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10-2015

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Douglas E. Abrams

*University of Missouri School of Law*, [abramsd@missouri.edu](mailto:abramsd@missouri.edu)

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### Recommended Citation

Douglas E. Abrams, Incivility in Legal Writing Can Be Costly to Client and to Attorney, 41 *Montana Lawyer* 14 (2015).

Available at: <https://scholarship.law.missouri.edu/facpubs/910>

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

This article first appeared in *Precedent, The Missouri Bar's quarterly magazine*. It is being reprinted with permission.

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."<sup>1</sup> 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."<sup>2</sup>

The ABA initiative echoes federal and state courts that call civility "a linchpin of our legal system,"<sup>3</sup> a "bedrock principle,"<sup>4</sup> and "a hallmark of professionalism."<sup>5</sup> Justice Anthony M. Kennedy says that civility "defines our common cause in advancing the rule of law."<sup>6</sup> Chief Justice Warren E. Burger called civility a "lubricant[] that prevent[s] lawsuits from turning into combat."<sup>7</sup> "Courtesy is an essential element of effective advocacy," agrees Justice John Paul Stevens.<sup>8</sup>

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 cause. 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.<sup>9</sup> "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."<sup>10</sup> The advice prevails, regardless of whether incivility pits lawyer on 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.<sup>11</sup>

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."<sup>12</sup>

"[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."<sup>13</sup> "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)."<sup>14</sup>

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."<sup>15</sup> The court instructed the parties to "leave the venom at home"<sup>16</sup> because "[w]hether you like (or get along well with) your opposition has little to do with the merits of a particular case."<sup>17</sup>

Some courts have moved beyond instruction. In the exercise of inherent authority, these courts have sanctioned lawyers, or have denied attorneys' fees, for incivility.<sup>18</sup> Some courts have even sanctioned the client who, having retained the lawyer, bears some responsibility for the lawyer's conduct.<sup>19</sup>

### 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*.<sup>20</sup> 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.”<sup>21</sup>

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.”<sup>22</sup>

## Part II.

### Incivility’s Costs to the Client

Lawyers whose writing descends into incivility risk weakening 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 argument.”<sup>23</sup> 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.<sup>24</sup>

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 representation 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 disgust 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 client may feel better reading it, but your audience is the judge, and judges abhor it.”<sup>25</sup> 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.”<sup>26</sup> “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.”<sup>27</sup>

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 preserving order and maintaining the decorum of its proceedings. Such things can irritate; they can never persuade.”<sup>28</sup>

## 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 professional 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.<sup>29</sup> “Being a lawyer can be pleasant or unpleasant,” 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 becomes more pleasant and easier.”<sup>30</sup>

Moving from the lawyer’s personal enrichment to professional 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, courteous, and civil attitude toward all persons involved in the legal system.”<sup>31</sup> Model Rule 8.4(d) operates against “conduct that is prejudicial to the administration of justice.”<sup>32</sup>

The Model Rules’ spotlight on professional obligation is fortified by commands for civility in federal and state court rules;<sup>33</sup> state admissions oaths;<sup>34</sup> and unofficial codes that some professional organizations maintain for their member lawyers.<sup>35</sup> The ABA Model Code of Judicial Conduct imposes reciprocal obligations of civility on judges in the performance of their official duties.<sup>36</sup>

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, 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,” confides one federal district judge.<sup>37</sup> 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 superb professional.”<sup>38</sup> 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.”<sup>39</sup>

Even without public rebuke or other disdain from the

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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 unswerving commitment to an honorable law practice.

As members of a largely self-governing profession devoted to the rule of law,<sup>40</sup> 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.”<sup>41</sup> “The greater the man, the greater courtesy,” wrote British Poet Laureate Alfred, Lord Tennyson in his epic poem, *Idylls of the King*.<sup>42</sup>

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.”<sup>43</sup> 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

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 *Wilson v. Airtherm Prods., Inc.*, 436 F.3d 906, 912 n.5 (8th Cir. 2006).

4 *Wescott Agri-Prods, Inc. v. Sterling State Bank, Inc.*, 682 F.3d 1091, 1096 (8th Cir. 2012).

5 *Cardello v. Cardello*, No. FA020088156S, 2002 WL 31875435 \* 1 (Conn. Super. Ct. Dec. 4, 2002).

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

7 Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 214-15 (1971).

8 Marvin E. Aspen, *Let Us Be “Officers of the Court,”* 83 A.B.A.J. 94, 96 (July 1997) (quoting Justice Stevens).

9 Joint Congressional Comm. on Inaugural Ceremonies, *Address by John F. Kennedy*, 1961 (Jan. 20, 1961).

10 Stephen L. Carter, *Civility* 132 (1998).

11 484 B.R. 825 (N.D. Okla. 2013).

12 *In re Gordon*, 484 B.R. 825, 827 (N.D. Okla. 2013).

13 *Id.*

14 *Id.* at 827-28.

15 *Id.* at 828.

16 *Id.* at 830-31.

17 *Id.* at 830.

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

20 No. 8:10-md-02173-T-27EAJ, 2014 WL 1338605 (M.D. Fla. Apr. 3, 2014).

21 *Id.* at \*1 n.1.

22 *Id.*

23 Leigh Ingalls Saufley, *Amphibians and Appellate Courts*, 14 *Maine B.J.* 46, 49 (Jan. 1999).

24 Eric Hoffer, *The Passionate State of Mind: And Other Aphorisms* (1955).

25 Naomi Kogan Dein, *The Need for Civility in Legal Writing*, 21 *CBA Record* 54 (Feb./Mar. 2007) (quoting Judge Michael B. Hyman).

26 Sandra Day O’Connor, *Professionalism*, 76 *Wash. U. L.Q.* 5, 9 (1998).

27 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*).

28 John W. Davis, *The Argument of an Appeal*, 26 *A.B.A.J.* 895, 898 (1940).

29 Duane Benton, *Chief Justice’s Address to Members of the Missouri Bar*, Sept. 24, 1998, 54 *J. Mo. Bar* 302, 302 (1998).

30 J. Timothy Eaton, *Civility, Judge Bauer and the CBA*, 28 *CBA Record* 8 (2014) (quoting Judge Bauer; citation omitted).

31 *ABA Model Rules of Prof’l Conduct*, Preamble [9] (2015).

32 *Id.*, R. 8.4(d) (2015).

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).

35 See, e.g., *Am. Bd. of Trial Advocates’ Principles of Civility, Integrity, and Professionalism*, <https://www.abota.org/index.cfm?pg=Civility>.

36 *ABA Model Code of Judicial Conduct* R. 2.8(B) (2015).

37 Aspen, *supra* note 8, at 96.

38 Louis H. Pollak, *supra* note 6 (quoting Justice Kennedy).

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

40 *ABA Model Rules of Prof’l Conduct*, Preamble [10] (2015).

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

42 Alfred, Lord Tennyson, *Idylls of the King, The Last Tournament* (1859-85).

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