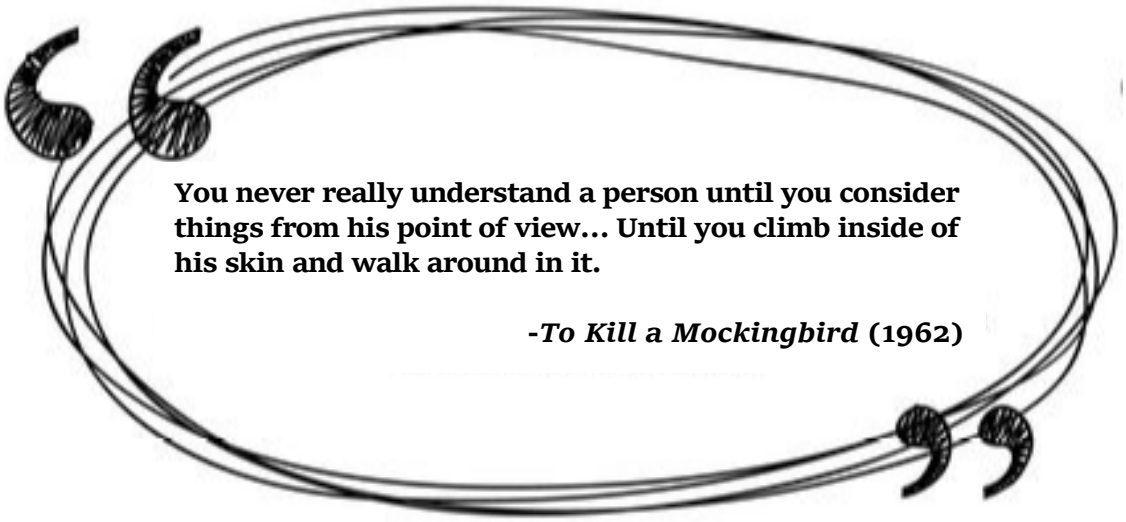
Chapter 13

CIVILITY

"Can't we all just get along?" No? Well then at least don't be a jackass about it. Credibility and civility are not mutually exclusive qualities. In fact, they are co-dependent—you cannot be credible if you are not civil. In the rough-and-tumble world of trial litigation, it can feel like remaining civil is an impossible goal, but it is not. Here are some thoughts, some of them random, on how you can exercise civility even in the face of harsh personal attacks.



Chapter 13 – Civility

Trial

Take it from me, you do not need to act like a jackass to be an effective litigator. … *[pause … laughter eventually dies down]*. Ok, ok, ha ha, very funny. So yes, maybe given my own sorted history of professional-responsibility complaints (all unsubstantiated, barely), appellate assertions of prosecutorial misconduct (all denied, mostly), and poor-filter/big-mouth reputation (underserved, sort of), it may seem odd that I am pontificating about the virtues of not acting like a jackass when operating in the military-justice system. But who would you rather have teach you to fight a shark; someone who has actually done it, or someone who was the shark's lunch?

I have tangled with a boatload of "sharks," jackass counsel, in my litigation career (sharks are jackasses of the sea). The thing about a jackass is that the jackass does not realize the thing that everyone else does—that the jackass is being a jackass. These jackass counsel are the ones who attempt to use bullying and intimidation and empty threats to cow junior counsel into giving them what they want (*i.e.,* letting them run roughshod over the rules and process of a court-martial). They are the ones who scream and yell and hyperventilate in court about every perceived slight and have as their only strategy asserting opposing counsel has acted unethically. They know not the facts nor the law so they resort to pounding on the table to make their points. The best way to deal with a jackass counsel is to relax and not take the bait, do not sink to their level.

I know, I know, easier said than done. To do that, you must not give the jackass ammunition. Failure to treat military justice and your upcoming court-martial as job

#1 will invariably provide ammunition to opposing counsel. This usually manifests itself in needless discovery disputes, which poison the well, with continuing acrimony and distrust effecting all subsequent trial encounters. Defense counsel shoulder some of the blame for this by filing increasingly long, boilerplate discovery requests seeking information that, even if produced, will have no meaningful impact on their trial preparation or defenses. Defense counsel then make it worse by sending email after email berating trial counsel for failing to respond immediately (and yes I understand there are time limits for discovery responses). A tailored request and some patience on the margins of a large discovery request would go far to setting the trial-counsel/defense-counsel relationship up for success.

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But most of the blame for needless discovery disputes lies at the feet of trial counsel and, sorry, deservedly so. We have all been there. Back in the day, and hopefully to this day, the refrain at JAG training was that "military justice is job #1." But then as the brand-new first lieutenant at a base legal office you quickly learned that "everything is job #1" … and legal assistance seemed to be "job #1+." And then, though detailed to a court-martial with the promise of senior-counsel support for trial down the road, that brand-new first lieutenant finds himself or herself handling discovery on their own, likely never having dealt with an actual discovery request in their short legal careers. If these counsel are lucky they have military-justice experienced bosses, but it is more likely they do not; thus the result = paralysis and procrastination.

My philosophy as a litigator and then as a Staff Judge Advocate was to give the defense whatever they want, within reason. I like to think my junior co-counsel and legal-office captains felt unburden with this permission to de-emphasize silly discovery battles, battles that often focus on the "principle" of a particularly legal point rather than the practical non-effect of just giving up the discovery. I have never been burned by giving up "too much" to the defense. Frankly, as a new JAG you have better things to do with your time preparing for trial than waging "principled" battles with the

defense about what they are or are not "entitled" to. You could, but better not to apply the narrowest definition of "relevant" or "material" when examining a defense discovery request. Apply the broadest one.

And do not dawdle. Give what you have immediately, and then also immediately go get everything else that is requested (even if you are not sure you will provide it in the end). Drop everything else you have to do and do all that you can do at that moment to retrieve whatever information the defense requests. If you are going to miss a deadline, advise opposing counsel in advance (and it is not bad practice to set a calendar reminder to give opposing counsel a weekly update on progress on outstanding matters). If you need something from a third-party (which typically turns out to be the sticking point), ask for it immediately and give a reasonably short suspense. Tell them that it is the "court-martial rules," not you, that has set the short suspense and that there are "consequences" for failing to meet the suspense. If they interpret that to mean the judge is demanding it, as long as their mistaken impression gets you what you need then no harm done (and eventually the judge might get involved so the mistaken impression really is not necessarily mistaken and thus is bordering on accurate). Then give that third party one more short chance to make it right when they blow your suspense and if they do not comply then elevate the issue to your bosses to unstick what is stuck.

Of course, this is all caveated by the "within reason" qualification. But it has to be a really good reason not to collect and provide what is requested, and it needs to be something other than the requested item is irrelevant. Or it needs to be something other than "that's a lot of stuff and it'll be a pain for X agency to pull it together" (more often than not this is just an excuse X agency uses to try to put off trial counsel and avoid putting forth a little bit of not "unduly burdensome" effort).

Privilege that the holder will not waive is the typical sticking point and even then you need to at least discuss the pros and cons of waiver with the holder, with a bias towards waiver if at all possible. "Tradecraft" is another common sticking point; but please, I have never seen any law-enforcement "tradecraft" information that was not something anyone who watches procedural dramas on television does not already know and it is never anything that is going to undermining on-going investigations

(and if it did, the question is why we brought charges in this case before all the investigations to which the particular secret "tradecraft" relate were complete). Pushback hard on these "tradecraft" objections.

In the rare case when you are going to decline to provide the requested information, run that decision by your bosses and senior counsel, advise defense counsel as soon as possible, provide a reason, and then go about your business. If defense counsel wants to file a motion to compel, that's fine, that's how the system is supposed to work, don't fear it. If defense counsel wants to amend their request, that's fine, quickly consider it and respond accordingly. But there is no need to get into a motions hearing by email where you and defense counsel go back and forth, arguing about the basis for your refusal to provide the information. Those jackass counsel I mentioned love to fire off emails demanding explanations, demanding legal authorities. But I have checked—there is no legal requirement that you respond to every email opposing counsel sends you. I give you permission to ignore the obnoxious email demands, or to just provide a simple response: "Yes sir, I understand that you disagree, it may be worth you filing a motion to compel so we can address our stated legal basis in the appropriate forum." Nine times out of 10 a motion to compel will not be forthcoming as the jackass counsel's obnoxious and demanding emails rarely translate into reasoned legal arguments that will overcome your well thought out objection, and they know it.

You have to work through the 'inexperience paralysis' and move out proactively and aggressively at each stage of trial preparation

But you are going to have to be on top of your obligations, discovery and otherwise, to exercise this permission-to-ignore approach. You have to work through the "inexperience paralysis" and move out proactively and aggressively at each stage of trial preparation consistent with the mantra that "military justice is job #1." Do not put off military-justice tasks, prioritize them, do not procrastinate, and especially do not be afraid to ask early and often for help and advice—we know that you are new at this,

no true leader is going to fault you for asking for help early and often (if one does, find another one to talk to).

The accommodating approach to discovery can get the trial-counsel/defense-counsel relationship off on the right foot, but should not to be taken as direction to roll over at every seeming impasse prior to trial. If the trial-counsel/defense-counsel relationship is jackass-free and you can resolve resolvable issues without hindering the effectiveness of your case, that is awesome, more power to you. Frankly, no criminal-justice system can function efficiently without plea agreements and a bit of give-n-take between cooperating counsel. But because of this, and because of gospel of attaining a mythical level of "civility" at every juncture of every case preached early and often in a young JAG's career, junior counsel have been conditioned to believe that failing to resolve an issue prior to trial is a personal and professional failure. Thus, young counsel on both sides, particularly in the military-justice system where over a career trial roles are fluid, work too hard to get along, to get to "yes," and thus resolve issues "informally" (they roll over) when litigation is more appropriate. That is the wrong mindset. Let me make this clear—it is not a personal attack to file a motion, or suggest filing a motion, if you and opposing counsel cannot agree on the resolution of a particular issue. You and opposing counsel have not "failed" if you cannot agree on resolution of an issue and end up in court advocating for your positions. It is the way an adversarial system is supposed to work. Adversarial is not unprofessional or unfriendly—you can agree to disagree without slashing each other's throats.

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There is an easy fix to this civility-at-all-costs mindset that will actually help enhance civility (and your trial preparation generally)—both sides should assume, and should prepare their respective cases on the assumption that there will be no agreements to anything; that there will be no pretrial agreement, that if there is a possible motion to be filed, it will be filed, that opposing counsel will object to each witness called and piece of evidence offered, and that an agreement will only be made if that agreement has a manifestly positive impact on your case. That is the default. If

you go into the case expecting and preparing to litigate everything, then actually doing so will not seem like a failure. If something gets worked out along the way, great, an unexpected event but not one that you needed (and "needed" because you were busy with other things and were willing to roll over to free up some time). Junior counsel need all the trial practice they can get so litigating issues in front of judge is not a bad thing. Sure, it will require more work on your (and the judge's) part, but remember "military justice is job #1" and everything you invest into a particular case will pay dividends to your overall litigation skills.

Once you are in the cauldron of the courtroom, however, maintaining civility can be a challenge. It is the nature of the competitive environment and the drive to "win" that can drive even the most well-meaning counsel to slip into jackassery at times (been there, done that). Maintaining civility will be a challenge even with counsel with whom the pretrial relationship has been professional, and if you are stuck with one of those jackass counsel … well good luck. Some tips to help you maintain your composure …

The PrimeCOLE corollary to Goodwin's Law--The more contentious a trial becomes, the probability of one of the counsel accusing the other of unethical behavior approaches 1

Do not assume bad faith on the part of your opponent for anything, and certainly do not argue that opposing counsel has acted unethically (or engaged in "prosecutorial misconduct" unless you are using that phase as a legal term of art and even then don't). It is the PrimeCOLE corollary to Goodwin's Law[1]: The more contentious a trial becomes, the probability of one of the counsel accusing the other of unethical behavior approaches 1. Even if you believe it to be true, uttering the word "unethical" does nothing to improve your underlying argument. Quite the opposite. Do so and you will lose all credibility in the eyes of the judge, who will simply smell desperation in the accusation. Use your words, your better words, to make the point that there has been

[1] "As an online discussion grows longer, the probability of a comparison involving Nazis or Hitler approaches 1."

a rule violation and there should be a consequence. Even if there was intent, you do not have to label the intent as "unethical" to describe its maliciousness.

If actions in court raise true professional-responsibility concerns, address them out of court after a long discussion with your bosses or some other dispassionate third party—your perspective as litigation combatant is skewed enough that you cannot credibly decide whether a particular act was ethical or unethical. Having been accused of acting "unethically" by opposing counsel (usually civilian counsel), and never having actually acted unethically in court (in my totally unbiased opinion), I have never seen the uttering of the word impress a judge during an argument. In fact, each and every time counsel has thrown that accusation at me during trial it has undermined their argument and I have always won the day, either directly or with a consequence for a mistake that was not as severe as it would have been if opposing counsel had simply made their argument without the "unethical" hyperbole. Thus, if you are the recipient of the accusation, know that it may hurt your feelings but the only damage it is actual doing is to the argument of the counsel injecting into the discussion.

Try also to de-personalize your arguments when countering those of opposing counsel. Attack the message, not the messenger. I freely admit that I am not good at this, but if you can learn it and exercise early in your career it will become "muscle memory" and then second nature down the line. So rather than "Captain Smith's [or defense counsel's] argument that the victim lacks credibility fails because …," try "The argument that the victim lacks credibility fails because …," or even better just the positive spin "The victim in this case is credible because …." Maybe a bridge too far, but rather than "The prosecution [or the government] has failed to prove beyond a reasonable doubt …," try "The evidence before you is woefully short of reaching that high standard of proof beyond a reasonable doubt …." You can do the same thing in arguments to the judge, dropping the reference to the identity of the proponent of the argument you are countering (as that is obvious anyhow) and just addressing the argument.

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It seems like a small point, but you "win" by contrast here. The more a counsel

subconsciously or intentional starts every argument focused on "identity litigation,"™ ("Captain Smith [or "the government" or "the defense"] is wrong …," "Captain Smith [or "the government" or "the defense"] wants you to believe …," "Captain Smith [or "the government" or "the defense"] has failed …."), the more it will appear to the members (or judge) that the argument is more focused on opposing counsel personally than the point of the argument. You will come across as petty, vindictive, and generally boorish and this will lose you credibility. On the other hand, if you can avoid the personalization, and be seen as above-the fray and focused on the substance without the constant reference to opposing counsel, you will enhance your credibility.

More importantly for the current topic, this de-personalization puts you in the right civility mindset. It has the subtle effect of focusing you on the argument and moving you away from subconsciously treating trial as a winner-take-all, to-the-death battle of counsel. And when opposing counsel does not feel personally attacked by your argument, as you have not expressly called them out in front of the members, the civility index at trial tends to rise. It is a small matter, one you probably have not thought about before (and even most seasoned counsel have not thought about it), but one that will now be glaring obvious to you the next time you are in trial or watching one. Not even knowing the substance of an argument, the de-personalizing counsel always seems more credible than the personalizing one. Guaranteed.

During trial, do not let jackass counsel distract you. Do not argue with jackass counsel when he (or she) makes some long-winded, law-free, snotty objection. Stand there stoically (no eye rolling, do not even turn to look at counsel), and wait for the judge to solicit your opinion—more often than not the judge will overrule the objection without the need for you to engage. Then proceed; your unflappableness will enhance your credibility with the judge and the members. Thus, when you hear the word "objection," your mantra should be "I am a statue, I am unmoving and unmoved, I will not sway with the hot air blowing my direction." Or something like that.

I am a statue, I am unmoving and unmoved, I will not sway with the hot air blowing my direction

I have mentioned this before, but it bears repeating as it was way early in this Compendium: Cockiness does not equal Confidence.

It equals Jackassery. Do not act like a jackass at counsel table. No making faces, snickering at witnesses or opposing counsel, loud talking while opposing counsel is conducting a direct or making an argument. Some attorneys may think all of that is good tactics intended to distract opposing counsel or send some message to the trier of fact … but the message it sends to members and judges (particularly in the military) is that you are a fool, a jackass.

Most of your interactions with opposing counsel will be professional and civil, with only occasional fits of animosity and wanderings into jackassery, by both sides. But you will get stuck litigating against a jackass counsel and the more you litigate the more this will happen. And you will definitely want to counter-attack once attacked, if for no other reason than to satisfy your fear that failing to do so makes you seem "weak." But understand that you will never get the satisfaction of having jackass counsel admit that you bested them. When the jackass counsel "wins" a case, which can happen despite their antics, it is because of what they misperceive as their take-no-prisoners approach to litigation (their approach is really just being obnoxious). When they "lose" a case … well, they never lose a case, the case was lost because the other side cheated, or the judge was an idiot, or … something.

It is trite, but Mark Twain had it right: "Never wrestle with a pig--it gets mud all over you and the pig likes it." True, there is very little else worse than remaining civil in the face of personal attacks from a jackass counsel and then "losing" a case. But understand the momentary despair of such a loss will quickly dissipate and the "loss" itself will soon be forgotten (and not placed on you by those in the know anyhow as those in the know know that facts and evidence win or lose cases, not the performance of counsel). What will remain in the short and long term is your reputation—do not get that dirty by wrestling with jackass counsel. I have done it in the past, maybe slipped into jackassery myself on occasion, and to this day that dirtiness has hurt my reputation with some folks.

Civility will go a long way to enhancing your credibility in court and your reputation outside of it. By avoiding pointless personal battles, you can focus on the important skills of litigation detailed *ad nauseum* in the preceding couple hundred pages. In that and in many other ways civility really is its own reward.

Post-Trial