

BOSTON BAR ASSOCIATION

***TASK FORCE ON CIVILITY
IN THE LEGAL PROFESSION***

REPORT

MAY 23, 2002

INTRODUCTION

In November, 2001, Michael B. Keating, Esquire, President of the Boston Bar Association (“BBA”), created the BBA Task Force on Civility in the Legal Profession. Mr. Keating appointed Superior Court Associate Justice Peter M. Lauriat and Robert J. Muldoon, Jr., Esquire, to co-chair the Task Force and named the following members:

Eugene B. Benson	Karen V. Morton
Sharon R. Burger	Brien T. O’Connor
Marcus E. Cohn	John C. Ottenberg
Jennifer W. Corinis	Andrew A. Rainer
Hon. Mary Ann Driscoll	Lynne F. Riley
Richard M. Gelb	Constance L. Rudnick
Martin A. Glazer	Hon. Charles B. Swartwood, III
Adam D. Janoff	Robert R. Trant
Robert K. Lamere	Jayne B. Tyrrell
Cynthia Robinson Markey	Michael D. Vhay
Mark C. Michalowski	

The Task Force first met on December 6, 2001, and organized four committees:

1. Survey of Other Jurisdictions
2. Survey of Massachusetts Constituencies
 - New Lawyers
 - Judges
 - Clients
 - Mental Health Professionals
3. Communication and Education
4. Enforcement

The committees presented written and oral summaries of their work at subsequent Task Force meetings on January 9, February 6, March 6, April 23, and May 16, 2002.

Following a preamble, this Report comprises four sections. First, it summarizes the efforts of other jurisdictions to address the problem of incivility in the profession. Second, it records the results of Task Force members' interviews and communications with judges, lawyers, clients and others who deal with the profession. Third, the Report considers the difficulties that arise in creating enforcement mechanisms specific to incivility. Fourth, it makes a number of specific recommendations for action to address the origins of uncivil conduct and to provide remedies where it occurs.

PREAMBLE

This is the third BBA Task Force to consider civility in the legal profession. The first, in 1992, produced a report entitled Professionalism and the Legal Profession. The second, in 1994, resulted in the BBA's adoption of a statement entitled Civility Standards for Civil Litigation ("Civility Standards"). In 1994, 36,570 lawyers were in active practice in Massachusetts. Today, that number has increased to 44,456. In 1994, attention focused on trial lawyers' failure to observe civility in the conduct of litigation. Today, as increasing numbers of courts, bar associations and other professional groups confront issues of civility and professionalism, the scope has widened. By its nature, litigation remains the area in which uncivil conduct appears to occur most often. To a lesser but still real extent, observers of transactional practice note occasions where unprofessional contentiousness interferes with the effective accomplishment of client goals. In addition, the profession has identified the occasional need for recognition that standards of civility apply to the bench as well as to the bar. Finally, the pressures of billable hour-driven law practices in a competitive environment can create a climate where incivility can flourish among partners, associates and staff within the same law firm.

No precise definition of "civility" is possible beyond the general dictionary one that it is "politeness." (Concise Oxford Dictionary [6th ed. 1976] 182); in

outrageous cases, however, in Justice Stewart’s famous words, we know bad behavior when we see it. The problem is that one person’s sense of the quality of his or her own, or another’s, behavior is intensely subjective. Nevertheless, the legal profession cannot hope to develop and maintain an atmosphere of civility based on subjective feelings informed by merely aspirational exhortations. The bar must educate lawyers to practice in civil, professional ways, not from some abstract devotion to politeness and etiquette, but as an element essential to the lawyer’s multiple roles that the Rules of Professional Conduct define: counselor, advisor, advocate, officer of the court and public citizen. The bar must convey to lawyers that they can achieve their clients’ goals efficiently and effectively without uncivil behavior. Accordingly, we offer specific recommendations (Section IV, below) which would institutionally incorporate continuing attention to, and a deepening appreciation of, the place of civility in the practice of law.

I. SURVEY OF OTHER JURISDICTIONS

A. Civility Codes

Since the late 1980s, courts, bars and bar associations have struggled with effective ways to codify standards of civil conduct for attorneys. In 1998, an article in the University of Dayton Law Review reported that 36 state bar associations and supreme courts, 69 local bar associations (including the BBA, whose Civility Standards are featured prominently in the article), 13 federal district courts and one federal circuit court have adopted civility codes or standards. See Smith, “Civility Codes: The Newest Weapons in the “Civil” War Over Proper Attorney Conduct Miss Their Mark,” 24 *U. Dayton L. Rev.* 151, 159, n.66 (Fall, 1998). The Center for Professional Responsibility of the American Bar Association has a website (www.abanet.org/cpr/profcodes.html) which lists state, local and regional bar associations and judicial districts which have adopted “Professionalism Codes.”

Most civility codes are aspirational. A few, however, are mandatory, and violation carries punishment and sanctions. Courts that have imposed some sanction for conduct demonstrating what some might consider “lack of civility”

generally do so on grounds other than an existing civility code, such as a state's applicable disciplinary rules or Rule 37 of the Rules of Civil Procedure. Although some dispute the effectiveness of civility codes, particularly those which are aspirational and sanction-free, jurisdictions continue to enact them.

B. Professionalism/Civility Courses

1. Continuing Legal Education

Many states have CLE requirements, and of those, most have included some ethics or professionalism requirements. However, only some of the "Ethics" or "Professionalism" programs cover "civility," that is, conduct which might not rise to the level of a violation of the disciplinary rules, but nonetheless is discourteous, inappropriate and disrespectful.

2. Town Meetings

Some jurisdictions employ round table discussions for members of the bar and bench to discuss issues of civility and professionalism. These appear to be offered to the entire legal community by Professionalism Commissions as opposed to Bar Associations, which generally offer programs only to members.

C. Professionalism Commissions/Committees

A 1999 report by the Conference of Chief Justices entitled *A National Action Plan on Lawyer Conduct and Professionalism* recommended that each state create a commission or agency under the auspices of the appellate court of highest jurisdiction whose responsibility it is to coordinate efforts to foster professionalism among members of the bench and bar. Efforts and activities are tailored to each state's characteristics, needs and resources, and include many of the alternatives this Task Force has identified and included in this report. At the present time, approximately 15 such Commissions have been formed, although other jurisdictions, such as Illinois, have created "Committees" under the direct supervision of the highest court which appear to operate similarly to the

Commissions. (See Appendix A for a listing of professionalism resource materials.)

D. Mentoring, Inns of Court and Peer Counseling

Many writers point to the positive role that mentors can bring to issues of civility. Some recommend increased use of American Inns of Court as a mentoring model. There are eighty-two Inns of Court in the United States. The Inns of Court seek improved lawyering and increased civility in the profession through fellowship, discussions, and role playing demonstrations. Other writers suggest creating mentoring programs within law firms as a method to help increase civility. Still other writers suggest that an increased collegiality, through organizations such as bar associations and Inns of Court, would help to foster civility.

E. Law Schools

In a few jurisdictions, such as Florida (which has had a Professionalism Commission since 1989), in which professionalism in its broadest definition is a major concern of the courts and organized bar, law schools have assumed a significant role in professionalism instruction. Stetson Law School has an Institute, and hosts an entire website which operates, *inter alia*, as a resource clearinghouse for resources available from the Institute and elsewhere. See <http://www.law.stetson.edu/excellence/litethics>. The purview of the Institute and the website go beyond our definition of “professionalism” to encompass general issues of professional ethics.

Additionally, many writers have focused on what law schools can do to foster civility in the profession. Law school is seen as an opportunity to model and teach civil behavior to future lawyers, with the expectation that students will take their learning about civility into the workplace. Specific suggestions include requiring law schools to (a) incorporate courses into their curricula designed to encourage and demonstrate civil behavior; (b) provide instruction in civil behavior and teach that civility is a part of ethical behavior; (c) develop an effective system

for encouraging and monitoring their ethics and professionalism programs; and (d) do a better job in fostering a civil atmosphere within the law school.

II. SURVEY OF MASSACHUSETTS CONSTITUENCIES

A. Judges

The Task Force conducted informal surveys of Justices of the Superior Court and United States District Court Judges and Magistrate Judges for the District of Massachusetts. The results of those surveys indicated the following.

With few exceptions, attorneys appearing in court deported themselves in a civil manner. Infrequent complaints emerged about improper conduct in the presence of a judge at motion hearings or trials. Isolated incidents were reported of attorney rudeness to other attorneys or even to judges in open court, including the use of obscenities in court. More frequent occurrences involved interrupting opposing counsel during argument, interrupting the judge, and exhibitions of non-verbal conduct, such as making faces, guttural noises or laughing. Also reported were instances of rude, insulting, badgering, hostile, or browbeating behavior toward witnesses.

Judges noted that uncivil conduct appears much more frequently in memoranda submitted to the court, which often contain personal attacks upon opposing counsel, and which employ unnecessarily scornful characterizations of opponents' arguments. Judges also observed a far too prevalent practice of requesting sanctions, especially in routine discovery disputes, either against the opposing party or counsel.

The Judges' survey revealed other examples of incivility: attorneys' failure to agree on a short continuance to accommodate the schedule of opposing counsel, or the attachment of unfair conditions to such an agreement; attorneys' failure to provide a full and fair account of the facts when seeking ex parte relief; attorneys' indiscriminate use of certain types of pleadings, including baseless G.L. c.93A claims and multiple, inapplicable affirmative defenses, and attorneys' failure to make a good faith effort to conduct Superior Court Rule 9C conferences.

B. Clients

The Task Force posed three questions to representative clients: (1) did they expect aggressive legal representation; (2) where did they think the line between aggressive and offensive behavior should be drawn; and (3) did they believe that uncivil behavior helped or hurt their interests.

Clients noted the following examples of uncivil behavior. At depositions, counsel were insulting, demeaning and arrogant. Specific conduct included rudeness, belligerence, unnecessary sarcasm, yelling, smirking, and not allowing a deponent to complete answers. In negotiations, counsel often exhibited an abrasive negotiating style and used pejorative language. Like the judges, clients also complained of personal attacks in memoranda and during oral arguments, directed both against the client and opposing counsel.

The clients all concluded that inappropriate behavior delayed or undermined the achievement of their goals, chiefly because it alienated the opposing party, and produced highly adversarial proceedings that resulted in protracted litigation, lost business opportunities, and additional legal fees.

Clients appeared able, for the most part, to distinguish between aggressive representation and offensive conduct. Clients want counsel to set goals, ascertain facts, keep communication open and effectively deflect offensive behavior of an opponent, all to achieve positive results and, where appropriate, compromise. Clients, in sum, desire that counsel be responsive, attentive to detail, and aggressive in pursuit of the client's goals, but not rude, belligerent or disrespectful in pursuit of those goals.

C. New Lawyers

New lawyers, namely, those in practice less than eight years, reported a variety of forms of uncivil behavior, including yelling, overly hostile tones of voice, dismissive attitudes, obstinacy, rudeness, condescension and arrogance. The majority of those surveyed said that they encountered incivility occasionally, but some considered that it occurred far too frequently. Other new lawyers responded

that they met with uncivil conduct infrequently, but when it occurred, the conduct was egregious.

New lawyers observed incivility in closings, transactional and trial negotiations, telephone communications with opposing counsel (“people find it much easier to be rude on the telephone than in person”), court hearings (including the conduct of judges), depositions, and meetings with other lawyers in the same law firm.

Some of the respondents thought that their status as new lawyers may have provoked or exacerbated uncivil conduct directed toward them. One respondent observed: “I believe that some practitioners try to take advantage of less experienced lawyers and can begin a relationship with hostility to try to establish dominance.” Another stated: “Some uncivil conduct, such as misrepresentations of fact, dilatory behavior and using a dismissive attitude were probably prompted or exacerbated by the fact that I am a young lawyer.” Almost all of those responding said that when confronted with offensive behavior, they would likely respond in kind.

Most of the new lawyers said they had not received any training, guidance, or mentoring on the subject of civility. Most also responded that they were not interested in attending a workshop on civility administered by their own firm. Some instructive responses to this question included:

- “I would be interested in attending a workshop on civility if it provided strategies for dealing with hostile attorneys.”
- “I think perhaps an MCLE or BBA workshop panel may be more beneficial, because then you get to see more viewpoints, hear a variety of ways of handling circumstances and are able to develop your own sense of civility.”
- “I don’t think a workshop would be particularly helpful; most people who are uncivil are so by nature, and I don’t think you can change that. Also, some people adopt the approach as a tactic and I don’t think you could convince them that it is generally unavailing. If

anything, I'd like to see training to teach people on the receiving end of rudeness how to handle it.”

D. Board of Bar Overseers

On average, the Board receives each year about two hundred complaints from the public involving uncivil conduct exhibited by lawyers. According to Bar Counsel, the incivility often involves the elderly, those involved in divorce proceedings, or those faced with substantial bills for legal services.

The Board keeps a record of these complaints and may take action if they accumulate with respect to a particular attorney. In several situations, lawyers have received public reprimands for egregious incivility, and one lawyer was suspended from practice as a result of his incivility on two separate occasions before two different judges.

E. Mental Health Professionals

The Task Force interviewed mental health professionals who have regular contact with the legal profession, through participation in legal proceedings as well as in counseling lawyers. These respondents' viewpoint was that lawyers are under tremendous stress, which contributes greatly to lawyers being uncivil. Of sole practitioners, it was observed that they often try to be all things to all clients, and so set themselves up for failure, and have difficulty keeping up with the needs and requirements of their practice. Different factors create significant amounts of stress for lawyers in large firms. The demand to produce significant income based on immense billable hours, along with the expectation of client development, is invariably hard to meet. For young associates at large firms, the escalation in salaries has produced heightened expectations of profitable performance at an early stage of their careers. These pressures have resulted in less mentoring and in the reluctance of associates, and even partners, to seek training or otherwise to spend time on non-billable projects. This combination of high expectations and inadequate preparation leads to high job dissatisfaction.

These respondents offered no easy remedy for their diagnosis. They concluded that the contributing factors are longstanding and penetrate deeply into the legal system and the cultural and social fabric of the law.

III. ENFORCEMENT

The Task Force did not reach a consensus about any new measures to enforce civility. Rather, greater use of existing enforcement mechanisms could substantially reduce instances of incivility. At the same time, the Task Force recognizes that the Civility Standards alone may not be sufficient. Should the measures proposed in this report fail to curb incivility, the BBA should study whether additional enforcement mechanisms are warranted.

A. Federal and State Judiciary

Judicial intervention would have a marked effect on curbing incivility. While judges interviewed by the Task Force observed relatively few instances of incivility in the courtroom, nevertheless, such conduct is not often aggressively challenged. Some judges believe that they lack the power to curb incivility. The judges also observed that while courtroom incivility was infrequent, there was a higher level of caustic, intemperate and contentious pleadings, briefs and deposition practice.

Opinions widely differ about responsibility for civility beyond the courtroom. Some judges do not regard incivility in written submissions as showing as much disrespect as does incivility in the courtroom. Others thought that courts should deter incivility in pleadings, briefs or letters written to the court by rejecting inflammatory pleadings, requiring clients to attend Rule 16 conferences and to sign pleadings, and warning counsel and parties that the court would sanction inappropriate conduct.

B. Board of Bar Overseers

The Preamble of the Massachusetts Rules of Professional Conduct (“MRPC”), Supreme Judicial Court Rule 3:07 (1998) provides:

- “A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”
- “A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.”
- “A lawyer should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession.”
- “A lawyer’s professional responsibilities are also guided “by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession’s ideals of public service.”

Several MRPC Rules address incivility:

- 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 for doing so that is not frivolous”
- Rule 3.2 (Expediting Litigation): “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”
- Rule 3.4(d) (Fairness to Opposing Party and Counsel): “A lawyer shall not ... in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party”

- Rule 4.1(a) (Truthfulness in Statements to Others): “In the course of representing a client a lawyer shall not knowingly ... make a false statement of material fact or law to a third person”
- Rule 8.4(d) (It is “professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice.”)
- Rule 8.4(h): It is professional misconduct for a lawyer to “engage in any other conduct [apart from that listed in Rules 8.4(a)-(g)] that adversely reflects on his or her fitness to practice law.”

The MRPC provides the Board of Bar Overseers with the means for addressing some forms of incivility. The Task Force does not recommend any changes in the MRPC to deal with the problem of incivility. The Task Force does recommend, however, that the BBA encourage Bar Counsel, in appropriate cases, to publicize more widely those instances in which the BBO has disciplined attorneys in whole or in part for their incivility. (See Appendix B for citations to selected cases related to incivility treated as a disciplinary matter.)

IV. RECOMMENDATIONS

On the basis of these findings and conclusions, the Task Force makes the following specific recommendations to ensure continuing attention to and a deepening appreciation of the role of civility in the practice of law.

1. The BBA’s creation of specific standing committees is the best outward and visible sign of the importance that the Association ascribes to a subject. Occasional monitoring of issues through specific groups, such as the Task Force, cannot as easily achieve the goal of ensuring that standards of civility and professionalism continue to inform the practice of law. Accordingly, the Task Force recommends that the BBA establish, within an appropriate Section, a Committee on Civility and Professionalism. The Committee would provide a forum for continuing attention to and education in standards of civility. It would also develop strategies with other BBA sections and committees, such as the

Committee on Professional Liability and the Solo and Small Firm Section, as well as other bar and professional groups, to incorporate discussions of civility/professional matters in continuing legal education programs in substantive practice areas.

2. Retitle the Civility Standards as “Civility Standards for the Legal Profession.”

3. Expand the Civility Standards to recognize transactional practice issues, judicial conduct and intra-firm conduct, while continuing to recognize that litigation is the area that continues to require the keenest attention.

4. Provide the Civility Standards to new members of the bar upon their admission. This should include new members admitted on motion as well as those who sit for the bar examination. Alternatively, the Civility Standards might be included in the package of application forms that the Supreme Judicial Court and the Board of Bar Examiners supply to applicants.

5. Give the Civility Standards to all judges, clerk-magistrates and court administrators, state and federal.

6. Support the inclusion of the Civility Standards in the publications containing the rules of all divisions of the Trial Court and in the Local Rules of the United States District Court.

7. Make the Civility Standards available and encourage its distribution in all courthouses, state and federal.

8. Encourage judges to use existing mechanisms to sanction counsel for incivility in the courtroom and the deposition room, as well as in the tone and content of written submissions.

9. Distribute the Civility Standards at all BBA CLE programs and work with the Flaschner Judicial Institute, the Massachusetts Judges Association and the Judicial Institute to provide copies to judges.

10. Publish the Civility Standards periodically in the Boston Bar Journal, Massachusetts Lawyers Weekly, Boston Law Tribune, and in other similar publications, and arrange for occasional features there and in other publications emphasizing the bar's efforts to promote civility and professionalism.

11. Endorse the American Inns of Court movement and similar organizations as a concrete way of establishing mentoring relationships in which newer lawyers, especially, learn their trade in an atmosphere of civil exchange between lawyers and judges in an educational and social context.

12. Cooperate closely with other bar associations, judges' and clerks' organizations, Massachusetts Continuing Legal Education, Inc., the Flaschner Judicial Institute, the Massachusetts Judges Association, the Judicial Institute, associations of corporate counsel, the District Attorneys Association, CPCS, and Massachusetts law schools to incorporate civility in their educational programs as an essential component of professional life.

13. Communicate with managing partner associations, law firm management committees, and similar firm committees to address intrafirm issues, such as, for example, that the relative isolation in which many new associates work, combined with the mounting pressure to bill hours, encourages a climate where incivility breeds.

14. Develop, as part of the BBA internet website, a component dealing with civility and professionalism that would provide a clearing-house for educational efforts, information, conversation and anecdotes.

CONCLUSION

Lawyers and judges practice a profession that is inherently contentious. Every case, and every transaction, has at least two sides. The rhetoric of advocacy and of negotiation often produces words and conduct not found in drawing-rooms. It is no accident that lawyers tell "war stories." Wars are not polite.

From its earliest days in England, the legal profession has developed conventions to conduct litigation and business in ways that diminish war-like instincts in the service of client interests. Civil conduct by legal professionals reflects society's need for restraint and respect for the achievement of justice, the principal mark of a true civilization. Civility, thus, is not mere "politeness"; for lawyers and judges it is essential to our professional lives.

Respectfully submitted,

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APPENDIX A

Professionalism Resources

a) Graham Thatcher and wife (an attorney) put on live performances raising ethical, moral and professionalism issues for law schools and bar associations, e.g. *The Curse of the Virtuous Lawyer, Balancing the Roles of the Attorney: Legal Ethics, Professionalism and Morality*.

b) Jack Marshall, former Assistant Dean at Georgetown Law Center, owner of Virginia-based corporation which puts on live and videotaped “performances” dealing with issues which are, in the main, covered by the disciplinary code.

c) American Bar Association Professionalism VideoLaw Library contains such offerings as "Dealing with the SOB Litigator." The tape contains a number of vignettes that illustrate questionable behavior by litigators in situations ranging from discovery to settlement conference and trial. For example, the tape asks: (1) What obligation does a lawyer have to correct misrepresentations made during settlement negotiations? and (2) When does a lawyer's behavior exceed the bounds of zealous advocacy and become conduct designed to harass the opponent and obstruct the legal process? The Ethical Dilemmas and Professionalism videotape series includes such topics as attorney-client relations, client confidentiality, conflicts of interest, associate-partner relations, and independence of counsel.

d) American Inns of Court have a variety of videos and scripts available which deal with civility issues.

The American Bar Association website has a very complete survey of offerings of bar associations in general, and the ABA itself has actively worked on civility issues. It has adopted Guidelines for Litigation Conduct, modeled on the Standards for Professional Conduct adopted by the United States Court of Appeals for the Seventh Circuit. The guidelines are aspirational, designed not for punishment, but to set a voluntary higher standard of conduct. State and local bar associations have also worked on civility standards.

APPENDIX B

People v. Genchi, 824 P.2d 815 (Colo. 1992) (counsel’s “abusive, insulting and unprofessional behavior” towards his own expert witness during deposition violated Rule 8.4(d)-cognate DR 1-102(A)(5)); In re Black, 262 Kan. 825, 941 P.2d 1380 (1997) (counsel’s verbal abuse of opposing party during juvenile administrative hearing violated Rule 8.4(d)); In re Scimeca, 265 Kan. 742, 962 P.2d 1080 (1998) (counsel’s verbal abuse and physical threats towards judge during in-chambers conference violated Rule 8.4(d)); Attorney Grievance Commission v. Alison, 317 Md. 523, 566 A.2d 660 (1989) (attorney who engaged in verbal abuse and disparaged opposing counsel while standing in offices of court clerk violated Rule 8.4(d)); Office of Disciplinary Counsel v. Levin, 35 Ohio St.3d 4, 517 N.E.2d 892 (1988) (attorney’s abusive language and outrageous behavior at deposition violates DR 1-102(A)(5)); see also Guerrero v. Board of Education of the Emery Unified Sch. Dist., 1994 WL 378005 (N.D. Cal.), rev’d on other grounds, 72 F.3d 135 (9th Cir. 1995) (unpublished opinion) (attorney’s belligerence and insulting behavior during depositions, defamatory filings, and deliberately improper service of pleading warranted sanction under N.D.Cal. Local Rule 110-3, requiring performance of duties with “honesty, care, and decorum required for the fair and efficient administration of justice).

In re Holmes, 921 P.2d 44, 46 (Colo. 1996) (counsel’s letters to unrepresented opponent containing “undignified, offensive and unprofessional” material violated Rule 8.4(h)); Genchi, 824 P.2d at 815-16; Black, 941 P.2d at 1385; Levin, 517 N.E.2d at 893 (abusive behavior at deposition violates Rule 8.4(h)-cognate DR 1-102(A)(7)); In re Illuzzi, 160 Vt. 474, 632 A.2d 346 (1993) (attorney violated DR 1-102(A)(7) by suggesting to opposing party on two instances that his attorney was “running the meter”).