

University of Missouri School of Law Scholarship Repository

Faculty Publications

Faculty Scholarship

Spring 2015

Civility (Part I)

Douglas E. Abrams

Follow this and additional works at: <https://scholarship.law.missouri.edu/facpubs>

 Part of the [Law Commons](#)

School of Law

University of Missouri



**Legal Studies Research Paper Series
Research Paper No. 2015-11**

Civility (Part I)

Douglas E. Abrams

Published in the Spring 2015 issue of *Precedent*, the quarterly magazine of the Missouri Bar: <http://www.mobar.org/precedent/spring2015/civility.htm>

Copyright 2015 by The Missouri Bar

This paper can be downloaded without charge from the Social Sciences Research Network Electronic Paper Collection at: <http://ssrn.com/abstract=2600207>

Civility (Part I)

By Douglas E. Abrams

A few years ago, American Bar Association President Stephen N. Zack decried the legal profession's "continuing slide into the gutter of incivility."¹ An ABA resolution "affirm[ed] the principle of civility as a foundation for democracy and the rule of law, and urge[d] lawyers to set a high standard for civil discourse."²

The Missouri Bar has similarly adopted *Principles of Civility*, published prominently in each Annual Report: "It is the duty of all lawyers to conduct themselves with dignity and civility. Toward that end, each lawyer shall be: Respectful, Trustworthy, Courteous, Cooperative."³

The ABA and Missouri Bar initiatives echo federal and state courts that call civility "a linchpin of our legal system,"⁴ a "bedrock principle,"⁵ and "a hallmark of professionalism."⁶ Justice Anthony M. Kennedy says that civility "defines our common cause in advancing the rule of law."⁷ Chief Justice Warren E. Burger called civility a "lubricant[] that prevent[s] lawsuits from turning into combat. More than that, it is really the very glue that keeps an organized society from flying apart."⁸ "Courtesy is an essential element of effective advocacy," agrees Justice John Paul Stevens.⁹

The adversary system's pressures can strain the tone and tenor of a lawyer's oral speech or professional relationships, but the strain on civility can be especially great when lawyers write. Written messages arrive without the facial expression, tone of voice,

body language, and contemporaneous opportunity for explanation that can soothe face-to-face communication. Writing appears cold on the page, dependent not necessarily on what the writer intends or implies, but on what readers infer.

WHO LOSES?

This is a two-part article. Part I begins here by describing how a lawyer's written derision of an opponent or written disrespect of the court can weaken the client's cause. In *Precedent's* Summer issue, Part II will describe how these dual manifestations of incivility can also compromise the lawyer's own personal enrichment and professional standing.

Part II will conclude by discussing bias-free writing.¹⁰ Grounded in professionalism, and thus intimately linked to civility, bias-free writing remains respectful of race, ethnicity, gender, sexual orientation, religion, disability, and other differences among identifiable groups in American society, particularly groups that have been marginalized at one time or another.

The U.S. Court of Appeals for the 8th Circuit identifies civility's high stakes: "The parties, the profession, and the public all lose when the attorneys fail to treat each other with common courtesy."¹¹ The losers remain the same, regardless of whether incivility pits lawyer on lawyer, or whether it pits lawyer against the court. Each warrants a representative sample here.

LAWYER-ON-LAWYER INCIVILITY

When Chief U.S. Bankruptcy Judge

Terrence L. Michael (N.D. Okla.) recently considered whether to approve a compromise in *In re Gordon*, the contending lawyers in the Chapter 7 proceeding detoured into written lawyer-on-lawyer invective.¹² *Precedent's* Spring 2014 issue described the setting.

In a filing to support its motion to compel discovery from the bankruptcy trustee in *Gordon*, the lawyer for creditor Commerce Bank charged that the trustee and the United States had engaged in "a pattern . . . to avoid any meaningful examination of the legal validity of the litigation plan they have concocted to bring . . . a series of baseless claims."¹³

"[T]hey know," the bank's lawyer continued, "that a careful examination of the process will show the several fatal procedural flaws that will prevent these claims from being asserted."¹⁴ "Only by sweeping these issues under the rug will the trustee be able to play his end game strategy of asserting wild claims . . . in hopes of coercing Commerce Bank into a settlement (which the Trustee hopes will generate significant contingency fees for himself)."¹⁵

The trustee charged that the bank's lawyer had impugned his character with accusations that he had compromised his fiduciary obligations for personal gain. Judge Michael denied the trustee's sanctions motion on procedural grounds, but he chastised the bank's lawyer because "personal and vitriolic accusations have no place as part of a litigation strategy."¹⁶ The court instructed the parties to "leave the venom at home"¹⁷ because

“[w]hether you like (or get along well with) your opposition has little to do with the merits of a particular case.”¹⁸

Some courts have moved beyond instruction. In the exercise of their inherent authority, these courts have sanctioned lawyers, or have denied attorneys’ fees, for incivility.¹⁹ Some courts have even sanctioned the client who, having retained the lawyer, bears some responsibility for the lawyer’s conduct.²⁰

LAWYER-ON-COURT INCIVILITY

Gordon’s written recriminations pitted counsel against counsel, but lawyers sometimes venture into incivility that disrespects judges and the court. Every appeal involves at least one party who believes that the lower court reached an incorrect outcome, but few judges deserve criticism for incompetence. Lawyers for aggrieved parties are more likely to receive a serious hearing (and more likely to perform their roles as officers of the court) by firmly, forcefully, but respectfully arguing a judge’s good faith misapplication of the law to the facts, rather than by resorting to insinuations about the judge.

Insinuations surfaced during the federal district court’s review of the magistrate judge’s report and recommendation in *In re Photochromic Lens Antitrust Litigation*.²¹ A party’s lawyer contended that the magistrate judge was “misled” concerning relevant legal standards, and that the judge made her recommendation without “any reference to the voluminous underlying record.” The lawyer further contended that she “conducted no analysis, much less a ‘rigorous analysis,’” and decided “based on no evidence, a superficial misreading of the evidence, or highly misleading evidence.”²²

The district court approved the magistrate judge’s recommendation and report in significant part, but did not stop there. The court also publicly reprimanded the lawyer for crossing the line: “It is disrespectful and unbecoming of a lawyer to resort to such language, particularly when directed toward a judicial officer. Its use connotes arrogance, and reflects an unprofessional, if not immature litigation strategy of casting angry aspersions rather than addressing the merits . . . in a dignified and respectful manner.”²³

INCIVILITY’S EFFECTS ON PARTIES

Lawyers who descend into incivility risk weakening the client’s cause. The chief justice of the Maine Supreme Court confides that “[a]s soon as I see an attack of any kind on the other party, opposing counsel, or the trial judge, I begin to discount the merits of the argument.”²⁴ As they determine the parties’ rights and obligations by applying law to fact, perhaps judges sometimes react this way because civility projects strength and incivility projects weakness. “Rudeness is the weak man’s imitation of strength,” said philosopher Eric Hoffer.²⁵

The lawyer’s initial step toward civility may be an early candid talk with the client, who may feel grievously wronged and believe that the surest path to vindication is representation by a Rambo-type or a junkyard dog waiting to be unleashed. The client’s instincts may stem from movies and television dramas, whose portrayals of lawyers sometimes sacrifice realism for entertainment.

Without this early talk, the client may mistake the lawyer’s civility for meekness, and courtesy for concession. The client needs to understand

that a take-no-prisoners strategy can disgust any decision maker who shares the sensibilities expressed by the justices and judges quoted above. One Illinois trial judge recently said, “No judge has ever been heard to endorse or encourage the use [of mean-spirited] writing. Not one. You may feel better writing it and your client may feel better reading it, but your audience is the judge, and judges abhor it.”²⁶ Judicial abhorrence scores the client no points.

Justice Sandra Day O’Connor says that, “It is enough for the ideas and positions of the parties to clash; the lawyers don’t have to.”²⁷ “It isn’t necessary to say anything nasty about your adversary or to make deriding comments about the opposing brief,” adds Justice Ruth Bader Ginsburg, who says that such comments “are just distractions. You should aim to persuade the judge by the power of *your* reasoning and not by denigrating the opposing side. . . . If the other side is truly bad, the judges are smart enough to understand that; they don’t need the lawyer’s aid.”²⁸

Justice Antonin Scalia advises advocates that “straightforward recital of the facts will arouse whatever animosity the appellate court is capable of entertaining, without detracting from the appearance of calm and equanimity that you want to project.”²⁹

Judges are not alone in advancing civility for projecting strength. John W. Davis, perhaps the 20th century’s greatest Supreme Court advocate, understood his audience. “Controversies between counsel,” he wrote, “impose on the court the wholly unnecessary burden and annoyance of preserving order and maintaining the decorum of its proceedings. Such things can irritate; they can never persuade.”³⁰

The professional guideposts for legal writers who seek to persuade? Firmness, yes. Competent, zealous advocacy, yes. Unwavering devotion to client and cause, yes. Desire to prevail within the bounds of the law, yes. Personal attacks on the adversary or court, no.

ARGUMENT VS. PERSUASION

“[C]ivility is not a sign of weakness,” President John F. Kennedy assured Americans in his Inaugural Address in 1961 as he anticipated four years of faceoffs with the Soviets. “Civility assumes that we will disagree,” says Yale law professor Stephen L. Carter. “It requires us not to mask our differences but to resolve them respectfully.”³¹ “The best lawyers,” says former Missouri Bar President Ron Mitchell, “deal with the issues and leave personalities and egos out of the debate.”³²

Lawyers, judges, and court rules commonly label adversarial presentations as “arguments” (as in “written argument” and “oral argument”). The label, a venerable term of art in the legal profession, remains apt provided that lawyers distinguish the term’s lay meaning (recrimination and bickering) from the law’s specialized sense of the word. For the sake of client and counsel alike, “written persuasion” and “oral persuasion” more accurately describe advocacy’s goal.

WINNING WITHIN THE RULES

Civility in advocacy resembles sportsmanship in athletics. Sportsman-

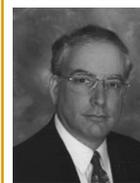
ship presumes that each athlete wants to win within the rules; a sportsman-like athlete who does not care about winning should not play. Civility similarly presumes that each advocate wants to win within the bounds of professionalism; a civil advocate who does not care about winning should not represent a client. Civility and forceful advocacy, like sportsmanship and forceful athleticism, define the total package.

Next issue: The lawyer’s personal and professional enrichment and standing; bias-free writing.

Endnotes

- 1 James Podgers (ed.), *From Many Voices, a Call for Public Civility*, 97 A.B.A.J. 58, 58 (Sept. 2011) (quoting Zack).
- 2 *Id.*
- 3 E.g., *The Missouri Bar Annual Rep., 2014-15: The Power of Belonging* 2 (2014).
- 4 *Wilson v. Airtherm Prods., Inc.*, 436 F.3d 906, 912 n.5 (8th Cir. 2006).
- 5 *Wescott Agri-Prods, Inc. v. Sterling State Bank, Inc.*, 682 F.3d 1091, 1096 (8th Cir. 2012).
- 6 *Cardello v. Cardello*, No. FA020088156S, 2002 WL 31875435 * 1 (Conn. Super. Ct. Dec. 4, 2002).
- 7 Louis H. Pollak, *Professional Attitude*, 84 A.B.A.J. 66, 66 (Aug. 1998) (quoting Justice Kennedy).
- 8 Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 214-15 (1971).
- 9 Marvin E. Aspen, *Let Us Be “Officers of the Court,”* 83 A.B.A.J. 94, 96 (July 1997) (quoting Justice Stevens).
- 10 E.g., Marilyn Schwartz, *Guidelines for Bias-Free Writing* (1995).
- 11 *Miller v. Bittner*, 985 F.2d 935, 941 (8th Cir. 1993).
- 12 484 B.R. 825 (N.D. Okla. 2013).
- 13 *In re Gordon*, 484 B.R. 825, 827 (N.D. Okla. 2013).

- 14 *Id.*
- 15 *Id.* at 827-28.
- 16 *Id.* at 828.
- 17 *Id.* at 830-31.
- 18 *Id.* at 830.
- 19 G.M. Filisko, *You’re OUT OF ORDER!*, 99 A.B.A.J. 32 (Jan. 2013).
- 20 See, e.g., *Wescott Agri-Prods, Inc.*, *supra* note 5, at 1096 (citation omitted).
- 21 No. 8:10-md-02173-T-27EAJ, 2014 WL 1338605 (M.D. Fla. Apr. 3, 2014).
- 22 *Id.* at *1 n.1.
- 23 *Id.*
- 24 Leigh Ingalls Saufley, *Amphibians and Appellate Courts*, 14 MAINE B.J. 46, 49 (Jan. 1999).
- 25 ERIC HOFFER, *THE PASSIONATE STATE OF MIND: AND OTHER APHORISMS* (1955).
- 26 Naomi Kogan Dein, *The Need for Civility in Legal Writing*, 21 CBA RECORD 54 (Feb./Mar. 2007) (quoting Judge Michael B. Hyman).
- 27 Sandra Day O’Connor, *Professionalism*, 76 Wash. U. L.Q. 5, 9 (1998).
- 28 *Interviews with United States Supreme Court Justices: Justice Ruth Bader Ginsburg*, 13 SCRIBES J. LEG. WRITING 133, 142 (2010) (quoting Justice Ginsburg) (italics in original).
- 29 ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 34-35 (2008).
- 30 John W. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 898 (1940).
- 31 STEPHEN L. CARTER, *CIVILITY* 132 (1998).
- 32 Ron Mitchell, *The President’s Page: Justice First – Civility*, 51 J. MO. BAR 199, 199 (July-Aug. 1995).



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