

West Virginia Bar WV Supreme Court of Appeals College of Labor & Employment Lawyers and West Virginia University College of Law present

Maintaining Civility in the Practice of Law

www.laborandemploymentcollege.org <https://wvbar.org/> <https://www.law.wvu.edu/>

Presenters

Evan Jenkins
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West Virginia University College of Law



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Presentation Overview

- Define Civility
- Contextualizing Civility
- WV and Civility
- Incentives for Civility/Disincentives for Incivility
- How Incivility Affects Different Relationships
- Promoting Civility in Different Contexts
- Civility's Relationships To the Rules
- Q&A

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Definition: Good Behavior for the Good of the Community

“Civility comes from French and Latin etymologies, suggesting that one should exhibit **good behavior for the good of a community**. The principles of civility in law permeate the entire legal system, defining at the core what it means to be a lawyer. Such principles speak to the lawyer’s dual duty as an officer of legal system and the advocate of the client. Even in advocating for a client, a lawyer must show respect for the legal system. Zealous advocacy does not extend to offensive tactics, discourtesy, or disrespect.”



<https://www.dallastdivorce.com/2018/04/articles/divorce-news/does-civility-mean-hugging-your-opposing-lawyer/>

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What Civility **Is Not** and **Is** —In the Legal Context

Civility IS NOT

- x the absence of disagreement
- x the absence of criticism
- x about liking someone
- x good manners alone.

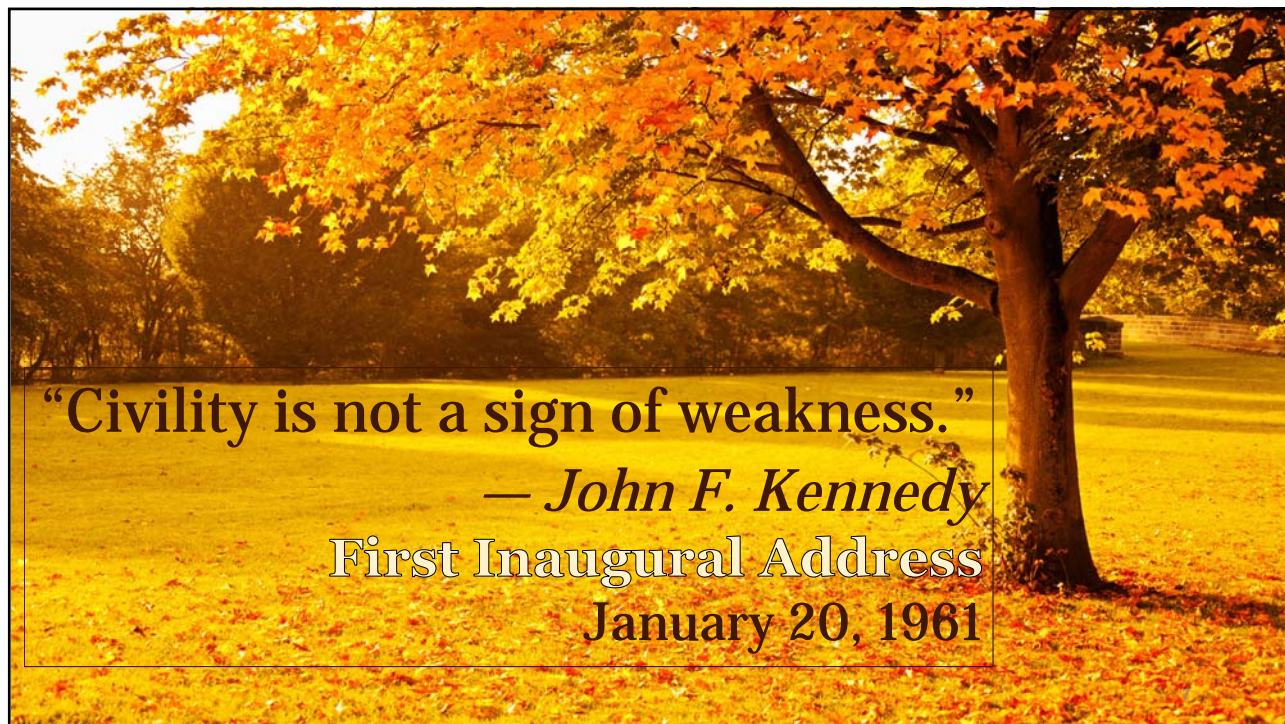
- ✓ There is always disagreement in the legal context
- ✓ Legal process requires criticism such as pointing out errors in an associate's or opponent's brief, draft, facts, or legal argument.
- ✓ Civility requires respect, not fondness.
- ✓ Good manners are necessary but not sufficient. Using good manners to fire a person because she is black is not civil.

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Let's Put Law Practice Today in Context

- Increasingly polarized politics
- Increasingly litigious society? (conflicting studies)
- Correlation between incivility and social media: uncivil comments on social media have grown from 4.4 uncivil interactions online per week in 2013 to 5.5 in 2019
- 2018 NORC U. Chi.: 74% Americans believe civility is on the decline (<https://www.sciencedaily.com/releases/2018/04/1804222018040.htm>)
- But most Americans describe their workplace as civil



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WV State Bar/WV State Bar Constitution

Article I: Definition:

- “[A]n agency of the Supreme Court of Appeals of West Virginia.”

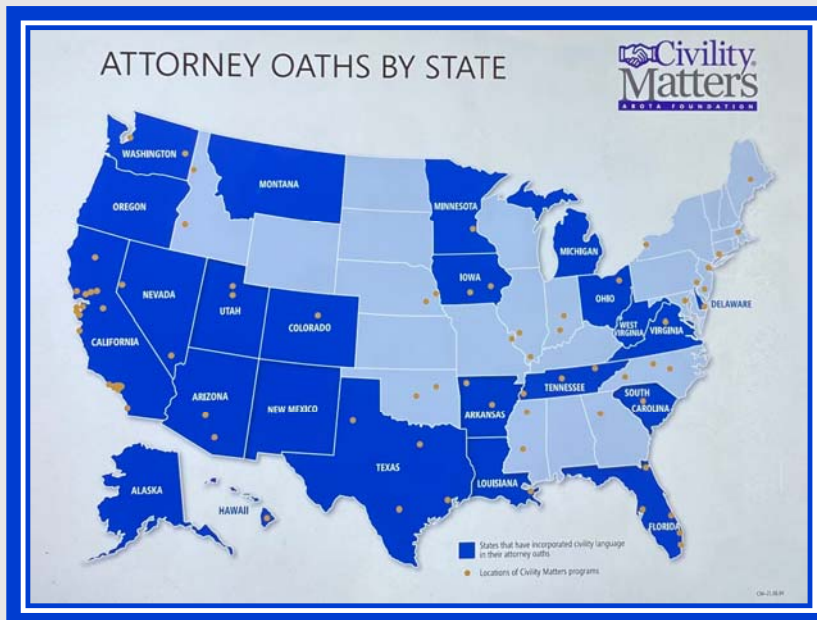
Art. II, ¶1 Object:

- “to protect the interests of the **public**;
- to advance the **administration of justice** and the science of jurisprudence;
- to improve the **relations** between **the public and the bench and the bar**;
- to uphold & elevate the standards of **honor, integrity, competency** and **courtesy** in the legal profession; and
- to encourage **cordial relations** among its members.”

Art. II, ¶2 Purpose:

- “to give effect to pertinent rules of the Supreme Court of Appeals of West Virginia,
- to perform the functions expressed in this constitution and bylaws, and
- to perform such other functions as directed by the Supreme Court of Appeals of West Virginia.”

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**WV has joined
23 other states
by including
civility in its
attorney oath**

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Rules and Oaths across the U.S. that Contain a Civility Component

Rules (incomplete)

Alabama
Colorado
Connecticut
D.C.
Delaware
Florida
Hawaii
Kansas
Michigan

New Jersey
New York
North Carolina
Ohio
Vermont
Washington
West Virginia

Oaths (complete)

Alaska
Arizona
Arkansas
California
Colorado
Delaware
Florida
Hawaii
Iowa
Louisiana
Michigan
Minnesota

Montana
Nevada
New Mexico
Ohio
Oregon
South Carolina
Tennessee
Texas
Utah
Virginia
Washington
West Virginia

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I. LAWYERS' DUTIES TO OTHER COUNSEL AND THE COURTS

A. CIVILITY AND COURTESY

1. A lawyer should treat all counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications. A lawyer should not, even when called upon by a client to do so, abuse or indulge in offensive conduct, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.
2. A lawyer should not encourage or knowingly authorize any person under the lawyer's control to engage in conduct that would be improper if the lawyer were to engage in such conduct.
3. A lawyer should not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.
4. Court sanctions should not be sought without first conducting a reasonable investigation and unless fully justified by the circumstances and necessary to protect the client's lawful interests.
5. A lawyer should adhere to all express promises and agreements with other counsel, whether oral or written, and should adhere in good faith to all agreements implied by the circumstances or local customs. Where practical, such agreements should be reduced to writing.
6. A lawyer should endeavor to confer early with other counsel to assess settlement possibilities, but should not falsely hold out the possibility of settlement as a means to adjourn discovery or to delay trial.
7. A lawyer should not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.
8. Unless specifically permitted or invited by the court, a lawyer should not send copies of correspondence between counsel to the court. Counsel may copy the court when the correspondence does not contain material which would infer that counsel or witnesses have conducted themselves inappropriately.

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<http://wvdc.org/sopc.htm#1a>

Supreme Court of Appeals of West Virginia



Oath of Attorney

"I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of West Virginia; that I will honestly demean myself in the practice of law; that I will conduct myself with integrity, dignity and civility and show respect toward judges, court staff, clients, fellow professionals and all other persons; and to the best of my ability, execute my office of attorney-at-law; so help me God."

WV Oath

(adopted summer 2021)

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What Are the Incentives for Civility?

- Clients come back
- Referrals from other attorneys
- Judges' respect
- Personal impacts
 - Can lead to health and diversity issues

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How Attorneys Experience Unprofessional Behavior

Prejudice

- Inappropriate comments about age/experience
- Racially or culturally insensitive comments
- Sexist comments

Rudeness

- Inappropriate interruptions of others
- Sarcastic or condescending attitude
- Inappropriate language or verbal abuse

Strategic Incivility

- Playing hardball
- Inflammatory writing
- Misrepresenting facts of negotiating in bad faith
- Indiscriminate use of drafts




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Organizational Outcomes of Incivility

- Reduced employee satisfaction and higher turnover costs
- Incivility disproportionately impacts women and minorities = lack of diversity
- Lose repeat and referral business

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by Unknown Author in Unknown context

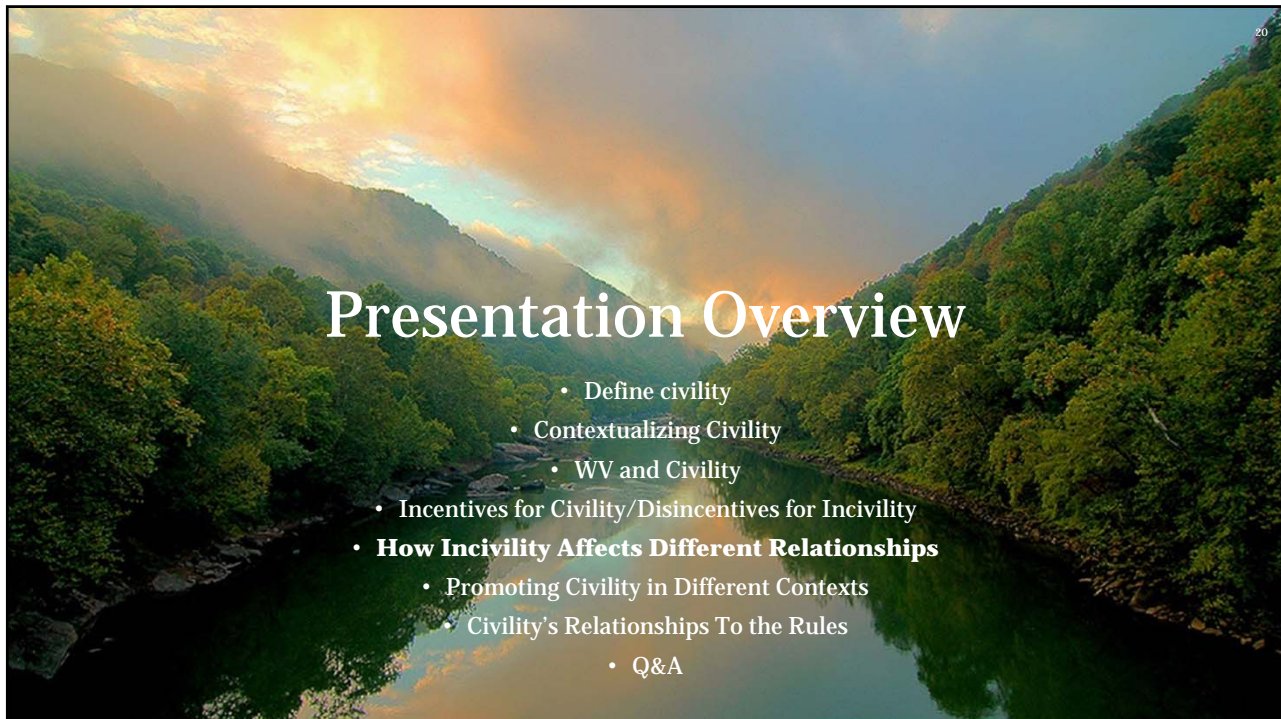


Personal outcomes

- Possible sanctions
- Legal community*
 - 28% experience symptoms of depression
 - 19% experience anxiety
 - 23% experience stress
- Suicide rate is 6 times higher

* "The Prevalence of Substance Use and other Mental Health Concerns Among American Attorneys," 2016.

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Relationship Between You and Your Clients



Loyalty doesn't interfere with objective, independent advice
 Advise client against pursuing frivolous claims
 Advise against tactics that unduly delay, harass, or drain financial resources of opponent
 Show clients/co-workers that civility and courtesy are not equated with weakness



Loyal and committed to client
 Pursue client objectives expeditious and economical
 Advocate zealously
 Counsel client about ADR in appropriate cases



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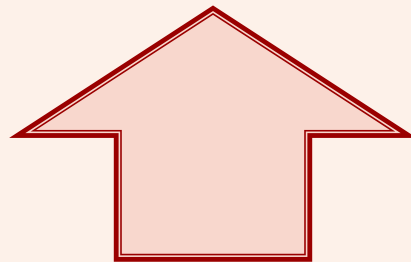
You and Opposing Parties and Their Lawyers



Treat opponents with courtesy, civility, respect, dignity
 Consult with opposing counsel before scheduling depositions, meetings, or hearings
 Cooperate with opposing counsel when scheduling
 Refrain from using litigation to harass opponent
 Refrain from using excessive or abusive discovery tactics
 Refrain from using unnecessary delay
 Avoid groundless objections during discovery and other proceedings



Be a zealous advocate
 Be a diligent advocate
 Be a competent advocate
 But . . .



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Relationship Between You and Tribunals



Proper functioning of our system of justice is enhanced by civility & courtesy
 Consistent with client's interests/instructions, endeavor to minimize or resolve litigation
 Voluntarily withdraw claims or defenses once they appear to lack merit
 Make reasonable efforts early on to agree on a voluntary exchange of info and discovery plan
 Attempt to resolve pleadings and discovery objections by agreement
 Notify the tribunal as early as possible when hearings, meetings, depositions need to be rescheduled
 Verify availability of key witnesses early—before dates are set if possible
 Be punctual in court proceedings
 Approach tribunals with candor, honesty, diligence, and respect



Proper functioning of our system of justice is enhanced by zealous advocacy
 Act consistently with client's interests and instructions



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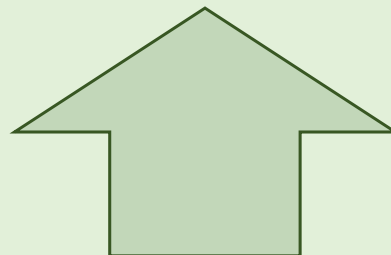
You and Public and System of Justice



You also have a commitment to the public good
 Competence: When necessary, associate with or refer clients to an expert
 Encourages other to conduct themselves in a manner consistent with a self-governing profession
 Conduct yourself in a manner that enhances the image of the legal profession
 Conduct yourself in a manner that shows acceptance of your commitment to public service, improvement of justice, access to legal assistance



You have a commitment to your client's cause
 Be competent: Keep current in areas of law in which you practice
 Conduct yourself in a manner consistent with a self-governing profession
 When advertising your services think about your duties to our justice system



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Relationship Between You and Other Bar Members




Continues throughout your career
 So why not mentor a law student?



Started in law school



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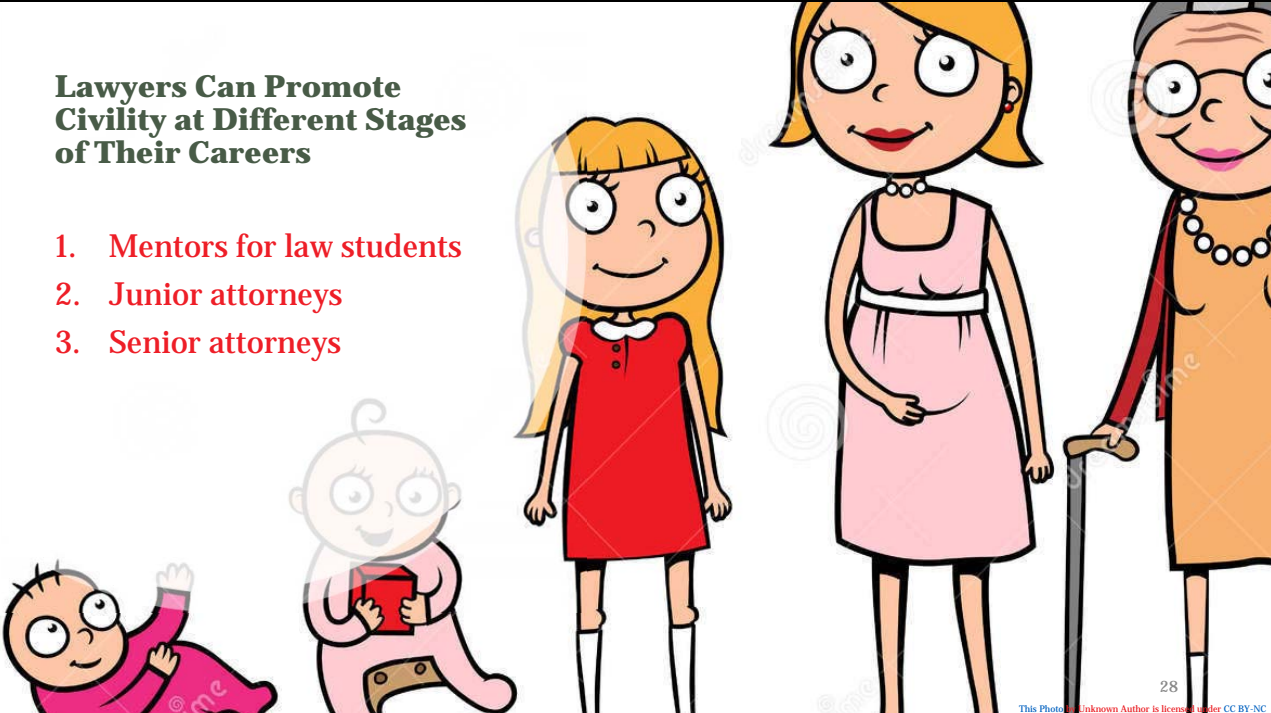
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Lawyers Can Promote Civility at Different Stages of Their Careers

1. Mentors for law students
2. Junior attorneys
3. Senior attorneys



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Promoting Civility in Transactions

- Not just about litigation
- Be guided by the client's goals in completing transactions
- When substance is not at issue, pride of authorship only delays the deal and contributes to higher costs
- Clearly identify for opposing counsel all changes made to all documents



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Ethics vs. Professionalism

Professionalism



Floor

R 1.3: "A lawyer shall act with reasonable diligence and promptness in representing a client."

**Rules of Professional
Conduct (Legal Ethics)**

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ABA Model Rules of Professional Conduct Applicable to Civility

Rule 1.3, cmt. [1]: "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client....The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."



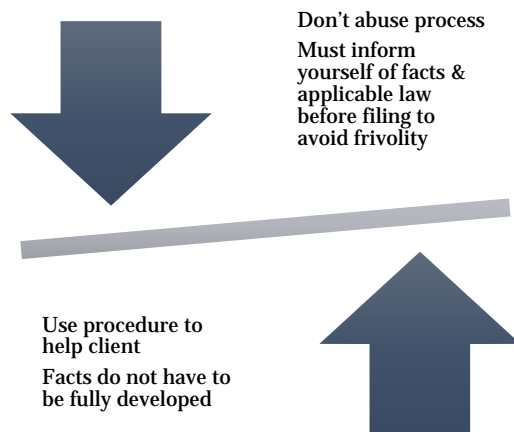
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Incivility Implicates Several WV Rules of Professional Conduct

Rule 3.1	• Meritorious Claims and Contentions
Rule 3.2	• Expediting Litigation
Rule 3.3	• Candor toward Tribunal
Rule 3.4	• Fairness to Opposing Party and Counsel
Rule 3.5	• Impartiality and Decorum in the Tribunal
Rule 4.1	• Truthfulness in Statements to Others
Rule 4.4	• Respect for Rights of Third Persons, and Rule 8.4 Misconduct.
Rule 8.3	• Violation of these Rules is enforceable by Office of Disciplinary Counsel and Rules mandate reporting of professional misconduct

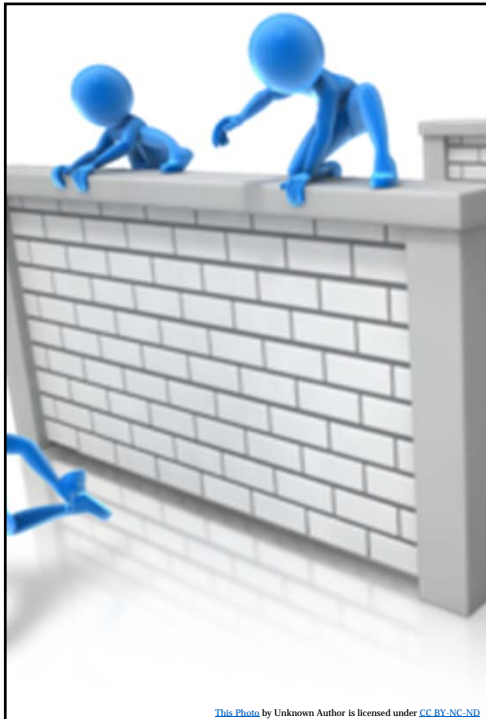
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Rule 3.1. Meritorious Claims and Contentions



A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

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Rule 3.2. Expediting Litigation

- “A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client.”
- Cmt. [1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

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Rule 3.3. Candor Toward Tribunal

A lawyer shall not knowingly:

- make false statements of law or fact or fail to correct false statements of material fact or law to a tribunal;
- fail to disclose controlling authority to the tribunal; or
- offer false evidence.

See also Rule 4.1 next slide



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Rule 4.1. Truthfulness in Statements to Others

In representing a client, a lawyer shall not knowingly:

- make a false statement of material fact or law to a third person; or
- fail to disclose a material fact to a third person when necessary to avoid assisting client's criminal or fraudulent act (unless disclosure prohibited by Rule 1.6).

See also Rule 3.4, next.



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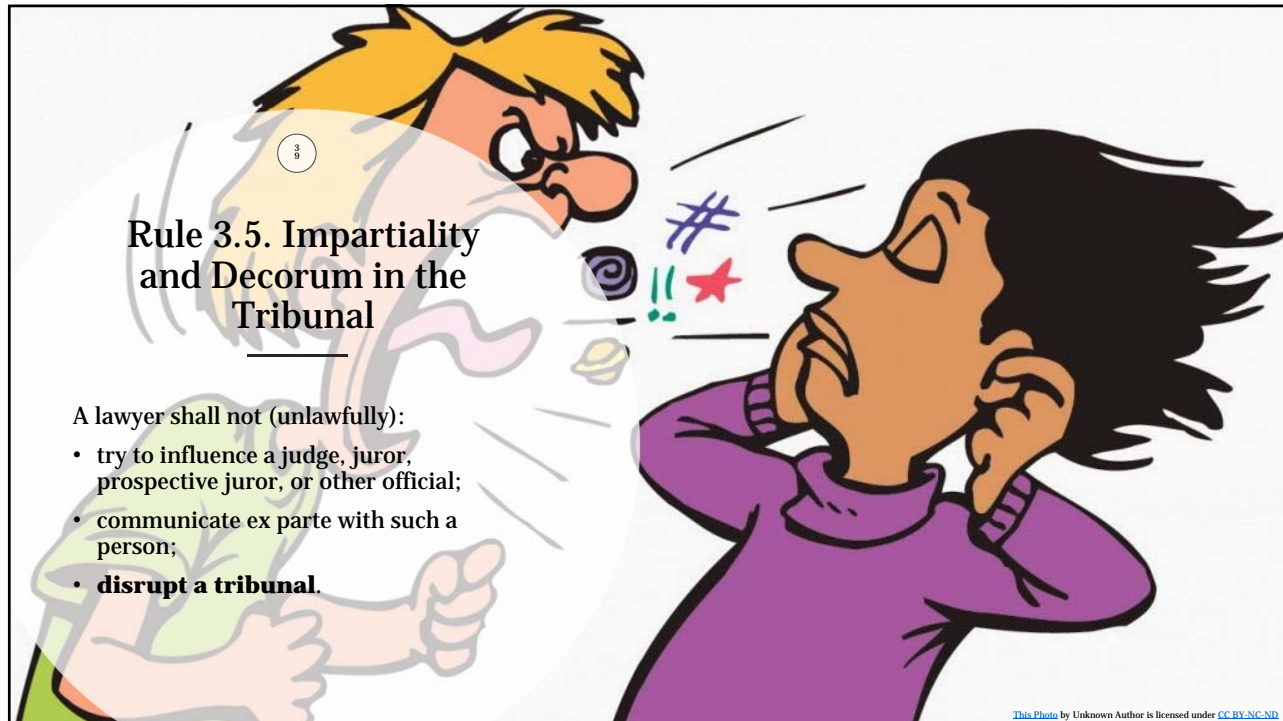
Rule 3.4. Fairness To Opposing Party and Counsel

A lawyer shall not (or counsel someone to):

- unlawfully obstruct another party's access to evidence
- unlawfully alter, destroy or conceal evidence
- falsify evidence
- make frivolous discovery requests
- fail to make reasonable diligent efforts to comply with a legally proper discovery request by opposing party



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Rule 3.5. Impartiality and Decorum in the Tribunal

A lawyer shall not (unlawfully):

- try to influence a judge, juror, prospective juror, or other official;
- communicate ex parte with such a person;
- **disrupt a tribunal.**

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Rule 4.4(a). Respect for Rights of Third Persons

“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

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Rule 4.4(b). Respect for Rights of Third Persons

A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

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Rule 8.3. Reporting Professional Misconduct

A lawyer who knows that another lawyer or judge has violated a Rule of Professional Conduct that raises a substantial question as to that **lawyer's honesty, trustworthiness or fitness as a lawyer**, shall inform the appropriate professional authority.

But ...



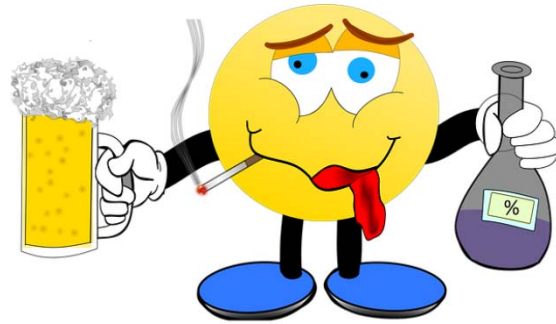
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Rule 8.3. Reporting Professional Misconduct

Sometimes a person's incivility is related to his or her responses to stress. R. 8.3(c)

West Virginia Judicial and Lawyer Assistance Program (WVJLAP) could be of some help and the disclosure requirements of R. 8.3 do not apply.



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“Civility Works”

Why Is Civility Important in Various Contexts?

The WV Bar
College of Labor and Employment Lawyers

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Questions are the path to learning

Questions, Comments, Discussion

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MATERIALS

ABA: Civility as the Core of Professionalism (August 22, 2019)

College of Labor and Employment Lawyers: Principles of Civility and Professionalism for Advocates

State Bar Civility Rules (California, West Virginia, etc.)

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West Virginia



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Office of Disciplinary Counsel

**City Center East
4700 MacCorkle Avenue SE, Suite 1200C
Charleston, West Virginia 25304**

Office: (304) 558-7999

Fax: (304) 558-4015

- *[Staff](#)
- *[Lawyer Disciplinary Board Information](#)
- *[Complaint Form](#)
- *[Rules of Professional Conduct](#)
- *[Rules of Lawyer Disciplinary Procedure](#)
- *[Rules of The West Virginia Lawyer Assistance Program](#)
- *[Standards of Professional Conduct](#)
- *[Legal Ethics Opinions](#)
- *[Recent Disciplinary Decisions](#)
- *[Links to Other Agencies](#)
- *[Additional Information](#)

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The End



**The College
of Labor and
Employment
Lawyers**

Thank you

College of Labor and Employment Lawyers, <https://www.laborandemploymentcollege.org/>

West Virginia University College of Law, <https://www.law.wvu.edu/>

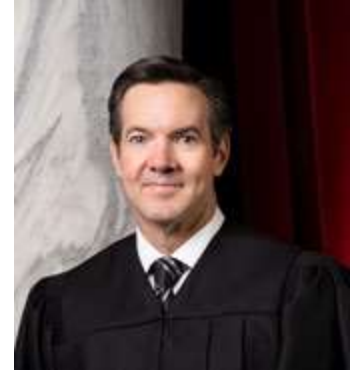


LEADERSHIP FOR GREATER PURPOSE

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Chief Justice Evan H. Jenkins was appointed to the Supreme Court of Appeals of West Virginia by Governor Jim Justice on August 25, 2018, and took the oath of office on October 1. Justice Jenkins was elected on November 6, 2018, to fill the seat vacated by the retirement of Justice Robin Davis until the end of that term on December 31, 2024.

At the time of his appointment to the bench, Chief Justice Jenkins was a member of the United States House of Representatives, to which he was elected in 2014 and re-elected in 2016, to represent the citizens of West Virginia's Third Congressional District. For four years he served on the House Appropriations Committee and most recently as the Vice-Chairman of the Commerce, Justice and Science Sub-Committee. He previously served three terms in the West Virginia House of Delegates, being elected in 1994, 1996, and 1998, representing Cabell and Wayne counties, followed by being elected to three terms in the West Virginia Senate, in 2002, 2006, and 2010. Before his election to Congress, he was executive director of the West Virginia State Medical Association, general counsel of the West Virginia Chamber of Commerce, and taught business law at Marshall University. Justice Jenkins was admitted to the practice of law in West Virginia in 1988 and began his legal career as an associate attorney with the Huntington law firm of Jenkins Fenstermaker, PLLC.



Chief Justice Jenkins is a native of Huntington. He has a bachelor's degree in business administration from the University of Florida and a law degree from the Cumberland School of Law at Samford University.

Chief Justice Jenkins and his wife, Elizabeth, live in Huntington where they raised two sons and a daughter. He is active in the community as a member of the First Presbyterian Church and has served as a volunteer leader for the American Red Cross, Boy Scouts of America, Big Brothers Big Sisters of the Tri-State Area, Foundation for the Tri-State Community, Foster Foundation, and Lily's Place, a nationally recognized facility that cares for newborn infants suffering from drug exposure during pregnancy.

Justice Elizabeth "Beth" D. Walker was elected to the Supreme Court of Appeals of West Virginia on May 10, 2016, becoming the first Justice elected in a non-partisan race. She took office on January 1, 2017 and served as Chief Justice in 2019.

Justice Walker is active on social media and passionate about public engagement and civics education. In 2020, she and her friends Justice Rhonda Wood of the Arkansas Supreme Court, Chief Justice Bridget McCormack of the Michigan Supreme Court, and Justice Eva Guzman of the Texas Supreme Court launched the podcast Lady Justice: Women of the Court. It features discussions of the judicial branch of government and their experiences on their state's highest appellate court and is available online at www.ladyjusticepod.com.



Justice Walker was raised in Huron, Ohio. She is a 1987 summa cum laude graduate of Hillsdale College in Hillsdale, Michigan. She earned her law degree in 1990 from The Ohio State University, where she was Articles Editor for The Ohio State Law Journal. During her years of private practice, she participated in courses offered by the Program on Negotiation at Harvard Law School, including its Mediation Workshop. Immediately after graduating from law school, Justice Walker moved to West Virginia and joined the law firm of Bowles Rice McDavid Graff & Love (now Bowles Rice) in Charleston. During her twenty-two years at Bowles Rice, she concentrated her statewide practice on labor and employment law and mediation. Justice Walker served on the firm's Executive Committee and in several other leadership roles.

After moving from Charleston to Morgantown in 2011, Justice Walker became Associate General Counsel for the West Virginia United Health System (also known as West Virginia University Medicine). In that role, she advised WVU Medicine's hospitals and other affiliates regarding labor and employment matters from 2012 until she resigned in 2016 to take office.

In 2012, Justice Walker was elected a Fellow of the College of Labor and Employment Lawyers. She is a 1999 graduate of Leadership West Virginia. A lifelong Girl Scout, Justice Walker is former chair of the board of directors of Girl Scouts of Black Diamond Council. She also served as chair of the boards of Leadership West Virginia and Kanawha Pastoral Counseling Center. She is married to Mike Walker and stepmother to Jennifer. They live in Charleston.

[Anne Marie Lofaso](#) is the Arthur B. Hodges Professor of Law at West Virginia University College of Law, where she teaches labor and employment law, professional responsibility, and appellate advocacy, among other things, and is the Advisor for the Labor and Employment Law Concentration. Professor Lofaso is also the co-Director (with Jones Day Partner, Larry Rosenberg) of the WVU United States Supreme Court Clinic and the former Associate Dean (2011–2015). Her clinic case load deals primarily with questions involving criminal law, criminal procedure, constitutional law, and immigration law.

Professor Lofaso, a research scholar for the [NYU School of Law Center for Labor & Employment](#) and the Oxford Human Rights Hub, is a prolific writer and public lecturer in the labor law field with numerous law review publications. Her casebook, *Modern Labor Law in the Private and Public Sectors* (with S. Harris, J. Slater, C. Garden, & R. Griffin) (Carolina Academic Press), and textbook, *Mastering Labor Law* (with P. Secunda, J. Slater, & J. Hirsch) (Carolina Academic Press), are the among the first U.S. labor-law-education books to treat both private and public-sector labor law. She is also co-author of the forthcoming case book *Public Sector Employment Law* (with M. Malin, J. Slater, J. Hirsch, & M. Oswalt) (West). As of 2020, Professor Lofaso is the author/editor of *NLRB Law and Practice* (Lexis/BNA) and *Drafting the Union Contract* (Lexis/BNA), both multi-volume treatises designed for the practitioner. She has been a Fellow to the [College of Labor and Employment Lawyers since 2015](#).

After clerking for the Second Circuit, and working as an associate for Milbank, Tweed, Hadley & McCloy in its business reorganization department where she primarily represented secured creditors committees in Chapter 11 bankruptcies, Professor Lofaso **spent ten years as an attorney with the National Labor Relations Board's Appellate and Supreme Court Branches** in Washington, D.C., under the Clinton and Bush administrations. At the Board, Professor Lofaso litigated cases and advised the United States Solicitor General on labor and employment cases before the Supreme Court. Professor Lofaso earned her A.B. *magna cum laude*, from [Harvard University](#), J.D. from the [University of Pennsylvania](#), and D.Phil. (Ph.D.) in jurisprudence from the University of Oxford, where she wrote her dissertation on mass economic dismissals.

Curriculum Vita

PAUL R. SHERIDAN

EMPLOYMENT HISTORY

- Supervising Attorney, Logan Office of Legal Aid of West Virginia 2015-present.
- Principal, Paul R. Sheridan Attorney at Law, 2013- present.
- Instructor, West Virginia University, Masters in Legal Studies Program, 2012-2015
- Interim Director, ACLU of West Virginia, 2013
- Counsel to the W.V. Senate Select Committee on Children and Poverty, 2013
- Deputy Attorney General, Civil Rights Division, Office of the WV Attorney General, 2004-2013
- Senior Assistant Attorney General, WV Civil Rights Division, 1990-2004
- Staff Attorney, Appalachian Research and Defense Fund, Inc., Logan, West Virginia, 1984-1990

ACTIVITIES AND AFFILIATIONS

- Admitted to practice law in the state and federal courts in West Virginia, and in the United States Circuit Courts of Appeals for the Fourth Circuit and the District of Columbia.
- Fellow, College of Labor and Employment Lawyers
- Member, West Virginia Employment Lawyers Association
- Board of Directors, Mountain State Justice
- Board of Directors, Laotong Yoga, Inc. (providing yoga instruction for incarcerated persons)
- Judiciary & Democracy Committee, Kettering Foundation, 2012-2013
- West Virginia Holocaust Commission, 2001-2013
- West Virginia Civic Literacy Council, 2011-2013
- Volunteer Mediator, W.V. Center for Dispute Resolution, Kanawha County Circuit Court, and U.S. District Court. (N.D.W.V.) 1995-2010
- Bias Crime Task Force, National Association of Attorneys General, 1995-2002
- U. S. Department of Justice Working Group on Bias Crime Training, 1997-2000

FORMAL EDUCATION

- West Virginia University College of Law, Morgantown, West Virginia, J.D., May 1984. Order of the Coif.
- Wesleyan University, Middletown, Connecticut, College of Social Studies, B.A., 1977. Cum laude.

Paul R. Sheridan works for Legal Aid of West Virginia, supervising its Logan office. He is the former head of the Civil Rights Division of the West Virginia Attorney General's Office, where he worked for 23 years. As part of his work for the Civil Rights Division, he organized and coordinated the West Virginia Hate Crime Task Force. He has also worked as counsel to the West Virginia Senate Select Committee on Children and Poverty, as a staff attorney to the Appalachian Research and Defense Fund, and as the interim director for the ACLU of West Virginia.