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Respectful Identifiers

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RESPECTFUL IDENTIFIERS

DOUGLAS E. ABRAMS

ON MAY 20, 2016, PRESIDENT BARACK OBAMA SIGNED H.R. 4238, WHICH THE SENATE AND THE HOUSE OF REPRESENTATIVES HAD EACH PASSED UNANIMOUSLY.¹ THE BIPARTISAN BILL AMENDS TWO ACTS THAT, WRITTEN IN THE 1970S, ARE CODIFIED IN TITLE 42 OF THE UNITED STATES CODE. THE ACTS REFERRED TO PERSONS BY SUCH NAMES AS NEGRO, AMERICAN INDIAN, ORIENTAL, ESKIMO, AND ALEUT. H.R. 4238 STRIKES THESE NAMES AND SUBSTITUTES ONES SUCH AS AFRICAN AMERICAN, NATIVE AMERICAN, ASIAN AMERICAN, HISPANIC, PACIFIC ISLANDER, AND ALASKA NATIVE.²

H.R. 4238 is the latest congressional recognition that names matter and times change. In 2012, for example, President Obama signed similar bipartisan legislation that eradicated the name “lunatic” from federal disability law after several decades.³ The 2012 legislation also passed by wide margins, unanimously in the Senate and 398-1 in the House.⁴

Lessons for Legal Writers

The two bipartisan bills hold continuing insights for drafters of federal and state legislation and administrative regulations. But these insights, grounded in respect, extend also to lawyers and judges who write in such contexts as client representation, public and private sector advocacy, and court opinions.

The bills teach that respectful legal writing replaces outdated identifiers of race, ethnicity, sexual orientation, religion, disability or challenge, or other differences among identifiable groups in American society. As Professors Laurel Currie Oates and Anne Enquist advise, respect normally means identifying a group by a name commonly preferred by its members in everyday communication.⁵

Respectful identification remains consistent with the ABA Model Rules of Professional Conduct, which recite that the lawyer serves as “an officer of the legal system and a public citizen having special responsibility for the quality of justice.”⁶ The ABA Model Code of Judicial Conduct recites a similar aspiration, specifying that the judiciary “plays a central role in preserving the principles of justice and the rule of law.”⁷ Published writing by lawyers and judges freezes a permanent record of their fidelity to these roles as their writing shapes our legal institutions.

Names Matter

Identifiers that passed largely unnoticed even a short time ago can raise eyebrows today. Consider the way that most state statutes identified citizens with mental challenges until quite recently. Section 1.01(5) of the Florida Statutes, for example, specified

that throughout the state code “[t]he words ‘lunatic,’ ‘insane persons,’ and other like terms include idiots, lunatics, insane persons, non compos mentis and persons of deranged or unsound mind.”⁸ This section was not repealed until 1988, when the legislature overcame likely inertia and substituted the terms “mentally incompetent” and “mentally incompetent person” in the guardianship act and elsewhere in the state code.⁹

To be fair to Florida and the other states that maintained similar statutory definitions (and other definitions such as “imbecile” and “feeble-minded”), many of the definitions were long used by mainstream medical and legal professionals. In *Buck v. Bell* (1927), for example, the Supreme Court upheld a state’s decision to involuntary sterilize a young woman whom the Court called “feeble minded.”¹⁰ After quickly presenting the woman’s family background, the Court brusquely rejected her Fourteenth Amendment challenge. Writing for the majority, Justice Oliver Wendell Holmes approved sterilization because “[t]hree generations of imbeciles are enough.”¹¹

Medical professionals, lawyers, judges, and lay people did not talk that way by the twilight of the 20th century, and even earlier. They do not talk that way today, nor do they write that way.

One further example of changing times, a racial component of H.R. 4238, suffices here.¹² Over the decades, “Colored” yielded to “Negro,” which has yielded to “Black” or “African American.” Lawyers ordinarily should use the commonly preferred



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The Virginia Supreme Court rejected Barrett's argument that the rule did not apply to him because he was not representing a client (he was pro se), noting that an attorney who represents himself acts as both lawyer and client. The court concluded that the clear intent of Barrett's letter was to harass his former employer, the attorney, and compel him to waive the lien, a violation of rule 4.4.

A prosecuting attorney and her deputy were found to have violated rule 4.4 by obtaining evidence that violated a defendant's rights in *In re Winkler and Goode*, 834 N.E.2d 85 (Ind. 2005). During a pause in a deposition being taken in a criminal proceeding, after the defendant and his attorney left the room, the deputy prosecutor tore a page from a legal pad on which the defendant had written some notes. The deputy wanted to use the notes as a handwriting exemplar. The page was then concealed in a stack of files, although the prosecutors acknowledged what they had done when the defendant saw the sheet protruding from the files.

An Idaho prosecutor was found to have violated the rule in *Idaho State Bar v. Warrick*, 137 Idaho 86, 44 P.3d 1141 (2002). While an individual the attorney had prosecuted was housed in the county jail, Warrick wrote the words "waste of sperm" and "scum bag" next to the man's name on an inmate control board

located in the jail. The court concluded the prosecutor violated the rule, as the only purpose for writing the offensive words was to demean and embarrass the man.

Finally, in *In re Royer*, 276 Kan. 643, 78 P.3d 449 (2003), Royer represented a couple who owned a building located in downtown Abilene. The building had been badly damaged in a storm. The city communicated to Royer's clients that the building needed to be restored or demolished. Instead, Respondent prepared the necessary documents for his clients to "sell" the building for one dollar to a local man, well-known in Abilene for being homeless and an alcoholic. The new owner, of course, could not pay for the necessary work, which then fell to the city and its citizens. Royer was found to have violated rule 4.4 because even though his action benefited his clients, it had no substantial purpose other than to burden the homeless man and the city of Abilene.

Supreme Court Rule 4-4.4 serves as a reminder that lawyers must respect the rights of third parties while advocating for the rights of clients.

Sharon Weedin is staff counsel for the Office of Chief Disciplinary Counsel in Jefferson City.

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identifier. In appropriate contexts, however, writers should leave well-known historical terms untouched, including terms whose expression would be unacceptable today. Remaining untouched are such historical names as the Negro Leagues, the black or African American professional baseball organizations during Major League Baseball's Jim Crow era.

Simply Correct

Racial and ethnic minorities, persons with mental or physical challenges, and other groups concerned about how the law identifies them comprise a bulk of lawyers, clients, judges, and other Americans. In an age when fierce partisanship divides Congress, H.R. 4238 offers lawyers and judges the latest bipartisan reminder to acknowledge this reality in their writing.

A lawyer's approach to respect can lend luster or tarnish. Respectful identifiers can encourage readers to respect the writer, and thus the writer's message. The writer remains free to argue a chosen substantive position on the merits, whether pro or anti, liberal or conservative, or otherwise.

When a lawyer or judge uses an outdated identifier, the writer risks deflecting the reader's attention – even momentarily – from the substantive message. Respectful writing stands a much better chance of maintaining the reader's focus where it belongs – on the strength of the writer's words.

We should not belittle respectful identifiers as "politically correct," or "PC." Law and writing emerge stronger when lawyers

and judges respect personal dignity. Respect is not "politically" correct; it is simply correct.

Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books. Four U.S. Supreme Court decisions have cited his law review articles.

Endnotes

- 1 Ken Schwartz, *Obama Signs Law 'Modernizing' Federal References to Minorities*, VOICE OF AM. NEWS (May 23, 2016).
- 2 H.R. 4238, P.L. 114-157 (signed into law May 20, 2016).
- 3 See S.B. 2367 (The 21st Century Language Act of 2012), signed by the president on Dec. 28, 2012. The White House, Statement of the Press Secretary (Dec. 28, 2012).
- 4 Amy Sherman, *Allen West Said the House Voted to Remove the Word "Lunatic" from Federal Law*, POLITIFACT, Dec. 17, 2012.
- 5 LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK 583-86 (5th ed. 2010).
- 6 ABA Model Code of Prof'l Conduct, Preamble [1] (2016).
- 7 ABA Model Code of Judicial Conduct, Preamble [1] (2016).
- 8 Fla. Stat. §1.01(5) (1979).
- 9 1988 Fla. Sess. Laws 88-33, H.B. No. 288.
- 10 274 U.S. 200, 205 (1927).
- 11 *Id.* at 207.
- 12 Much of the remaining discussion is adapted from Douglas E. Abrams, EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS (West Academic 2016). Adapted with the permission of West Academic.

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