

Civility



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§ 60:1 Scope note

This chapter addresses the concept of civility as it may arise over the course of litigation in federal courts. After briefly noting the reactions of courts and bar associations to the perceived rise in uncivil behavior, the chapter discusses ways in which litigants may address uncivil behavior over the course of federal litigation, both formally and informally. Given the repercussions that could follow from a civility-based motion and the general wariness of courts to police attorney behavior, it is often advisable to consider informal methods of dealing with uncivil behavior. In that vein, the chapter discusses ways to address uncivil behavior in specific contexts, from discovery abuses to trial misconduct to general incivility, with reference to relevant federal precedent.

As set forth in this chapter, one possible response to uncivil behavior in litigation is a motion for sanctions. This chapter focuses on matters of civility and does not address broader sanctions issues except to the extent necessary to put civility in context. The principal treatment of these broader sanctions issues is in Chapter 50, “Sanctions” (§§ 50:1 et seq.).

This chapter discusses incivility throughout discovery. Once again, one possible response to incivility in discovery is an application to the court for sanctions. In addition to the discussion of discovery sanctions in Chapter 50, “Sanctions” (§§ 50:11 et seq.), there is additional coverage of discovery sanctions in Chapter 21, “Document Discovery”

(§§ 21:1 et seq.). Accordingly, the coverage of discovery sanctions in this chapter is limited to matters specifically related to civility.

This chapter also discusses incivility during depositions. There is also extensive discussion of deposition conduct in Chapter 20, “Depositions” (§§ 20:1 et seq.). Because the principal treatment of deposition conduct is in Chapter 20, the coverage of deposition conduct in this chapter is limited to matters specifically relating to civility.

Finally, this chapter addresses incivility in court and certain forms of improper behavior before juries. There is extensive coverage of trial conduct in Chapters 33 through 40 (§§ 33:1 – 4.0:30), and also coverage of various forms of improper behavior before juries in Chapter 59, “Ethical Issues in Commercial Cases.” (§§ 59:1 et seq.).¹ Because the principal treatments of trial conduct and ethical issues are in the chapters devoted to those subjects, the coverage of trial conduct and ethics in this chapter is limited to matters specifically relating to civility.

§ 60:2 Strategy, objectives, and preliminary considerations

In 1971, Chief Justice Warren Burger stated that “[a]ll too often, overzealous advocates seem to think the zeal and effectiveness of a lawyer depends on how thoroughly he can disrupt the proceedings or how loud he can shout or how close he can come to insulting all those he encounters . . .”¹ Although “from its earliest days in England, the legal profession has developed conventions to con-

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duct litigation and business in ways that diminish war-like instincts in the service of client interests,”² the modern problem of incivility has only increased since the chief justice’s remarks. What has caused this disturbing trend? It is not enough to say that the litigation process is adversarial and litigators have ethical obligations to — in some jurisdictions — “zealously” advance their clients’ interests. Neither of those factors alone causes incivility, as many successful litigators who are consistently professional honor both factors and neither is new to litigation. Suggested causes of the modern problem include an increase in the number of practicing attorneys; the growth in law firm size; the unaccountability of those practicing in large metropolitan areas and in national practice areas; and, most fundamentally, the perception that rude litigators obtain better results for their clients.³ It may not be fair to single out litigators or, more generally, lawyers as fostering this trend, as in many respects American society has moved away from an ethos in which manners are considered to be important in any endeavor. Hence, regrettably, the problem is not confined to major metropolitan areas where litigators practice with some anonymity but occurs even in rural environments in which combative and “in-your-face” behavior is condoned and sometimes encouraged.

The consequences of this conduct can appear throughout a case. An uncivil opponent has the potential to add unnecessary cost and unpleasantness to all stages of a case, obstructing everything from initial discovery disclosures to settlement negotiations.

Discerning the cause of incivility in an opponent may be useful in developing a strategy to combat it. For instance, some incivility occurs when a party (or its attorney) feels insecure in the face of a more experi-

enced opponent and, therefore, reaches for any supposed advantage that can be obtained. This can be dealt with by addressing the insecurity rather than the behavior, perhaps by demonstrating that greater resources or experience will not be used to disarm the opponent from effectively representing the client’s interests. Some litigators (like other people) are simply nasty, and as discussed below, nothing short of a court admonition or sanction will adequately address the issue.

Bad habits are learned early in a litigator’s career, and it is critical that more experienced lawyers serve as role models for younger lawyers. Law students who study by the case method — as most do — gather their legal education by reading materials that are, by definition, adversarial. There is also the instinct to please; few young associates believe that demonstrating anything less than aggressive conduct will gain favor with their superiors. It is important that experienced litigators disabuse younger attorneys of the idea that abusive, uncivil behavior advantages anyone.

Those who are perceived as the best litigators in commercial litigation are usually — by reputation and in fact — the most courteous and professional in their dealings with other attorneys. They have learned that uncivil conduct typically breeds reciprocal (or worse) uncivil behavior and that it is costly and usually interferes with successful development of a commercial case, both in the discovery and in the trial of the matter. It is costly because a lack of reasonable cooperation between adversaries means multiplying the time and effort needed to accomplish objectives. A failure to consent to a reasonable request for an extension or continuance, a last-minute cancellation of a deposition, a

failure to furnish responses to reasonable requests for discovery — all may require the other party to further consult with his or her client and prepare written motions to seek the intervention of the court. Uncivil behavior adds elements of difficulty to an endeavor (commercial litigation) that is difficult under the best of circumstances. Moreover, in the final analysis — and this has been corroborated by some close observance of jurors, — uncivil behavior by a trial lawyer suggests the absence of a meaningful position to advance on behalf of a client.

Sometimes uncivil behavior is prompted by clients who often want the “meanest dog in the junkyard” to represent them. All litigators must be mindful that they — not the client — should control how the litigation is developed, and it is their reputation — not the client’s — that is at risk in the proceedings. A client’s enthusiasm to mete out the hostility he or she has for the opposing party should not be transferred to the opponent’s attorney. One way to address this problem is to discuss with the client that such tactics will ordinarily increase the costs of the litigation, will in all likelihood be used in retaliation against the client, and may ultimately interfere with the development and presentation of the case. Much business litigation falls under the responsibility of in-house counsel in corporations that have budgets for cases and thus will be sensitive to uncivil conduct that may gratify egos but is more costly and does not produce results. Moreover, some corporations are sufficiently image-conscious that their in-house counsel prefer litigators whose conduct and reputation are beyond reproach.

Recent attention to the problem of incivility has encouraged some attorneys to routinely run to

court to complain of such behavior. Counsel should be judicious in seeking the attention of the court and should not turn any incivility-based motion into an opportunity to personally attack the character of the opponent. Indeed, one court criticized the parties for the “flurry of papers and the shrill, personal tone of counsel” during the proceedings in denying one party’s request that the court draw an adverse inference from the supposed failure of the opposing party to produce a witness for a deposition.⁴ Filing a motion based on uncivil behavior will likely delay the progress of the case and may further alienate opposing counsel (while encouraging accusations from one’s opponent). Further, judges are understandably reluctant to monitor attorney behavior.⁵ As discussed in more detail below,⁶ informal tactics may, in some instances, be more effective in addressing incivility.

At some point, however, it may become necessary to raise the issue of uncivil and disruptive behavior with the court. Attention should be paid to whether the particular judge has a tolerance for unprofessional behavior. This varies from judge to judge, and one should, first, try to research reported decisions to find out whether a particular judge has ruled on matters of incivility. Second, one should seek guidance from attorneys who have experience with the judge, perhaps even former law clerks (if the matter was not pending during the clerkship). In the absence of information from those two sources, one should rely on one’s best judgment, presenting, as discussed below, a specific request on a solid record with, perhaps, some acknowledgment of reluctance to bring the matter to the attention of the court. Although many judges understandably do not want to “babysit” attorneys who exhibit improper

conduct in the absence of serious ethical concerns, some judges are becoming increasingly concerned that the problem of incivility is increasing in the profession and that without judicial intervention — even if only by admonishment — the conduct will not improve. Experienced commercial litigators know when not to “cry wolf” but — as officers of the court — they should be willing to seek judicial redress in extreme cases.

§ 60:3 Formal reactions to incivility

Federal courts and bar associations have become increasingly active in cataloging and addressing problems of incivility in recent years. The Web site of the Center for Professional Responsibility of the American Bar Association indicates that professionalism codes have been adopted in various federal, state, and local jurisdictions in forty-six states and the District of Columbia.⁷ Committees and task forces have been formed to study the problem and issue recommendations. The Seventh Circuit and the Boston Bar Association, for example, have each created committees that have reviewed the issue and proposed standards.⁸

Although generally normative and not mandatory, these civility codes serve several useful purposes. Unlike disciplinary or ethical rules, which are mandatory and govern, with specificity, the conduct of attorneys in relation to their clients, civility codes advance standards that are normally aspirational — how lawyers should, rather than must, conduct themselves. They seek to address the tension between normal normative behavior in the interaction of adults and the adversarial world of litigation, where clients’ interests must be vigorously pursued. Of course, disciplinary and ethical rules can be broadly construed; in some instances,

incivility can be so egregious that it can “interfere with the administration of justice” or “the orderly proceedings in a court.”

Such ethical rules should not be ignored in the consideration of incivility; while, in large part, civility codes are not intended to have the same force as disciplinary or ethical rules, they do have useful purposes. First, they can be used as guides for lawyers to understand the kinds of conduct the profession encourages. Second, they provide specific standards of behavior that often are applicable to specific instances in commercial litigation. For instance, the Boston Bar Association report deals with requests for continuances and other concrete situations to which lawyers and judges can refer as establishing patterns of behavior adopted by a bar association or federal court.⁹ Every litigator should be familiar with the civility codes that are promulgated in his or her jurisdiction.¹⁰ Every law firm’s litigation department should circulate to its members those codes and discuss, particularly with younger associates, their purpose. These standards should be understood as setting the boundaries of behavior, which is critically important for young lawyers to understand.

The American College of Trial Lawyers publishes a Code of Trial Conduct. This code is meant “not to supplant, but to supplement and stress certain portions of the rules of professional conduct in each jurisdiction.”¹¹ It details the minimal duties owed to clients, opposing counsel, the court, and the administration of justice.¹² The code stresses, however, that lawyers should strive for an even higher level of civility whenever possible.

Notwithstanding the proliferation of civility codes, at least one federal judge has found that they have

not triggered “satellite litigation” concerning accusations of incivility.¹³ Further, as most of those codes are aspirational, parties seeking formal redress for uncivil behavior tend to bring motions for sanctions under Fed. R. Civ. P. 11 (permitting sanctions for written representations to the court that, inter alia, were presented for an improper purpose); Fed. R. Civ. P. 16 (pertaining to violations of scheduling or pretrial orders); Fed. R. Civ. P. 37 (pertaining to discovery violations); and 28 U.S.C.A. § 1927 (permitting a court to order costs against an attorney who “multiplies the proceedings in any case unreasonably and vexatiously”).¹⁴

Addressing Uncivil Behavior in Specific Contexts

§ 60:4 General incivility

Attorneys who are unpleasant to deal with generally self-identify early in a case. One should not assume, however, that a lawyer who has a reputation of incivility will always act that way. If it is someone who does have that reputation, or is unknown, it is wise to send a letter at the outset of the case setting forth suggestions for proceeding: reasonableness in setting deadlines, accommodations for busy schedules when possible, a willingness to discuss matters of disagreement, and the hope for a professional relationship, notwithstanding any hostility between the clients.

Whether they are being impolite to gain a perceived advantage in the litigation or to strike fear in the heart of their opponents, savvy opposing counsel are less likely to be uncivil if their behavior is being recorded. A lawyer faced with uncivil behavior could then request that counsel communicate solely via letter or e-mail, modes of communication that

could be shown to the judge or jury, if necessary. This would, at best, encourage counsel to communicate more courteously; at worst, it would create a paper trail of the offending behavior. If the lawyer refuses to communicate in writing, then the best course of action is for the lawyer facing uncivil behavior to make a written record of every statement, threat, or disparaging remark communicated orally, sending the writing to the offending attorney (“Dear Mr. Jones: This letter is intended to reflect the telephone communication I received from you today in which you said the following . . . If I have misunderstood or misstated the substance of that communication, please let me know . . .”). The lawyer is thus beginning to make a record that will be critically important if the intervention of the court is later sought.

Generally, uncivil behavior may serve as the basis for the award of sanctions. The Fifth Circuit upheld a sanction of \$25,000 against an attorney on the basis of numerous forms of uncivil behavior over the course of the case, including repeatedly calling opposing counsel and parties rude names and referring to the work of other attorneys as “garbage.”¹⁵ Another court reduced the statutory fee award to attorneys who, inter alia, called an opposing attorney a “second-grade loser,” were disruptive during discovery, harassed the court reporter, and did not conduct themselves professionally while court was in session.¹⁶ More specifically, counsel stated to their client, “Let’s kick some [expletive],” after the judge had taken the bench; had a confrontational conversation with the court reporter, asking, “What are you here for, just to look pretty?”; reacted dramatically to unfavorable rulings on objections by, for example, rolling his eyes, flailing his arms, and laughing, despite repeated admonitions by the

court to stop such behavior; and refused to shake opposing counsel's outstretched hand at the end of the trial.¹⁷ The Eleventh Circuit upheld sanctions against an attorney who, in five filings, made personal attacks on opposing counsel, including remarks on his physical traits and unsubstantiated allegations of racism and unfitness as a member of the bar.¹⁸

Counsel should also be aware that the uncivil behavior of nonlawyer consultants may be the basis for a fee award. The Supreme Court of Delaware recently upheld a fee award based in part on the incivility of a consultant who, among other things, obstructed discovery by sending potentially threatening e-mails to opposing counsel and refusing to respond to written discovery or answer questions at his own deposition.¹⁹

Even when not applying sanctions or fees, a number of courts have seen to fit to comment on the lack of civility they witnessed. This may reflect an increased sensitivity to the importance of civility in the practice of law.²⁰ A few courts have also commented positively on the parties' civility.²¹

In making a record of uncivil conduct for the court, it is important that the record be factual and, to the extent possible, free of generalities and pejorative opinions that may not have objective support and may suggest a hostility toward the opposing attorney that would undermine the asserted position. One must assume that the court has little interest in these matters because they are all — even if well-founded — a distraction in the resolution of the substantive case. Therefore, restraint, rather than overstatement, may be the best course of action in drafting moving papers; the articulated conduct should

speak for itself rather than the state of mind of the attorney preparing the papers, who may be deemed to have “protest[ed] too much.” Motions for judicial relief in the context of incivility should be advanced sparingly and only when the asserted conduct — and the supporting conduct — is such that serious prejudice will result if the court does not intervene.

It is important to be aware that some courts have refused to sanction uncivil behavior that did not take place before a judge. The Third Circuit, for example, reversed a sanction award against an attorney who “repeatedly directed profanity toward opposing counsel” in her communications, as she had not had these confrontational conversations in front of the court.²²

“Incivility” need not be confined to egregious personal attacks to be sanctionable. One court excoriated a party who moved to dismiss an original complaint mistakenly titled “First Amended Complaint,” noting that “in the interest of civility, [defendant’s] counsel should have called [plaintiff’s counsel] to alert him of the obvious mistake and agree on a way to correct it as expeditiously and economically as possible.”²³ In another case, the court declined to sanction one party after finding that both parties had behaved improperly over the course of the litigation, while noting it would otherwise have been sanctionable for one party to wait to file a motion for reconsideration until the eve of another filing deadline, thus knowingly allowing the parties to engage in needless and wasteful briefing. “Although [the] attorneys [seeking sanctions] may fancy themselves the white knights of this litigation,” the court held that “their outrageous posturing has contributed to the delay in their clients’ receipt of relief” over the course of the liti-

gation.²⁴ Such a case reminds counsel of the importance of maintaining civility notwithstanding the behavior of the opposing party.

§ 60:5 Incivility throughout discovery

Discovery has been identified as “the area in which uncivil conduct is most likely to arise.”²⁵ As the court is not directly involved and counsel must deal with time strictures and pressure from their clients, discovery is particularly vulnerable to incivility.²⁶

Courts may find allegations of incivility relevant when reviewing motions pertaining to general discovery abuses. For example, one court noted that an attorney’s uncivil behavior put other discovery violations “in context,” granting the motion to dismiss two defendants after finding that plaintiff’s counsel had not only violated discovery orders but repeatedly engaged in uncivil behavior pertaining to depositions, including “coaching her client’s testimony, storming out without cause, hanging up on counsel, insulting counsel, and even questioning the religious beliefs of a deponent.”²⁷

It is critical that counsel maintain decorum in the wake of incivility and avoid ad hominem attacks both in dealing with rudeness and in the context of any motion for relief. Attorneys who behave uncivilly will undermine any incivility-based argument of their own. While finding that a party had incontrovertibly abused the discovery process, one court refused to sanction the behavior because of the other party’s “unsubstantiated and extreme attacks on the personal integrity, ethics, and character of defense counsel.”²⁸ Another judge referenced the uncivil conduct of both parties in denying cross-motions for sanctions and refused to entertain further motions “absent evidence that attorneys for

both sides have conducted themselves professionally . . . [and] abide[d] by the common sense rules of civility in order to promote an orderly and efficient resolution of the pending lawsuit.”²⁹ In another court, when both sides were “equally culpable for the protracted, contentious discovery,” the court held they should bear their own expenses rather than granting any attorney’s fees to either side.³⁰ Similarly, while sanctions would have otherwise been appropriate when counsel submitted a witness statement that did not reflect the witness’s final edits, another court chose instead to place both parties “on notice” because of bad behavior on both sides.³¹ Counsel’s incivility may cause him to lose his autonomy during discovery, and lead judges to closely monitor his behavior.³²

Moreover, turning every discovery abuse into an opportunity for briefing may dilute any subsequent accusations of incivility. After an attorney threatened to “eat part of someone else’s anatomy” during a deposition, the court sanctioned both sides for uncivil behavior, citing general noncompliance with its discovery order and a total of nineteen discovery motions and ten motions for sanctions filed by the parties.³³

§ 60:6 Incivility during depositions

Uncivil behavior during a deposition not only makes the experience unnecessarily unpleasant for the lawyers and the witness, but it risks impacting the content of the testimony. An uncivil lawyer who conducts a deposition could use rudeness to berate or otherwise harass the witness, causing them to give testimony in suboptimal circumstances. A lawyer who uncivilly defends a witness could prevent the examining attorney from fully obtaining information, by stalling the progress of

the deposition and setting an uncooperative tone.³⁴ Counsel should also be aware that the court may interpret the decision to deposition other attorneys as a sign of incivility.³⁵

Federal courts have been receptive to motions based on uncivil deposition conduct, sanctioning an attorney who made obstructionist remarks on 91 percent of the transcript pages³⁶ and appointing a discovery master to supervise the completion of a deposition of a witness whose lawyer engaged in “Rambo litigation tactics.”³⁷ One appellate court upheld the dismissal of a case, based in part on what reasonably could have been construed as a physical threat made by counsel to the examining attorney after the examiner asked for a telephone to call the court.³⁸ While stating that it “has no bearing on the outcome of the case,” the Supreme Court of Delaware attached an addendum to an opinion pertaining to a “serious issue of professionalism involving deposition practice in proceedings in Delaware trial courts” by a participating attorney.³⁹ There, the attorney admitted *pro hac vice* “(a) improperly directed the witness not to answer certain questions; (b) was extraordinarily rude, uncivil, and vulgar; and (c) obstructed the ability of the questioner to elicit testimony to assist the Court in th[e] matter.”⁴⁰

The best tool at the disposal of an attorney confronted with incivility in a deposition is the transcript. If the transcript would not speak for itself before a judge, counsel should note the uncivil behavior and continue with the deposition. It is, of course, unwise to respond with an uncivil remark of one’s own; a court is likely to be wary of awarding relief on the basis of uncivil behavior if it must sort

through the transcript and determine who was “more” uncivil.

The Seventh Circuit harshly reprimanded uncivil behavior in a deposition. Even where opposing counsel’s uncivil conduct was “shameful,” the court still censured attorneys who responded unprofessionally in a deposition. The court conceded they were “goaded” but concluded that “their responses — feigned inability to remember, purported ignorance of ordinary words . . . and instructions not to respond that neither shielded a privilege nor supplied time for a protective order — were unprofessional.”⁴¹ Moreover, the court criticized the lower court’s refusal to sanction one side when both sides were uncivil: “Instead of declaring a pox on both houses, the district court should have used its authority to maintain standards of civility and professionalism. It is precisely when animosity runs high that playing by the rules is vital.”⁴²

Although discovery is the forum in which much incivility occurs — largely because it is totally unsupervised and, in the case of depositions, clients are often face-to-face — it is also the part of the case in which judges do not want to intervene. Under the Federal Rules of Civil Procedure, the discovery process is robust but also intended to proceed without court supervision and intervention. Therefore, matters that arise in the context of “discovery disputes” usually are viewed somewhat skeptically by the court. Before attempting to get a court to delve into these matters, it is important to suggest not merely a few instances of incivility but a pattern of conduct by one’s adversary that calls for judicial intervention. The transcript of a deposition is critical, and the absence of pejorative or long-winded statements by the movant is important. The tran-

script can also be supported by correspondence related to the subject matter of the complaint. It is critical that the papers demonstrate the uncivil conduct is intentional, not inadvertent, and repeated, not isolated. To the extent that there are applicable portions of civility codes that could be referenced in the transcript or written communications, as well as in the moving papers, they could convey that the accused conduct violates standards of conduct that the court should not ignore.

§ 60:7 Incivility in court

Attorneys who behave rudely in front of a judge or jury act at their own peril.⁴³ Despite the image of the badly behaved “bulldog” attorney that prevails in popular culture, jurors are unlikely to respond favorably to an uncivil lawyer and judges are unlikely to tolerate such antics. It is far wiser to be trusted by the jury and respected by the judge.⁴⁴

Federal case law contains examples of attorneys who have, despite the risks, acted unprofessionally in court.⁴⁵ Incivility in this context is so offensive that it has served as grounds for a mistrial. In one case, for example, immediately after the presiding judge had left the courtroom at the end of the day, an attorney's response to his opponent's request that he stop handling the relevant exhibit was to throw his opponent to the ground.⁴⁶ An attorney was denied *pro hac vice* admission in another jurisdiction after causing two mistrials in his home district partially through uncivil behavior; in the first mistrial, he used foul language on the record, and in the second, he repeatedly referred to his opponent as a “fat pig” in the presence of the jury.⁴⁷

Counsel should also be wary of initiating or returning uncivil behavior during substantive motion prac-

tice, when their behavior is conveyed to the court through written submissions or oral argument.⁴⁸ Recent courts have weighed the civility or incivility of one or all parties in considering substantive motions.⁴⁹ Where counsel's briefs were “replete with attacks on the integrity of the court of appeals panel that decided the cases below,” one court struck the briefs and assessed attorney's fees against counsel.⁵⁰ In a brief, treating a lower court or opposing counsel with disrespect is a sign of incivility and a court may admonish offending counsel.⁵¹ Furthermore, another court noted the important difference between civil and uncivil criticisms of the court and the other party: “It is one thing to argue cogently and calmly that Appellees' counsel was less than candid and that the trial court made erroneous decisions. It is quite another to compare Appellees' lawsuit to a rape and to suggest that the trial court is ignorant of the law.”⁵² The court proceeded to strike the offending party's argument.⁵³

When uncivil behavior takes place in the presence of a judge, it may be advisable to defer to the judge's opinion as to the best way to run the courtroom. As in other contexts, an attorney who shrieks about his opponent's incivility is likely to be considered uncivil himself.

In instances in which the court does not react to incivility that occurs in its presence — dismissing or overruling an objection that is made about the conduct — there are two courses of action that can be pursued. The first is to ask to see the court at sidebar, outside the presence of the jury but on the record, where the attorney should clearly and politely articulate his or her concern about the adversary's conduct. Unless the damage must be cured immediately, one may ask to approach the sidebar at the

end of a session so as to not interfere with the pace of the proceedings. On that occasion, one may ask that certain statements be stricken from the record or that curative instructions be given to the jury. Another procedure would be to file a written motion setting forth its factual basis, including supporting affidavits if the complained-of conduct is not a matter of record, and request appropriate relief. If the complaining attorney has a reputation of not crying wolf at every slight, the court will be more likely to give attention to the matter; whether or not the court ultimately intervenes, the motion may prompt the offending attorney to modify his or her behavior.

Practice Checklists

§ 60:8 Checklist: considering whether to seek attention of court

- Determine whether the court has tolerated rude behavior in the past or would seem receptive to a formal motion. (See § 60:2)
- Ensure that counsel has maintained decorum in all dealings with opposing counsel before seeking relief based on opposing counsel's misdeeds. (See § 60:2)
- Ascertain whether objective evidence of incivility is available (e.g., deposition transcripts or rude written communications) or if the court will have to decide the motion after weighing the attorney's credibility. Given the busyness of judicial dockets and the general skepticism associated with civility motions, it is usually advisable for the movant to defer to the court's judgment as to whether an evidentiary hearing would be necessary, rather than affirmatively seeking one. (See § 60:2)

- Review previous and anticipated motions not related to the merits of a case to decide whether an incivility-based motion would aggravate a court that feels it is already devoting a significant amount of time to peripheral motions. (See § 60:2)
- Avoid making personal attacks in any motion based on opposing counsel's incivility. (See § 60:2)

§ 60:9 Checklist: addressing general incivility

- Consider requesting that all communications be written (e.g., via letter or e-mail), to create a record of incivility and encourage proper behavior. (See § 60:4)
- Be aware of the general reluctance of courts to “babysit” attorneys, and consider whether the court would sanction rude behavior that did not concern a filing or a hearing. (See § 60:4) Recall that “incivility” can include filing motions with the purpose of embarrassing opposing counsel or creating unnecessary work on the part of counsel and the court. (See § 60:4)

§ 60:10 Checklist: addressing incivility throughout discovery

- Consider whether it would be appropriate to call the court's attention to uncivil behavior in the context of a motion concerning discovery violations. (See § 60:5)
- Set a cooperative tone with opposing counsel from the outset of discovery (e.g., consent to reasonable requests for extensions or other changes to the schedule). If counsel is unwilling to be reasonable in scheduling decisions or accommodations, create a written record of the behavior and, if becomes so unreasonable that it

threatens the progress of the case, consider bringing it to the court's attention. (See § 60:5)

§ 60:11 Checklist: addressing incivility in depositions

- Recognize the impact uncivil behavior can have on the content of the testimony elicited at a deposition. (See § 60:6)
- Be keenly aware of the transcript, ensuring that uncivil behavior by opposing counsel is adequately reflected in the transcript, and avoid making any rude remarks in response to such behavior. (See § 60:6)

§ 60:12 Checklist: addressing incivility in court

- Consider deferring to the judge's opinion as to the best ways to run his or her courtroom, unless to acquiesce would be to abdicate one's duties as an advocate. (See § 60:7)
- Take advantage of opposing counsel's rudeness by behaving as politely as possible before the judge and jury. (See § 60:7)

End Notes

[Section 60:1]

¹ A complete summary of contents appears at the beginning of this volume.

[Section 60:2]

² Chief Justice Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 213 (May 18, 1971) (remarks made to the Opening Session of the American Law Institute).

³ See Boston Bar Association Task Force on Civility in the Legal Profession Report, at 15 (May 23, 2002).

⁴ See Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 445 (7th Cir. 1992) ("discovery, billing demands, and the increased size of the bar are among the fuels igniting uncivil litigation practices"). See also

Felder, *I'm Paid to Be Rude*, N.Y. TIMES, July 17, 1997, at A23 (maintaining that a proposed civility code in New York "reflects a misreading of what lawyers are hired to be — adversaries — and a misreading of what the legal profession is about — conflict").

⁵ *Rudolph v. Hechinger Co.*, 884 F. Supp. 184, 188 n.5, 74 Fair Empl. Prac. Cas. (BNA) 1469, 66 Empl. Prac. Dec. (CCH) P 43717 (D. Md. 1995).

⁶ For a general discussion of the reluctance to encourage "satellite litigation" regarding motions for sanctions under Fed. R. Civ. P. 11, see Chapter 50, "Sanctions" (§§ 50:1 et seq.).

[Section 60:3]

⁷ See §§ 60:4–7.

⁸ See American Bar Association Center for Professional Responsibility Professionalism Codes, available at <http://www.abanet.org/cpr/profcodes.html>.

⁹ See Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 441 (7th Cir. 1992); Boston Bar Association Task Force on Civility in the Legal Profession Report (May 23, 2002).

¹⁰ For recent references to local rules and civility codes in the context of motion practice, see *Titan Finishes Corp. v. Spectrum Sales Group, et al.*, 452 F.Supp.2d 692, 695–96 (E.D. Mich. Aug. 14, 2006) (denying a motion for sanctions brought in part under the local civility code, where the code expressly stated that it was not an independent basis for penalties or litigation); *Dr. Robert Sicurelli, et al., v. Jeneric/Pentron, Inc., et al.*, 2005 WL 3591701, at *7 (E.D.N.Y. Dec. 30, 2005) (finding that while counsel's disruptive and uncivil behavior during a deposition did not constitute bad faith for purposes of sanctions under 28 U.S.C. § 1927, the behavior was inconsistent with counsel's role as an officer of the court and flouted a local rule on civility).

¹¹ Code of Conduct for the American College of Trial Lawyers, Preamble, p 467 (2007).

¹² Code of Conduct for the American College of Trial Lawyers, Introduction, p 466 (2007).

¹³ See, e.g., Boston Bar Association Task Force on Civility in the Legal Profession Report, at 11–12 (May 23, 2002).

¹⁴ See Aspen, *A Response to the Civility Naysayers*, 28 Stetson L. Rev. 252, 263 (1998) (analyzing the use of the Standards for Professional Conduct within the Seventh Federal Judicial Circuit and finding "a review of the case law turns [this . . .] criticism on its head: it indicates that the Standards actually hold out the promise of decreasing the [uncivil] use of sanctions").

¹⁵ See, e.g., *Nault's Auto Sales Inc. v. American Honda Motor Co., Inc., Acura Auto. Div.*, 148 F.R.D. 25, 26 Fed. R. Serv. 3d

46 (D.N.H. 1993) (Rule 11); *Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776, 780, 1991–2 Trade Cas. (CCH) P 69525, 20 Fed. R. Serv. 3d 295 (7th Cir. 1991) (Rules 16 and 37); *Cook v. American S.S. Co.*, 134 F.3d 771, 773–74, 48 Fed. R. Evid. Serv. 1010, 1998 FED App. 0019P (6th Cir. 1998) (28 U.S.C.A. § 1928). For a general discussion of motions brought under Rule 11, Rule 37, and 28 U.S.C.A. § 1928, including forms for such motions, see Chapter 50, “Sanctions” (§§ 50:1 et seq.).

[Section 60:4]

¹⁶ *In re First City Bancorporation of Texas Inc.*, 282 F.3d 864, 866 (5th Cir. 2002).

¹⁷ *Lee v. American Eagle Airlines, Inc.*, 93 F. Supp. 2d 1322, 1336 (S.D. Fla. 2000).

¹⁸ *Lee v. American Eagle Airlines Inc.*, 93 F. Supp. 2d 1322, 1327 (S.D. Fla. 2000).

¹⁹ *Kuang v. Cole Nat'l Corp.*, 884 A.2d 500, 505 (Del. 2005) (“For future guidance and deterrence, we emphasize that sanctions may be imposed upon anyone participating in a Delaware proceeding who engages in abusive litigation tactics.”)

²⁰ See, e.g., *Levy v. Office of the Legislative Auditor*, 459 F. Supp. 2d 499, 500 n.6 (M.D. La. 2006) (“[T]he personal attacks throughout this litigation cause this Court great concern. This lack of civility between parties was below the level of professionalism this Court expects and the federal judiciary deserves.”); *Howard v. State*, 945 So. 2d 326, 371 (Miss. 2006) (noting “concern[s] about the lack of civility between the lawyers . . . [they] must learn how to work together in a civil and professional manner”); *Sandberg v. John T. Crouch Co., Inc.*, 2006 Ohio 4519, P164 (2006) (“Incivility breeds incivility, and disrespect breeds disrespect . . . [T]he lack of cooperation and civility on both sides is nothing to which any attorney should aspire.”); *In re Jefferson*, 2007 Fulton County D. Rep. 1188, 20 (Ga. App. 2007) (remarking that while counsel’s impolite statements did not rise to the level of criminal contempt, his words did “offend the precept that civility and courtesy should be hallmarks of the legal profession”) (citation omitted); *Britts v. Superior Court*, 145 Cal. App. 4th 1112, 1121 n.3 (Cal. App. 6th Dist. 2006) (“[C]ounsel would be wise to remember that the snide personal attacks, hyperbole, and rhetoric that appear in this record do not aid in, and indeed distract from, the proper resolution of the issues.”)

²¹ See, e.g., *Constellation Power Source, Inc. v. Select Energy, Inc.*, 467 F. Supp. 2d 187, 190 (D.Conn. 2006) (“Counsel for each side distinguished themselves throughout this case by their skillful advocacy, professionalism, and civility. The Court is grateful to each of them.”); *Spiering v. Heineman*, 448 F. Supp. 2d 1129, 1142 (D. Neb. 2006) (“I thank the lawyers for their helpful briefs. More importantly, I compliment them for their commitment to civility and professionalism.”); *Independence Fed. Savings Bank v. Bender, et al.*, 230 F.R.D. 11, 16–17 (D.D.C. 2005) (“Advocacy on both sides has occasionally risen to the

boiling point, although the lawyers are to be commended for their civility in the midst of heavy battle.”)

²² *Thomas v. Tenneco Packaging Co., Inc.*, 293 F.3d 1306, 1324, 83 Empl. Prac. Dec. (CCH) P 41139, 53 Fed. R. Serv. 3d 318 (11th Cir. 2002) (“Affidavits, declarations, and other submissions to the court serve as a vehicle for the articulation of specific facts that support a particular position relevant to a case. Such submissions, however, are not meant to be an avenue through which attorneys, clients, and witnesses can simply emote, let off steam, or otherwise sling mud at an adversary.”)

²³ See *Saldana v. Kmart Corp.*, 260 F.3d 228, 236, 57 Fed. R. Evid. Serv. 795 (3d Cir. 2001) (reversing an order that the offending attorney attend a CLE class on civility, write letters of apology, and pay fees associated with the motion for sanctions where “[t]he language complained of in this case did not occur in the presence of the Court and there is no evidence that it affected either the affairs of the Court or the ‘orderly and expeditious disposition’ of any cases before it”).

²⁴ *Philadelphia Gear Corp. v. Swath Intern. Ltd.*, 200 F. Supp. 2d 493, 498, 52 Fed. R. Serv. 34 1384 (E.D. Pa. 2002) (“In over thirty-eight years of trial practice, the undersigned learned that lawyers who treat other lawyers with civility can expect the same when they inevitably find themselves in similar situations. In the long run, such behavior not only is totally consistent with zealous advocacy, but also inexorably promotes the interests of justice.”)

[Section 60:5]

²⁵ *Johnson v. Sullivan*, 714 F. Supp. 1476, 1486, 26 Soc. Sec. Rep. Serv. 356, Unempl. Ins. Rep. (CCH) P 15461A (N.D. Ill. 1989), decision aff’d in part, rev’d in part on other grounds, 922 F.2d 346, 32 Soc. Sec. Rep. Serv. 136, Unempl. Ins. Rep. (CCH) P 15842A (7th Cir. 1990) (“The court can only hope that the entry of an amended judgment order will restore some semblance of civility and reasonableness to this litigation.”)

²⁶ Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 445 (7th Cir. 1992).

²⁷ See Comment, Ethical vs. Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule, 74 U. Colo. Rev. 1197, 1215 (2003) (“Because it is largely unsupervised, the discovery process seems to encourage uncivil conduct . . .”).

²⁸ *Big Top USA, Inc. v. Wittern Group*, 183 F.R.D. 331, 342–43 Fed. R. Serv. 3d 158 (D. Mass. 1998) (“While the stress of litigation can understandably result in an isolated uncivil outburst, the appropriate follow-up is ‘I’m sorry.’ Alternatively, counsel should seek the advice of a mentor who is more experienced. However, no deposition should have unprofessional exchanges or yelling matches like the ones that occurred here.”)

²⁹ Nault's Auto Sales, Inc. v. American Honda Motor Co., Inc., Acura Auto. Div., 148 F.R.D. 25, 35, 26 Fed. R. Serv. 3d 46 (D.N.H. 1993).

³⁰ Pucket v. Hot Springs Sch. Dist. No. 23-2, 239 F.R.D. 572, 589 (D.S.D. 2006).

³¹ Enviva Corp v. Global Water Solutions, Inc., 440 F. Supp. 2d 1042, 1053–54 (D. Minn. 2006).

³² See Steinbuch v. Outler, 463 F. Supp. 2d 4, 8 (D.D.C. 2006) (“[G]iven [their] behavior . . . both parties are ordered not to file one single document of discovery, for any reason, without first receiving permission from this Court to do so, after providing specific grounds stating the reason such a filing is necessary.”)

³³ Chapsky v. Baxter V. Mueller Div., Baxter Healthcare Corp., 1994 WL 327348 (N.D. Ill. 1994), at *1 (finding that the “legal misconduct alleged is as much attributable to the parties’ failure to get along on a personal level as it is to a failure to comply with the law”).

³⁴ See Jaen v. Coca-Cola Co., 157 F.R.D. 146, 148, 31 Fed. R. Serv. 3d 178 (D.P.R. 1994) (noting that “[u]p until the denouement of this case, the attorneys accused each other of bad faith, abusive practices, conflicts of interest, harassment, and the use of terrorist tactics,” notwithstanding the court’s imposition of sanctions, and “[f]or every single discovery proceeding the Court was forced to intervene”).

³⁵ See Carehouse Convalescent Hospital v. Superior Court, 143 Cal. App. 4th 1558, 1562 (2006) (“Attorney depositions chill the attorney-client relationship, impede civility and easily lend themselves to gamesmanship and abuse.”)

[Section 60:6]

³⁶ An example of egregious conduct in depositions is revealed in Renata Adler’s book concerning the suit by William Westmoreland versus *Time* magazine. See *Reckless Disregard: Westmoreland v. CBS, et al. Sharon v. Time* at 37–52 (Knopf ed., Random House 1986) (“At worst, depositions, more than the other forms of discovery (sworn affidavits and document production, which do not require the presence of witnesses and paid attorneys), are the rich litigant’s best instrument for harassment, obfuscation, and delay.”)

³⁷ See Unique Concepts Inc. v. Brown, 115 F.R.D. 292, 293 (S.D. N.Y. 1987) (further ordering reexamination of the offending attorney’s client and payment of the deposition costs and a \$250 fine).

³⁸ See Van Pilsum v. Iowa State University of Science and Technology; 152 F.R.D. 179, 181, 28 Fed. R. Serv. 3d 574 (S.D. Iowa 1993) (further ordering the attorney to pay the costs of the master and 50 percent of the cost of the deposition).

³⁹ See Castillo v. St. Paul Fire & Marine Ins. Co., 938 F.2d 776, 779, 1991–2 Trade Cas. (CCH) P 69525, 20 Fed. R. Serv. 3d

295 (7th Cir. 1991) (noting that the remark — “[Y]ou step outside this room and touch the telephone, and I’ll take care of that in the way one does who has possessory rights” — was part of an overall pattern of uncivil behavior over the course of the litigation).

⁴⁰ See Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, Fed. Sec. L. Rep. (CCH) P 98063 (Del. 1994).

⁴¹ Redwood v. Dobson, 476 F.3d 462, 469 (7th Cir. 2007).

⁴² Redwood v. Dobson, 476 F.3d 462, 469 (7th Cir. 2007).

⁴³ For specific discussion of incivility in closing arguments, see Janelle L. Davis, Comment, *Sticks and Stones May Break My Bones, But Names Could Get Me a Mistrial: An Examination of Closing Argument in Civil Cases*, 42 Gonz. L. Rev. 133, 134 (2006) (“[I]mproper name-calling during closing argument can have very dire consequences. It can inflame passions and prejudices, it can distract from the real issues, and it can even result in unwarranted verdicts.”).

⁴⁴ Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 53, Fed. Sec. L. Rep. (CCH) P 98063 (Del. 1994).

[Section 60:7]

⁴⁵ For an example of a favorable reaction to civility by the bench, see Freed v. Consolidated Rail Corp., 201 F.3d 188, 190 n.2, 10 A.D. Cas. (BNA) 169 (3d Cir. 2000) (“We wish to comment on the civility shown by counsel for both parties during the oral argument to the court and to each other. It is, of course, consistent with the standard of conduct we expect and have often observed; we make note of it here to encourage all attorneys to do the same.”)

⁴⁶ See, e.g., Burks v. City of Philadelphia, 974 F. Supp. 475 (E.D. Pa. 1997).

⁴⁷ Cook v. American S.S. Co., 134 F.3d 771, 774, 48 Fed. R. Evid. Serv. 1010, 1998 FED App. 0019P (6th Cir. 1998) (upholding the district court’s order of a mistrial and sanctions against the assaulting attorney); see also Matter of Jaques, 972 F. Supp. 1070, 1084 (E.D. Tex. 1997) (listing the physical assault sanction in Cook, among various forms of misbehavior in other jurisdictions, including the use of profanity and other disruptive behavior during his own deposition, as grounds for a three-year suspension of the assaulting attorney in the Eastern District of Texas).

⁴⁸ See, e.g., Enviva Corp. v. Global Water Solutions, Inc., et al., 440 F.Supp.2d 1042, 1054 (D.Minn. July 13, 2006) (“At the start of oral argument, the Court expressed its disapproval of the lack of civility expressed in the parties’ motion papers and noted that such tone is rarely seen in federal court . . . Instead, while referring specifically to the Court’s comment, [the party opposing the motion] described Defendants’ counsel as an ‘attack dog,’ whose argument was ‘a bunch of [vulgarity].”); RLJCS Enterprises, Inc., et al., v. Professional Benefit Trust, Inc.,

et al., 438 F.Supp.2d 903, 905 (N.D. Ill. June 15, 2006) (“We are also compelled to remark that the briefs, clearly those of plaintiffs, are marked by pettiness and a lack of civility. The same sort of incivility creeps into defendants’ briefs at points.”); see also *City National Bank v. Clark*, 2006 WL 2136666 (S.D.W.Va. July 28, 2006) (examining rudely worded e-mails sent by counsel for both sides in weighing a motion to modify the scheduling order, noting their uncivil tone).

⁴⁹ See *MBNA Am. Bank, N.A. v. CIOE & Wagenblast, P.C., et al.*, 2006 U.S. Dist. LEXIS 30273, at *7 (N.D. Ind. May 15, 2006) (“Both parties have repeatedly sought sanctions and attorneys’ fees against each other on the basis of the other side’s alleged bad conduct . . . Given the allegations each side has leveled against the other, the court cannot say that either party’s behavior has been more unclear or uncooperative than the other’s. Accordingly, the court finds that requiring each party to bear its own expenses in this discovery dispute comports with justice in this case.”); *Flame Control Int’l, Inc., et al. v. Pyrocool Techs., Inc., et al.*, 2006 U.S. Dist. LEXIS 12308, at *15 (N.D. Tex. March 22, 2006) (denying motion for Rule 11 sanctions based on improper pleadings, noting, “It is true that Plaintiffs’ pleadings and motions reflect a lack of familiarity with the Federal Rules of Civil Procedure. On the other hand, Defendants’ motions and responses, strewn with veiled and not-so-veiled sarcasm, reflect a lack of familiarity with the federal rules of civility.”); *Third Wave Techs., Inc. v. Stratagene Corp.*, 405 F. Supp. 2d 991, 1017 (W.D. Wis. 2005) (enhancing damages based on, inter alia, improper litigation tactics that included the submission of an exhibit list evincing “counsel’s disregard for professionalism, civility, and simple courtesy”).

⁵⁰ *Peters v. Pine Meadow Ranch Home Ass’n*, 151 P.3d 962, 962 (Utah 2007).

⁵¹ See, *Levey v. Levey*, 731 N.W.2d 382, *21 n.7 (2007) (“[W]e admonish both counsel in this case based upon the briefs as a whole as to rules of appellate briefing and the requirements of civility toward their adversarial party, other counsel and the court.”); *Cochran v. State*, 859 N.E.2d 727 (Ind. App. 2007) (“Such language adds nothing to the debate and undermines civility in the practice of law.”).

⁵² *Leone v. Keesling*, 858 N.E.2d 1009, 1016 (Ind. Ct. App. 2006).

⁵³ *Leone v. Keesling*, 858 N.E.2d 1009, 1016 (Ind. Ct. App. 2006).

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