

# Do the Standards of Professionalism and Civility Have Teeth?

by Keith A. Call

Yesterday, I received a postcard reminding me of my upcoming dentist appointment. This happened to coincide with an upcoming deadline for submitting articles to the *Utah Bar Journal*. This led me to ponder two questions: (1) Why are there more lawyer jokes than dentist jokes? (2) Do the Standards of Professionalism and Civility have teeth?

There are a number of excellent articles on the potency of our Standards of Professionalism and Civility (Civility Standards). See, e.g., Ted Weckel, *Regarding the Standards of Professionalism and Civility and the Use of Disparaging Language as a Tactical Decision During a Criminal Trial*, 27 UTAH B. J. 32 (Mar./Apr. 2014); Donald J. Winder, *Civility Revisited*, 26 UTAH B. J. 45 (Nov./Dec. 2013). In fact, the entire November/December 2006 issue of the *Utah Bar Journal* was dedicated to civility.

Here's a brief summary of what I believe the Civility Standards do and don't do.

### The Civility Standards Are Aspirational and Are Not Binding (Yet?)

Referring to the Civility Standards, the Utah Supreme Court has stated that “these standards are not binding.” *Peters v. Pine Meadow Ranch Home Ass’n*, 2007 UT 2, ¶ 22, 151 P.3d 962. The court has also described the Civility Standards as “aspirational guidelines that encourage legal professionals to act with the utmost integrity at all times.” *Abrogast Family Trust v. River Crossings, LLC*, 2010 UT 40, ¶ 40, 238 P.3d 1035.

However, in his recent article, Mr. Winder argues there is a “sea change” in Utah and elsewhere, and that there is a “growing recognition that the concept of civility is no longer merely aspirational.” Winder, *supra*, at 45, 48. Perhaps he is right, and

the Civility Standards are growing adult teeth.

### The Civility Standards Are Not a Basis for Disciplinary Action

Rule 14-509 of the Utah Supreme Court Rules Governing the Utah State Bar states the “Grounds for [attorney] discipline.” Utah S. Ct. R. 14-509. “It shall be a ground for discipline for a lawyer to . . . violate the Rules of Professional Conduct.” *Id.* R. 14-509(a). Rule 14-509 has no similar provision relating directly to the Civility Standards. In my research and experience, I am not aware of any case in which the Office of Professional Conduct has prosecuted a case based solely on an alleged violation of the Civility Standards. The Utah Supreme Court has stated that violation of the Civility Standards may result in disciplinary consequences “if [the] conduct also runs afoul of the Utah Rules of Professional Conduct.” *Abrogast*, ¶ 43.

It appears we are not quite there in terms of using the Civility Standards as an independent basis for attorney discipline.

### The Civility Standards Can Be Used to Impose Sanctions

Several reported cases in Utah have cited the Civility Standards as a basis – at least partially – for imposing civil sanctions. For example, in *Peters v. Pine Meadow Ranch Home Association*, 2007 UT 2, 151 P.3d 962, the Utah Supreme Court cited Civility Standard violations in support of its decision to strike the

*KEITH A. CALL is a shareholder at Snow, Christensen & Martineau, where his practice includes professional liability defense, IP and technology litigation, and general commercial litigation.*



appellant's brief, impose attorney fees, and affirm the lower court's decision, all without even addressing the merits of the appeal. *Peters*, 2007 UT 2, ¶¶ 11, 16, 22, 23. By this decision, the court undoubtedly meant to send a message to Utah lawyers that a violation of the Civility Standards is a punishable offense.

Notably, however, the *primary* basis for the court's decision appears to have been a violation of Utah Appellate Procedure Rule 24(k), which refers to "scandalous matters" in briefs, Utah R. App. P. 24(k). *Id.* ¶ 23. I have searched in vain for a reported decision in which a violation of the Civility Standards was a stand-alone basis for imposition of sanctions. Perhaps that is because egregious violations of the Civility Standards are usually coupled with violations of other procedural or ethical rules. I suspect courts would encourage civil behavior by more frequently imposing less severe sanctions for less severe civility violations than were present in the *Peters* case.

### Violation of Civility Standards Can Result in Lost Credibility and Embarrassment

Judges agree that uncivil tactics are ineffective. The Utah Supreme Court has stated, for example, that although uncivil advocacy "may occasionally lead to some short-term tactical advantages, . . . it is usually highly counterproductive. . . and erodes the credibility of the advocate." *Peters*, 2007 UT 2, ¶ 21.

Once lost, credibility and trust are usually difficult to regain. It is also highly embarrassing to be called out by a court or others for uncivil behavior, publicly or in private.

### There Is Tension Between the Civility Standards and the Duty of Zealous Representation

There will probably always be tension between the dual obligations to be civil and zealous. Mr. Weckel makes a great case for this in his article about the tension between certain Civility Standards and criminal defense work. *See generally* Weckel, *supra*, at 32–34. This is part of what makes the fine art of law a "practice." In lawyering and in life, we learn to balance these sorts of tensions through practice and experience.

### Civility Standards Have Strong Moral Force

Utah's Attorney's Oath states, in part, "I will faithfully observe . . . the Standards of Professionalism and Civility. . . ." Utah R. Prof'l Conduct, Preamble, [1] (internal quotation marks omitted). Every lawyer should be firmly committed to living by the Civility Standards because it is the right thing to do.

Like the Civility Standards, one might say that flossing your teeth and visiting the dentist regularly are merely aspirational. But it is undisputed that flossing every day and visiting the dentist every six months results in a lot less pain and a lot more smiling.



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