Civility as a Strategy in Litigation

by

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1. Introduction*

Our profession is an adversarial profession, and gladiators for justice do not always follow the motto in the movie Gladiator: "Strength and honour". **Some lawyers use litigation as a flamethrower.**

Every one of us personally knows lawyers who, given a choice, we'd rather be smacked across our heads with an annotated *Constitution* for two days straight than be snowed-in with them in a remote cabin for a weekend.

The bottom line is: there are some people you simply will not be able to change. What you can change is your attitude in dealing with such people, and also your strategy in dealing with such people.

2. Civility as a Tactical Tool

The adversarial nature of the legal system directs lawyers to a radical kind of individualism in a contest to trump rights. This context can foster patterns of discourteous, thoughtless, and rude behaviour towards one another:

- the talking down (by a senior lawyer to an opposite junior lawyer: "You're not a partner there yet?")
- the belittling (the lawyer on the other side says "How are articles going?")
- the sexist behaviour ("Are you the lawyer or his secretary?")
- the threats ("If you don't do XYZ by Friday, I'll report you to the Law Society.")
- the over-your-head game (calling someone "higher" up in your firm)
- during discoveries the constant interrupting, bickering, answering for the witness, and the continual and deliberately evasive "I'll take that under advisement"
- the satisfaction-of-undertakings document dump on a Friday at 4:50 p.m.
- the service on your receptionist-on-her-way-out-the-door at 4:55 p.m. (so you get it the following Monday)
- the 2-page letter attacking you personally, copied to your client, copied to his client (or trying to be clever, attacking your legal assistant personally)
- being told that the other sides' response to my court motion was to "F___ off."

*Ideas for this paper taken from writer's personal experience and other material, including in *Select Bibliography*, and in quotes from other material therein.

One judge has recently written that the problem is exacerbated by:

- lawyers telling clients only what they want to hear
- clients shopping their cases, and being told how and when they'll succeed, instead of risks
- lawyers ("many" the judge says) believing the hallmark of the adversarial system is keeping relevant information from the other side for as long as possible
- lawyers who take the position " I won't cooperate until the *Rules* say I have to" or whose attitude is "*You'll have to drag it out of me*".

3. Trying to legislate civility is impossible—not to mention impractical

I suggest that instead of thinking of civility as something that must be regulated or that will come naturally, that we rather think of civility and courtesy strategically, as tools.

Sincere civility is the expression of a state of mind, a sign of character and personality. But more significantly, civility is a tactical tool all too often overlooked by lawyers. The practice of civility is usually undertaken on the basis of individual lawyers voluntarily restraining their impulses in favour of the greater good. But seen another way, however, civility is an inherent component of any legal strategy: in the same way that **good oratory is a good person speaking well, so good lawyering is a good person acting well.**

4. A time-waster, a money-waster

A common objection to civility is that it diminishes advocacy for the client. Yet, the reality is that incivility disserves the client because it wastes time and energy. Billable hours that should be spent working on the case are wasted by working the opposing counsel over.

An English proverb says: "the robes of lawyers are lined with the obstinacy of clients." In the writer's experience, the obstinacy of one lawyer lines the pockets of another—and the escalating tensions are matched by escalating fees.

5. A strategic option

Don't be civil because it's the proper thing to do. Be civil because it's the strategic thing to do.

6. Ten points for using civility as a strategic tool

No. 1: To most judges bad behaviour makes bad advocacy

Belligerent and discourteous behaviour in the eyes of strong judges is not persuasive. In fact, discourtesy in delivery can undermine an otherwise strong argument.

Points are won by being personally attacked, and you standing your ground, saying little or nothing, and instead of responding to the attack, responding only to the issues.

Judges know some people blow out other people's candles so theirs burn a little brighter. Remember: **judges are just lawyers with a whistle**—they know what it's like to be a lawyer.

No. 2: Incivility has a price

The principles of civility may not have the force of law, but a decision indicates that advocates who prefer Rambo-style intimidation eventually do so at their peril.

In the (January 15, 2010) case of *1013952 Ontario Inc. et al v. Sakinofsky, Rosso, Lawyers Professional Indemnity Company, et al,* the Ontario Superior Court gave a costs order of $25,000 (inclusive of fees, disbursements, and GST) on the basis that "substantial indemnity costs are reserved for cases in which the court demonstrates its disapproval of the party's conduct", concluding "this is one of those rare cases".

The motions court judge (Regional Senior Madam Justice H. M. Pierce) made the following points:

- Mr. Russo (a law clerk at a law firm) filed an affidavit exceeding 40 pages, replete with scandalous allegations about the behaviour and personal life of the solicitor, Sakinofsky
- Also alleged Mr. Gouveia [the firm's articling student] was complicit in Sakinofsky's alleged failure to practise professionally
- The inclusion of irrelevant and scandalous material in the record had the effect of greatly lengthening the proceeding

- It maligned the professional reputations of both Sakinofsky and Gouveia
- It is reprehensible to make irrelevant and scandalous allegations against a lawyer in a public record and persist in these allegations even when they have been rejected by the court
- "A lawyer's reputation is delicate. He or she works for a lifetime to establish it. It can be shattered in a moment by careless or vengeful pleading…"
- "The reputation of a lawyer for integrity is fundamental to his ability to earn a living in a practice. It is his calling card in the community. When a lawyer's reputation is damaged, so too is the personal credibility he brings to the court…

And in *Deveau v. Fawson Estate*, 2013 N.S.C.A. 54:

- $3250 costs payable by a lawyer personally
- for "…habitual failure to respond or acknowledge reasonable requests from opposing counsel; …. failure to communicate with the court; … filing of an affidavit that does not meet the basic requirements of the *Rules* or the law of evidence…"

No. 3: Civility in communications

Every communication with opposing counsel can be an opportunity for employing strategic civility. Lawyers have long memories—judges too. Civility frames common expectations about trust and respect in seeking resolutions through dialogue.

As one lawyer said, without mutual confidence, there cannot be an effective meeting of the minds as a way to resolve social disputes and problems. Lawyers often wind up talking past each other or sinking to the lowest common denominator to strike a short term advantage. What's ultimately important, and ultimately strategic, is doing what is right regardless of the circumstances and not being deliberately distracted from your goal by what the other side does.

No. 4: Avoiding acrimonious language

Do not attribute bad motives or improper conduct to opposing counsel unless it is relevant to the issue at hand and even then only when well-founded and provable.

In Ontario the matters which formed the largest class of claims made against lawyers are from categories such as libel and slander allegations by lawyers against lawyers, claims that counsel should pay the costs of proceedings personally and claims arising from a breakdown in the solicitor/client relationship.

For example, the following letter cc'd to the other side's client may be defamatory:

> "I notice that you have still not delivered a Statement of Defence on behalf of [ ]. My friendly advice to you is that you are being negligent.
> I do not wish to take advantage of your apparent lack of knowledge. I will give you one last chance and give you some homework to do. Please refer to Rule 16.08 of the Rules of Civil Procedure and to any textbook on Civil Procedure on service of court process. You will no doubt realize that your insistence on "personal service" is in error.
>
> The letter you wrote me copied to your client misrepresents what happened to the point of untruthfulness.
>
> In any case you must deliver the Statement of Defence on or before [ ]. If you fail to do so, you may regret the consequences."

No. 5: Setting a flexible tone

Make efforts to avoid scheduling conflicts. Agree to reasonable requests for scheduling changes. Do not attach unfair conditions. Remember: what goes around comes around. **You smack someone today, you'll get smacked later.**

When consistent with your client's interests, co-operate with opposing counsel in an effort to avoid litigation and resolve litigation that has already commenced.

Return telephone calls and answer correspondence promptly. Not because that's the proper thing to do but because the other lawyer, her client, your client, will report you to the Law Society. That means, even when you're vindicated, you have to respond to that complaint letter from the Law Society in a proper, full, and therefore time-consuming way.

Don't deliberately schedule the service of papers to cause disadvantage to your opposite number. Do not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.

No. 6: In the Court of Appeal, let go the little stuff

Minor misstatements of the law or facts by the Court below aren't going to win your appeal. Don't set out just to whack the Court or judge below, rather identify major mistakes and criticise the rationale of the lower court's decision.

Don't whack the other side either - use courtesy. Advice given to Ed Bayda, former Chief Justice of Saskatchewan, during his first summer job (selling "waterless" cooking pots door to door): "**People buy things from people they like**."

No. 7: Dealing with stress

Much has been written about how stressful the practice of law has become. One of the most effective ways of handling stress is simply to avoid creating unnecessarily stressful interactions with colleagues. Strategic friendliness is a way of doing this. Instead of wasting time trying to think of how best to create a detriment to the other side, consider what one lawyer has termed an "ethic of care" which is described as "considering the needs of all the parties involved as well as their relationships and attempting to find a solution that will satisfy everyone, rather than selecting a winner and a loser."

No. 8: Practical reasons why civility is important

The harder you argue, the less persuasive you are. The more you press, the more you hype, and the more you urge, the more sales resistance you create and the more you start to sound like the guy from *Fred's Water Beds* on Saturday night TV.

Real persuasion takes place when the reader thinks the conclusion is his or her own idea. Your job as an advocate is to help the judge find the right ideas herself that will lead her to decide the case your way. **Offer a reasoned solution to the judge instead of arguing**: here's why I am right and here's why you the judge must agree with me. The "I'm always right" technique doesn't work with my 10 year old, why expect it to work with a 50 year old? **Change your overall strategy over to the following: here's the problem, but here's also a reasoned solution. It works better - and you'll win more.**

One lawyer has written that the most important trick about good advocacy is the trick of abandoning trickery. You can be the greatest legal orator the legal system has known, but if you're not credible it simply doesn't work. A child can win an

argument with very simple language that innocently reveals the truth, or innocently reveals the logic. People win arguments because they are <u>believed</u>.

<u>No. 9</u>: Never respond in kind

As difficult as this may be, never resort to similar conduct, you open yourself to counter-charges or worse, damage your own credibility. Make a practice of preparing yourself in advance of the next communication and anticipate the situation. This will allow you to control your emotions and responses.

Remember the two Pig Rules:

> **<u>Pig Rule # 1</u>: Never wrestle with a pig—you only get dirty; and the pig enjoys it**.

> **<u>Pig Rule # 2</u>: Never try to teach a pig to dance – it wastes your time; and it only annoys the pig.**

<u>No. 10</u>: Ten Tactical Tools, to Stay Practical

Prepare yourself strategically for confrontations with incivility.

Ten tactical tools to respond to incivility:

1. when opposing counsel insults or baits you in telephone conversations simply inform him/her that unless they agree to be civil, all future communications must be in writing.

2. when the other side is constantly interrupting discoveries or cross-exams on an affidavit with silly objections, try to create a transcript describing the reasons you are prematurely adjourning until you can get a ruling on the appropriateness of the conduct of opposing counsel. You can also inform opposing counsel that you will be asking for costs.

3. when opposing counsel is being needlessly abusive, I just sit back and say, "Go ahead, get it off your chest. When you're finished, I've something to add." **Patience is idling your engine when you feel like stripping your gears.**

4. when your opposite number says you don't belong in the practice of law, says you don't know what you are doing, or insults the Law School where you received your degree; exude self-confidence and, with exaggerated humility, say something like "well in your mind you may be right, but I'm here to stay and it's a problem you will have to learn to live with." Your own self-esteem does not depend on affirmation from this person. **Accept that some days you're the statue, and some days you're the pigeon.**

5. when a lawyer consistently talks over you, wait until they take a breath, then say: "Listen, let's make a deal: when you're talking, I'll listen and not interrupt; but when I talk, the deal is you too listen and not interrupt." If, when they don't (inevitably) abide by the deal, simply remind them (on the record).

6. when a lawyer I know gets shouted over in discoveries her standard response is to say: "Shouting your questions and your responses doesn't give the force of your statement additional weight beyond that of additional noise. Madame Reporter we'll take a 10 minute break so Mr. X may compose himself", and walks out with the client. And the transcript so records.

7. another lawyer I know tries to figure out in advance each objection he thinks the other lawyer will make during the discovery/exam-on-affidavit, whether his client is being examined or vice versa, whether the objections are polite or impolite, then types his detailed responses into his laptop, and when the objection comes, he reads it

into the transcript. When the inevitable motion to produce/answer comes, the transcript always makes him look like a star. When appropriate he asks for costs, sometimes on a personal basis (again, where the behaviour is particularly uncivil and intemperate), and sometimes gets them.

8. when you get a letter full of dictated invective, the person sending it to you wants you to be shocked and appalled and respond the same way. Don't. Respond, saying only: "I am in receipt of your letter of [date]." Don't sign it yourself, have your secretary initial it. **A personalized attack letter from an attack-dog lawyer has all the credibility of a disbarred lawyer on a book tour.** Don't join the book tour.

9. respond to extreme hostility and baiting (as one Alberta judge did when called a "Motherf___g b_____" by an accused) with "Lucky guess".

10. and last, hope for the opportunity that <u>once</u> in your legal career another lawyer (or perhaps a judge) will say to you: "Mr./Ms. ____, I have read your material and I must tell you I am none the wiser"— <u>just</u> so you can respond: "Perhaps, your Honour, but certainly better informed."

7. <u>Conclusion</u>

My mother was right, 50 or so years ago, when I was 9 (me, not my mother): "Eugene, if you've nothing nice to say, don't say it". 50 years later, as a strategic response to incivility, it still works.

<u>End Quote</u>

Nelson Mandela/Carrie Fisher (not clear who):

"Resentment is like drinking poison,
and waiting for the other person to die".

8. Addendum

I received the following practical suggestions from other lawyers by email/letter on the issue of civility that I think is useful to add here, to see how other colleagues have dealt with the problem in a pragmatic way. Reproduced with permission.

1. The name of the incivil lawyer below is changed to Mr. Smith:

"I couldn't agree more with your point that civility can be used tactically. It also makes life much more enjoyable not to have to squabble interminably with opposite counsel.

I will always remember Gerry Morin's [later Mr. Justice Morin] piece of advice on civility. I had a fatal accident case years ago where one of my clients was killed while standing on the shoulder of the road by a client whose defence lawyer was my old nemesis Mr. Smith. [He had] sent me a letter telling me my claim was "frivolous and vexatious" and I should consider a "change of venue to Disneyland and a guest appearance on the Gong Show".

I was much younger then with a much lower outrage threshold. What I wasn't going to do to him – Law Society, demand apology yadda, yadda. The day I received the letter I had a call from Tom Conway about another file and I ranted to Tom about the letter and my plans to whack away at the *. Tom told me the story of a similar letter he had received from the same Mr. Smith – Tom had actually never heard of a lawyer getting the Gong Show AND the Disneyland reference in the same letter – a bit of a badge of honour.

Anyway, Tom had written an excoriating draft letter to Mr. Smith demanding apology, dastardly consequences etc. He took it in to Gerry Morin to review before he sent it out and Gerry ripped the letter in half before Tom's startled eyes. He explained patiently to Tom that was not the way to deal with Mr. Smith. The right way to deal with him and like-minded litigators was to completely ignore the provocative remarks and under no circumstances should you refer to it in writing, or in conversation. Just ignore it as if it never existed and respond politely and professionally to the substantive issues in the letter.

I accepted Gerry's derivative advice and it works like an absolute charm. I never once lost my temper with his eminence or other provocative counsel since then."

Eugene Meehan Q.C., Supreme Advocacy LLP, Ottawa

Barry Laushway, Laushway Law Office, Prescott, Ontario (now deceased).

2. "Mr. Laushway's/Gerry Morin's advice reminded me of Fraser Goddard's advice to me in a similar situation. I prepared a sharp riposte to a sneer (in writing) I had received. I showed it to Fraser. He told me that it was a fine answer, and it was probably a good idea to write it. However, I should on no account send it because "you can't win piss-fights with skunks". When I have to expurgate that advice, I just say you can't win fights with skunks. They're stinkers, and you get some on ya. There is a lawyer in Edmonton, quite senior at the bar, who was renowned for his rudeness when I was a junior lawyer. On the phone, he never said good-bye, he just hung up, often in the middle of what his caller was saying. He did builders' liens, so I had the privilege of having many files with him. To remedy the situation, I started being as friendly to him as I could possibly be. I chatted with him in elevators, asked him about his holidays, etc. etc. Before long, he reciprocated quite warmly. And there was no more rudeness. I believe I became the only friend he had, or ever had had, among lawyers with whom he practiced. … I have repeatedly and very self-consciously adopted a similar very friendly demeanour with lawyers who have reputations for being difficult to deal with. Not very many people are nice to them in any given day. It has paid off."

Elsa Rice, Q.C., Scorgie Wilson Rice, Edmonton, Alberta

3. "… your paper made me remember the early days (1970s) in San Francisco as a young woman lawyer, a bit sheltered and shy in spite of having graduated from Berkeley. I entered a deposition once and the opposing counsel, after asking if I was the court reporter, tried to kiss my hand. At the time, I found it awkward and weird. I also noted that he did not know how to do that properly (the guy's lips are NOT supposed to actually TOUCH the lady's skin; it is a gesture). If I had known THEN, what I know NOW, I would have halted right there in front of everyone and given him lessons in correct hand-kissing. Over and over. Had I been sufficiently coarse, I could have invited him to kiss my posterior part as well … but then, that would not have been civil, would it? The fact today, at least in my US experience, is that only a minority of lawyers are actually raised with good manners. Dog-eat-dog and jungle survival tactics take over. The goal of many is to win, to wear the other side down with paper. Sadly, lawyers in the federal government do more of this than many others, having deep resources.
Oregon is far more gentle than California or New York. We talk about that among ourselves here. One reason is that this is a small state and Portland is a small town. What goes around, comes around. If one gets the reputation of being a jerk, well-mannered opposing counsel will not be inclined to grant favours, such as

stipulated extensions, when requested or needed. One will not get referrals in conflict of interest situations. One will not be sought after by in-house counsel. It is true that the most successful lawyers here follow the rule of civility. To do otherwise demeans the profession and is a disservice to the client, needlessly exacerbating tensions and emotions within the dispute resolution process, and wasting economic resources. Preaching the higher expectation as the norm does have an impact – so that the tactics you describe will be seen for what they are: the unprofessional conduct and rantings of inferior jerks and dweebs who believe they must fall back on such games and foul play in order to "win"."

Carol A. Emory, Emory Law Group PC, Portland, Oregon.

4. "I am a tax litigation counsel for the Province of BC. As such, I defend tax assessments. Some counsel (usually counsel who are not tax counsel), adopt their client's persona in their initial dealings with me and the client (and hence the lawyer) often harbours a deep anger at the tax authority. These lawyers begin their litigation by taking strong positions on timing and rules of court and use strong and often intemperate language in their letters and telephone communications. I do not respond in kind but maintain a calm and civil approach. This invariably has the effect, as Barry Laushway's story suggests, of neutralizing the counsel's approach. In fact, a few such counsel have become outright sycophantic."

Hunter Gordon, Sales Tax Lawyer, Victoria, BC

5. "I am an associate with Laurie Allen and she is a huge proponent of the civility strategy. It is amazing how a civil response completely disarms a boorish adversary. Laurie is a master of the technique."

Gay M. Benns, Moe, Hannah & McNeill LLP, Calgary, Alberta.

6. "I agree with your assertion that I don't need to seek validation from opposing counsel. To thine own self be true. Law is a funny thing, with many people who seem to be insecure in their place in the universe, and lawyers often tend to see everything as a competition. I was reminded of this (and of the value of not joining the party) at a bar dinner several years ago. There is an annual dinner where the articling students are introduced to the Bar. The repartee often takes the form of taking shots at each other. In other cases it takes the form of rather merciless teasing of the students (which is a particularly bad form of predation on the weak, in my view). Not that it is offensive in any way, because it is restrained, but there are times it just strikes me as genteel name-calling. Without really thinking about it, I adopted a rather self deprecatory approach, telling some funny

stories on myself, and then introduced my student, by giving him a pat on the back. Never really thinking about it, I was surprised afterward when one of my partners approached me and told me that the female members of the bar had almost uniformly remarked on the fact that I was the only speaker who hadn't taken the time at the podium to take a shot at someone else."

Kim Anderson, B.C. Ministry of Attorney General, Victoria, B.C.

7. "Barry's story reminds me of a lawyer's response I saw years ago (not sent to me or my firm), written in answer to a provocative, uncivil letter from another lawyer. On expensive letterhead, after all the usual formal date, name, address, re: lines, it succinctly stated: "Well, excuuuussssse me…" Signed off with "yours very truly"."

Elisabeth Sachs, Barrister & Solicitor, Orangeville, Ontario.

8. "I have a note stuck to the window ledge next to my computer to remind me that a thoughtful response is always better than a reaction. This was pasted there after hearing a quote attributed to Melody Beattie: "Much of what we react to is nonsense"."

Laurie Gordon, L.M. Gordon Law Office, Nanton, Alberta.

9. "Lawyers should note that they meet other lawyers on the way up and on the way down. … you meet other lawyers and must be able to negotiate with them at all times. … since 98% to 99% of most lawsuits get settled without going to Court, it is especially important to keep good lines of reasonable communications open."

Emanuel Sonnenschein, Q.C., Sonnenschein Law Office, Saskatoon, Saskatchewan.

10. "I am old enough to remember the day when an older lawyer with much senior experience who was opposing me on an estate matter, and addressing me as Mrs. V. (as I was then known) kindly, and ever so politely, pointed out several errors I had made in an estate matter, that would have been to my client's detriment. He did it so diplomatically that it took me some minutes to figure out that he was actually pointing out my mistakes to me so I could fix them, instead of taking advantage of me and them. This, I understand was his duty then and still is our duty today. But do you think anyone today ever points out his or her opponent's errors?"

Nadia Senyk, Corporate Counsel, Canadian Red Cross, Ottawa, Ontario.

11. "I read Barry Laushway's story with interest. Over the course of my 24 years of practising law, I have been told to "shut up" by counsel considerably senior to me and called a communist on a couple of other occasions. I learned to smile (only when on the phone, as I agree with Mr. Justice Morin's advice to show no reaction) and take comfort that counsel has no persuasive logic or reasoning to rely upon. Without exception, those cases resolved favourably for my client. When confronted by rude behaviour, I remind myself that discourteous behaviour conveys weakness and fear. Civility conveys strength and confidence."

Dale K. Beck, Provincial Mediation Board and Office of Residential Tenancies, Regina, Saskatchewan.

12. "It was great to read Barry's story, which I remember well because I really took Gerry's advice to heart. His was one of the best mentoring tips I received in my early days of practice. I have tried, not always successfully I confess, to follow his advice every day of my professional life since. It is no coincidence, I'm sure, that the very same advice made the very same impact on Barry. I estimate that my exchange with Gerry years ago took less than two minutes, but here his advice shows up again a dozen years later and is disseminated by you to an even larger audience. What I have noticed over the years about practitioners like Gerry and Barry is that, by refusing to take the bait and by maintaining high standards of civility and professionalism, they become the tide that lifts all boats. One cannot help but respond in kind when ambushed by unrestrained, uncompromising civility. A postscript: The ways of "Mr. Smith" eventually caught up to him. He later resigned from the profession. No one was sad to see him go. A needless ending for him. Ironically, "Mr. Smith" and his demise are a cautionary tale to those of us who occasionally draft scathing rebuttals to imagined adversaries: remember the advice of Gerry Morin and the end of "Mr. Smith", and toss the angry intended missives into the blue box where they belong."

Tom Conway, Cavanagh Williams Conway Baxter, LLP, Ottawa.

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