology³⁷. There is no reason I also cannot keep up with my own growth both as a person and as a lawyer and use that to keep improving my own best practices for civility.

“BOWLED OUT” – A CONCLUSION

Lord’s Middle Ground was only utilized for a few years before the “New” ground was fully adopted for use in 1814.³⁸ Just as in many professions, including sports, lawyers come and go from firms or agencies, and attorneys on opposing sides will find themselves dealing with new attorneys.

There are a few commonalities between ending a cricket match (or any professional sporting match) and the conclusion of a lawsuit. Both sides post-mortem review what happened. Questions are asked regardless of the result. If successful, “What worked? How can we refine and improve? What takeaways do we have for future references?” If unsuccessful, “What went wrong? Why? What can we change? How can we improve? What actions caused harm, and can we change things so they do not happen again?” Teams seek to improve from game to game, as do lawyers from case to case. The process of growth and civility continues over time, for those who take it on themselves to continue it in their own profession and persons. Just like maintaining legal education with continuing education, attorneys can maintain and improve their

37. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS’N 1983).

38. Marleybone Cricket Club, *Our History*, LORD’S, <https://www.lords.org/mcc/the-club/our-history> (last visited Dec. 19, 2023).

civility by adopting new best practices and becoming better from case-to-case, year-to-year, and over the course of their careers. Unlike certain sports, there is no end to a season or off season for attorneys, so practicing civility is a skill that always has room for growth. That being said, the adversarial nature of the legal profession should not be an excuse to substitute civility. Instead, we may live in a time where civility is more needed in the legal profession than ever before.

For both of the authors, appreciating the game of cricket was the starting middle ground on a long professional relationship where civility was the key element, no matter how adversarial a case was. Even on the challenging cases, the friendly banter and sledging³⁹ that each side participated in came from that base of civility. While numerous cricket terms could be used to describe portions of a case in litigation, and even the reverse, it is essential to understand that civility and professionalism is the focus and the ability to keep growing civility is a key part of that. As cricketer and Test Captain Alastair Cook said, “No matter how much cricket you have played, you are always learning.”⁴⁰ This can also equally be applied to the practice of law, as no matter how much civility you practice, you are always learning. After all, in both worlds—cricket and law— nobody wants to have a negative reputation ascribed to them over “verbal spray.”⁴¹

39. *Glossary of Cricket Terms*, WIKIPEDIA, https://en.wikipedia.org/wiki/Glossary_of_cricket_terms (last visited Dec. 19, 2023); *Sledging*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Sledging> (last visited Dec. 19, 2023).

40. George Dobell, *Cook Aims for 'Remarkable' Ashes Glory*, ESPNCRICINFO (June 26, 2015), <https://www.espnricinfo.com/story/alastair-cook-aims-for-remarkable-ashes-glory-891627>; Ali Martin, *Alastair Cook's Ashes Optimism Fired by Feelgood Factor after NZ Series*, THE GUARDIAN (June 26, 2015), <https://www.theguardian.com/sport/2015/jun/26/alastair-cook-england-ashes-feelgood>.

41. Justin Robertson, *'Dibbly Dobbly', 'French Cut', 'Bunny' and Other Cricket World Cup Terms you Should Know by Now*, YAHOO SPORTS (Feb. 26, 2015), <https://sports.yahoo.com/blogs/eh-game/-dibbly-dobbly---french-cut--and--bunny---here-s-28-world-cup-cricket-terms-you-should-know-by-now-193033965.html>.