TO THE EDITOR:

Given the recent increased attention given to matters of professional ethics, we thought that a recurrent problem, and a proposed solution, should be publicly discussed.

In two recent cases, this office faced opponents who either did not understand, or did not care about, basic ethical behavior. In the first, the attorney had her staff call our client, and she herself called our expert witness to try to get information "off the record." In the second case, the attorney wrote a letter directly to our client. Additionally, that attorney insisted for months that his client did not have the funds in dispute, and did not have anyone else holding the money for him. The attorney came into possession of proof that both those representations were false, but did not share that revelation with the court or opposing counsel.

Both attorneys violated SCR 182, which prohibits any contact with a represented opposing party. SCR 182; Model Rule of Professional Conduct 4.2. ***All*** cases unanimously say that neither a client's interests nor counsel's own ignorance or negligence could justify such conduct. *Cronin v. Eighth Judicial Dist. Court*, 105 Nev. 635, 781 P.2d 1150 (1989); *In re News Am. Publ'g Corp., Inc.*, 974 S.W.2d 97 (Tex. Ct. App. 1998).

The second attorney also violated SCR 172, which requires a lawyer to tell the Court when a factual representation made earlier by counsel is discovered to be false.[1] Model Rule 3.3(a)(4) & Comment, paragraph 11; *Maryland Nat'l Bank v. Resolution Trust Corp*., 895 F. Supp. 762 (D. Md. 1995) (once lawyer has made a representation of fact, he is duty-bound to advise court and opposing counsel if he subsequently learns that his representation was false).

Adherence to ethics rules is not rocket science, and is the ***minimum*** to be demanded of anyone who expects to exercise the privilege of practicing law. There is no question that the lawyers knew perfectly well (or at least should have known) that they were acting unethically.

The judges presiding over those two cases, however, did . . . nothing. There was no consequence to either lawyer. One judge "declined" to make a record of the ethical violations, without comment, and the other gave a speech to counsel about how we must "get along" because the court wanted to deal with the merits of the dispute, and counsel would have future cases against one another.

In the meantime, several judges have expressed dismay at rancor between counsel in their courtrooms. There have been calls in recent years for a "return to civility" in the Bar, from on and off the bench. From our observation, however, it is actions (and, more often, the inactions) of the judges themselves that fuel the problem about which they complain.

Specifically, we submit that in the absence of adherence to at least the minimum standards of ethical conduct required by the Supreme Court Rules and the Model Rules, any appearance of

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[1] The measures to be utilized include "remonstrating with the client privately, withdrawing if possible, and disclosing the fraud." Annotated Model Rules of Professional Responsibility (4th ed., ABA 1999) at 325.

civility is a sham. In such an environment, a pleasant demeanor by counsel is mere duplicity, covering up conduct in and out of court which undercuts the entire legal process.

Judicial tolerance of unethical conduct condones it. When unethical conduct is used by lawyers to achieve their ends in litigation, judicial tolerance ***encourages*** that conduct, inevitably leading to breakdown of the system of professional respect that promotes the efficient and civil resolution of legal disputes. Counsel complying with the ethical rules in such an environment are even put at something of a competitive disadvantage, and the lawyers prone to act unethically are not going to stop doing so until there are some consequences for their misbehavior.

It would be hypocritical to demand – or expect – "civility" between lawyers until judges demand and enforce ***ethical*** behavior. Lawyers only have good reason to be civil when they have reason to expect that their opponents are complying with ethical standards. Efforts to promote "civility" where unethical conduct is tolerated might make courtrooms ***seem*** more pleasant, but they will be places less and less deserving of the dignity and respect that is the foundation of truly civil behavior by legal professionals.

Judges who want their courtrooms to be more "civil" should start with a basic foundation of decency, by strictly enforcing the existing minimum standards of ethical behavior set out in the SCRs and the Model Rules. That means making findings on the record when an attorney violates those rules, and not tolerating unethical behavior in the name of "getting to the merits" or because "we are all going to have to work together in the future."

The district courts must demand ethical behavior from the attorneys, even if it "distracts" the courts from the immediate topic of the hearing. It is the only way to preserve the purity of the well from which we all must drink.

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