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By Douglas E. Abrams

"All advocacy involves conflict and calls for the will to win," said New Jersey Supreme Court Chief Justice Arthur T. Vanderbilt, but the will to win is only one ingredient of professionalism. Advocates, he added, also "must have character," marked by "certain general standards of conduct, of manners, and of expression."[1] One prime marker of an advocate's character is civility.

In the Spring issue, Part I of this two-part article began by describing how incivility in writing can pit lawyer on lawyer, or lawyer against the court. The article then discussed how either manifestation of a lawyer's incivility can weaken the client's cause.

Part II now discusses the effects of civility or incivility on the lawyer's own personal enrichment and professional standing. The Part concludes by discussing bias-free writing, a central aspect of lawyers' civility because it reinforces respect.[2]

INCIVILITY'S EFFECTS ON LAWYERS

Incivility "takes the fun from the practice of law," says Judge Duane Benton of the U.S. Court of Appeals for the 8th Circuit.[3] "Being a lawyer can be pleasant or unpleasant," explains Judge William J. Bauer of the U.S. Court of Appeals for the 7th Circuit, who adds that "[w]hen we treat each other and those with whom we have professional contact with civility, patience and even kindness, the job becomes more pleasant and easier."[4]

Moving from the lawyer's personal enrichment to professional duty, the Preamble to the ABA Model Rules of Professional Conduct recites "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system."[5] Model Rule 8.4(d) operates against "conduct that is prejudicial to the administration of justice."[6]

The Model Rules' spotlight on professional obligation is fortified by commands for civility found in federal and state court rules;[7] state admissions oaths;[8] and unofficial codes that some professional organizations maintain for their member lawyers.[9]

The ABA Model Code of Judicial Conduct imposes reciprocal obligations of civility on judges in the performance of their official duties.[10]

These professional commands and expectations mean that descent into incivility can damage the lawyer's reputation with judges and other lawyers. The damage seems greatest when the court's opinion calls out the offending lawyer publicly, either by name or by leaving the lawyer readily identifiable from the appearances listed atop the opinion. In the two decisions featured in Part I of this article, offenders may have had belated second thoughts when the court shined the spotlight on them.[11]

Even without public rebuke from the bench, however, word gets around. In cities, suburbs and outstate areas alike, the bench and practicing bar usually remain bound by bar association memberships, other mutual relationships, word of mouth, recollections, and past experiences. The specialization that characterizes so much contemporary law practice constricts the circle still further.

"Just as lawyers gossip about judges and most litigators have a 'book' on the performances of trial judges, we judges keep our own book on litigators who practice before us," confides one federal district judge.[12] During my judicial clerkship, I learned early that when many judges pick up a brief or other submission, they look first for the writer's name. A writer with a track record for civil, candid, forceful advocacy gets a head start; a writer who has fallen short must make up lost ground.

On the positive side of the ledger, a lawyer's reputation for unwavering civility can bring professional reward. For one thing, lawyers with that reputation stand a better chance of receiving civility in return. Sooner or later, for example, a lawyer may need a stipulation, consent to a continuance, or similar accommodation from opposing counsel or the court. Like other people, lawyers can expect to get what they give.

In a challenging employment market, maintaining a reputation for civility can also enhance a lawyer's professional mobility. Lawyers sometimes receive appealing lateral job feelers from a nearby public sector or private sector adversary who respects not only their competence, but also their professionalism. Being smart is not enough. Plenty of lawyers are smart, but fewer lawyers earn respect for maintaining an air of professionalism as they seek the best possible outcomes for their clients. Because few Americans (including few lawyers) spend their

entire careers with their first employer, enhanced lateral mobility can be a significant reward of commitment to an honorable law practice.

Incivility brings tarnish, but civility brings luster. Justice Kennedy calls civility "the mark of an accomplished and superb professional."[13] A veteran federal district judge concurs: "The lawyers who are the most skillful tend to be reasonably civil lawyers because they project an image of self-confidence. They don't have to stoop to the level of acrimony."[14]

As members of a largely self-governing profession devoted to the rule of law,[15] lawyers are judged by expectations sometimes even higher than the expectations that judge other professionals. President Theodore Roosevelt said that "[c]ourtesy is as much a mark of a gentleman as courage."[16] "The greater man, the greater courtesy," wrote British Poet Laureate Alfred, Lord Tennyson in his epic poem, *Idylls of the King*.[17]

The greater lawyer, too.

WRITE WITH RESPECT

Intimately linked to civility is bias-free writing, which avoids perceptions of discrimination based on racial, ethnic, gender, sexual orientation, religious, disability or challenge, or other differences among identifiable groups in American life. Justice Kennedy draws the link: "Civility has deep roots in the idea of respect for the individual. We are civil to each other because we respect one another's human aspirations and equal standing in a democratic society."[18]

Respect and equality remain cornerstones of writing by legal professionals. The ABA Model Code of Judicial Conduct specifies that the judge "plays a central role in preserving the principles of justice and the rule of law";[19] the ABA Model Rules of Professional Conduct specify that the lawyer serves as "an officer of the legal system, and a public citizen."[20] Published writing by these professionals creates a record that reflects the author's approach to these professional obligations.

For legal writers, respect and equality normally mean identifying a group by a name commonly preferred by its members in everyday communication.[21] Respectful identification leaves unfettered the writer's freedom to argue a chosen substantive position on the merits, whether pro or anti, liberal or conservative, or otherwise. Two examples – race and ethnicity, and gender – demonstrate that respect, the common denominator, does nothing to inhibit the vigor of substantive dialog.

Race and Ethnicity

A group's commonly preferred name may change over time. For example, "colored person" yielded to "Negro," which has yielded to "black" or "African American." Legal writers should use the members' commonly preferred identifier, at least unless the client or the discrete anticipated audience consists largely of group members who prefer a different identifier.[22]

In appropriate contexts, however, writers should leave untouched historical terms, even ones whose expression would be unacceptable today. For example, it would be fruitless to debate the merits of Mark Twain's 1885 novel, *The Adventures of Huckleberry Finn*, without mentioning the N-word, which Twain used.

Mention should come with recognition of the word's contemporary unacceptability for its hurt and disrespect. Audience members can debate "presentism" – whether to judge Twain and his novel by the standards of his day or by today's standards. By shining a light on race relations in late-nineteenth century America and afterwards, debate can spark greater mutual understanding of a painful past.

Also remaining untouched are such historical names as "the Negro Leagues," the black or African American professional baseball organizations during the Jim Crow era. Nor should there be any adjustment of the name "National Association for the Advancement of Colored People," which the venerable civil rights organization still proudly uses; adjustment seems out of place unless and until the organization itself chooses to act.

Gender

Backed by equal protection doctrine and general social expectations, officially sanctioned gender discrimination is the exception rather than the rule in contemporary America. Gone too are the days when legal writers could expect readers routinely to accept, tacitly or explicitly, that "the masculine includes the feminine." Federal and state codes and rules typically still carry such gender-neutral ground rules in their general-construction provisions,[23] but legislative and administrative drafters are inching toward gender-neutral expression in future enactments and amendments.

The English language has no third-person singular pronouns that encompass both genders. Depending on the context, writers can consider familiar constructions that avoid gender bias.[24] For example, try unitary third party plural pronouns ("Every law student must do *his* best," becomes "Law students must do *their* best."). Sometimes the message needs no pronoun at all ("Success in law school depends on students' best efforts," or "Success in law school depends on *the* student's best efforts."). As sometimes more awkward fallback positions, try alternating masculine and feminine pronouns from one passage to the

next, or using a "his or her" construction ("Every law student must do *his or her* best.").

Using "s/he" or "he/she" seems stilted and can usually be avoided with one of the alternative constructions just mentioned. Also better avoided are constructions that mix singular and plural pronouns ("*Each* law student must do *their* best," becomes "Law students must do their best.").

Eliminate gender-based identifiers (for example, "businessman" becomes "businessperson"), and identifiers that denigrate one gender. In formal writing, it is usually appropriate to use the term "girl" or "young woman" to identify a female who is in high school or younger, provided that the writing refers to similarly situated males as "boys" or "young men." But the term "woman" (and not "girl" or "gal") describes an older female who has reached the general age of majority, and "man" (and not "boy" or "guy") describes an older male.

The discussion above about historical perspective in racial identification bears recall. In appropriate contexts, writers should similarly leave untouched gendered historical expressions that might raise eyebrows today. A few paragraphs ago, the discussion of civility quoted British Poet Laureate Alfred, Lord Tennyson: "The greater man, the greater courtesy." The discussion did not modernize the quote with brackets ("The greater [person], the greater courtesy.") The discussion trusted audience members to draw their own conclusions about the source and the expression, discernment that remains well within the capacities of most readers.

Simply Correct

Racial and ethnic minorities, women, and other traditionally marginalized groups comprise a bulk of lawyers, clients, judges, witnesses, and others in everyday life. The lawyer's writing (and interactions with lawyers, staff, and others in and out of the courtroom) should recognize this reality through civility and respect.

From a practical standpoint, overtly biased identifiers may rankle readers, and thus deflect attention from the substantive message. Bias-free writing stands a better chance of focusing readers' attention where it belongs – on the writer's argument, persuasion, and position pro or con on the merits.

Despite some lingering cynics, lawyers should not belittle bias-free writing as "politically correct," or "PC." The social fabric emerges stronger when expression by judges and lawyers, as guardians of the rule of law, conveys respect for the dignity of personhood. Respect is not "politically" correct; it is simply correct.

ENDNOTES

1 Arthur T. Vanderbilt, *Forensic Persuasion*, 7 Wash. & Lee L. Rev. 123, 130 (1950).

2 *E.g.*, Marilyn Schwartz, Guidelines for Bias-Free Writing (Indiana U. Press 1995).

3 Duane Benton, *Chief Justice's Address to Members of The Missouri Bar*, 54 J. Mo. Bar 302 (1998).

4 J. Timothy Eaton, *Civility, Judge Bauer and the CBA*, 28 CBA Record 8 (2014).

5 ABA Model Rules of Prof'l Conduct, Preamble [9] (2014); Rule 4, Preamble [9].

6 ABA Model Rules of Prof'l Conduct, R. 8.4(d) (2014); Rule 4-8.4(d).

7 *E.g., Standards for Professional Conduct Within the Seventh Federal Judicial Circuit* 120-21, 123 (2013); *available at* https://www.ca7.uscourts.gov/Rules/rules.htm#standards.

8 G.M. Filisko, *You're OUT OF ORDER!*, 99 A.B.A.J. 32 (Jan. 2013).

9 *See, e.g., Am. Bd of Trial Advocates' Principles of Civility, Integrity, and Professionalism*, https://www.abota.org/index.cfm?pg=Civility (visited May 5, 2015).

10 ABA Model Code of Judicial Conduct R. 2.8(B) (2014); Rule 2-2.8 (B) (judges "shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control").

11 *E.g.*, *In re Gordon*, 484 B.R. 825 (N.D. Okla. 2013); *In re Photochromic Lens Antitrust Litig.*, No. 8:10-md-02173-T-27EAJ, 2014 WL 1338605 (M.D. Fla. Apr. 3, 2014), both discussed in Part I of this article.

12 Marvin E. Aspen, *Let Us Be "Officers of the Court,"* 83 A.B.A.J. 94, 96 (July 1997).

13 Louis H. Pollak, *Professional Attitude*, 84 A.B.A.J. 66 (Aug. 1998) (quoting Justice Kennedy).

14 Laura Castro Trognitz, *Bench Talk*, 86 A.B.A.J. 56 (Mar. 2000) (quoting Judge John G. Koeltl, S.D.N.Y.).

15 ABA Model Rules of Prof'l Conduct, Preamble [10] (2014); Rule 4, Preamble [10].

16 Cliff Sain, *Earth's Atmosphere*, Springfield (Mo.) News-Leader, Feb. 26, 2008, at 3C (quoting Roosevelt).

17 Alfred, Lord Tennyson, Idylls of the King, The Last Tournament (1859-85); *available at* http://www.poetryfoundation.org/poem/174591.

18 Pollak, *supra* note 13, at 66 (quoting Justice Kennedy).

19 ABA Model Code of Judicial Conduct, Preamble [1]; Rule 2, Preamble [1].

20 ABA Model Rules of Prof'l Conduct, Preamble [8] (2014); Rule 4, Preamble [8].

21 Laurel Currie Oates & Anne Enquist, The Legal Writing Handbook 583-86 (5th ed. 2010).

22 *Id*. at 584.

23 *E.g.*, 1 U.S.C. § 1 (2014) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise – . . . words importing the masculine gender include the feminine as well"); Section 1.030 RSMo Supp. 2015 ("When any subject matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, are included.").

24 *E.g.*, Richard C. Wydick, Plain English For Lawyers 74-75 (5th ed. 2005); Gerald Lebovits, *He Said-She Said: Gender-Neutral Writing*, 74 N.Y. St. B.J. 64 (Feb. 2002).

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