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Incivility in legal writing can be costly to client and to attorney

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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.” An ABA resolution affirmed “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.”

The ABA initiative echoes federal and state courts that call civility “a linchpin of our legal system,” a “bedrock principle,” and “a hallmark of professionalism.” Justice Anthony M. Kennedy says that civility “defines our common cause in advancing the rule of law.” Chief Justice Warren E. Burger called civility a “lubricant[] that prevent[s] lawsuits from turning into combat.” “Courtesy is an essential element of effective advocacy,” agrees Justice John Paul Stevens.

The adversary system’s pressures can strain the tone and tenor of a lawyer’s oral speech, but the strain on civility can be especially great when lawyers write. Words on paper 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.

This article is in three parts. Part I describes two manifestations of incivility, a lawyer’s written derision of an opponent, and a lawyer’s written disrespect of the court. Part II describes how either manifestation can weaken the client’s case. Part III describes how incivility in writing can also compromise both the lawyer’s own personal enrichment and the lawyer’s professional standing among the bench and bar.

Part I.

“[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.” The advice prevails, regardless of whether incivility pits lawyer against lawyer, or whether it pits lawyer against the court. Each of the two manifestations of incivility warrants a representative example 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.

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.” “[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.” 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).”

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.” The court instructed the parties to “leave the venom at home” because “[w]hether you like (or get along well with) your opposition has little to do with the merits of a particular case.”

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

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. A party’s lawyer contended that the magistrate judge was “misled” concerning
relevant legal standards, and that the judge made her recommend-

ation without “any reference to the voluminous underly-

ing 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 evi-

dence, or highly misleading evidence.”

The district court approved the magistrate judge’s recommend-

ation 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 re-

flects an unprofessional, if not immature litigation strategy of
casting angry aspersions rather than addressing the merits . . .
in a dignified and respectful manner.”

Part II.

Incivility’s Costs to the Client

Lawyers whose writing descends into incivility risk weaken-
ing the client’s cause, perhaps irreparably. 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 argu-

ment.” As they determine the parties’ rights and obligations by

applying fact to law, 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.

The lawyer’s first step toward civility may be an early
candid talk with the client, who may feel grievously wronged

and may believe that the surest path to vindication is re-
presentation by 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 dis-
gust any decision maker who shares the sensibilities expressed

by the justices and judges quoted above. One Illinois trial

judge recently had this advice for lawyers: “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 cli-

ent may feel better reading it, but your audience is the judge,

and judges abhor it.” 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.” “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 denigrat-
ing 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.”

Judges are not alone in advancing civility for projecting

strength. John W. Davis, perhaps the 20th century’s greatest

Supreme Court advocate, understood his judicial audience.

“Controversies between counsel,” he wrote, “impose on the
court the wholly unnecessary burden and annoyance of pre-

paring order and maintaining the decorum of its proceedings.

Such things can irritate; they can never persuade.”

Part III.

Incivility’s Costs to the Lawyer

Aside from compromising the client’s interests, incivility can
damage the lawyer’s own personal enrichment and profes-

sional standing. Incivility “takes the fun from the practice of

law,” says Judge Duane Benton of the U.S. Court of Appeals

for the Eighth Circuit. “Being a lawyer can be pleasant or un-

pleasant,” explains Judge William J. Bauer of the U.S. Court

of Appeals for the Seventh 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 be-
comes more pleasant and easier.”

Moving from the lawyer’s personal enrichment to profes-
sional standing, 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, courte-

ous, and civil attitude toward all persons involved in the legal

system.” Model Rule 8.4(d) operates against “conduit that is

prejudicial to the administration of justice.”

The Model Rules’ spotlight on professional obligation is

fortified by commands for civility in federal and state court

rules; state admissions oaths; and unofficial codes that some

professional organizations maintain for their member law-
yers. The ABA Model Code of Judicial Conduct imposes

reciprocal obligations of civility on judges in the performance

of their official duties.

These professional commands and expectations mean that
descent into incivility can damage the lawyer’s reputation with
judges and others lawyers. The damage seems greatest when
the court’s opinion calls out the offending lawyer publicly, ei-

ther 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, the offenders may have had

belated second thoughts when the court shined the spotlight.

“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,” con-

fides one federal district judge. 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.

Incivility brings tarnish, but civility brings luster. Justice

Kennedy calls civility “the mark of an accomplished and su-

perb professional.” 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.”

Even without public rebuke or other disdain from the
Civility, from page 15

bench, word gets around. In cities, suburbs and outstate areas alike, the bench and bar usually remain bound by mutual relationships, word of mouth, recollections, and past experiences. Lawyers with sterling reputations for civility 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 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 offers from a nearby public- 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 genuine 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 for unswooning commitment to an honorable law practice.

As members of a largely self-governing profession devoted to the rule of law, lawyers are judged by expectations sometimes 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.”41 “The greater the man, the greater courtesy,” wrote British Poet Laureate Alfred, Lord Tennyson in his epic poem, Idylls of the King.42

The greater the lawyer too.

Conclusion: The Will to Win

“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.”43 One prime marker of an advocate’s character is civility.

Civility in advocacy resembles sportsmanship in athletics. Sportsmanship presumes that each athlete wants to win within the rules of the game; a sportsmanlike athlete who does not care about winning should not play. Civility similarly presumes that each advocate wants to win within the rules 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.

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

Endnotes

2 Id.
3 Wilson v. Airtherm Prods., Inc., 436 F.3d 906, 912 n.5 (8th Cir. 2006).
4 Wescott Agri-Prod., Inc. v. Sterling State Bank, Inc., 682 F.3d 1091, 1096 (8th Cir. 2012).
13 Id. at 827-28.
14 Id. at 830.
15 Id. at 830.
16 Id. at 830-31.
17 Id. at 830.
18 Wescott Agri-Prods., Inc., supra note 5, at 1095-96 (citation omitted).
19 See, e.g., Wescott Agri-Prods., Inc., supra note 4, at 1096 (citation omitted).
21 Id. at *1 n.1.
22 Id.
25 Naomi Kogan Dein, The Need for Civility in Legal Writing, 21 CBA Record 54 (Feb./Mar. 2007) (quoting Judge Michael B. Hyman).
30 J. Timothy Eaton, Civility, Judge Bauer and the CBA, 28 CBA Record 8 (2014) (quoting Judge Bauer; citation omitted).
33 E.g., Standards for Professional Conduct Within the Seventh Federal Judicial Circuit 120-21, 123 (2013).
34 Filisko, supra note 18 (quoting S.C. oath).
37 Aspen, supra note 8, at 96.
38 Louis H. Pollak, supra note 6 (quoting Justice Kennedy).
42 Alfred, Lord Tennyson, Idylls of the King, The Last Tournament (1859-85).