

## Civility: The Ultimate Legal Weapon?

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Half an hour ago, you sent opposing counsel's inexcusably incendiary e-mail to your client. Now in your in-box is your client's outraged demand that you fight fire with fire. Although you are satisfied that you have been sufficiently provoked to justify a scorched earth response and you certainly know how to make one, perhaps you should first consider a simple question: is it tactically wise to do so?

We all know that few, if any, clients want wimps for lawyers. We also know that attorneys whose clients perceive them to be unable to stand up to pressure are likely to find themselves replaced and unpaid. But we know more. For example:

- Opposing counsel may well respond to your "fire" with more of her own, leading to an increasing cycle of malevolence.
- Hostility between counsel can substantially drive up fees and costs and can foreclose opportunities for early and mutually beneficial resolutions of a matter—something for which the client may subsequently seek to hold you responsible.
- Although your client and you may assume that a judge or bar disciplinarian will see things the same way that you do, there is no guarantee that this will be so. Even if you are absolutely, positively convinced that you do not live in a glass house, others may not agree that you were more sinned against than sinning. "A plague on both your houses" is often the reply.

What, then, are lawyers who refuse to give in to bombast to do? In many instances, the best and most effective response will involve firmness mixed with a heaping dose of civility.

Suppose, for example, that you respond to the initial incendiary e-mail with one of your own which apologizes for any offense your client or you may inadvertently have given and which states—clearly, rationally and without rancor—why you disagree and what you are and are not willing to do. Suppose further that you go out of your way to state that your client and you are concerned about the expense and delays to which rhetorical wars can lead, that you ask opposing counsel to explain his position more clearly in case you are missing his point, that you propose one or more constructive steps to deal with the present impasse, and that you ask opposing counsel to suggest his own steps if he does not like yours. In a great many instances, this approach is more likely to box in your opponent and to bring about the results that your client and you want than a perpetuation or elevation of hostilities. For example:

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- Particularly in the modern era of instant electronic communications, all of us say things at times that, in retrospect, might better have been said differently or not at all. Allowing the other side to save face may help the parties and counsel move forward.
- Although you may not realize it, you may in fact have given the other side reason to be annoyed. In such circumstances, heading off further annoyance is likely to be in your client's and your best interest. This is so whether or not the other side should have been annoyed and whether or not their annoyance was intentionally, negligently or entirely innocently caused.
- Giving in to emotion now is likely to make it harder for your client and you to be objective later on.
- If what then occurs is further angry-grams from your opposition with each one answered in turn by your civil response, a judge, arbitrator, mediator, or bar disciplinarian is far more likely to see where the fault lies.
- If your opponent, seeing your civil approach, decides that you are trying to set him up for a sanctions motion or bar complaint and therefore decides to try to outfox you by being civil himself, you will have achieved your objective.

Alternatively, an uncivil writing need not immediately be followed by any writing at all. Suppose that instead of sending an immediate response, you first call opposing counsel and suggest a meeting—perhaps at opposing counsel's office—to discuss your concern that matters not be allowed to get out of hand. If that meeting is agreed to (and it often will be), you can try, as calmly as possible, to resolve any and all issues on a mutually acceptable basis.

Sometimes the most difficult part of this process will be convincing your client that rationality should prevail. In this context, the suggestions above can serve as a template for a conversation with your client about why a nasty e-mail or phone call may fail to serve his interests. Remember that the client is not in nearly as good a position as you to assess the damage that incivility can cause. Positions can rapidly shift, whether in negotiating or litigating, and the party with the upper hand on Monday may find itself in desperate need of a favor on Tuesday. It is up to you as the bearer of greater knowledge to impress upon your client that what goes around comes around.

In the event that your client refuses to acquiesce, there are still ways to preserve the relationship with opposing counsel and perhaps to find at least some common ground. Every attorney has, at one time or another, had to deal with a difficult client who does not always follow the attorney's advice. Suppose that you have a client in litigation who wants to do everything according to the rules and not to be flexible when it comes to grants of extensions or other accommodations. Instead of simply letting opposing counsel discover, by trial and error, that this is your client's position (and, along the way, conclude that you are as much of a jerk as your client) how about alerting opposing counsel up front to your client's plan? If nothing else, this approach may reduce the personal offense that opposing counsel might otherwise take to your subsequent actions and may allow a line of communication to be kept open between counsel in the event that your client later decides that the time has come to negotiate a settlement.

This is not an all-inclusive list of civil options. Suppose, for example, that you are having a particularly difficult time working with Partner A at the ABC Law Firm but that, based on past experience, you believe you have a reasonably good and mutually respectful relationship with Partner B. Might you at least want to consider contacting Partner B in order to seek her help in getting beyond the difficulties you seem to be having with Partner A? And if this fails, will you have foreclosed any other desirable options?

Before the age of comparative fault, we had the tort doctrine of "last clear chance" which sometimes places responsibility on a party who was not initially at fault but who nonetheless had the last opportunity to avoid the

harm that ultimately occurred. What this article suggests is a kind of “last clear chance” approach to difficulties in dealing with opposing parties and counsel—not just because of whatever moral benefits it may have but also because of its often high potential for effectiveness. While fighting fire with fire is dramatic, fighting fire with a fire extinguisher may do more to save your (and your client’s) house. And avoiding fire altogether through the use of fire prevention techniques will often be better still.

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