Civility

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FOLEY HOAG LLP

Reprinted from
Business and Commercial
Litigation in Federal Courts

Third Edition

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*The author expresses his appreciation to his colleagues Catherine C. Deneke, Esq., and Madeleine Rodriguez for their assistance with the preparation of this chapter for the Third Edition.

I. INTRODUCTION

§ 66:1 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 54 "Sanctions" (§§ 54:1 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 54 "Sanctions" (§§ 54:11 et seq.), there is additional coverage of discovery sanctions in Chapter 24 "Document Discovery" (§§ 24:1 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 23 "Depositions" (§§ 23:1 et seq.). Because the principal treatment of deposition conduct is in Chapter 23, 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 36 through 43 (§§ 36:1 to 43:30), and also coverage of various forms of improper behavior before juries in Chapter 65 "Ethical Issues in Commercial Cases" (§§ 65:1 et seq.). 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.

§ 66:2 Strategy, objectives, and preliminary considerations

In 1971, Chief Justice Warren Burger stated that "[a.]11 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 conduct 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. One court characterized the problem as follows: "Advocacy is supposed to be helpful, to make it easier for judges to understand the facts and legal issues of the case. Yet too much advocacy today is the opposite of helpful. It favors exaggeration over accuracy, attack over debate, and indiscriminate barrage over efficiency and cooperation. A culture of belligerence has taken root in our legal system, and it is an affliction on the day-to-day business of judging."[3] 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.[4] 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 of law firm size; a rise in inside counsel and a shift to transaction-based client relationships; increasing time pressures; a lack of guidance and training for young associates; the hierarchical organization of firms; 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.[5] It may not be fair to single out litigators or, more generally, lawyers as fostering this trend, as in many respects American society has

[1] Chief Justice 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).

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

[3] Hagen v. Faherty, 133 N.M. 605, 2003-NMCA-060, 66 P.3d 974, 979-80 (Ct. App. 2003) (quoting Bien, Viewpoint: A New Way for Courts to Promote Professionalism, 86 Judicature 132, 132 (2002)).

[4] See Lerner, Putting the "Civil" Back in Civil Litigation, 81 N.Y. St. B.J. 33 (2009) ("Aggression, belligerence and abusive tactics are by no means inherent in our adversarial system, and civility and mutual respect are not mutually exclusive with our role as zealous advocates."); see also In re Abbott, 925 A.2d 482, 489 (Del. 2007) ("Civil behavior towards the tribunal and opposing counsel does not compromise an attorney's efforts to diligently and zealously represent his or her clients."); Fischer, Incivility in Lawyers' Writing: Judicial Handling of Rambo Run Amok, 50 Washburn L.J. 365 (2011) (discussing how zealous advocacy has become so prevalent that it has been nicknamed "Rambo Litigation," after the fictional movie character "who was always ready for a fight"). Recognizing that "zealous" advocacy has too frequently become a pretext for incivility, the Arizona Supreme Court deleted the word from its Rules of Professional Conduct in 2003, replacing it with a duty to "act honorably" in pursuit of clients' interests. See Ariz. Sup. Ct. R. 42. Indiana, Louisiana, Montana, Nevada, New Jersey, Oregon, and Washington have since followed suit. Dodge, When Lawyers Behave Badly: The "Z" Word, Civility & the Ethical Rules, 44 Ariz. Att'y 18 (2008), available at http://wvvw.myazbar.org/AZAttorne_y/PDF_Articles/0408EthicsCivilitv.pdf.

[5] See Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 445 (7th Cir. 1992) ("[D]iscovery, billing demands, and the increased size of the bar are among the fuels igniting uncivil litigation practices."); Nelson, The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation, 67 Fordham L. Rev. 773, 777-87 (1998) (listing the factors identified by surveyed corporate litigators as reasons for a decline in the civility and ethics of litigation). See also Shawn Collins, Be Civil? I'm a Litigator!, Nat'l L.J., Sept. 20, 1999, at A21 (decrying the creation of civility committees by bar associations as "stalking horses for legal wimpery" and pronouncing that lawyers should not be constrained by "some notion that you're supposed to like the person you're paid to beat"); Raoul Felder, Op-Ed., 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").

moved away from an ethos in which manners are considered to be important in any endeavor. Hence, regretfully, 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. In reality, while civility is important in any legal community, it is particularly crucial within small legal environments and specific practice fields, even in large metropolitan areas.[6]

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.[7] 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 experienced 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. In order to quell such tendencies, opposing attorneys may be advised to meet—face to face—at the onset of litigation to try to dispel any such concerns. Some litigators (like other people) are simply nasty, and, as discussed below,[8] nothing short of a court admonition or sanction will adequately address the issue.[9]

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. Though students are required to take courses such as Ethics or Professional Responsibility, the legal academicians who teach these courses, themselves sometimes woefully disconnected from the practicing bar, may not "step beyond the line of straightforward rule memorization and specific ethical and regulatory problems."[10] 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

[6] See Rao v. Ross, 2008 Copr. L. Dec. P 29596, 2008 WL 2441926, at *3 (N.D. Cal. 2008) ("Both [attorneys] practice within the small intellectual property legal community of Palo Alto. If they have not previously bumped into each other, they undoubtedly will in the future. Civility is of the utmost importance in any legal community, and it is absolutely obligatory in this case.") (emphasis added).

[7] See Chapter 60 "Techniques for Expediting and Streamlining Litigation" (§§ 60:1 et seq.) for discussion of increased costs and reduced efficiency resulting from incivility.

[8] See §§ 66:4 to 66:8, 66:10.

[9] See, e.g., Cotterill v. City and County of San Francisco, 2010 WL 1223146, at *14 (N.D. Cal. 2010), report and recommendation adopted, 2010 WL 1910528 (N.D. Cal. 2010) (indicating that "a quagmire of discovery disputes, countless motions for a broad spectrum of relief, rambling over-length briefs, and unacceptable incivility" needlessly burdened the court's limited judicial resources, but adding that the real cost of the incivility "is borne by the clients and the legal profession as a whole").

[10] See Boothe-Perry, Professionalism's Triple E Query: Is Legal Academia Enhancing, Eluding, or Evading Professionalism?, 55 Loy. L. Rev. 517, 521 (2009). It has been increasingly recognized that law schools, which give young attorneys their first exposure to the appropriate standards of the legal profession, are vitally important in preventing incivility in practice. See, e.g., id. at 552 ("Academia is beginning to acknowledge that the auspicious position of educating the nation's future lawyers inseparably involves instilling professionalism values as a core of one's law school career."); Roy Stuckey et al., Best Practices for Legal Education: A Vision and A Road Map 29 (2007) ("[L]egal educators should take leadership roles in making professionalism instruction a central part of law school instruction."); William Sullivan et al., Educating Lawyers: Preparation for the Profession of Law 14 (2007) ("[I]n a time when many raise questions about the legitimacy of the legal profession in both general and specific terms, professionalism needs to become more explicit and better diffused throughout legal [education].").

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. A professional attorney is one who treats her colleagues with the respect and courtesy due to others professionals, both in the tone of her discourse and the reasonableness of her accommodations, and recognizes the demands of the profession when responding to an opposing party's reasonable requests. 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 the trial of the matter. It is costly because a lack of reason-able co-operation 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 counsel for the other party to further consult with 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.[11]

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.[12] Attorneys should be mindful of the effects that their uncivil behavior can have on their own clients.[13] 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, most corporations are sufficiently image-conscious that their in-house counsel prefer litigators whose conduct and reputation are beyond reproach, not only in their dealings with adverse counsel but also in their dealings with the court.

[11] See, e.g., Gibbs et al., Cross Examination of the Expert Witness: Do Hostile Tactics Affect Impressions of a Simulated Jury?, 7 Behay. Sci. & L. 275 (1989) (finding that attorneys who use hostile and manipulative tactics in the courtroom are perceived as ineffective by jurors).

[12] See Sahyers v. Prugh, Holliday & Karatinos, P.L., 560 F.3d 1241, 1245, 14 Wage & Hour Cas. 2d (BNA) 1000, 157 Lab. Cas. (CCH) P 35547 (11th Cir. 2009), cert. denied, 131 S. Ct. 415, 178 L. Ed. 2d 323, 16 Wage & Hour Cas. 2d (BNA) 1536 (2010) (holding lawyer who "slavishly followed his client's instructions" showed a "conscious disregard for lawyer-to-lawyer collegiality and civility" that ultimately wasted a significant amount of judicial resources).

[13] See Jacobson v. Washington State University, 2008 WL 2873530, at *4 (E.D. Wash. 2008) (noting that the conduct of attorneys engaged in a prolonged fee dispute over a nominal sum of "money was uncivil and suggesting that expedited resolution of the dispute was important" to avoid causing the plaintiff further anxiety); Schaefer, Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor's Touchstone, 38 Fla. St. U.L. Rev. 251 (2011) (explaining the frequency of which attorney conduct is marked by a form of "zealous advocacy" that often creates a tremendous liability for both the client and the attorney. Contrary to popular belief, zealous advocacy is not synonymous with client loyalty, and clients are ultimately harmed when "lawyers use zealous advocacy as an excuse for incivility.").

If your client evidences a desire for needless hostility with the other party or its counsel, it is best to ignore it in the first instance, in the hopes that passions will cool. If the matter arises again, however, an attorney should confront the problem and attempt to dissuade the client. 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.

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.[14] 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.[15] As discussed in more detail below,[16] 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 researching 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,[17] a specific request on a solid record with, perhaps, some acknowledgement 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 not to cry "wolf' but—as officers of the court—they should be willing to seek judicial redress in extreme cases.[18]

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[14] 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).

[15] For a general discussion of the reluctance to encourage "satellite litigation" regarding motions for sanctions under Fed. R. Civ. P. 11, see Chapter 54 "Sanction" (§§ 54:1 et seq.).

[16] See §§ 66:4 to 66:12.

[17] See § 66:4.

[18] While some litigators may be tempted to bring a claim for defamation based on uncivil comments made by an opposing party's counsel, this form of recourse is generally unavailable. Communications made in the course of a judicial or quasi-judicial proceeding are traditionally absolutely privileged. See, e.g., Shanks v AlliedSignal, Inc., 169 F.3d 988, 992 (5th Cir. 1999).

§ 66:3 Formal reactions to incivility

Federal courts and bar associations have become increasingly active in cataloguing 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 46 states and the District of Columbia.[1] Committees and task forces have been formed to study the problem and issue recommendations. The Seventh Circuit, the Boston Bar Association, and the State Bar of California, for example, have each created committees that have reviewed the issue and proposed standards.[2] Also, in 2008, the Utah Supreme Court created the first program in the country to provide "professionalism counseling" to members of the state bar. A board of five counselors, selected by the Court, provides counseling to members, educates about the Utah Standards of Professionalism and. Civility, and publishes its advisories for the benefit of practicing lawyers.[3]

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. More and more, judges are relying upon these codes as setting forth acceptable conduct by attorneys. 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.[4]

[1] See American Bar Association Center for Professional Responsibility Professionalism Codes, available at http://www.abanet.org/cpr/professionalism/o rofcodes.html. For examples of recent references to local rules and civility codes in the context of motion practice, see Hamovitz v. Santa. Barbara Applied Research, Inc., 188 L.R.R.M. (BNA) 2337, 2010 WL 1337742, at *3 (W.D. Pa. 2010) (finding that defense counsel's use of "language of aspersion and escalating disrespect for the Court and its Magistrate Judges" violated the Pennsylvania Rules of Professional Conduct and Code of Civility); Bristol v. Astrue, 2009 WL 3210928, at *2 n.2 (E.D. Mich. 2009), aff'd, 408 Fed. Appx. 956 (6th Cir. 2011) (noting that plaintiff's counsel violated Eastern District of Michigan Rules of Civility, which require that counsel "speak and write civilly and respectfully in all communications with the Court," by including contentious language and unfounded accusations against a judge in a court filing).

[2] See Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 441 (7th Cir. 1992); The State Bar of California, California Attorney Guidelines of Civility and Professionalism (2007); Boston Bar Association, Task Force on Civility in the Legal Profession Report (2002); Riordan, U.S. District Court for the Eastern District of Michigan Adopts the "Lawyers Commitment of Professional Civility," 88 Mich. B.J. 42 (2009).

[3] Utah Supreme Court Standing Order No. 7 (Jan. 9, 2008).

[4] At least one lawsuit has challenged, albeit unsuccessfully, the constitutionality of such courtesy and civility provisions in local rules of professional conduct. In that case, an attorney made vulgar comments on his radio show about Michigan Court of Appeals judges who reversed a jury verdict in his favor, including telling the judges to "kiss my [expletive]" and referring to them as "three [expletive] Court of Appeals judges." The attorney settled a charge with the state attorney grievance administrator, then challenged the constitutionality of the civility provisions on U.S. Const. Amend. I and XIV grounds. The court found that the attorney did not have standing as he could not demonstrate actual present harm, nor a significant possibility of future harm based on a single, stipulated reprimand. Fieger v. Michigan Supreme Court, 553 F.3d 955, 957-58 (6th Cir. 2009), cert. denied, 130 S. Ct. 1048, 175 L. Ed. 2d 881 (2010).

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.[5] Every litigator should be familiar with the civility codes that are promulgated in their jurisdiction.[6] Every law firm's litigation department should circulate to its members those codes and discuss, particularly with younger associates, their purpose. 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."[7] It details the minimal duties owed to clients, opposing counsel, the court and the administration of justice.[8] 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.[9] 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").[10]

[5] See, e.g., Boston Bar Ass'n Task Force on Civility in the Legal Profession Report, at 11-12 (May 23, 2002).

[6] In a case that stands as an example of the perils of being unfamiliar with local civility codes, a court admonished an attorney for failing to appear for a scheduled hearing when the attorney notified the court of his absence only six minutes prior to the start of the hearing and failed to notify opposing counsel. Finding that the attorney's conduct violated the court's Code of Civility, the court noted that, "for future reference, Counsel is instructed to be cognizant of the standing of the legal profession and to be more attentive to the principles outlined in the Code of Civility." The court noted that in failing to appear for the hearing, the attorney "has done a disservice to his client, to opposing counsel, to opposing counsel's clients, to the judiciary, and to the general public, as significant resources were wasted in preparation for an argument that would not take place." Johnson v. White, 964 A.2d 42, 49-51 (Pa. Commw. Ct. 2009) (internal citation omitted).

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

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

[9] See Aspen, A Response to the Civility Naysayers, 28 Stetson L. Rev. 253, 263-64 (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").

[10] See, e.g., 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); Castillo v. St. Paul Fire & Marine Ins. Co., 938 F.2d 776, 780, 1991-2 Trade Cas. (CCH) ¶ 69525, 20 Fed. R. Serv. 3d 295 (7th Cir. 1991) (Rules 16 and 37); Wolters Kluwer Financial Services Inc. v. Scivantage, Adnane Charchour, Sanjeev Doss, Cameron Routh, 525 F. Supp. 2d 448 (S.D. N.Y. 2007), aff'd in part, rev'd in part, 564 F.3d 110, 28 I.E.R. Cas. (BNA) 1818 (2d Cir. 2009), cert. denied, 130 S. Ct. 625, 175 L. Ed. 2d 501, 29 I.E.R. Cas. (BNA) 1760 (2009) (Rules 16 and 37, 28 U.S.C.A § 1927); Nault's Auto. Sales, Inc. v. American Honda Motor Co., Inc., Acura Auto. Div., 148 F.R.D. 25, 26, 26 Fed. R. Serv. 3d 46 (D.N.H. 1993) (Rule 11).

Before filing a motion for sanctions under Rule 11, counsel must give the opposing counsel an opportunity to correct their errors or explain their position.[11] Then, a Rule 11 motion should be crafted like any other motions asking the court for relief: rely on the record, and the opposing counsel's own words to tell the story, do not characterize the opposing counsel's actions or words, and avoid hyperbolic or inflammatory language. If you need to go beyond the record, such as to recite a voicemail you received or left, do so in an affidavit accompanying the motion, not in the motion itself, and be precise and accurate when describing opposing counsel's actions.

Additionally, even absent a motion for sanctions, courts have used public admonishments, the threat of Rule 11 sanctions, and their inherent judicial authority to quell instances of attorney incivility.[12] Furthermore, courts have denied attorneys pro hac vice admission based on an extensive history of uncivil and disruptive behavior.[13] Additionally, in unusually egregious circumstances, courts always have the power to refer to attorneys to their local bar for discipline.

[11] See Fed. R. Civ. P. 11(c)(2)

[12] See, e.g., In re Lehtinen, 564 F.3d 1052, 1058, Bankr. L. Rep. (CCH) P 81474 (9th Cir. 2009), cert. denied, 130 S. Ct. 739, 175 L. Ed. 2d 515 (2009) (stating that a bankruptcy court's inherent authority allows the court to sanction bad faith or willful misconduct even in the absence of express statutory authority to do so); Unlimited Resources Inc. v. Deployed Resources, LLC, 2009 WL 1370794, at *1 (M.D. Fla. 2009) (threatening to sanction attorneys failing to "conduct him or herself with a spirit of civility and cooperation"); U.S. v. Shaygan, 661 F. Supp. 2d 1289, 1314 (S.D. Fla. 2009), as amended, (Apr. 14, 2009) (issuing a public admonishment for prosecutorial misconduct and finding that an Assistant United States Attorney's "displeasure and toward defense counsel" created huge additional costs and expenses for. the defendant and resulted in the prolonging of his house arrest).

[13] See Stern v. Burkle, 20 Misc. 3d 1101(A), 867 N.Y.S.2d 20 (Sup 2008) (finding that an attorney's record of incivility "evinces a total disregard for the judicial process" and there was therefore "no reason for [him] to be involved in this case or appear in this court"); Adkins v. Lipner, Gordon & Co., 10 Misc. 3d 1062(A), 814 N.Y.S.2d 559 (Sup 2005) (denying pro hac vice admission to an attorney who had been publicly admonished for professional misconduct and suspended from practice twice).

II. ADDRESSING UNCIVIL BEHAVIOR IN SPECIFIC CONTEXTS

§ 66:4 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.[1]

Whether they are being impolite to gain a perceived advantage in the litigation or to strike fear in the heart of their opponent, 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. However, some civility codes warn against creating a record unnecessarily. For example, the Boston Bar Association's Civility Standards for Civil Litigation warn "Letters intended only to make a record should be used sparingly and only when thought to be necessary under all the circumstances."[2]

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. If you have prepared a suitable record, the motion should

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[1] See Chapter 60 "Techniques for Expediting and Streamlining Litigation" (§§ 60:1 et seq.) for additional suggestions of communications with opposing counsel designed to increase efficiency and improve civility.

[2] See Civility Standards for Civil Litigation, Section B(4), available at http://www.bostonbar.org/prs/reports/civilty.htm.

be little more than a recitation of the record—deposition excerpts, and failed or hostile communications—and not characterizations of the content of the record. 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.

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."[3] 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.[4] 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.[5] 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.[6]

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.[7]

Even when not imposing sanctions or fees, a number of courts have seen fit to comment on the lack of civility demonstrated by counsel, perhaps reflecting an increased sensitivity to the

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

[4] Lee v. American Eagle Airlines, Inc., 93 F. Supp. 2d 1322; 1336 (S.D. Fla. 2000).

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

[6] Thomas v. Tenneco Packaging Co., Inc., 293 F.3d 1306, 1324, 83 Empl. Prac. Dec. (CCH) P 41139, 53, 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 remote, let off steam, or otherwise sling mud at an adversary.").

[7] 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").

importance of civility in the practice of law.[8] This increased sensitivity may also explain some courts' willingness to incarcerate egregiously uncivil attorneys. One court held an attorney in contempt of court and sentenced him to 10 days in county jail for a repeated course of "reprehensible, inexcusable, and contemptible" behavior, which included making disrespectful and derisive comments about an opposing attorney and the court. Specifically, when asked how long he had been practicing law, the attorney responded "considerably longer than you, Your Honor," and when asked by the court to cease his disruptive behavior, the attorney responded "whatever you say, Judge."[9] In a recent Massachusetts case in which, as a stalling tactic, two attorneys made assertions in a complaint that they knew to be false, a judge called the lawyers' actions "repugnant" and wrote that "This Court has no interest in chilling an attorney's enthusiasm or creativity in pursuing factual or legal theories, but the conduct engaged in here was borne of neither enthusiasm nor creativity, but simple malevolence."[10] On the other hand, courts have made efforts to comment positively when counsel conduct themselves with particular courtesy and professionalism.[11]

"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

[8] See, e.g., U.S. v. Pitts, 346 Fed. Appx. 839, 841 n.2 (3d Cir. 2009) ("We note with concern the inappropriate language in the Appellant's brief characterizing one of the District Court's assertions as 'absurd' and 'disingenuous.' We . . disagree with counsel's intemperate characterization, which we believe demonstrates a lack of professional civility."); Bellinger v. Astrue, 2009 WL 2496476, at *10 (E.D. N.Y. 2009) (warning counsel that "the orderly and efficient progress of this case has been impeded by [their] failure . . to work together productively and treat each other civilly" and reminding them that "incivility vitiates effective advocacy"); Levy v. Office of 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."); In re Jefferson, 284 Ga. App. 877, 645 S.E.2d 349, 356 (2007), judgment vacated on other grounds, 283 Ga. 216, 657 S.E.2d 830 (2008) (remarking that while counsel's impolite statements did not rise to the level of criminal contempt, his words "offended the precept that civility and courtesy should be hallmarks of the legal profession") (internal citations omitted). . (remarking that while counsel's impolite statements did not rise to the level of criminal contempt, his words "offended the precept that civility and courtesy should be hallmarks of the legal profession") (internal citations omitted).

[9] Bank One Trust Co., N.A. v. Scherer, 176 Ohio App. 3d 694, 2008-Ohio2952, 893 N.E.2d 542 (10th Dist. Franklin County 2008); see also Steven Kreytak, Lawyer's Lewd Gesture Brings 90 Days in Jail, Austin Am. Statesman, Apr. 17, 2008, at B01 (detailing a court's sentencing of a defense attorney to 90 days in jail for contempt of court when the attorney made a lewd gesture to the court during proceedings). But see Petrakh v. Morano, 385 Ill. App. 3d 855, 325 Ill. Dec. 68, 897 N.E.2d 316, 322 (1st Dist. 2008), appeal denied, 231 Ill. 2d 687, 328 Ill. Dec. 475, 904 N.E.2d 985 (2009) (J. Cahill, concurring) ("Incarceration of a lawyer as a sanction is almost always an abuse of the contempt power and a signal that a judge who orders it has lost control of his courtroom and his temper.").

[10] Karapanos v. Pappas, et al., Lawyers Weekly No. 12-117-11 (Mass. Sup. Ct. 2011).

[11] See, e.g., 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."); Constellation Power Source, Inc. v. Select Energy, Inc., 467 F. Supp. 2d 187, 190 (D. Conn. 2006), adhered to on reconsideration, 2007 WL 188135 (D. Conn. 2007) ("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 Federal Say. Bank v. Bender, 230 F.R.D. 11, 16-17, 62 Fed. R. Serv. 3d 786 (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.").

it as expeditiously and economically as possible."[12] 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 litigation.[13] Such a case reminds counsel of the importance of maintaining civility notwithstanding the behavior of the opposing party.[14] Attorneys should be mindful too of avoiding uncivil conduct toward opposing clients. In one recent case, the New Jersey Supreme Court reprimanded a lawyer who told an opposing party in a divorce dispute that "I'm going to cut you up into bits and pieces, put you in a box and send you to India and your parents won't recognize you."[15]

Courts have examined incivility frequently in recent years. Incivility might consist of rude or improper language, abuse of court procedures, or failure to accommodate fellow attorneys. Examples of courts' efforts to curb such conduct follow. Counsel was found to have made numerous "gratuitous, rude, unsubstantiated, and impertinent" remarks, including an unsubstantiated allegation in an e-mail of a "special relationship" between opposing counsel and the judge or her law clerk. The court did not impose sanctions, but wrote "counsel is forewarned, however, that this Court does not appreciate and will not tolerate bad language, sarcastic comments, innuendos or any further gratuitous commentary that impugns the integrity of his adversary or the Court. Such conduct is wholly inappropriate for a member of the bar, and if it continues the Court will take appropriate disciplinary action. The Court trusts that such conduct will stop immediately.[16]

The Florida Supreme Court sanctioned counsel by requiring him to obtain the signature of another member of the bar on any future filings with the courts. This was a result of "over fifty filings directly with this court, all of which have either been forwarded to the referee, dismissed, or denied . . . [they were] repetitive, frivolous, and, like his earlier ones, insulting

[12] Philadelphia Gear Corp. v. Swath Intern., Ltd., 200 F. Supp. 2d 493, 498, 52 Fed. R. Serv. 3d 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.").

[13] 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.").

[14] The uncivil behavior of nonlawyer consultants may also 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: Kaung v. Cole Nat. 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.").

[15] Gottlieb, Lawyer Reprimanded for Alleged "Cut You Up" Remark to Adversary's Client, N.J.L.J., June 3, 2009.

[16] Abraham v. Super Buy Tires, Inc., 2007 WL 1450311 (S.D. Cal. 2007).

to the court." He claimed the filings were necessary because of " the court's inability to comprehend' his arguments" and called one or-der "idiotic." The court found his "responses are rambling, argumentative, and contemptuous." The court noted that while uncommon, courts have at times sanctioned citizens by refusing them access to the courts pursuant to their inherent authority.[17]

In a trespass suit, defense counsel asserted numerous frivolous defenses and counterclaims, threatened absurd and unnecessary discovery requests, and sent letters the court characterized as "adolescent" (once calling the plaintiffs "the grinches of Fairthorne" and saying "I don't know whether their heads are not on just right or their shoes are too tight but something has shriveled their heart and made them bitter and tart.") Therefore, the court imposed Rule 11 sanctions.[18]

A judge described a case as "a mudslinging match in which neither party began with or now has clean hands." Nonetheless, he refused to base the award of attorney's fees on the uncivil behavior of the attorneys, except to deny plaintiff fees for one motion because but for plaintiff's conduct, defendant would not have needed to file it.[19]

[17]The Florida Bar v. Thompson, 979 So. 2d 917 (Fla. 2008) (per curiam).

[18]Fairthorne Maintenance Corp. v. Ramunno, 2007 WL 2214318 (Del. Ch. 2007).

[19]Barrett v. Detroit Heading, LLC, 2007 WL 1655434, at *7 (E.D. Mich. 2007), aff'd, 311 Fed. Appx. 779, 14 Wage & Hour Cas. 2d (BNA) 1021 (6th Cir. 2009). For a formulation of professional and courteous pretrial and trial conduct, see The American College of Trial Lawyers, Code of Pretrial Conduct and Code of Trial Conduct (2002).

§ 66:5 General Incivility—Acquiescing to Client Misconduct

Courts have refused to allow uncivil attorney behavior even when the attorney's client specifically instructed such conduct. In one such case, the attorney for the plaintiff filed suit against the defendant law firm after making no effort to resolve the dispute and failing even to inform the defendant of the impending claim. This was done, the court noted, in accordance with the specific instructions of the attorney's client. The court held that this "conscious indifference to lawyer-to-lawyer collegiality and civility" amounted to bad faith, and the court refused to award the plaintiff attorney's fees or costs.[1]

Even passively acquiescing to improper conduct when working with a group of lawyers can lead to sanctions. One lawyer in a bankruptcy action filed a recusal motion at the behest of multiple clients, baselessly accusing the judge of criminal conduct. Two attorneys also representing the same clients, but working at a different firm, signed the motion but did not argue it. They later tried to claim that they insulated themselves from liability because they "took a passive role." The judge found that since they did not withdraw their support from the motion, they acquiesced to bad faith conduct and were assessed monetary sanctions under Rule 9011 (the bankruptcy equivalent of Rule 11).[2]

Junior lawyers who witness uncivil behavior amongst the more senior members of their team should find a way to address the incivility. First, a junior lawyer should consult with a mentor or other senior lawyer in her firm for guidance. Second, a junior lawyer should consider using local civility codes a means to highlight the inappropriateness of the conduct. By pointing to a rule, a junior lawyer can play the role of helpful advisor, attempting to ensure her more senior colleagues stay out of trouble and explaining why a different course of conduct may be preferable. A similar strategy can be employed when attempting to dissuade clients from using uncivil tactics.

[Section 66:5]

[1]Sahyers v. Prugh, Holliday & Karatinos, P.L., 560 F.3d 1241, 1246 n.9, 14 Wage & Hour Cas. 2d (BNA) 1000, 157 Lab. Cas. (CCH) P 35547 (11th Cir. 2009), cert. denied, 131 S. Ct. 415, 178 L. Ed. 2d 323, 16 Wage & Hour Cas. 2d (BNA) 1536 (2010).

[2]In re Evergreen Sec., Ltd., 384 B.R. 882 (Bankr. M.D. Fla. 2008), order aff'd, 391 B.R. 184 (M.D. Fla. 2008), decision aff'd, 570 F.3d 1257, 51 Bankr. Ct. Dec. (CRR) 201, Bankr. L. Rep. (CCH) P 81509 (11th Cir. 2009).

§ 66:6 General Incivility—Failure to Accommodate Fellow Attorneys

Courts have also criticized attorneys for not co-operating with opposing counsel, recognizing that failure to respond promptly (or at all) to communications may not only heighten tensions in adversarial proceedings, but can, if judicial intervention is required, waste valuable time and resources. In one case, an attorney failed to comply with a Confidentiality Agreement by retaining an opposing client's mental health records after the conclusion of a divorce litigation and ignored four written requests for their return from opposing counsel, leading to the filing of a motion for court-ordered return and a petition for disciplinary action. The court reproached the attorney, remarking that his failure to respond to communications "resulted in elevated tension, frustration, and less effective communication" and "his refusal to work with opposing counsel to try to reach an out-of-court resolution demonstrated incivility and disrespect."[1]

Another court found an attorney's persistent failure to respond to discovery requests from opposing counsel "problematic," saying that the attorney's lack of response "fueled incivility, undercut the spirit of professionalism among litigants that the rules and the Court encourage, and ultimately caused the Court and counsel to expend energies best directed elsewhere."[2]

Similarly, where defense counsel refused to co-operate with opposing counsel to schedule four depositions by ignoring eight separate requests in one month, despite a looming discovery deadline, and then proceeded to seek protective orders from the court to prevent the depositions after plaintiff's counsel was forced to unilaterally notice them, the court denied the motions, ordered defense counsel to pay plaintiffs' counsel's fees, and declared that not only did defense counsel's behavior demonstrate a lack of good faith, but also ran contrary to the district's local rules requiring that discovery be "practiced with a spirit of cooperation and civility."[3]

The Ninth Circuit remarked that a lack of professional courtesy contributed to the district court's errors and compounded the > harshness of the lower court's rulings. Defense counsel engaged in various "hardball tactics designed to avoid resolution of the merits of [the] case" and refused to accommodate opposing counsel's reasonable requests for extensions and relief from the court. Given that defense counsel knowingly took advantage of time restraints in place by local rules, a three-day holiday, and opposing counsel's prescheduled out of state appointment, the court found that the defense attorneys had undermined "the truth-seeking function of our adversarial system." This adversarial system, the court noted, "relies on attorneys to treat each other with a high degree of civility and respect."[4]

[Section 66:6]

[1]Attorney Grievance Com'n v. Rand, 411 Md. 83, 981 A.2d 1234, 1246-47 (2009).

[2]Klingeman v. DeChristofaro, 2010 WL 395215, at *3 (N.D. Ohio 2010).

[3]Paxton v. Great American Ins. Co., 2009 WL 5064054, at *8 (S.D. Fla. 2009).

[4]Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253, 1263, 77 Fed. R. Serv. 3d 1253 (9th Cir. 2010).

Understandably, it may seem difficult to create a record of an opposing counsel's refusal to respond. It is important to document each attempt at communication, with reference to the prior unreturned communication. For example, send a series of e-mails in which you state that you left the opposing counsel a voicemail the previous day and have not heard anything in return, and documenting the trail of communications. After such a series of communications, send the opposing counsel a certified letter describing your attempts to contact her and asking for politely to please respond. Varying your method of communication can prevent the opposing counsel from claiming that a certain method of communication was malfunctioning (e.g. that her e-mail must not have been receiving messages).

§ 66:7 General Incivility—Overly Aggressive Arguments

Attorneys should be wary of pursuing overly aggressive arguments including, but not limited to, using inflammatory or hyperbolic language and making unfounded accusations against the court or opposing counsel. Incivility is not only manifested in oral communications, but also in written communications—both in correspondence and in court filings. For example, one court cautioned an attorney to avoid the use of "sarcastic hyperbole" in filings with the court.[1] In another case, counsel for the petitioner claimed in a court filing that his client's parole revocation made "a mockery of the judicial branch." Though declining to impose sanctions, the court noted: "Such hyperbole is not supported by the record and does not assist defendant's prayer for relief. This leads us to observe once again: it is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law."[2] The use of inflammatory language or hyperbole may in some cases even constitute grounds for sanctions,. One court imposed monetary sanctions when an attorney confused "incivility with aggressiveness" and "replaced legal argument with vitriolic rhetoric." The court accused counsel of "insolence," "impertinence," and of filing a motion "founded primarily on spite."[3]

Recent case law illustrates that some courts may strike inflammatory or offensive language contained in court filings. In one such case, a pro se litigant filed a complaint with extraneous and inflammatory hyperbole. The court acted to strike the offending portions of the complaint and urged the litigant to "consider carefully his obligation as a pro se litigant in this Court to comport himself with civility at all times," as he, "just as any counseled litigant, 'may not use the court for uncontrolled venting and, like attorneys, he must adhere to the rules of the Court."[4] In another case, the court struck offensive portions of a brief in which an attorney

[Section 66:7]

[1]DS Waters of America, Inc. v. Western Slope Bar Supplies, Inc., 2007 WL 3216574 (D. Colo. 2007).

[2]In re Ross, 170 Cal. App. 4th 1490, 1513, 88 Cal. Rptr. 3d 873 (3d Dist. 2009), as modified on denial of reh'g, (Mar. 6, 2009) and review denied, (June 10, 2009) (internal quotations omitted).

[3]Guy Chemical Co., Inc. v. Romaco AG, 2007 WL 1276909, at *5 (W.D. Pa. 2007).

[4]In re Gulley, 2009 WL 1176614, at *9 (Tex. App. Dallas 2009).

had drawn an analogy between a civil suit against his client and rape as well as made derisive comments about a trial court judge. The court noted: "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."[5] Another court cautioned attorneys that had lodged unsubstantiated accusations against each other in their briefs that, while it could not police the daily interactions of counsel, it "can—and will—ensure that the parties' briefs comport with the civility standards expected in this District" and "will strike any brief that fails to live up to those standards without further warning."[6] A decision to strike inflammatory language, however, may be predicated on the court's opinion of the underlying conduct that gave rise to the use of such language. At least one court has refused to strike portions of a brief that the court concluded were inconsistent with standards of civility and professionalism on the grounds that the opposing party's conduct was sanctionable and, therefore, the attorney's outrage was deemed to be understandable.[7]

Attorneys should be similarly mindful of aggressively pursuing arguments that make unsubstantiated accusations against either the court or opposing counsel, as such arguments can constitute grounds for sanction. For example, one court publicly reprimanded and imposed monetary sanctions against an attorney who repeatedly characterized opposing counsel's arguments as "fictional," "imaginary," and "creative," and made unfounded accusations of bias against the court.[8] The court found his conduct was not only uncivil, it was also unethical. Making unfounded allegations against the court or opposing counsel may also constitute grounds for bar suspension. In one such case, an attorney was suspended from practicing in Florida for five years and was fined for his "egregious behavior" after his "relentless pursuit" of 'a recusal motion. During a hearing on that motion, the attorney was "extremely difficult to deal with" and was disrespectful to the court. Specifically, the court noted that the attorney "refused to answer the court's questions, treated the court as an adversary and continually made inflammatory statements" including stating that "your Honor has compromised my health, your Honor has compromised my immune system."[9] In a similar case, an attorney conducted an unyielding campaign to have a judge recused from his cases by raising his Catholic faith and political affiliations in court filings as evidence of bias against him and his clients, Speaking to the media about the judge's bias, and commissioning an expert report from a statistician based on false information to show that the judge had manipulated the case assignment system to receive a disproportionate

[5]Leone v. Keesling, 858 N.E.2d 1009, 1016, R.I.C.O. Bus. Disp. Guide (CCH) P 11223 (Ind. Ct. App. 2006).

[6]Flomo v. Bridgestone Americas Holding, Inc., 2010 WL 935553, *1 (S.D. Ind. 2010).

[7]Read v. Harvey, 147 Idaho 364, 209 P.3d 661, 667-68 (2009).

[8]In re Abbott, 925 A.2d 482, 489 (Del. 2007); see also Frank, Judge Slams Attorney For "Disgraceful" Claims vs. Opposing Counsel, Massachusetts Lawyers Weekly, June 29, 2009, at 1 (detailing the stiff monetary sanctions imposed against an attorney who made unfounded accusations that opposing counsel had destroyed evidence and remained on a case despite a conflict of interest).

[9]In re Evergreen Sec., Ltd., 570 F.3d 1257, 1277, 51 Bankr. Ct. Dec. (CRR) 201, Bankr. L. Rep. (CCH) P 81509 (11th Cir. 2009).

number of the attorney's cases. Finding that the attorney had "publicly impugned the dignity of the undersigned and [the court] with scurrilous and baseless accusations" and "engag[ed] in behavior that no reasonably competent lawyer in like circumstances would have engaged in," the court suspended him from practice in the district for 42 months, referred him to the Florida bar,[10] imposed a fine, and assessed attorney's fees against him and his law firm.[11]

In another such case, the First Circuit upheld sanctions imposed on counsel in two consolidated disciplinary cases. The lower court found that counsel's submissions to the court contained numerous unsubstantiated accusations of impropriety against both the court and opposing counsel, and that the tone of the accusations was inappropriate. The court therefore suspended counsel from practice for three months and from the court's Criminal Justice Panel for 15 months.[12]

However, some courts have declined to impose sanctions on an attorney despite observing that the attorney's comments about opposing counsel were unacceptable and unprofessional. In one such case, an attorney filed documents with the court accusing opposing counsel of "playing fast and loose," filing "illicit" documents, and attempting to "gain an unfair advantage." The attorney also accused opposing counsel of perpetrating "blatant," "purposeful," and "calculated" deceit and fraud, and of having "corrupt intent [that] knows no boundaries." While not imposing sanctions, the court instructed counsel that it would not tolerate such comments in future filings.[13] Similarly, another court scolded counsel for accusing the opposition of "continu[ing] to assert false information in an attempt to obfuscate the truth, cloud the issues and delay the inevitable" and "knowingly attempt[ing] to mislead this Court with the specious claim." The court stated that Is much patently offensive, uncivil and unprofessional rhetoric crosses the line of appropriate argument, is not permitted in federal court, or in any court for that matter . . . ."[14] Of note, filings that courts have considered uncivil or unprofessional have not been limited to those containing overstated or offensive language—exaggerated use of formatting or inclusion of excessive detail may also lead to admonishment. One court warned an attorney that his "all-too-liberal use of bolding and underlining on virtually every page" of a filing that accused a magistrate judge of incompetence fell short of his obligation under the state's Civility Principles to address the court respectfully.[15] Another court criticized motions from both counsel for "excruciatingly detailing] events such as rescheduling of depositions, problems with document production, and permissible topics for discovery." The court advised the parties to "chill," citing local rules setting forth standards of civility and noting that "[w]hile litigation is by its nature contentious, no circumstances justify abandoning professionalism and civility that help make the legal profession a noble pursuit."[16]

[10]Although courts have the power to refer counsel to bar disciplinary committees, see § 66:3, attorneys should not refer their brethren to such committees. Such conduct may dramatically escalate the hostility, because of the possible implications for opposing counsel's livelihood, and could damage relations between the attorneys for years to come.

[11]Bettis v. Toys R Us, 2009 WL 5206192, at *1-2 (S.D. Fla. 2009), order affd, 403 Fed. Appx. 387 (11th Cir. 2010).

[12]In re Zeno, 504 F.3d 64, 65 (1st Cir. 2007).

[13]Lewis v. Wilcox, No. 3:06-cv-29, 2006 -U.S. Dist. LEXIS 89680, at *1344 (M.D. Ga. Dec. 11, 2006).

[14]Design Trend International Interiors, Ltd. v. Huang, 2007 WL 2683790, at *3 (D. Ariz. 2007).

[15]Wells v. Home Depot U.S.A., Inc., 2009 WL 3068797, at *4 (E.D. Mich. 2009).

[16]Peak Performance Nutrition v. MediaPower, Inc., 2010 WL 2384412, at *6 (C.D. Cal. 2010).

§ 66:8 Incivility throughout discovery

Discovery has been identified as "the area in which uncivil conduct is most likely to arise."[1] 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.[2] One frustrated judge described incivility's detrimental impact on the discovery phase of a litigation, and a court's patience, as follows: "In the court's experience, the great majority of discovery disputes arise when one or both sides exhibit (1) failure to grasp, or disdain for, the law, the rules, or the facts, (2) lack of professionalism, (3) lack of civility, (4) refusal to extend common courtesy to a fellow professional (and therefore to the court), (5) bad faith, or (6) some or all of the above, which generally manifests itself in the now all too common, but absolutely intolerable, take-no-prisoners, scorched earth arrogance exhibited by many present day self-styled 'litigators.' Indeed, it is sad to say, but nonetheless true, that it is very rare for this court to see a truly justiciable discovery issue requiring thoughtful consideration and resolution by the court which the parties have tried to resolve in good faith."[3]

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."[4]

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. As irritated as your opposing party's conduct makes you, you must not escalate the conflict. Your adversaries conduct will always be weighed by a court in light of your own conduct. You must be able to demonstrate that your conduct did not give rise to your opposing counsel's incivility. For this reason, it is important to take a close look at your own conduct, before moving for sanctions against another.

[Section 66:8]

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

[2]See Piazzola, Comment, Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should. Have Adopted a Civility Rule, 74 U. Colo. L. Rev. 1197, 1215 (2003) ("Because it is largely unsupervised, the discovery process seems to encourage uncivil conduct . . . .").

[3]Harding v. Maximus Multimedia Intern., LLC, 2009 WL 4730631, at *1 (N.D. Fla. 2009). The judge also warned attorneys who would employ uncivil or abusive discovery tactics that "[i]f civility and common courtesy are not in your make-up, or if you think bully tactics are a necessary part of the practice of our profession, you undoubtedly will not like the consequences of your lack of manners." Id. at *3.

[4]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.").

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."[5] 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."[6] In another court, when both sides were "equally culpable for the protracted, contentious discovery," the court held the parties should bear their own expenses rather than granting attorney's fees to either side.[7] Similarly, while sanctions would have otherwise been appropriate when counsel submitted a witness statement that did not reflect the witness' final edits, another court chose instead to place both parties "on notice" because of bad behavior on both sides.[8] Counsel's incivility may cause him to lose his autonomy during discovery, and lead judges to closely monitor his behavior.[9]

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 19 discovery motions and 10 motions for sanctions filed by the parties.[10]

Lack of civility in discovery negotiations may draw admonishment from the court. Frustrated with its need to intervene because opposing attorneys could not reach an agreement themselves, one court requested that counsel "reasonably and civilly negotiate discovery issues that may arise in the future. Part of such negotiation includes timely responses to communications by opposing counsel and a willingness to reasonably discuss and even compromise when the parties are able to do so in keeping with their professional obligations to their clients."[11] In another case, to accommodate a planned family vacation, the plaintiff's attorney abruptly cancelled a deposition as an extended discovery deadline was approaching.

[5]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).

[6]Chapsky v. Baxter V. Mueller Div., Baxter Healthcare Corp., 1994 WL 327348 at *1 (N.D. Ill. 1994) (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").

[7]Pucket v. Hot Springs School Dist. No. 23-2, 239 F.R.D. 572, 589 (D.S.D. 2006).

[8]Eniva Corp. v. Global Water Solutions, Inc., 440 F. Supp. 2d 1042, 1053-54 (D. Minn. 2006).

[9]See Steinbuch v. Cutler, 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.").

[10]See Jaen v. Coca-Cola Co., 157 F.R.D. 146, 148, 31 Fed. R. Serv. 3d 178 (D.P.R. 1994) (noting that "[t]il 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 "Wor every single discovery proceeding the Court was forced to intervene").

[11]SMS Demag AG v. Xtek, Inc., 2007 WL 2225839 (E.D. Ark. 2007).

Denying the attorney's request to participate in a subsequent scheduling conference by phone, the court noted that for the attorney to "needlessly create a crisis, leave the district, and then complain when resolution of that crisis proceeded in his absence reflects unusual obliviousness to the consequences of his conduct but affords no basis for relief.[12]

One exasperated court ordered that the parties participate in a round of "rock, paper, scissors" to settle a dispute concerning the location of a deposition: "[A]t 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in, one (1) game of 'rock, paper, scissors.' The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period July 11-12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006 before the undersigned.[13] Persistent discord between the parties that so impedes discovery as to require drastic intervention from the court may lead to sanctions. In one case, constant bickering between the parties' counsel required that the court "baby-sit" discovery by providing conference rooms, scheduling depositions "when the counsel's acrimonious behavior precluded them from doing so themselves," and even having a judge personally supervise a deposition "in an effort to get the parties to conduct themselves professionally," at which he was forced to repeatedly admonish counsel about improper objections and unprofessional behavior. The court imposed sanctions on both counsel, saying that their "complete lack of civility [was] disgraceful" and their conduct "demean[ed] and hinder[ed] the practice of law."[14]

The most severe instances of misconduct during discovery may result in disqualification of counsel In one particularly egregious example, defense counsel filed a motion to continue a deposition hours after the deposition was scheduled to begin, repeatedly interrupted depositions and interjected comments to testify on behalf of his client, arrived at a hearing over an hour late, neglected to review opposing counsel's requests for production of documents, threatened opposing counsel in e-mails and voice mails, attempted to extort money from opposing counsel, repeatedly referred to the plaintiff as a "crack whore" in court filings, and ignored court procedural rules. The court concluded that counsel's misconduct "has disrupted the orderly administration of justice, that [he] has violated multiple Alabama Rules of Professional Conduct, and that he has acted in bad faith," and disqualified him from further representation in the case.[15]

[12]Kullman v. New York, 2009 WL 1562840, at *12 (N.D. N.Y. 2009).

[13]Avista Management, Inc. v. Wausau Underwriters Ins. Co., 2006 A.M.C. 1569, 2006 WL 1562246 (M.D. Fla. 2006). The "rock-paper-scissors" approach to petty discovery disputes may be increasingly appealing to judges. Another court, while deciding a motion for fees and costs incurred on the basis that plaintiffs had failed to provide an appropriate Rule 30(b)(6) designee, observed that the parties had consistently "picked at" each other during discovery and warned that while it was "disinclined at this stage to employ the 'rock-paperscissors' approach . . . it may consider such an approach in the future." Innovative Patents, L.L.C. v. Brain-Pad, Inc., 2009 WL 3648444, at *2 (D. Del. 2009).

[14]Alford v. Aaron Rents, Inc., 2010 WL 2765260, at *8 (S.D. Ill. 2010).

[15]Boswell v. Gumbaytay, 2009 WL 1515884, at *8-9 (M.D. Ala. 2009).

§ 66:9 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.[1] One court explained: "A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record."[2] Counsel should also be aware that the court may interpret the decision to depose other attorneys as a sign of incivility.[3]

Federal courts have been receptive to motions based on uncivil deposition conduct, sanctioning an attorney who made obstructionist remarks on 91% of the transcript pages[4] and appointing a discovery master to supervise the completion of a deposition of a witness whose lawyer engaged in "Rambo litigation tactics.[5] 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.[6] 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.[7] There, the attorney,

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[1]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.").

[2]Hall v. Clifton Precision, a Div. of Litton Systems, Inc., 150 F.R.D. 525, 528, 27 Fed. R. Serv. 3d 10 (E.D. Pa. 1993). See also Boston Bar Association's Civility Standards for Civil Litigation, Section B(5)(g), available at htto://www.b ostonbar.org/prs/reports/civility.htm ("A lawyer defending a deposition should limit objections to those that are well-founded and necessary for the protection of a client's interest. A lawyer should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought.").

[3]See Carehouse Convalescent Hosp. v. Superior Court, 143 Cal. App. 4th. 1558, 1562, 50 Cal. Rptr. 3d 129 (4th Dist. 2006) ("Attorney depositions chill the attorney-client relationship, impede civility and easily lend themselves to, gamesmanship and abuse.").

[4]See Unique Concepts, Inc. v. Brown, 115 F.R.D. 292, 293 (S.D. N.Y. 1987) (further ordering re-examination of the offending attorney's client and payment of the deposition costs and a $250 fine).

[5]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% of the cost of the deposition).

[6]See Castillo v. St. Paul Fire & Marine Ins. Co., 938 F.2d 776, 779, 1991-2 Trade Cas. (CCH) ¶ 69525, 20 Fed. R. Serv. 3d 295 (7th Cir. 1991) (noting that the remark—"you 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).

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

who was admitted pro hac vice, had "(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." On another occasion, a federal court imposed sanctions of $1,000 for "repeated, blatant violations" made during a deposition, particularly noting the attorney's numerous "speaking objections," and ultimately granted opposing counsel the opportunity to depose the witness again.

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 to apply for a protective order—were unprofessional."[10] 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."[11]

The best tool at the disposal of an attorney confronted with incivility in a deposition is the transcript.[12] 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.

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 is 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 fitters, it is important to suggest not merely a few instances of civility but a pattern of conduct by one's adversary that calls judicial intervention. The transcript of a deposition is critical, of the absence of pejorative or long-winded statements by the movant

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

[9]Specht v. Google, Inc., 268 F.R.D. 596, 603 (N.D. Ill. 2010).

[10]Redwood v. Dobson, 476 F.3d 462, 469, 67 Fed. R. Serv. 3d 457 (7th Cir. 2007).

[11]Redwood v. Dobson, 476 F.3d 462, 469, 67 Fed. R. Serv. 3d 457 (7th Cir. 2007).

[12]For example, a court affirmed an $18,000 sanction on the basis of a deposition transcript "replete with . . . interruptions, improper objections, and plaintiff's counsel plainly testifying on behalf of her witness." Devine v. Givaudan Fragrances Corp., 2010 WL 2232718, at *8-10 (D.N.J. 2010), aff'd, 419 Fed. Appx. 201 (3d Cir. 2011).

is important. The transcript can also be supported by correspondence related to the subject matter of the misconduct. ::}t is critical that the papers demonstrate the uncivil conduct is intentional, not inadvertent, and repeated, not isolated. Objections should be stated briefly and politely. 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.

Counsel should rarely end a deposition early because of opposing counsel's incivility. Ending a deposition early may be appropriate if opposing counsel is being truly abusive towards your client. However, you should not cease a deposition because opposing counsel is being abusive to you or other attorneys. Rather, ensure this abuse is caught on the record.

§ 66:10 Incivility during depositions—Sanctioned conduct

Failure to rein in a client's behavior during a deposition can lead to sanctions imposed on both client and counsel. If your client's behavior is trending towards incivility, it is best to request a recess, pull your client aside once you are off the record, and discuss her behavior. Explain that such incivility is not in her best interest and may harm the case and cause monetary sanctions to be imposed. In one case, defendant exhibited outrageous conduct during a deposition, repeatedly calling opposing counsel expletive-laden names and using one particular expletive 73 times over the course of the deposition. The defendant also smirked, patted himself on the back, and eventually stormed out of the deposition. The court sanctioned both the defendant and his attorney, finding that counsel failed to take reasonable steps to stop the misconduct. The court noted that counsel interjected infrequently (and only to mildly ask his client not to interrupt opposing counsel), and asked for few breaks, never requesting adjournment. The court determined that counsel was as liable as if he had advised his client to commit the misconduct. The court found violations of Federal Rules 30(d)(2) and 37(a), as well as the ABA Model Rules and imposed monetary sanctions (although it declined to impose discipline for the Model Rules violations because the Federal Rules allowed for sufficient sanctions).[1] Inappropriate behavior by attorneys during depositions can also lead to sanctioning. In one such case, a court sanctioned two attorneys who, during the course of a deposition, had engaged in conduct that the court characterized as "unprofessional, condescending, rude, insulting and obstructive." However, noting that one attorney's conduct was significantly more inappropriate than the other's, the court imposed a significantly larger monetary sanction on that attorney.[2] Another court concluded that "counsel undeniably and intentionally crossed the line between appropriately aggressive advocacy and unrestrained,

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[1]GMAC Bank v. HTFC Corp., 248 F.R.D. 182, 186 (E.D. Pa. 2008).

[2]Cioffi v. Habberstad, 22 Misc. 3d 839, 869 N.Y.S.2d 321, 325 (Sup 2008).

pointless offensive name-calling" during a deposition when they exchanged numerous, personal insults, plaintiff's counsel threatened to have an unlicensed paralegal complete the deposition, and defense counsel and the witness eventually walked out of the deposition. The court ordered that plaintiff's counsel attend a CLE course on civility and compelled both attorneys to "join each other for an informal meal in an effort to facilitate the repair of their professional relationship."[3] In another case, an attorney was publicly reprimanded for her behavior during a deposition. The court noted that she had "refused to show witnesses documents from which she quoted, showed documents to witnesses from across the table, refused to provide copies of documents to counsel, refused to allow witnesses to take breaks, and threatened to call security when opposing counsel stated his intention to approach a Magistrate with a discovery dispute."[4]

§ 66:11 Incivility during depositions—Less Severe Misconduct

One court "condemn[ed], in the strongest possible terms, the tenor and tactics" of both sides based on their behavior during a deposition. The deponent was so deliberately evasive that defense counsel gave up pursuing many important lines of questioning. Frustrated, defense counsel belittled the deponent. Although the court expressed empathy with defense counsel's frustration, noting that he did not exhibit any uncivil behavior until well into the deposition, the court scolded both sides for the mutual incivility that resulted. The court did not grant either side's request for sanctions, but cautioned both parties to be civil to one another.[1]

Misbehavior in a deposition may not be sanctionable when it does not destroy the value of the deposition or frustrate the examination. Sanctions did not result when an attorney, among other things, volunteered information to the witness, made speaking objections and unprofessional and disruptive remarks about opposing counsel, and improperly instructed the witness not to answer questions on the grounds of relevance. The court did, however, deem the conduct "improper," "unbecoming," and "indefensible."[2] In another case, plaintiff's counsel's inappropriately objected to "the overwhelming majority of questions," posed multiple objections at least 330 times, clearly coached the witness, testified on the record herself, and asked that questions be read back to her multiple times in an attempt to disrupt the

[3]Huggins v. Coatesville Area School Dist., 107 Fair Empl. Prac. Cas. (BNA) 651, 2009 WL 2973044, at *1-4 (E.D. Pa. 2009).

[4]Wolters Kluwer Financial Services Inc. v. Scivantage, Adnane Charchour, Sanjeev Doss, Cameron Routh, 525 F. Supp. 2d 448, 543 (S.D. N.Y. 2007), aff'd in part, rev'd in part, 564 F.3d 110, 28 I.E.R. Cas. (BNA) 1818 (2d Cir. 2009), cert. denied, 130 S. Ct. 625, 175 L. Ed. 2d 501, 29 I.E.R. Cas. (BNA) 1760 (2009).

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[1]Scotts Co. LLC v. Liberty Mut. Ins. Co., No. 2:06-cv-899, 2007 U.S. Dist. LEXIS 91577, at *8 (S.D. Ohio Dec. 13, 2007) ("It is a sad commentary, indeed, to have to remind parties and counsel that the incivility and evasiveness reflected in this file has no place in the judicial process. Such litigation tactics are not effective of their apparently intended result; they serve only demean the user as well as the Court.").

[2]Cameron Industries, Inc. v. Mothers Work, Inc., 2007 WL 1649856 (S.D. N.Y. 2007).

questioning. While the court believed that the attorney's conduct was aimed at impeding the questioning of critical witness and "crossed the line between zealous advocacy and deliberate frustration of the deposition," it held that her behavior was not sanctionable and declined to grant a second deposition of the witness on the basis that defense counsel "was able to complete the deposition and elicit responses even to those questions [plaintiff's counsel] barely allowed him to finish"[3]

Mere frustration in the deposition transcript does not necessarily rise to the level of incivility. During a deposition, the deponent was evading even the simplest of questions, and defense counsel accused plaintiff's counsel of asking poor questions. The court ruled it was not hostile or uncivil, and that sanctions would be too harsh.[4]

Even if sanctions are not imposed, an attorney acting uncivilly during the course of a deposition may expose her client to additional discovery and deposition demands. In one such case, the court allowed the defendant to take additional deposition testimony from a witness after counsel for the plaintiff failed to adhere to previously agreed-upon terms regarding the scope of a deponent's testimony and instructed the witness not to respond to an appropriate line of questioning. The court noted that the plaintiff attorney's refusal to acknowledge the agreement "violated the agreement the parties reached and this Court's Rules of Civility."[5] In another case, following allegations of attorney incivility, a court appointed a referee to oversee future depositions.[6]

[3]Synventive Molding Solutions, Inc. v. Husky Injection Molding Systems, Inc., 262 F.R.D. 365, 376 (D. Vt. 2009). But see Medline Industries v. Lizzo, 2009 WL 3242299, at *1 n.2 (N.D. Ill. 2009) (noting that an attorney's interjection of an excessive number of improper objections alone can be grounds for sanctions).

[4]Jadwin v. County of Kern, 2008 WL 2064514, at *1 (E.D. Cal. 2008).

[5]Hochstein v. Microsoft Corp., 2009 WL 1448544, at *4 (E.D. Mich. 2009), order amended and superseded, 2009 WL 2616253 (E.D. Mich. 2009).

[6]Laddcap Value Partners, LP v. Lowenstein Sandler P.C., 18 Misc. 3d 1130(A), 859 N.Y.S.2d 895 (Sup 2007).

§ 66:12 Incivility in court

Attorneys who behave rudely in front of a judge or jury act at their own peril.[1] 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. Counsel should be particularly wary of showing any sign of incivility towards another judge or court. Juries and judges are likely to lose respect for lawyers who exhibit rudeness in court.

Federal case law contains examples of attorneys who have, despite the risks, acted unprofessionally in court.[2] 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 responded to his opponent's request that he stop handling the relevant exhibit by throwing his opponent to the ground.[3] 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.[4]

A pattern of misbehavior before a judge can lead to a contempt charge. After a hearing where defense counsel accused the government of "scurrilous" behavior, accused the judge and the assigned magistrate judge of bias, and repeatedly talked over the judge, the judge later reminded counsel: "What I have said to you on numerous occasions is that I do not like the lack of civility that you bring to cases; that I do not like the lack of candor that you often bring to cases; that I do not like the fact that you on occasion misrepresent facts before a jury or before a witness; that I don't like the aspersions you cast, the personal aspersions that you cast at times upon the professional who oppose you, nor do I like the aspersions you cast upon the court at times." When counsel again spoke over the judge, the judge directed that the government formally charge him with two counts of criminal contempt, of which he was

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[1]See, e.g., Bank One Trust Co., N.A. v. Scherer, 176 Ohio App. 3d 694, 707-12, 2008-Ohio-2952, 893 N.E.2d 542 (10th Dist. Franklin County 2008) (sentencing an attorney to 10 days in county jail for uncivil behavior in court); but see Sobolewski v. State, 889 N.E.2d 849, 859-60 (Ind. Ct. App. 2008) (declining to rebuke a prosecutor who stated in front of the jury that defense counsel "has done nothing but ask clearly objectionable questions, trying to harass witnesses, make objections without knowing the rules, be totally amateurish and then he puts his client up to violate the Court's order," and concluding that the prosecutor was "merely expressing his frustration with the performance" of the defense counsel). For specific discussion of incivility in closing arguments, see 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."). See Chapter 65 "Ethical Issues in Commercial Cases" (§§ 65:1 et seq.) for additional discussions of avoiding disruption of the tribunal.

[2]See, e.g., Burks v. City of Philadelphia, 974 F. Supp. 475 (E.D. Pa. 1997); Mingo v. City of Detroit, 2009 WL 928784, at *2 (E.D. Mich. 2009) (noting that an attorney for the defendant made unnecessary facial gestures and spoke harshly and in a threatening manner toward the plaintiff).

[3]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).

[4]Kohlmayer v. National R.R. Passenger Corp., 124 F. Supp. 2d 877, 880-883 (D.N.J. 2000).

convicted. The Sixth Circuit affirmed the convictions, holding that "someone must be in control of what happens in a courtroom, and that someone is the trial judge, not the lawyer for a criminal defendant nor the lawyer for the United States.[5]

Counsel should also be wary of the negative consequences of initiating or returning uncivil behavior when such conduct is conveyed to the court through written submissions. 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.[6] In a brief, treating a lower court or opposing counsel with disrespect is a sign of incivility and a court may admonish offending counsel.[7] Courts have also weighed the civility or incivility of one or both parties when ruling on substantive motions.[8]

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 her opponent's incivility is likely to be considered uncivil herself. 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 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

[5]U.S. v. Moncier, 571 F.3d 593, 599 (6th Cir. 2009), cert. denied, 130 S. Ct. 2078, 176 L. Ed. 2d 416 (2010).

[6]Peters v. Pine Meadow Ranch Home Ass'n, 2007 UT 2, 151 P.3d 962 (Utah 2007).

[7]See RLJCS Enterprises, Inc. v. Professional Ben. Trust, Inc., 438 F. Supp. 2d 903, 905, 38 Employee Benefits Cas. (BNA) 1368 (N.D. Ill. 2006), aff'd, 487 F.3d 494, 40 Employee Benefits Cas. (BNA) 2095 (7th Cir. 2007) ("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."); Cochran v. State, 859 N.E.2d 727 (Ind. Ct. App. 2007) ("Such language adds nothing to the debate and undermines civility in the practice of law."); Levey v. Levey, 301 Wis. 2d 747, 2007 WI App 130, 731 N.W.2d 382 (Ct. App. 2007) ("We 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.").

[8]See, e.g., City Nat. Bank v. Clark, 2006 WL 2136666 (S.D. W. Va. 2006) (examining rudely-worded e-mails sent by counsel for both sides in weighing a motion to modify the scheduling order, notirig their uncivil tone); Eniva Corp. v. Global Water Solutions, Inc., 440 F. Supp. 2d 1042, 1054 (D. Minn. 2006) (noting that "[alt 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," admonishing counsel for failing to heed that warning in subsequent motion practice, criticizing "how acrimonious this case has become," and warning both parties that "the utmost civility will be expected in future proceedings."); Third Wave Technologies, 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").

ultimately intervenes, the motion may prompt the offending attorney to modify her behavior. For this reason, an attorney should not seek the court's redress on a minor infraction. Rather, an attorney should wait until a particularly egregious act of incivility, or wait until the aggregate of all their opposing counsel's incivility becomes egregious, before seeking the court's intervention. Even without intervention from the court, counsel would be ill-advised to forget that incivility in the courtroom can cost an advocate her most valuable asset: the respect of the judge and the jury.[9]

When the uncivil behavior is coming from the court itself, counsel are advised to ignore this behavior unless it harms the interests of the client or affects your ability to represent your client. Assume, however, a judge makes statements impugning your professional reputation in front of a jury. In this instance, you should address your concerns, politely, and only at sidebar out of the presence of the jury. Make sure to focus upon your need to effectively represent the client, not your own hurt feelings. If the court's conduct does not stop, continue to attempt to address the conduct at sidebar. Only when you are concerned that you may not be given an opportunity to raise the matter at sidebar, or the court actually refuses to address the issue at sidebar, should you file something—perhaps stylized as a motion to amend the record.

[9]See, e.g., In Memoriam: The Honorable Marvin N. Rimm, Judge of the Tax Court of New Jersey (Retired), 2009 N.J. Tax LEXIS 35 (N.J. Tax Ct. Sept. 21, 2009) (paying tribute to the career of a judge of the Tax Court of New Jersey, one of his colleagues noted that he remembered him most for "his great personal upset with those who violated the rules of civility, respect for authority and the obligations to be honest and candid with the Court and their adversaries. Those who violated those rules, even once, had a very hard time in reestablishing whatever credibility they may have had . . . .").

III. PRACTICE CHECKLISTS

§ 66:13 Checklist: considering whether to seek attention of court

- Try to discerning the cause of incivility in an opponent, and attempt to combat the cause. (See § 66:2)

- If your client mentions a desire for needless hostility, ignore the first such suggestion. If the matter arises again, however, an attorney should confront the problem and attempt to dissuade the client. Tell 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 interfere with the case. (See § 66:2)

- Before raising a matter of incivility with the court, (i) research reported decisions to find out whether a particular judge has ruled on matters of incivility, (ii) seek guidance from attorneys who have experience with the judge, perhaps even former law clerks, and (iii) rely on one's best judgment, which requires an honest assessment of the record and one's own conduct. (See § 66:2)

- Before filing, consider your own actions. You must be able to demonstrate that your conduct did not give rise to your opposing counsel's incivility. (See § 66:8)

- Filings with the court should be little more than a recitation of that record—deposition excerpts, and failed or hostile communications—and not characterizations of the content of the record. (See § 66:4)

- If you need to go beyond the record when seeking relief, such as to describe a voicemail you received or left, do so in an affidavit accompanying the motion, not in the motion itself, and remain as civil as possible when swearing to the opposing counsel's actions. (See § 66:3)

- Before filing a motion for sanctions under Rule 11, give the opposing counsel an opportunity to correct their errors or explain their position. Then, a Rule 11 motion should be crafted like any other motions asking the court for relief from incivility: rely on the record, and the opposing counsel's own words, to tell the story, do not characterize the opposing counsel's actions or words, and avoid hyperbolic or inflammatory language. (See § 66:3)

- Avoid making personal attacks in any motion based on op-posing counsel's incivility. (See § 66:2)

§ 66:14 Checklist: addressing general incivility

- Serve as role models for younger lawyers: disabuse younger attorneys of the idea that abusive, uncivil behavior advantages anyone. (See § 66:2)
- Meet face-to-face with opposing counsel at the onset of litigation. (See § 66:2)
- Be familiar with the civility codes that are promulgated in their jurisdiction. (See § 66:3)
- 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. (See § 66:4)
- 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 § 66:4)
- In making a record of uncivil conduct for the court, make the record be factual and free of generalities and pejorative opinions. (See § 66:4)
- 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. (See § 66:4)
- Do not use bad language, sarcastic comments, innuendos or any further gratuitous commentary that impugns the integrity of his adversary or the Court. (See § 66:4)
- If you witness uncivil behavior amongst a more senior lawyer on your team, consider consulting a mentor about the conduct or using existing civility codes to discuss the conduct with the senior member. (See § 66:5)
- Document each attempt at communication, and reference any prior unreturned communication. Before moving for court intervention with an unresponsive lawyer, send a certified letter documenting your attempts at contact and ask-ing for politely to please respond. (See § 66:6)
- Be wary of pursuing overly aggressive arguments. Do not use inflammatory or hyperbolic language or making un-founded accusations against the court or opposing counsel. (See § 66:7)
- Be aware that some courts may strike inflammatory or offensive language in court filings. (See § 66:7)

§ 66:15 Checklist: addressing incivility throughout discovery

- 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 § 66:5)

- Do not escalate the hostility. (See § 66:8) Pick your battles. Turning every discovery abuse into an opportunity for briefing may dilute any subsequent accusations of incivility. (See § 66:8)

- Be civil in discovery negotiations: respond timely to communications, maintain a willingness to discuss issues and compromise. (See § 66:8)

§ 66:16 Checklist: addressing incivility in depositions

- Recognize the impact uncivil behavior can have on the content of the testimony elicited at a deposition. (See § 66:9)

- If the transcript would not speak for itself before a judge, counsel should note the uncivil behavior and continue with the deposition. (See § 66:9)

- Do not respond to incivility with, pejorative or long-winded statements. (See § 66:9)

- Objections should be short and polite. (See § 66:9)

- Do not end a deposition early merely because opposing counsel is abusive to you or another attorney. Only end a deposition early if opposing counsel is being truly abusive towards your client. (See § 66:9)

- Be aware that the court may interpret the decision to depose other attorneys as a sign of incivility. (See § 66:9)

- If your client's is behaving uncivilly, request a recess, pull your client aside once you are off the record, and explain that such incivility may harm the case. (See § 66:10)

§ 66:17 Checklist: addressing incivility in court

- Take advantage of opposing counsel's rudeness by behaving as politely as possible before the judge and jury. (See § 66:12)

- Keep your court filings civil or risk having them stricken by the court. (See § 66:12)

- Consider deferring to the judge's opinion as to the best ways to run her courtroom, unless to acquiesce would be to abdicate one's duties as an advocate. (See § 66:12)

- If the judge does not react to incivility in her presence, address your concerns at sidebar, in a clear and polite manner.

- If the matter can wait, request sidebar at the end of the proceedings not immediately. Once at sidebar, you can ask that certain statements be stricken from the record, or that curative instructions be given to the jury, but only if necessary. (See § 66:12)

- When the uncivil behavior is coming from the court itself, address your concerns politely and only at sidebar. Focus upon your need to effectively represent the client, not your own hurt feelings. If the conduct does not stop, continue to attempt to address the conduct at sidebar. Only file a motion to amend the record if you cannot resolve the issue at sidebar. (See § 66:12)

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