

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

2020

Stay in the Fight with Civility and Professionalism

David Spratt

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Commercial Law Commons](#), [Contracts Commons](#), [Law and Economics Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Securities Law Commons](#)



BY DAVID H. SPRATT
PROFESSOR, AMERICAN UNIVERSITY

'Stay in the Fight' with Civility and Professionalism

Washington baseball fans are pumped! For the first time since 1933, a major league baseball team from Washington, D.C., played in the World Series. The Washington Nationals' season had a rocky start with a staggering 31 losses in the first 50 games. Defying the odds and the public's expectations, the team rallied and, to use its playoff slogan, chose to "Stay in the Fight." By the end of the season, the Nationals boasted an 81-40 record, clinched a spot as the National League East wild card, won the National League Championship Series, and achieved what many deemed impossible.

Your resident columnist had the pleasure of attending the wild card game and several division and championship games at Nationals Park. The atmosphere was euphoric. At the end of each winning game, Nationals fans displayed a camaraderie with one another that is all-too missing from society. Leaving the stadium, strangers hugged and smiled at each other. Every few steps, there were high-fives, and fans happily cheered and chanted in unison walking to the Metro, riding down the escalators, and even on the trains. Finally, Washington was getting along and demonstrating a sense of community.

So what does this have to do with being a lawyer and legal writing? Unfortunately, the legal profession, like the rest of society, has witnessed a decrease in professionalism. We do not always get along, and civility and kindness in the practice of law is more frequently the exception, not the rule. This should not be the case. Do not give up on civility and professionalism. Do not assume just because others might not be courteous that you should join their cause. Like the Nationals, defy expectations and rally. This column offers several ways to "Stay in the Fight" and model civility in legal writing and our written interactions.

ACKNOWLEDGE EMAILS

My 13-year-old son plays baseball and makes a point at the end of every baseball game to find the umpires and thank them for their time and service on the field (no matter how many "bad" calls they make). The umpires notice and appreciate this small act of kindness.

When did it become acceptable in the legal field to forgo a simple "thank you"? As a law professor teaching primarily first-year law students, I spend significant time answering

Remember that the person who is your **adversary** today may be your **teammate** tomorrow.

emails. As students assimilate into the legal discourse community, they ask me numerous detailed questions that require lengthy, complex answers. I also get emails from practicing lawyers checking a student's references or on a myriad of other topics. I do not mind receiving or answering emails. What I do mind, however, is the silence with which these recipients accept my answers. When you receive an email that conveys information to you or answers a question, take 10 seconds to type "Thank you" or "I appreciate the response. Have a nice afternoon." This small act of kindness not only makes the writer feel appreciated and acknowledges her time and effort, but also makes her more receptive to answering your questions in the future.

BE POSITIVE

Out of the mouths or actions of babes often comes wisdom. Unfortunately, my son's travel baseball team last year did not have a season like the Nationals. The team won a few games, but it lost more. At the end of each game, we pack up and walk to the car, usually passing other players who played for the opposing team. Win or lose, my son always approaches these players and gives them compliments, such as "Good game" or "Nice job pitching." At times, the look on the players' faces is priceless. They seem confused, and they (and sometimes their parents) are speechless. How could another team's player be complimenting me? We should be mean to each other. We are adversaries.

Competition does not demand a lack of civility, either on the baseball field or in the practice of law. No matter the dispute, legal adversaries, like baseball players, need not be unnecessarily competitive and unfriendly to one another personally. When communicating with opposing counsel, either in writing or in person, do not always feel the need to be defensive or resort to attack mode. Choose your words carefully, and make sure you would be comfortable with those words ending up on a trial exhibit, in social media, or the front page of a newspaper. Make sure the tone of your communication is positive, professional, and courteous. Even take time for a brief pleasantry or two. Remember

that the person who is your adversary today may be your teammate tomorrow.

BE TRANSPARENT

In my Contracts class, we recently covered the battle of the forms. The battle of the forms refers to a situation in which the offeror makes an offer using its own boilerplate terms and the offeree responds by sending back different boilerplate. Often the parties do not discuss the boilerplate terms or even mention that there are, in fact, different terms in their respective boilerplate. Under the common law, any discrepancy between the forms prevents the offeree's response from operating as an acceptance, and a contract does not form. Under UCC § 2-207, which deals with the sale of goods, a multiple-step process is used to determine whether the additional, different terms become part of the parties' contract. Under the UCC, litigation often ensues over whether an additional term materially altered the contract, in which case the additional term is not included in the contract.

As a legal drafter, why put yourself in this situation? When negotiating a deal, be upfront with opposing counsel about any terms you are adding, and do not try to slip in new boilerplate or other terms. When I was in practice, I was always specific about any changes I made to a proposed settlement agreement, boilerplate or otherwise. This practice eliminated confusion between the parties, prevented expensive and time-consuming interpretation litigation, and showed a commitment to professional, ethical, and good-faith negotiations. Follow my lead, and "Stay in the Fight" for professionalism.

When you read this column, the World Series will be a distant memory. The Nationals showed us how to overcome the odds and "Stay in the Fight" with dignity and class. As a member of the legal profession, you, too, can overcome the odds and "Stay in the Fight" against increasingly self-focused and unprofessional behavior. ■

Your emails and comments, as long as they are civil and professional, are welcome at dspratt@wcl.american.edu.