Incivility in Lawyers' Writing: Judicial Handling of Rambo Run Amok

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I. INTRODUCTION

The fictional Atticus Finch[1] is often viewed as the epitome of an admirable lawyer.[2] He argued legal points on their merits with courtesy, professionalism, and respect for others, including his opponents.[3] He has been an inspirational role model for many students as they embarked on the study of law.[4] When law graduates enter the practice, however, they are sure to encounter at least a few lawyers of a different type—those who attempt to prevail with discourtesy and hardball tactics.[5]

The growing incivility in the legal profession has been amply criticized in recent years.[6] There is even a shorthand term for it: "Rambo Litigation,"

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1. *See generally* HARPER LEE, TO KILL A MOCKINGBIRD (1960).

2. *See, e.g.*, Clifford E. Haines, *Calling All Atticus Finches*, 31 PA. LAW. 2, 2 (2009) ("Deep inside, each of us [lawyers] longs to be that perfect lawyer, Atticus Finch . . . .").

3. *See* Cynthia L. Fountaine, *In the Shadow of Atticus Finch: Constructing a Heroic Lawyer*, 13 WIDENER L.J. 123, 160 (stating that Atticus showed that "a lawyer can zealously represent the client and still be respectful to the adversary").

4. *See, e.g.*, Morris Dees, *Foreword to* MIKE PAPANTONIO, IN SEARCH OF ATTICUS FINCH: A MOTIVATIONAL BOOK FOR LAWYERS 7 (1995) (stating that Atticus Finch inspired Dees to become a lawyer); Bill Haltom, *The Trial of Atticus*, 45 TENN. B.J. 34, 34 (Oct. 2009) ("Indeed, many lawyers of my generation (myself included) will tell you that they became a lawyer because they were inspired by Gregory Peck's portrayal of Atticus Finch.").

5. *See* Michael J. Riordan, *U.S. District Court for the Eastern District of Michigan Adopts the "Lawyer's Commitment of Professional Civility": FBA Chapter Institutes the Cook-Friedman Civility Award*, 88 MICH. B.J. 42, 42 (2009) (stating that "civility among lawyers is on the decline").

6. *See, e.g.*, Townsend v. Superior Court, 72 Cal. Rptr. 2d 333, 337 (Ct. App. 1998) (lamenting the increasing number of cases wherein "most of the trappings of civility between counsel are lacking"); Geneva Nat'l Cmty. Ass'n v. Friedman, 598 N.W.2d 600, 607 (Wis. Ct. App. 1999) (noting "an increasing amount of incivility in the practice of law"); Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 114 (1995) (noting a "current crisis in civility"); Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 949, 953 (1995) (decrying a "broad decline in professionalism" and stating that lawyers should be "harmonizers[] and peacemakers"); Allen K. Harris, *The Professionalism Crisis —The 'Z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 551 (2002) (noting a recent increase in uncivil litigation tactics). *But see* Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 665 (1994) (arguing that the perceived crisis in civility may be an exaggeration, contrived to promote more cultural homogeneity in the profession); Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics against Legal Ethics*, 17 PEPP. L. REV. 637, 639 (1990) (stating that incivility among lawyers is not new); Deborah L. Rhode, *Opening Remarks: Professionalism*, 52 S.C. L. REV. 458, 459 (2001) (stating that "the good-old days were never all that good for many lawyers who did not fit within well-off white male circles").

named after a different fictional character, John Rambo,[7] who was always ready for a fight,[8] whether lawful or not.[9] This Article focuses on what happens when Rambo tactics taint lawyers' written documents.

The varieties of Rambo tactics are limited only by lawyers' imaginations. They include "rudeness, hostility, abrasive conduct, and strident personal attacks on opponents,"[10] "overzealous advocacy,"[11] "unnecessary combativeness," and "bad manners."[12] While it is easy to catalog uncivil conduct, its opposite, *civility*, is more difficult to pin down.[13] Here, *civility* in the practice of law will mean treating others with respect and with consideration for the overall good of clients, the legal profession, and society.[14]

The causes of incivility in the profession are many. Commentators have suggested the following: (1) the growth of the bar, which leads to increased competition and more anonymity,[15] (2) the adversarial legal system, which pits lawyers against one another, leading to combativeness,[16] (3) poorly prepared law graduates,[17] (4) clients who want combative lawyers,[18] (5) an erroneous view that civility shows weakness,[19] (6) pressures to increase billable hours,[20] (7) the shifting of many litigation proceedings to out-of-court depositions, where lawyers may feel freer to appear belligerent in an effort to impress clients,[21] (8) individual lawyers' poor moral character,[22] and

7. *See* FIRST BLOOD (Orion Pictures 1982).

8. *See* Reavley, *supra* note 6, at 637 n.4.

9. *See* Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561, 563 (1996).

10. Kohlmayer v. Nat'l R.R. Passenger Corp., 124 F. Supp. 2d 877, 879 (D.N.J. 2000).

11. Harris, *supra* note 6, at 551.

12. *In re* Golden, 496 S.E.2d 619, 622 (S.C. 1998).

13. Melissa S. Hung, Comment, *A Non-Trivial Pursuit: The California Attorney Guidelines of Civility and Professionalism*, 48 SANTA CLARA L. REV. 1127, 1131 (2008) (stating that "[d]efinitions of civility are nebulous"); Monroe Freedman, *Civility Runs Amok*, LEGAL TIMES, Aug. 14, 1995, at 54 (stating that " 'civility' means radically different things to different people").

14. *See* Sandra Day O'Connor, *Professionalism: Remarks at the Dedication of the University of Oklahoma's Law School Building and Library, 2002*, 55 OKLA. L. REV. 197, 198 (2002) ("A great lawyer is always mindful of the moral and social aspects of the attorney's power and position as an officer of the court."); Rhode, *supra* note 6, at 467 (arguing that professionalism means "lawyers owe responsibilities, both individually and collectively, to clients, the legal system, and society generally"); Justice Anthony Kennedy, Address to the 1997 ABA Annual Meeting (Aug. 5, 1997) (stating "civility is respect for the dignity and worth of a fellow human being").

15. Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 757–58 (1994); John J. Juryk, Jr., *Honor the Law!: The Essential Role of Civility in the Legal System*, BENCHER, July/Aug. 2005, at 20; *see also* Harris, *supra* note 6, at 589–90 ("In smaller cities and towns, where all the lawyers know each other, the Rambo lawyer does not thrive so easily.").

16. Joseph G. Bisceglia, *Professionalism and Civility in an Adversary System*, 96 ILL. B.J. 172, 172 (2008); Juryk, *supra* note 15, at 20.

17. Browe, *supra* note 15, at 762; *see* Hung, *supra* note 13, at 1135–36 (arguing that the competitive atmosphere in law schools fosters incivility).

18. Juryk, *supra* note 15, at 20.

19. *Id.*

20. *Id.*; Browe, *supra* note 15, at 759.

21. Richard C. Fields, *A Look at Idaho's Standards for Civility in Professional Conduct*, ADVOCATE, Feb. 2009, at 13.

22. Aaronson, *supra* note 6, at 116 (arguing that a key cause of lawyers' incivility is a lack of "the strength of character to exercise self-discipline when making practical or ethical choices"); Bisceglia, *supra* note 16, at 172 (stating that some lawyers are "simply 'jerks'—lawyers who are born, raised, or trained to be unreasonable, disagreeable, and antagonistic when it serves no purpose").

(9) a growing impression that the law is becoming more a business than a profession.[23] While the profession "claims to promote the interests of the whole community,"[24] those who see the law as just another business often slight the profession's public-spirited ideals.

Despite these pulls toward incivility, many lawyers want more civility in the profession, as evidenced by the enactment of civility codes[25] by numerous bar groups in the past twenty years or so.[26] The U.S. Court of Appeals for the Seventh Circuit was a leader in this trend[27] by enacting one of the first civility codes in 1992.[28] Whether these codes will have a significant effect has been questioned[29] because they are often advisory rather than binding.[30] Yet, courts have been citing civility codes when chastising erring lawyers,[31] and those scoldings are likely to influence the offenders and others. As a former American Bar Association president wrote, "[L]awyers learn quickly when judges mean what they say about observing professional standards. A few sharp raps on the knuckles, and knuckles won't be used as much."[32]

Some contend that courts are not rapping enough knuckles.[33] Twenty years ago, Judge Thomas Reaveley urged judges to devote more attention to "methods which will ensure a proper penalty for misbehavior."[34] More recently, a court attorney proposed that courts should "send a clear message to counsel that mean-spirited litigation will not be tolerated,"[35] and others have offered similar suggestions.[36]

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23. Juryk, *supra* note 15, at 20.

24. JAMES A. BRUNDAGE, THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS 2 (2008).

25. Hung, *supra* note 13, at 1135–36 (stating that the codes indicate lawyers want "mutual respect and graciousness" in the profession).

26. *See* Harris, *supra* note 6, at 582 n.173 (stating that by 1999, more than 100 bar associations at various levels had enacted civility codes). There are 159 professionalism codes listed at http://abanet.org/cpr/-professionalism/profcodes.html (last visited Mar. 2, 2011).

27. Christopher J. Piazzola, Comment, *Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule*, 74 U. COLO. L. REV. 1197, 1200 (2003).

28. *See* Final Report of the Comm. on Civility of the Seventh Fed. Judicial Circuit, 143 F.R.D. 441, 447 (1992).

29. *E.g.*, Aaronson, *supra* note 6, at 114–15 (expressing doubt about lawyers' compliance with the codes because they "are not necessarily intended to be formally enforced").

30. *See In re* Bernstein, 774 A.2d 309, 309 (D.C. Cir. 2001) (declining to order a lawyer to read a professionalism code because it was not binding); Aaronson, *supra* note 6, at 115.

31. *E.g.*, *In re* Mann, 220 B.R. 351, 358 (Bankr. N.D. Ohio 1998) (citing the American Bar Association ("ABA") Section of Litigation, *Guidelines to Litigate By* in disapproving a lawyer's intemperate language); *City of Jackson v. Estate of Stewart*, 939 So. 2d 758, 765 (Miss. 2005) (citing Misissippi's *Lawyer's Creed* in disapproving of a lawyer's inappropriate language); Muster v. Muster, 921 A.2d 756, 766 (Del. Fam. Ct. 2005) (citing Delaware's *Principles of Professionalism for Delaware Lawyers* in disapproving a lawyer's intemperate language).

32. Jerome J. Shestack, *Advancing Professionalism Needs Judicial Help*, 84 A.B.A. J. 8, 8 (1998).

33. *E.g.*, Harris, *supra* note 6, at 592 (noting that "judicial oversight of lawyer behavior is so critical"); Jeffrey A. Parness, *Civility Initiatives: The 2008 Allerton House Conference*, 96 ILL. B.J. 636, 637 (2008) (stating that incivility would be deterred if "judges more frequently sanctioned civil litigation misconduct"); Shestack, *supra* note 34, at 8 (stating that lawyers "need the help of judges" to foster civility).

34. Reaveley, *supra* note 6, at 648.

35. Ty Tasker, *Sticks and Stones: Judicial Handling of Invective in Advocacy*, 42 JUDGES J. 17, 21 (2003).

36. Browe, *supra* note 15, at 765; Harris, *supra* note 6, at 592; Shestack, *supra* note 32, at 8.

Are judges attempting to control incivility? This Article shows that many of them are. Of course, there is no way to know how often incivility goes unaddressed. A few reported cases show lawyers avoiding sanctions for seemingly obnoxious written language.[37] But another court wrote of "a nation-wide judiciary that refuses to condone or even entertain conduct by attorneys that is unprofessional or unethical,"[38] and numerous recent cases demonstrate that many courts have imposed consequences for lawyers' incivility.

This Article attempts to increase awareness of the negative effects of incivility on clients, lawyers, and the legal system by examining how courts handle lawyers' incivility in filed documents and other written communication. Accordingly, incivility that manifests in overall case planning[39] or orally[40] is outside the scope of this Article. That means depositions, which all too frequently devolve into incivility,[41] are not covered here.

While this Article focuses on uncivil writing, the counter-story should not be overlooked: many lawyers enhance the profession by writing professional, civil documents. They receive less attention because courts have less reason to comment when lawyers do their jobs right. But courts sometimes commend such lawyers; two courts complimented lawyers for maintaining a professional approach despite their opponents' incivility.[42]

Part II of this Article discusses background about incivility. Part III examines specific instances of courts' reactions to uncivil writing—responses that range from disbarment to scoldings on the record. Part IV concludes that courts should actively discourage incivility in the legal profession.

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37. *E.g.*, Saldana v. Kmart Corp., 260 F.3d 228, 237–38 (3d Cir. 2001) (reversing the district court's assessment of sanctions against an attorney whose letter called an expert witness a "Nazi," because the out-of-court statement did not warrant use of the court's inherent power to sanction); Revson v. Cinque & Cinque, 221 F.3d 71, 79 (2d Cir. 2000) (declining to sanction a lawyer who threatened to subject opposing counsel to "the legal equivalent of a proctology exam" because although that language was "offensive," it was "regrettably" similar to other contemporary discourse).

38. Welsh v. Mounger, 912 So. 2d 823, 828 (Miss. 2005).

39. *E.g.*, Redwood v. Dobson, 476 F.3d 462, 467, 470 (7th Cir. 2007) (censuring one lawyer and admonishing another for bringing numerous frivolous cross-motions due to "personal distaste" for each other); Thomason v. Lehrer, 182 F.R.D. 121, 122–23 (D.N.J. 1998) (sanctioning a lawyer who multiplied the proceedings out of "meanspiritedness [sic] and petulance," and warning that the law is not a "free fire zone").

40. *See, e.g.*, California v. Chong, 90 Cal. Rptr. 2d 198, 200, 207 (Ct. App. 1999) (chastising counsel for her "unprofessional, offensive, and contemptuous conduct" in making hostile comments during trial).

41. *See, e.g.*, Townsend v. Superior Court, 72 Cal. Rptr. 2d 333, 337 (Ct. App. 1998) (stressing that "bickering with deponent's counsel at a deposition" is not a civil way to resolve disputes); Geneva Nat'l Cmty. Ass'n v. Friedman, 598 N.W.2d 600, 604–05 (Wis. Ct. App. 1999); Cary, *supra* note 9, at 563 (discussing increasingly uncivil tactics at depositions).

42. Bettendorf v. St. Croix Cnty., 754 N.W.2d 528, 532 n.3 (Wis. Ct. App. 2008) (commending a lawyer's "professionalism and restraint" in declining to respond in kind to his opposing counsel's incivility); *Geneva*, 598 N.W.2d at 607 (commending a lawyer for "representing the best of lawyering" and observing "the highest standards of professionalism" against an uncivil opponent); *see* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 54 (Del. 1994) (stating that "integrity, compassion, learning, civility, diligence and public service . . . mark the most admired members of our profession").

II. BACKGROUND ABOUT INCIVILITY

A. Incivility and Its Effects

As a lawyer, Abraham Lincoln frequently pursued opportunities for settlement or mediation,[43] and he advised lawyers that they should be peacemakers.[44] In 1995, Chief Justice Warren Burger echoed that philosophy when he urged lawyers to address the civility crisis by acting as "harmonizers[] and peacemakers."[45] Cultivating that public-spirited dimension of law practice[46] is especially important now, when incivility affects the tenor of the entire profession,[47] harming the following interests:

- *Incivility harms clients.* By abandoning civility, a lawyer is likely to lose the trust of the court. In a close case, civility may tip the scales toward a lawyer with a reputation for integrity,[48] causing the uncivil lawyer's client to lose the case. Sound arguments, not "vituperative sniping," persuade courts,[49] which have "absolutely no interest in internecine battles" between lawyers.[50] One judge stressed that lawyers need to understand "how truly annoying all this sniping can be."[51] At times he has stopped reading briefs with uncivil language—briefs that, instead of aiding the court, "serve as some kind of weird outlet for lawyers with a lot of pent-up hostility."[52]
- *Incivility harms lawyers.* It contributes to the high degree of lawyers' dissatisfaction with their work,[53] and it also may harm their health.[54]
- *Incivility harms the legal profession.* The current decreased respect for lawyers and the legal profession is well known.[55] As Justice Sandra Day O'Connor argued, incivility is a likely source

43. MARK E. STEINER, AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN 84 (2006).

44. Abraham Lincoln, *Notes for a Law Lecture*, *in* 1 THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES 12 (Daniel W. Stowell et al. eds., 2008).

45. Burger, *supra* note 6, at 953.

46. *See* ANTHONY T. KRONMAN, THE LOST LAWYER 365 (1993) (advocating public-spiritedness in the practice of law).

47. *See* Cary, *supra* note 9, at 573 (stating that a few Rambo lawyers "take the pleasure out of practicing law"); Deborah L. Rhode, *Foreward: Personal Satisfaction in Professional Practice*, 58 SYRACUSE L. REV. 217, 222 (2008) (stating that combativeness detracts from lawyers' happiness).

48. David J. Brown, *Civility*, BENCHER, July/Aug. 2005, at 18, 19.

49. Bettencourt v. Bettencourt, 909 P.2d 553, 558 (Haw. 1995).

50. Amax Coal Co. v. Adams, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992).

51. Naomi Kogan Dein, *The Need for Civility in Legal Writing*, 21 CBA REC. 54, 55 (Feb./Mar. 2007) (quoting Judge A. Benjamin Goldgar of the U.S. Bankruptcy Court of Northern Illinois).

52. *Id.*

53. Rhode, *supra* note 47, at 219, 224.

54. Hung, *supra* note 13, at 1135 (stating that lawyers are "generally miserable and unwell vis-à-vis the general population, as evidenced by greater rates of divorce, alcoholism, suicide, and depression"); Rhode, *supra* note 47, at 220 (listing emotional and physical problems that occur among lawyers at greater rates than in society at large).

55. Harris, *supra* note 6, at 561 n.58 (citing statistics documenting poor opinions of lawyers).

of this problem, causing the profession and the legal system to "lose esteem in the public's eyes."[56]

- *Incivility harms the legal system and, through it, our society.* Incivility makes conflict resolution more difficult[57] and diminishes confidence in the legal structure.[58] Justice O'Connor aptly stated, "[T]he justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another."[59]

By contrast, "civility is important because it frames common expectations about trust and respect in seeking resolutions through dialogue."[60] It enhances the legal system and our society by promoting efficient resolution of conflicts.[61]

B. The Role of "Zeal" in Incivility Cases

The "z" words—zeal, zealous, and zealotry[62]—have been repeatedly blamed for promoting incivility in the profession.[63] Lawyers sometimes defend their incivility by invoking a need to represent their clients zealously,[64] apparently unaware that most states have eliminated the zealous advocacy requirement from their ethical rules.[65] While former ethical rules did contain a requirement of "zealous" representation,[66] that requirement was not incorporated into the Model Rules of Professional Conduct adopted by the ABA in 1983.[67] Instead, the Model Rules require "reasonable diligence."[68] Moreover, "lawyers have never had a special dispensation to aid a client's cause through unethical or unlawful means."[69] Thus one court stated that "[z]ealous advocacy cannot be translated to mean win at all costs, and although the line may be difficult to establish, standards of good taste and pro-

56. Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 52 n.24 (Del. 1994) (citing Sandra Day O'Connor, Civil Justice System Improvements, Speech to American Bar Association (Dec. 14, 1993)).

57. Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks*, 34 TEX. TECH L. REV. 3, 19–20 (2002).

58. Hung, *supra* note 13, at 1145; *see also* Cary, *supra* note 9, at 578 (stating that Rambo lawyers "feed the public's negative perception that lawyers . . . will do anything to win"); O'Connor, *supra* note 14, at 199 (stating that when lawyers cause conflict instead of focusing on the issues, that "undermines our adversarial system and erodes the public's confidence that justice is being served").

59. *Paramount*, 637 A.2d at 52 n.24.

60. Aaronson, *supra* note 6, at 141.

61. *See, e.g.*, Bisceglia, *supra* note 16, at 172 (noting that incivility "prevents a fair result").

62. Harris, *supra* note 6, at 551.

63. John Conlon, *It's Time to Get Rid of the "Z" Words*, J. IND. ST. B. ASS'N RES GESTAE, Feb. 2001, at 50; David D. Dodge, *The "Z" Word, Civility & the Ethical Rules*, 44 ARIZ. ATT'Y 18 (2008); Harris, *supra* note 6, at 551.

64. *See, e.g.*, Fla. Bar v. Buckle, 771 So. 2d 1131, 1133 (Fla. 2000).

65. Harris, *supra* note 6, at 572 (noting that by 2002, forty-two states and the District of Columbia had eliminated a duty of "zealous advocacy" in favor of a duty of diligent representation).

66. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1983) (stating, a lawyer's duty "is to represent his clients zealously within the bounds of the law").

67. Conlon, *supra* note 63, at 50.

68. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2007).

69. GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, 1 THE LAW OF LAWYERING 6-4 (2011).

fessionalism must be maintained."[70] Another court emphasized that zealous representation does not mean lawyers are free to be "loose cannons."[71]

C. The Role of Free Speech in Incivility Cases

Lawyers whose writings attack courts sometimes argue that they have a free speech right to criticize tribunals.[72] The problem of balancing free speech protection against the need for lawyer discipline has been amply discussed elsewhere,[73] but a short summary is helpful here.

The free speech defense is often unsuccessful because the U.S. Supreme Court has held that lawyers' speech in pending cases may be restricted beyond that of ordinary citizens.[74] Because states grant lawyers licenses and lawyers are officers of the court, they may be required to "conduct themselves in a manner compatible with the role of courts in the administration of justice."[75] Allowing states to discipline them in that role serves the important interest of "protecting the public, the administration of justice and the profession."[76] Under *New York Times Co. v. Sullivan*,[77] speech made with knowledge of its falsity or reckless disregard of its truth or falsity is not protected in any event.[78] Some courts have held that the *New York Times Co.* subjective standard does not go far enough in protecting against lawyers' intemperate criticisms of courts.[79] These courts reason that because states license lawyers in order to protect the public, attorney regulation differs significantly from a defamation claim like that in *New York Times Co.*[80] These courts apply a stricter objective standard.[81]

How courts treat the issue of free speech and incivility cases differs by jurisdiction. One court declined to sanction a lawyer who wrote that a judge

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70. Fla. Bar v. Buckle, 771 So. 2d 1131, 1134 (Fla. 2000) (assessing sanctions against a defense lawyer who wrote a humiliating letter to a crime victim).

71. Thomason v. Lehrer, 182 F.R.D. 121, 123 (D.N.J. 1998).

72. *See, e.g.*, *In re* Arnold, 56 P.3d 259, 264 (Kan. 2002) (holding that Kansas Rules of Professional Conduct 8.2 limits a lawyer's free speech protection); *In re* Graham, 453 N.W.2d 313, 321 (Minn. 1990) (holding that Minnesota's lawyers' right to criticize judges is not absolute and can be abused); Anthony v. Va. State Bar, 621 S.E.2d 121, 126–27 (Va. 2005) (holding that, under both the U.S. and Virginia constitutions, a statement impugning "the qualifications or integrity of a judge, made by a lawyer with knowing falsity or with reckless disregard of its truth or falsity" is not subject to free speech protection).

73. *E.g.*, Angela Butcher & Scott Macbeth, Current Development, *Lawyers' Comments About Judges: A Balancing of Interests to Ensure a Sound Judiciary*, 17 GEO. J. LEGAL ETHICS 659, 667–70 (2004) (arguing that the subjective *New York Times* standard should be applied); Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1588–89 (2009) (arguing for the subjective standard).

74. Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991).

75. *In re* Snyder, 472 U.S. 634, 644–45 (1985) (holding that a lawyer's one-time criticism of a law and assignments of cases under it did not rise to a level requiring discipline).

76. *Graham*, 453 N.W.2d at 321 n.6.

77. 376 U.S. 254 (1964).

78. *Id.* at 279–80; *In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995); *In re* Green, 11 P.3d 1078, 1085 (Colo. 2000); *see also* MODEL RULES OF PROF'L CONDUCT R. 8.2 (2007) (proscribing a lawyer from making a statement about a judge's integrity "that the lawyer knows to be false or with reckless disregard as to its truth or falsity").

79. *See, e.g.*, *Graham*, 453 N.W.2d at 321.

80. *E.g.*, *id.* at 322.

81. *E.g.*, *id.*

was "a racist and a bigot."[82] Although the court emphasized that it did not condone the language, it felt compelled to find that the statement was an unsanctionable opinion under the subjective standard.[83] The U.S. Court of Appeals for the Ninth Circuit reversed sanctions against a lawyer who had called a judge a "buffoon" and a "sub-standard human," on the ground that most of his statements were opinions, apparently applying a subjective standard.[84] But a majority of jurisdictions that have considered the issue have applied the objective standard.[85] The Minnesota Supreme Court, for example, held that lawyers' privilege to criticize courts must be judged by "what the reasonable attorney, considered in the light of all his professional functions, would do in the same or similar circumstances."[86] Several of the cases discussed below applied the objective standard.

III. JUDICIAL HANDLING OF LAWYERS' INCIVILITY

This Section examines courts' reactions to incivility through discussions of particular cases. They are arranged by type of reaction and, within types, by the object of the incivility—either lawyers, courts, or others. Cases that fit more than one category may be treated in depth in one category and in less depth in the others.

A. Incivility Resulting in Disbarment, Suspension, or Referral to the Bar

Incivility can rise to the level of unethical conduct that warrants bar discipline. Applicable rules include Model Rules of Professional Conduct Rule 4.4, which prohibits behavior undertaken for "no substantial purpose other than to embarrass, delay, or burden a third person,"[87] and Rule 8.4(d), which prohibits misconduct that is "prejudicial to the administration of justice."[88] Thus, lawyers have been subject to bar discipline due to their uncivil conduct, usually in combination with other violations.

1. Bar Discipline for Incivility to Other Lawyers

Disbarment by two federal courts was the consequence for one lawyer, Antonio Cordova-Gonzalez, who not only engaged in inappropriate financial

82. *Green*, 11 P.3d at 1082.
83. *Id.* at 1087.
84. Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1440, 1445 (9th Cir. 1995) (noting that respect for judges will not be increased by silencing lawyers); *see In re* Cobb, 838 N.E.2d 1197, 1212 (Mass. 2005) (stating that it is unclear whether California applies a subjective standard). *But see In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995) (stating that *Yagman* contradicts *Gentile* to the extent that *Yagman* suggests lawyers can berate judges with the same freedom lay persons have to criticize officeholders).
85. *See Cobb*, 838 N.E.2d at 1212 (citing examples of courts utilizing the objective standard).
86. *Graham*, 453 N.W.2d at 322.
87. MODEL RULES OF PROF'L CONDUCT R. 4.4 (2007).
88. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2007).

transactions with clients but also used flagrantly uncivil language.[89] His "vituperative statements" and "vitriolic slurs" were so offensive that the court declined to repeat them, but it said the pleadings included pervasive abusive and disrespectful language against opposing counsel and judges.[90] Because of his inappropriate behavior, the U.S. Court of Appeals for the First Circuit affirmed the district court's disbarment and disbarred Cordova-Gonzalez from practicing before the First Circuit.[91]

In another case, the Kansas Supreme Court suspended Dorothy Gershater in part because she wrote a letter to her own lawyer containing "vile and unprintable epithets."[92] The Court said the letter reflected poorly on Gershater's fitness to practice law, because a lawyer should be able to communicate an argument without using profane language and because lack of civility reflects poorly on the bar.[93] Due to that and other transgressions,[94] the Court suspended Gershater indefinitely.[95]

Another court declined to repeat a lawyer's "steady stream of uncivil, disrespectful, and unprofessional *ad hominem* attacks on parties, opposing counsel, and [the] Court."[96] The court found improper the lawyer's purpose to "hurl insults at the opposing parties and counsel and to impugn the integrity of the Court."[97] It therefore imposed Rule 11 sanctions in an unspecified amount and referred the matter to the Pennsylvania state bar's disciplinary board,[98] leading to the lawyer's suspension for five years.[99]

Ad hominem attacks also resulted in suspension for a South Dakota lawyer, Benjamin J. Eicher.[100] He already had built a reputation for unprofessionalism[101] when he crossed the line in *Thomas v. Thomas*.[102] In that case, Eicher represented a divorced woman, Shirley, whose former step-daughter, Gail, sued to quiet title to the family home.[103] The case became rancorous, and Eicher filed a brief containing many vitriolic comments about Gail's lawyer. Eicher wrote that the lawyer needed a lecture in "good lawyering," was firing "blunderbuss," and, like an undisciplined child, presented "half-baked"

89. *In re* Cordova-Gonzalez, 996 F.2d 1334, 1337 (1st Cir. 1993).
90. *Id.* at 1335.
91. *Id.* at 1337; *see infra* notes 120–123 and accompanying text (discussing disbarment for incivility to judges and lawyers in *In re* Cobb).
92. *In re* Gershater, 17 P.3d 929, 931 (Kan. 2001) (per curiam).
93. *Id.* at 935.
94. *Id.* at 931. Gershater misrepresented that she was licensed to practice law, although she had been suspended; she allowed her attorney to misrepresent her status to a court; and she did not comply with discovery requests. *Id.* at 930–31.
95. *Id.* at 939.
96. Warren v. Baker, No. 07-CV-0188, 2007 WL 4111428, at *1 (M.D. Pa. Nov. 16, 2007).
97. *Id.*
98. *Id.* at *2 (citing FED. R. CIV. P. 11(b)).
99. Office of Disciplinary Counsel v. Warren, No. 151 DB 2007, *1 (Pa. Feb. 2, 2009) (per curiam).
100. *In re* Eicher, 661 N.W.2d 354, 357–58 (S.D. 2003).
101. *Id.* at 357 (noting that Eicher had been the subject of previous bar complaints for unspecified infractions).
102. 661 N.W.2d 1 (S.D. 2003).
103. *Id.* at 3.

arguments to the court.[104] On appeal, the Supreme Court of South Dakota acknowledged that lawyers must be vigorous advocates, but it concluded that Eicher's personal attacks on counsel and others were outside the acceptable bounds of appropriate advocacy:[105] "His writings added nothing to the determination of legal issues and only worked to inflame opposing counsel."[106] The Court, therefore, remanded the case to the trial court for imposition of sanctions for Eicher's "uncivil behavior."[107]

But Eicher's troubles did not end there. His opposing counsel in the *Thomas* case filed a bar complaint against him,[108] as required by a state rule when a "substantial question" about a lawyer's fitness arises.[109] Eicher worsened his position by filing retaliatory complaints against his accusers.[110] Based on the misconduct of the unrepentant Eicher, which included his "harsh, vindictive and insulting communication to opposing counsel,"[111] along with other transgressions,[112] the Supreme Court of South Dakota imposed a 100-day suspension from the practice of law so he could "educate himself on the proper conduct of an attorney."[113] In order to reactivate his license, Eicher was required to pass the Multistate Professional Responsibility Examination, file an affidavit stating that he had reviewed the state's Rules of Professional Conduct, and pay costs and expenses for the disciplinary case.[114]

Another lawyer, R.S. McCullough, was already in trouble with the Arkansas bar when he insulted bar counsel, Ligon.[115] On a motion to abate his fine for other matters, McCullough employed the novel technique of refusing to capitalize the first letter of Ligon's name.[116] McCullough also accused Ligon of harboring venom for black lawyers and pointedly mentioned Ligon's loss of a local election.[117] The Arkansas Supreme Court denounced McCullough's uncivil language and cautioned lawyers against filing papers with "irrelevant, disrespectful, and caustic remarks that serve only to vent a party's emotions."[118] Finding McCullough's insults a breach of professionalism, the Court referred the matter to the state's Professional Conduct Committee for a ruling on appropriate discipline.[119]

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104. *Id.* at 10.
105. *Id.* at 11.
106. *Id.*
107. *Id.*
108. *In re* Eicher, 661 N.W.2d 354, 357 (S.D. 2003).
109. *Id.* at 364–65 (citing S.D. RULES PROF'L R. 8.3(a)).
110. *Id.* at 368.
111. *Id.* at 361.
112. *Id.* 366–70. Eicher also accused the disciplinary board of bias, unfairly disparaged the court's referee, created a conflict of interest with his client, and misled the trial court. *Id.*
113. *Id.* at 371.
114. *Id.*
115. Ligon v. McCullough, 247 S.W.3d 868, 869 (Ark. 2007) (per curiam).
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* McCullough was later disbarred for other offenses, including misappropriating client funds. Ligon v. McCullough, 303 S.W.3d 78, 85 (Ark. 2009).

2. Bar Discipline for Incivility to Courts

It is somewhat surprising that lawyers continue to engage in a tactic that appears unwise: insulting the courts that will decide their pending or future cases. But the following lawyers were disciplined for doing just that.

The ultimate bar discipline, disbarment, was imposed on Massachusetts attorney Matthew Cobb for multiple infractions.[120] An appellate judge found Cobb's petition for interlocutory review "scandalous" and "impertinent" in accusing him of "bias, unethical conduct, and inappropriate susceptibility to unspecified illegitimate influence."[121] Cobb's "quick and ready disparagement of judges, his disdain for fellow attorneys, and his lack of concern for and betrayal of his clients" led the Massachusetts Supreme Court to find him "utterly unfit to practice law."[122] The Court disbarred him.[123]

In re S.C.[124] also involved numerous transgressions.[125] Among them, California attorney Julie Lynn Wolff disparaged the trial judge, "a tactic that is not taken lightly by a reviewing court."[126] Wolff asserted that the trial judge was biased because he asked questions from the bench to a developmentally disabled minor who testified against Wolff's client.[127] But the Court emphasized that it was reasonable for the judge to question the girl in an attempt to understand her testimony.[128] Wolff further claimed that the judge had "admitted" bias.[129] The Court found Wolff's appeal meritless.[130] It further stated that Wolff's unfounded allegations against the trial judge could be grounds for contempt, but it decided to refer the matter to the State Bar of California instead.[131] There, Wolff was disbarred for multiple infractions,[132] some of which are discussed below.[133]

Disbarment was also the penalty for Illinois attorney Michael Palmisano.[134] He had been relieved as counsel in a case in which attorneys' fees were later awarded to his replacement.[135] In correspondence and

120. *In re* Cobb, 838 N.E.2d 1197, 1201, 1219 (Mass. 2005) (finding that Cobb was accused of falsely telling clients that they had been sanctioned and had converted the clients' settlement proceeds).

121. *Id.* at 1205.

122. *Id.* at 1219.

123. *Id.*

124. 41 Cal. Rptr. 3d 453 (Ct. App. 2006).

125. *Id.* at 458 (discussing, in addition to incivility, the offending brief's rambling prolixity, violations of court rules, misrepresentations of the record, and unsupported arguments); *see infra* notes 207–216 and accompanying text (discussing Wolff's offensive statements about a party to the case).

126. *Id.* at 475.

127. *Id.* at 476.

128. *Id.*

129. *Id.* at 476–77. Wolff's claim that the judge admitted bias was based on the judge's explanation that he questioned the minor because he wanted to understand her testimony. *Id.*

130. *Id.* at 458.

131. *Id.* at 477, 479.

132. *See Attorney Search: Julie Lynn Wolff—#142531*, STATE BAR OF CAL., http://members.calbar.ca.gov/search/member_detail.aspx?x=142531 (last visited Mar. 2, 2011) (listing attorney Julie Lynn Wolff as disbarred).

133. *Infra* notes 207–215 and accompanying text.

134. *In re* Palmisano, 70 F.3d 483, 488 (7th Cir. 1995).

135. *Id.* at 485.

motions, he referred to the judge who removed him as "Frank the Fixer" and "Frank the Crook," who was "filling the pockets of his buddies."[136] He made similar accusations against other judges and asserted that most Illinois cases are "fixed" through judges' friendships and biases.[137] An Illinois disciplinary hearing board found that Palmisano's statements were false and made "with knowledge of their falsity or reckless disregard for their truth or falsity."[138] Therefore, the Illinois Supreme Court disbarred him.[139]

The U.S. District Court for the Northern District of Illinois then considered whether it also would disbar Palmisano under a court rule providing for reciprocal disbarment.[140] Palmisano argued that it should not, claiming "an infirmity of proof" in the Illinois proceeding, and claiming that disciplining him was unconstitutional.[141] Rejecting Palmisano's arguments, the district court disbarred him, and he appealed to the Seventh Circuit.[142]

The Seventh Circuit held that the charges against Palmisano had been adequately proven and rejected Palmisano's constitutional defense.[143] The court stated that while removing corrupt judges is an important reason to allow criticism of judges, unjustified accusations against courts do not accomplish that end.[144] Therefore, attorneys may be held to a higher First Amendment standard than ordinary citizens.[145] The court affirmed Palmisano's disbarment from practice before the district court.[146]

A Kentucky lawyer, Louis Waller, was jailed for contempt and suspended due to his uncivil conduct in filing a memorandum that called a judge a "lying incompetent ass-hole."[147] For failing to accord the appropriate respect to the court, Waller received a thirty-day jail sentence and a fine of $499.[148] The judge then referred the matter to the bar association, which initiated a complaint charging Waller under several disciplinary rules.[149] In that proceeding, Waller submitted a pleading calling a judge a racist, incompetent liar.[150] He then defended his use of the term "ass-hole" and sarcastically suggested that an appropriate sanction against him would be "flogging, caning or some other physical torture."[151] Waller also referred to himself as an "old

136. *Id.*
137. *Id.* at 485–86.
138. *Id.* at 486.
139. *Id.* at 485.
140. *Id.* at 484 (citing N.D. ILL. R. 3.51.D).
141. *Id.* (citing U.S. CONST. amend. I).
142. *Id.*
143. *Id.* at 487.
144. *Id.*
145. *Id.* (citing Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995); Gentile v. State Bar of Nev., 501 U.S. 1030, 1065–76 (1991)).
146. *Id.* at 488.
147. Ky. Bar Ass'n v. Waller, 929 S.W.2d 181, 181 (Ky. 1996).
148. *Id.* at 181–82.
149. *Id.* at 182 (citing KY. SUP. CT. R. 3.130-3.5(c), 4.4, 3.4(e), 8.2(a)).
150. *Id.*
151. *Id.*

honkey" and used other offensive language.[152] The Kentucky Supreme Court summarized his pleadings as "generally scandalous and bizarre."[153] Although the bar association had recommended only a public reprimand, the Court determined that Waller's repeated scandalous language and his lack of repentance required a more severe punishment, one that would remind him that "he must conform his professional conduct to minimum acceptable standards."[154] The Court suspended Waller from practice for six months, ordered him to pay costs, and suggested that he consider professional counseling.[155]

A five-year suspension was the consequence for a Pennsylvania lawyer, Neil Price, who filed documents containing serious, unsupported accusations against two judges and an assistant district attorney.[156] Price alleged that a judge colluded with a lawyer to bring a baseless suit against Price's client[157] and that the same judge had coerced officials.[158] Price accused another judge of "prosecutorial bias to ingratiate himself with the disciplinary and other authorities," as well as sexual harassment of constituents.[159] Price also alleged that an assistant district attorney was biased against him because Price had discovered embezzlement by that attorney.[160]

The bar's hearing committee had applied an objective standard to Price's state of mind.[161] Explaining why the objective standard was appropriate, the Supreme Court of Pennsylvania noted that under a subjective standard, a respondent always could exonerate himself by saying he believed even the most "scurrilous" accusation.[162] Under the objective standard, the Court considered the factual basis for Price's state of mind and held that the statements were made with no objectively reasonable belief in their truth.[163] Price had not presented competent testimony to support his accusations, and he even testified that he based his statements only on his "perceptions and impressions."[164] The seriousness of Price's conduct, his lack of understanding of its wrongness or of the damage he caused, and the harm it caused to public perceptions of the judicial system led the court to suspend Price from the practice for five years and order him to pay costs.[165]

Other instances of incivility to the judiciary have brought suspensions. In *In re Madison*,[166] a judge continued a trial because of a problem involving

152. *Id.*
153. *Id.*
154. *Id.* at 183.
155. *Id.*
156. Office of Disciplinary Counsel v. Price, 732 A.2d 599, 607 (Pa. 1999).
157. *Id.* at 602.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 604–05.
162. *Id.* at 604.
163. *Id.* at 605.
164. *Id.* (internal quotations omitted).
165. *Id.* at 606–07.
166. 282 S.W.3d 350 (Mo. 2009) (en banc) (per curiam).

her elderly parents.[167] A Missouri lawyer, James Madison, was offended at not being told the specific reason for the continuance and sent the judge a "very hostile" letter accusing her of selfishness and racism.[168] Finding the letter "insulting and offensive," the judge recused herself.[169] Despite her recusal, Madison sent her another letter accusing her of being racist and a tyrant.[170] Yet another letter referred to the judge's " 'evil' network."[171] These letters led the judge to fear for her safety.[172]

In his disciplinary hearing arising from these and other incidents, Madison tried to defend himself by arguing that his statements were true.[173] Although Madison claimed he had carefully researched his accusations, he was unable to support them with facts.[174] The Missouri Supreme Court found that they were "without factual basis and were made in the heat of anger and pique."[175] The Court suspended Madison indefinitely, without leave to reapply for six months.[176] Additionally, the Court required him to be evaluated psychologically and complete anger management and ethics courses.[177]

Kenneth Bernstein, a District of Columbia attorney, worsened his plight in a disciplinary proceeding.[178] He took more than he was entitled to out of a client's settlement check and commingled his funds with his client's, resulting in a bar complaint.[179] He wrote to the disciplinary hearing committee that the bar was inventing "garbage" against him, and he characterized bar counsel as "persecutors" and "vultures" who "should rot in Hell."[180] The U.S. Court of Appeals for the District of Columbia Circuit denounced Bernstein's "intemperate and inflammatory rhetoric" as uncivil and deliberate.[181] It approved most of the disciplinary measures recommended by the bar, including suspending Bernstein from practice for nine months, and it required him to make restitution to the wronged client and complete a course on professional responsibility.[182]

An Arkansas lawyer, Oscar Stilley, wanted to revisit cases he had lost before the Arkansas Supreme Court,[183] so he filed a brief that used "strident, disrespectful language" to accuse the Court of various transgressions.[184]

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167. *Id.* at 354 n.4.
168. *Id.* at 355.
169. *Id.*
170. *Id.*
171. *Id.* at 356.
172. *Id.*
173. *Id.* at 358.
174. *Id.*
175. *Id.*
176. *Id.* at 362.
177. *Id.*
178. *In re* Bernstein, 774 A.2d 309 (D.C. Cir. 2001).
179. *Id.* at 312.
180. *Id.* at 319.
181. *Id.*
182. *Id.*
183. White v. Priest, 73 S.W.3d 572, 579 (Ark. 2002).
184. *Id.* at 580.

Among the transgressions were that the Court was biased, that it had lied, and that it had committed "many serious and apparently intentional wrongs."[185] The Court found the brief "an inexcusable breach" of Stilley's professional obligations.[186] It considered whether it could strike only part of the brief, but because offensive language appeared throughout, the Court struck the entire brief and referred the matter to the state's Professional Conduct Committee.[187] The committee concluded that Stilley had engaged in "serious misconduct," and the Arkansas Supreme Court agreed, noting that the striking of his intemperate brief caused "substantial prejudice to his client."[188] The Court suspended him from practice for six months.[189]

In a Minnesota case, attorney John Graham was suspended after alleging his "certain knowledge" that a district court judge, a magistrate, an attorney, and others had conspired to fix a case against Graham's client.[190] Graham was brought before the disciplinary board on the ground that those accusations were unfounded.[191] He then admitted that by "certain knowledge" he meant "belief" and that some of his allegations were based on "speculation."[192] He argued, however, that the First Amendment provided an absolute privilege for his allegations.[193] But the Minnesota Supreme Court held that an absolute privilege would be inappropriate because of lawyers' special role in the legal system and the potential for their false statements to harm judges as well as "the administration of justice."[194] Graham contended that his "feelings were genuine" when he made the accusations, but the Court applied the objective "reasonable attorney" standard to hold that Graham's subjective belief was not sufficient to exonerate him.[195] Moreover, Graham's conduct also violated the prohibition against bringing frivolous claims.[196] Finding that Graham's conduct showed a lack of the judgment that befits "an officer of the legal system,"[197] the Court suspended Graham from the practice of law for sixty days[198] and required him to take the state's professional responsibility examination and pay $750 in costs.[199]

185. *Id.*
186. *Id.* at 581.
187. *Id.*
188. Stilley v. Superior Court Comm. on Prof'l Conduct, 259 S.W.3d 395, 405 (Ark. 2007).
189. *Id.* at 405.
190. *In re* Graham, 453 N.W.2d 313, 318 (Minn. 1990) (per curiam).
191. *Id.*
192. *Id.* at 318 n.3.
193. *Id.* at 319–20.
194. *Id.* at 322.
195. *Id.*; *see supra* notes 72–86 and accompanying text.
196. *Id.* at 324 (citing MINN. RULES OF PROF'L CONDUCT R. 3.1 (2007)).
197. *Id.* at 322.
198. *Id.* at 325. Graham was later reinstated after complying with the Minnesota Supreme Court's requirements, conditional upon his completion of the state's professional responsibility bar examination. *In re* Reinstatement of Graham, 459 N.W.2d 706, 706 (Minn. 1990).
199. *Graham*, 453 N.W.2d at 325; *see In re* Garringer, 626 N.E.2d 809, 810–11 (Ind. 1994) (suspending a lawyer for sixty days for writing an "open letter" falsely contending, among other things, that a magistrate was biased against "poor litigants" and a judge had protected criminals); *In re* Becker, 620 N.E.2d 691, 692 (Ind. 1993) (suspending a lawyer for six months for writing, among other insults, unfounded accusations that

Uncivil conduct in *Bettencourt v. Bettencourt*[200] was referred to the Hawaii bar for consideration.[201] There, Hawaii attorney Lionel Oki's brief "excoriate[d] individual family court judges personally in a scathingly contemptuous diatribe."[202] Footnotes throughout the brief contained running sarcastic commentary, for instance, "how'd she ever become a judge!"[203] The Court described the brief as "an egregious example of the substitution of rancorous rhetoric for legal and factual analysis in appellate briefs."[204] The Hawaii Supreme Court stressed that this not only burdened the court but also harmed the client's interests.[205] The Court referred the case to the state's Office of Disciplinary Counsel for further proceedings.[206]

3. Bar Discipline for Incivility to Others

The insults in *In re S.C.* stand out as brazen even among other incivility cases.[207] In addition to disparaging the trial judge, as discussed above,[208] California attorney Julie Lynn Wolff used offensive language to describe her client's developmentally disabled minor daughter. In trying to discredit her testimony, Wolff said the girl was "akin to broccoli"[209] and "pretty much a tree trunk" whose testimony was "jibber jabber."[210] The court found that Wolff's language "wrongly insult[ed]" the girl,[211] who as a witness was competent and "easy to understand."[212] Wolff's characterizations were thus "shameful editorializing" that was "gratuitous [and] offensive."[213] The court condemned Wolff's conduct, stating, "[w]e note with dismay the ever growing number of cases in which most of the trappings of civility . . . are lacking."[214] Because of Wolff's "contemptuous attack" on the girl, along with

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a court had "trampled the rights of the Appellants" and delayed a hearing to favor the opposing party); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 427, 433 (Ohio 2003) (suspending a lawyer from the practice for six months because his motion stated, among other insults, that an appellate panel "did not give a damn about how wrong, disingenuous, and biased" it was). *See generally* Welsh v. Mounger, 912 So. 2d 825 (Miss. 2005) (listing cases in which lawyers were suspended for making uncivil false accusations against judges).

200. 909 P.2d 553 (Haw. 1995).

201. *Id.*

202. *Id.* at 556.

203. *Id.* at 557.

204. *Id.* at 558.

205. *Id.*

206. *Id; see* Shortes v. Hill, 860 So. 2d 1, 2 (Fla. Dist. Ct. App. 2003) (referring to the state bar a case in which the appellate brief contained "vitriolic comments about the trial judge"); Sears v. Olivarez, 28 S.W.3d 611, 616 (Tex. App. 2000) (referring to the state bar a case in which, without basis, a lawyer alleged that justices of the court had committed "gross judicial misconduct and tortuous behavior"); *In re* Maloney, 949 S.W.2d 385, 388 (Tex. App. 1997) (referring to the state bar a case in which a lawyer's motion included personal attacks on a judge); Fox v. Lam, 632 So. 2d 877, 879–80 (La. Ct. App. 1994) (referring to the state bar a case in which a brief accused the trial court of bias and prejudice and of altering the record).

207. *See In re* S.C., 41 Cal. Rptr. 3d 453 (Ct. App. 2006).

208. *Supra* notes 125–132 and accompanying text.

209. *In re S.C.*, 41 Cal. Rptr. 3d at 458.

210. *Id.* at 474.

211. *Id.* at 458.

212. *Id.* at 474.

213. *Id.*

214. *Id.*

her numerous other transgressions, the court referred the case to the state bar,[215] and Wolff was disbarred.[216]

Benjamin Eicher, whose insults against opposing counsel in a family dispute were discussed above,[217] made personal attacks against the opposing party, Gail Thomas.[218] He wrote that Gail wanted "blood," showed "despicable greed," displayed "rancid animosity," and had bared her "fangs" to hurl "acidic bile" at his client.[219] When the matter was referred for bar discipline, the court found these insults, along with Eicher's other conduct, "improper and unprofessional"[220] and suspended him for 100 days.[221]

An Ohio lawyer, Mark Foster, insulted the brother of the opposing party, a pro se litigant.[222] Foster's correspondence to the brother asked whether the family had been "seriously inbreed [sic]." Foster described the litigant as an "anencephalic cretin" on the "lunatic fringe" with a "single operating brain cell" who issued "brain-dead ravings" and "anal rantings."[223] Because Foster engaged in "a pattern of escalating abusive language," the Court suspended him for six months and ordered him to pay costs but stayed the sanction provided that Foster did not commit other violations during the term.[224]

B. Incivility Resulting in Formal Censure, Reprimand, or Admonishment

1. Censure, Reprimand, or Admonishment for Incivility to Lawyers

While formal disapproval by the bar or a court does not directly curtail a lawyer's ability to practice law, it is likely to have an indirect affect by damaging the lawyer's reputation.

The U.S. Court of Appeals for the Eleventh Circuit censured and reprimanded Georgia attorney Ethel Munson for "*ad hominem* attacks" in her pleadings.[225] On a motion for summary judgment, Munson raised racial issues through affidavits of plaintiff Thomas, an African-American.[226] One of Thomas' affidavits stated that during his deposition he was "uncomfortable" being around a "white person" like the opposing lawyer.[227] Thomas also stated that people attending the deposition had made fun of the opposing lawyer's personal attributes, including his flushed face, and that he and Munson had

215. *Id.* at 474, 479.
216. *See Attorney Search: Julie Lynn Wolff—#142531*, *supra* note 132.
217. *See supra* notes 101–114 and accompanying text.
218. *In re* Eicher, 661 N.W.2d 354, 358 (S.D. 2003).
219. *Id.*
220. *Id.* at 366.
221. *Id.* at 371.
222. Butler Cnty. Bar Ass'n v. Foster, 794 N.E.2d 26, 26 (Ohio 2003) (per curiam).
223. *Id.*
224. *Id.* at 27.
225. Thomas v. Tenneco Packaging Co., 293 F.3d 1306, 1313 (11th Cir. 2002) (per curiam).
226. *Id.* at 1310.
227. *Id.*

continued making fun of that lawyer outside the courtroom.[228] When opposing counsel's papers called the personal attacks inappropriate, Munson characterized that as "psycho-babbling."[229] Munson also filed another affidavit that likened the defendant's counsel to "the Grand Wizard of the KKK."[230]

The district court found no basis for Munson's negative comments and strongly denounced the charges of racism as "both serious and demeaning."[231] Making such an accusation without basis, the judge said, is "more than bad manners; it is just plain wrong."[232] The judge vowed to "protect [the court], its officers and its litigants from unwarranted and malicious accusations of [racism]."[233] Under the court's inherent powers, the judge formally censured and reprimanded Munson for her comments against opposing counsel and warned her that he would strike, without a hearing, any further documents containing similar language.[234] The Eleventh Circuit affirmed that holding, finding Munson's "baseless accusations and invective" demeaning, and warning lawyers who practice before that court that such slurs would be "cause for severe sanction" in the future.[235]

In another case, Kansas attorney Richard Comfort wrote a disparaging letter about a lawyer, David Swenson, and then forwarded it to eight members of the community.[236] The letter accused Swenson of "very unprofessional actions"[237] and "reckless acts"[238] regarding an alleged conflict of interest with Comfort's client.[239] Swenson filed a complaint with the disciplinary administrator, stating that the letter was improperly interjected for the purpose of embarrassment or delay.[240] The disciplinary panel agreed and said that Comfort engaged in conduct "prejudicial to the administration of justice."[241] The disciplinary office recommended that Comfort be censured, and the Kansas Supreme Court upheld that recommendation and assessed costs against him.[242]

Elsewhere, Louisiana attorney Nicolas Estiverne filed a brief replete with allegations against opposing counsel of "professional misconduct, unethical and illegal behavior," which the Louisiana Court of Appeals found "insulting and offensive" because there was no supporting evidence.[243] The court stressed that a lawyer always should act with "personal courtesy and

228. *Id.*
229. *Id.* at 1311.
230. *Id.* at 1313.
231. *Id.* at 1317.
232. *Id.*
233. *Id.* at 1318.
234. *Id.* at 1308.
235. *Id.* at 1331–32.
236. *In re* Comfort, 159 P.3d 1011, 1017–18 (Kan. 2007) (per curiam).
237. *Id.* at 1015.
238. *Id.* at 1016.
239. *Id.* at 1015.
240. *Id.* at 1017 (citing KAN. RULES PROF'L CONDUCT R. 4.4 (2006)).
241. *Id.* (citing KAN. RULES PROF'L CONDUCT R. 8.4(d)).
242. *Id.* at 1028.
243. Galle v. Orleans Parish Sch. Bd., 623 So. 2d 692, 696 (La. Ct. App. 1993).

professional integrity," emphasizing that our legal system "is designed to resolve human and societal problems in a civilized, rational and efficient manner."[244] Uncivil conduct, by contrast, "wastes limited judicial resources, increases transactional costs, delays justice and causes loss of public confidence in the judicial system."[245] The court reprimanded Estiverne and directed him not to make any further unsupported accusations of ethical misconduct.[246]

2. Censure, Reprimand, or Admonishment for Incivility to Courts

Lawyers' incivility directed at courts also has been the subject of official bar admonitions or reprimands. For example, Kansas attorney Kris Arnold wrote to a judge following a hearing and asked the judge to "*please* seriously consider retiring from the bench," stating that the judge did not "have what is required" to decide cases.[247] Arnold also characterized one of the judge's deadlines as "ridiculous" and derided his "absurdly fastidious insistence on decorum and demeanor."[248] Arnold added that the judge "act[ed] like a robot" and had written a "muddled" order.[249] The judge referred Arnold to the bar for a disciplinary hearing.[250] There, Arnold contended that it is not unethical to insult a judge, and further argued that the insults were privileged under the First Amendment.[251] The Kansas Supreme Court rejected that argument, reiterating that a lawyer's free speech in pending cases may be limited by professional requirements.[252] Because of Arnold's "sarcastic, insulting, and threatening" style and his "complete lack of respect for the judiciary," the Court publicly censured him.[253]

Incivility against a court led to a reprimand for Virginia lawyer Joseph Anthony, who filed documents calling a judge's finding of fact "libelous, harsh and incredible" and accused other judges of making false accusations and conspiring against him.[254] Anthony raised a free speech defense,[255] which the Court rejected, stating that a lawyer's free speech right is " 'extremely circumscribed' in the courtroom."[256] The Supreme Court of Virginia explained that judges' actions may be criticized appropriately through appeals, disciplinary bodies, or even removal or impeachment,[257] but that

244. *Id.*
245. *Id.*
246. *Id.* at 696; *see In re* Abbott, 925 A.2d 482, 484 (Del. 2007) (publicly reprimanding a lawyer for, among other things, labeling arguments by counsel "laughabl[e]," "irrational," and "whimsical speculation").
247. *In re* Arnold, 56 P.3d 259, 263 (Kan. 2002) (per curiam).
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* at 264.
252. *Id.* at 267–68.
253. *Id.* at 268–69.
254. Anthony v. Va. State Bar, 621 S.E.2d 121, 124–25 (Va. 2005).
255. *See supra* notes 72–86 and accompanying text.
256. *Anthony*, 621 S.E.2d at 126 (citing Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991)).
257. *Id.*; *see In re* Becker, 620 N.E.2d 691, 694 (Ind. 1993) (stating that the appropriate forum for addressing judicial misconduct is not insults in pleadings but the state's judicial commission); *In re Arnold*, 56 P.3d at 268 (stating that the proper way to challenge a judge's ruling is by an appeal, not an "intemperate

judges are "uniquely dependent upon the trust of the people" and their ability to respond to attacks is "extremely limited."[258] Therefore, "[r]eckless attacks by lawyers are especially damaging" and are not constitutionally protected.[259] The Court held that Anthony's allegations, which were based partly on anonymous telephone calls,[260] were made with reckless disregard of their truth or falsity.[261] The Court affirmed an order for Anthony's public reprimand.[262]

The Supreme Court of Mississippi likewise decided to reprimand a lawyer in *Welsh v. Mounger*.[263] There, after a court issued an opinion unfavorable to his client, attorney Dana Kelly filed a motion stating that one of the opposing parties was "the highest bidder" in the election campaign of one of the judges.[264] The Court concluded that Kelly's unfounded accusations "blatantly disregarded" the bar's professional standards.[265] Stating that a lawyer's first duty is to represent his client's interests, the Court also noted that Kelly's conduct did not serve his client well.[266] The Court further stated that free speech protections do not prevent lawyers from being held to a higher standard than the general public when they file documents with a court.[267] Moreover, while attorneys should represent their clients diligently, zealous advocacy does not include "blatant disregard or outright disrespect to the judiciary and, accordingly, will not be tolerated."[268] Noting that Kelly refused to accept responsibility for the false accusations, the Court sanctioned him in the amount of $1,000 and issued a public reprimand.[269]

3. Censure, Reprimand, or Admonishment for Incivility to Others

In another colorful case, Delaware attorney Richard Abbott compared an administrative board to "monkeys" and its statements to "the grunts and

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writing" sent to the judge).

258. *Anthony*, 621 S.E.2d at 126.

259. *Id.*

260. *Id.* at 125.

261. *Id.* at 126.

262. *Id.* at 122, 127.

263. 912 So. 2d 823, 828 (Miss. 2005) (en banc).

264. *Id.* at 825.

265. *Id.* at 826–27 (citing the MISS. RULES OF PROF'L CONDUCT R. 3.3, 8.2 (2005); *A Lawyer's Creed*, MISS. BAR, http://www.msbar.org/admin/spotimages/2027.pdf (last visited Mar. 2, 2011)).

266. *Id.* at 826.

267. *Id.* at 828.

268. *Id.*

269. *Id.*; *see* Notopoulos v. Statewide Grievance Comm., 890 A.2d 509, 511, 517, 522 (Conn. 2006) (upholding a reprimand of a pro se attorney whose letter unfoundedly accused a probate judge of being "venal and avaricious"); *In re* Abbott, 925 A.2d 482, 485 (Del. 2007) (publicly reprimanding a lawyer for, among other incivilities, suggesting that the court "might rule on a basis other than the merits of the case"); *In re* Wilkins, 777 N.E.2d 714, 717 (Ind. 2002) (reprimanding a lawyer for suggesting, without foundation, that the judges had unethical motivations); *In re* McClellan, 754 N.E.2d 500, 501, 502 (Ind. 2001) (upholding a public reprimand of a lawyer who filed a document characterizing a court's ruling as resembling "a bad lawyer joke"); Lasater v. Lasater, 809 N.E.2d 380, 404 (Ind. Ct. App. 2004) (admonishing counsel for filing a brief "permeated with sarcasm and disrespect," including allegations of bias on the part of the court); *In re* Coe, 665 N.W.2d 849, 856–57 (Wis. 2003) (formally admonishing a lawyer whose motion and letter described a referee as "intoxicated from his own whine" and displaying "antebellum condescension").

groans of ape[s]."[270] On appeal of the board's decision, the Delaware Superior Court denounced Abbott's insults as "impertinent material" that was "highly inappropriate" and "degrading to [the] tribunal."[271] Moreover, the insults were unrelated to the issues and unpersuasive.[272] The court stressed that a lawyer's role is not only to represent clients zealously but also to do so with appropriate civility.[273] Uncivil personal attacks, the court noted, lower both the quality of legal practice and public confidence in the legal system.[274] Finding it sad that it needed to address such incivility, the court reminded lawyers that "undignified or discourteous conduct . . . casts a pall over our rich tradition of civility and professionalism."[275] The court ordered Abbott to strike the offensive material from the brief.[276]

Abbott then was brought before the state bar's disciplinary board because of his uncivil conduct.[277] After the board concluded that Abbott's conduct had only "come close to crossing the line" into unprofessional conduct, the Office of Disciplinary Counsel appealed, asking the Delaware Supreme Court to sanction Abbott.[278] The Court found that Abbott had indeed crossed the line.[279] Calling his language "offensive and sarcastic," the Court noted that the superior court had been required to "waste [] judicial resources" in dealing with it.[280] The Court also stated that as an officer of the court, Abbott was required to put the court's interests above his client's, because he must represent clients "*within* the bounds of both the positive law and the rules of ethics."[281] Moreover, the Court said, "[z]ealous advocacy never requires disruptive, disrespectful, degrading or disparaging rhetoric."[282] Stressing that even hardball has exacting rules, the Court concluded that Abbott's briefs were not only "foul" but "so far beyond the boundaries of propriety that they were unethical."[283] The Court publicly reprimanded Abbott.[284]

The Florida Supreme Court reprimanded criminal defense lawyer Richard Buckle, who wrote a letter to a crime victim that threatened to expose embarrassing personal matters.[285] A referee found the letter "objectively humiliating and intimidating"[286] and proposed sanctions that included a thirty-

270. 395 Assocs., LLC v. New Castle Cnty., No. 05A-01-013-JRJ, 2005 WL 3194566, at *2 (Del. Super. Ct. Nov. 28, 2005).
271. *Id.*
272. *Id.*
273. *Id.* (citing CODE OF PRETRIAL CONDUCT R. 4(a) (2002)).
274. *Id.*
275. *Id.* at *5.
276. *Id.* at *3.
277. *See generally In re* Abbott, 925 A.2d 482 (Del. 2007).
278. *Id.* at 484.
279. *Id.* at 489.
280. *Id.* at 486.
281. *Id.* at 487–88 (citations omitted).
282. *Id.* at 489.
283. *Id*.
284. *Id.*
285. Fla. Bar v. Buckle, 771 So. 2d 1131, 1133 (Fla. 2000).
286. *Id.* at 1132.

day suspension.[287] Buckle argued that his actions had been required by a duty to zealously represent his client.[288] But the Court emphasized that lawyers' ethical rules are grounded in "basic fairness, respect for others, human dignity, and upholding the quality of justice."[289] Therefore, zealous representation crosses the line when it is used as a vehicle for harassment.[290] The Florida Supreme Court agreed with the referee's findings and issued a public reprimand, which it believed was consistent with penalties in similar cases.[291]

C. Incivility Resulting in Monetary Penalties

Sometimes incivility directly affects the pockets of lawyers or their clients, as happened in the following cases involving monetary penalties.

1. Monetary Penalties for Incivility to Other Lawyers

Texas attorney Harvey Greenfield incurred a hefty penalty for his *ad hominem* attacks in a bankruptcy matter.[292] In oral and written comments, he described other lawyers as "stooges," a "weak pussyfooting deadhead," "inept," and "clunks."[293] His uncivil language led the bankruptcy judge to sanction him in the amount of $25,000. On appeal to the district court, Greenfield's brief pointed out that his opposing counsel had graduated from a lower-ranked law school than Greenfield's and previously had been fired by a law firm.[294] Concluding that these comments violated civility standards, the district court affirmed the bankruptcy court's sanctions,[295] commenting that the bankruptcy judge had shown admirable "patience and restraint" in not levying a greater sanction earlier in the proceedings.[296]

On appeal, Greenfield worsened his situation by "brazenly" arguing that his behavior was appropriate because it "serve[d] him well in settlement negotiations."[297] Calling Greenfield's behavior "egregious" and "obnoxious,"[298] the U.S. Court of Appeals for the Fifth Circuit affirmed the sanction.[299]

Another attorney's client lost money because the attorney crossed the line between zealous representation and incivility.[300] In that divorce case, the wife's attorney, Bruce Rogers, disparaged the husband and then issued an

287. *Id.* at 1133.
288. *Id.*
289. *Id.* at 1134.
290. *Id.*
291. *Id.*
292. *In re* First City Bancorporation of Tex., Inc., 270 B.R. 807, 809 (N.D. Tex. 2001), *aff'd*, 282 F.3d 864, 865 (5th Cir. 2002).
293. *Id.* at 810 (internal quotations omitted).
294. *Id.* at 813.
295. *Id.* at 809, 813.
296. *Id.* at 814 n.5.
297. *In re* First City Bancorporation of Tex., Inc., 282 F.3d at 865.
298. *Id.* at 866.
299. *Id.* at 867.
300. Muster v. Muster, 921 A.2d 756, 757 (Del. Fam. Ct. 2005).

equivocal apology to the opposing lawyer, Thomas Gay: "[I]f I have disparaged your client, please forgive me. Truth is sometimes difficult."[301] Rogers then impugned Gay's motives, a gambit which the court said did not help Rogers' client.[302] As matters escalated, Rogers sent sarcastic comments to Gay and referred to his letters as "acerbic."[303] By this point, Gay had "lower[ed] himself into the fray of incivility,"[304] calling Rogers hypocritical.[305]

The court wrote at some length about the effects of incivility, pointing out that with less acrimony, the case might have taken a less emotional and expensive course.[306] Quoting Tenth Circuit Judge Deanell Tacha, the court stressed that "we are the profession whose core duty is to resolve disputes in an orderly, civilized, fair, and professional manner."[307] Especially in domestic disputes, the court said that adding to the acrimony detracts from the parties' ability to reach an amicable settlement.[308] Noting that the issue before it was not whether disciplinary action should be taken, but rather apportionment of attorneys' fees, the court stated that both lawyers were responsible for the "continued negative and insulting correspondence between them."[309] However, the court found Rogers more at fault than Gay because Rogers caused unnecessary delays.[310] The court therefore ordered the wife to pay some of the husband's fees of $8,570.[311]

Other lawyers crossed a line into offensive personal attacks in *United States v. Kouri-Perez*.[312] In that case, a motion by several Puerto Rico lawyers asserted that opposing counsel was the granddaughter of a controversial former Dominican Republic dictator.[313] That statement "unnecessarily intruded into the private life of a colleague and an officer of the court,"[314] revealing her adoption under seal by another family.[315] The news media immediately reported the story. The U.S. District Court for the District of Puerto Rico found the lawyers' lack of civility unacceptable because they "attack[ed] [opposing counsel] in the most personal way possible, by making allegations about her family and her ancestry."[316] The court assessed a fine of $4,000 against the offending lawyers.[317]

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301. *Id.* at 760–61.
302. *Id.* at 761.
303. *Id.* at 762.
304. *Id.* at 766.
305. *Id.* at 764.
306. *Id.* at 765–66.
307. *Id.* at 767 (quoting Deanell R. Tacha, *President's Message*, BENCHER, July/Aug. 2005, at 2) (internal quotations omitted).
308. *Id.* at 768.
309. *Id.* at 770.
310. *Id.*
311. *Id.* at 771.
312. 8 F. Supp. 2d 133 (D. P.R. 1998).
313. *Id.* at 135.
314. *Id.* at 139.
315. *Id.* at 136.
316. *Id.* at 138.
317. *Id.* at 141.

In another matter, a Massachusetts lawyer was required to pay costs because his brief contained "inappropriate matter" in a case in which the opposing party, Sandra Steele, was a lawyer acting pro se.[318] In addition to making insulting arguments,[319] the brief called Steele dishonest and suggested that she had "fraudulently altered" a document by falsifying a date.[320] The brief also argued that Steele "displayed amazing stupidity."[321] Citing its inherent power "to punish those who obstruct or degrade the administration of justice," the Supreme Judicial Court of Massachusetts required the offending lawyer to pay double costs for the appeal.[322]

Offensive personal attacks also occurred in *Barrett v. Virginia State Bar*.[323] At issue was a divorce proceeding in which attorney Timothy Barrett, the husband, represented himself.[324] He wrote several times to the wife's counsel, Lanis Karnes, addressing her by her former married name to "honor" her former husband.[325] In addition to calling her "inept," Barrett expressed disappointment that, as a professed Christian, Karnes would represent one Christian against another, "let alone a wife" against a husband.[326] "Shame on you," he added, calling Karnes "one of the worst examples of 'Christian' feminism ever to pollute" their community.[327] Barrett also threatened to bring a bar complaint against Karnes, claiming that she had attempted to deceive the Court and that she failed to proofread her documents.[328] Interestingly, the Supreme Court of Virginia used "[sic]" several times to highlight Barrett's own errors.[329] The State Bar Disciplinary Board ordered that Barrett be suspended for three years, and Barrett appealed.[330] The Court determined that Barrett had violated several disciplinary rules, including one that prohibits taking a position to harass another.[331] The court remanded the case for a new determination of sanctions.[332]

2. Monetary Penalties for Incivility to Courts

A Maine lawyer incurred sanctions for disparaging the court in *Key Equipment Finance, Inc. v. Hawkins*.[333] In that case, Ralph Dyer's briefs displayed "an escalating tirade of unsupported accusations and aspersions" that

318. Avery v. Steele, 608 N.E.2d 1014, 1015–16 (Mass. 1993).
319. *Id.* at 1015 n.2.
320. *Id.*
321. *Id.*
322. *Id.* at 1018.
323. 611 S.E.2d 375 (Va. 2005).
324. *Id.* at 377.
325. *Id.* at 379.
326. *Id.*
327. *Id.*
328. *Id.* at 381.
329. *Id.* at 379, 381.
330. *Id.* at 377.
331. *Id.* at 379 (citing VA. RULES PROF'L. CONDUCT R. 3.4(j) (2000)).
332. *Id.* at 384.
333. 985 A.2d 1139 (Me. 2009) (per curiam).

impugned the trial court's competence.[334] Among other accusations, he said the court was naive, incompetent, and biased, and that it fabricated facts and wrote a "fictional script" as its opinion.[335] The Maine Supreme Court concluded that these accusations were unfounded and amounted to nothing more than "childish vitriol."[336] It sanctioned Dyer with a fine of $2,500.[337]

Another lawyer, Kenneth Kozel, already had accumulated a list of similar infractions in other matters when he engaged in "months of uncivil behavior." [338] He submitted filings containing "frivolous, unsupported arguments and personal attacks upon the judges, their staffs, and the lawyers involved in the case."[339] When he came before the Illinois Disciplinary Commission, the Commission detailed his uncivil conduct.[340] In response, Kozel presented another lengthy, repetitive brief, which included falsehoods about the court's staff and argued that he was before the Commission simply because the court did not like him.[341] The Commission found Kozel's behavior "inexcusable" because "[i]t has disserved the client, the taxpayers, and the justice system,"[342] and had wasted "[the court's] time as well as the time of opposing counsel."[343] The court imposed a $1,000 sanction against Kozel.[344]

D. Incivility Resulting in Material Being Stricken from Filed Documents

When a court strikes an entire document or part of it, counsel is in the embarrassing position of realizing that he or she has wasted time and harmed the client through poor lawyering. Several lawyers incurred that consequence as a result of incivility in their writing.

1. Material Stricken for Incivility to Other Lawyers

Attorney Richard Abbott, whose conduct was described in more detail above,[345] insulted opposing counsel.[346] Abbott disparaged the lawyer's brief by saying it contained fabrications along with "laughabl[e]" and "ridiculous" arguments that were "pure sophistry."[347] Abbott was required to strike this

334. *Id.* at 1145.
335. *Id.* at 1146.
336. *Id.*
337. *Id.* at 1147.
338. Betts v. Attorney Registration & Disciplinary Comm'n, No. 93 C 5883, 1994 WL 285061, at *1 (N.D. Ill. June 23, 1994).
339. *Id.*
340. *Id.* at *3. Kozel's other uncivil behavior included filing documents in the wrong courthouse and wasting the court's time by failing to appear when scheduled. *Id.*
341. *Id.* at *4.
342. *Id.*
343. *Id.*
344. *Id.* at *5; *see* Johnson v. Johnson, 948 S.W.2d 835, 840 (Tex. App. 1997) (sanctioning a lawyer $500 for remarks in a brief that "egregiously maligned" a judge by calling him biased and incompetent).
345. *See supra* notes 270–284 and accompanying text.
346. 395 Assocs., LLC v. New Castle Cnty., No. 05A-01-013-JRJ, 2005 WL 3194566, at *2 (Del. Super. Ct. Nov. 28, 2005).
347. *In re* Abbott, 925 A.2d 482, 484–85 (Del. 2007).

"unprofessional discourse" from his brief[348] and was publicly reprimanded.[349]

2. Material Stricken for Incivility to Courts

Uncivil comments about courts also have caused material to be stricken from filed documents. In *Peters v. Pine Meadow Ranch Home Ass'n*,[350] Boyd Dyer filed a brief disparaging the lower court.[351] He accused that court of "intentionally fabricating evidence" and misinterpreting a case.[352] The Utah Supreme Court acknowledged errors in the appellate opinion, but Dyer offered no support for his assertions that they were intentional and done for an improper motive.[353] Dyer made similarly offensive comments in his brief in another case, in which he again impugned the judges' motives.[354] The Court said the briefs in both cases contained "scandalous" personal attacks[355] that were "offensive, inappropriate, and disrespectful."[356]

The *Peters* Court cited Utah's civility standards, which provide that a lawyer cannot "without an adequate factual basis" impugn the motives or conduct of a court.[357] The Court observed that clients are harmed by such personal attacks because they diminish a lawyer's effectiveness:

> There is a misconception among some lawyers and clients that advocacy can be enhanced by personal attacks, overly aggressive conduct, or confrontational tactics. Although it is true that this type of advocacy may occasionally lead to some short-term tactical advantages, our collective experience as a court at various levels of the judicial process has convinced us that it is usually highly counterproductive. It distracts the decision-maker from the merits of the case and erodes the credibility of the advocate.[358]

Because the personal attacks were irrelevant to the questions on appeal, the Court struck the briefs in both cases and ordered Dyer to pay attorneys' fees.[359] The Court then affirmed the appellate decisions and limited both to the facts of each case.[360]

A motion was stricken in *City of Jackson v. Estate of Stewart*[361] when two Mississippi lawyers accused a court of ignoring and twisting the facts.[362] When ordered to show cause why they should not be sanctioned, they were

348. *395 Assocs., LLC*, 2005 WL 3194566, at *3.
349. *In re Abbott*, 925 A.2d at 489; *see supra* notes 282–284 and accompanying text.
350. 151 P.3d 962 (Utah 2007).
351. *Id.* at 963.
352. *Id.*
353. *Id.* at 964.
354. *Id.* at 964–66.
355. *Id.* at 966.
356. *Id.* at 964.
357. *Id.* (citing UTAH STANDARDS OF PROFESSIONALISM & CIVILITY 3 (2003)).
358. *Id.* at 967.
359. *Id.* at 968.
360. *Id.*
361. 939 So. 2d 758 (Miss. 2005) (en banc).
362. *Id.* at 761.

unrepentant[363] and raised a free speech defense.[364] In rejecting that defense, the Mississippi Supreme Court reiterated that lawyers may be held to higher standards than lay persons.[365] It then reminded counsel that effective advocacy "can certainly be accomplished without rude, offensive and demeaning language."[366] The Court therefore struck the offending lawyers' motion for reconsideration.[367]

In another case of incivility toward a court, an Indiana court considered striking a lawyer's entire petition and brief on rehearing because of its inappropriate language.[368] Lawyers for the petitioners accused the court of using "pens filled with the staining ink of innuendo," said the court would be "ridiculous" to disagree with them, and questioned the court's "good faith and ethics."[369] The court pointed out that the "strident and offensive tenor" of portions of the brief made it difficult to consider the merits of the arguments.[370] Declining to strike the entire submission because that would harm the client, the court struck the offensive portions and admonished the lawyers that "impertinent material disserves the client's interest and demeans the legal profession."[371]

E. Incivility Resulting in Judicial Criticism

When confronted with incivility in legal writing, courts sometimes choose to forego more onerous penalties and simply scold the offending lawyers. But a scolding in a written opinion can sting, as the lawyers below no doubt discovered.

1. Judicial Criticism for Incivility to Other Lawyers

The Ohio lawyers on both sides of *In re Mann* were guilty of incivility.[372] There, both parties asked for attorneys' fees and sanctions in an acrimonious bankruptcy dispute.[373] Mann's counsel referred to a bank's "arrogance of power in it's [sic] finest glory" and pointed out the bank's spelling errors, while the bank's counsel wrote of Mann's "flimsy, disingenuous arguments," calling them "downright silly."[374] The court observed that "[t]he

363. *Id.* at 761–62.
364. *Id.*
365. *Id.* at 765 (citing Welsh v. Mounger, 912 So. 2d 823, 826–28 (Miss 2005)).
366. *Id.* at 766.
367. *Id.*; *see* White v. Priest, 73 S.W.3d 572, 581 (Ark. 2002) (striking a brief in its entirety that accused a court of bias and lying).
368. Worldcom Network Servs., Inc. v. Thompson, 698 N.E.2d 1233, 1237 (Ind. Ct. App. 1998).
369. *Id.* at 1236.
370. *Id.* at 1236–37.
371. *Id.* at 1237; *see* B & L Appliances & Servs., Inc., v. McFerran, 712 N.E.2d 1033, 1037–38 (Ind. Ct. App. 1999) (striking the offensive section of a petition that characterized the court's ruling as resembling "a bad lawyer joke"). The lawyer in that case later received a public reprimand for that conduct. *In re* McClellan, 754 N.E.2d 500, 502 (Ind. 2001).
372. *In re* Mann, 220 B.R. 351, 353 (Bankr. N.D. Ohio 1998).
373. *Id.* at 357.
374. *Id.* at 358 (mistake noted in original).

rhetorical excesses in this case were not designed to resolve the discovery disputes and, not surprisingly, they did not accomplish that end."[375] Instead of being marks of strength, the court said, the attacks merely showed both lawyers' lack of civility.[376] Therefore, neither side was awarded sanctions, and each side was ordered to bear its own costs.[377]

Similarly, both lawyers were at fault in a Delaware case that the court equated to "children in the sandbox throwing sand at each other."[378] The plaintiff's lawyer, John Spadaro, moved to revoke the admission pro hac vice of the defendant's lawyer, James Haggerty.[379] Spadaro enumerated several incidents of incivility. In one letter, Haggerty referred to Spadaro's letters as "inane."[380] Later he called Spadaro's settlement request "sophomoric" and his concerns "delusional."[381] Spadaro, however, was not a model of civility, accusing Haggerty of plotting against him and his family.[382] The court denounced the "profanity, acrimony, derisive gibes, [and] sarcasm," from both counsel and cautioned them to act from then on in an "exemplary manner."[383] However, the court decided not to revoke Haggerty's admission, blaming both lawyers for the escalating incivility.[384]

In another case, an Indiana court's opinion included an extended lecture about the lawyers' "rhetorical broadsides" against each other.[385] The briefs included negative comments about the lawyers' intelligence and motivations, leading the court to lament the incivility that it was seeing with increasing frequency.[386] The court pointedly said judges have "absolutely no interest" in counsel's clashes about civility or personal disagreements, adding that such arguments waste courts' time.[387] Like "static [on] the radio," the court said, "such petulant grousing" tends to "to blot out legitimate argument," weakening a brief's effectiveness.[388]

A Wisconsin lawyer earned a rebuke for calling opposing counsel's brief a "rant" with a "farcical theme."[389] Attorney Gregory Timmerman also accused his opposing counsel of self-interest and of creating a false reality.[390] The court described this language as "unfounded, mean-spirited slurs" and noted that a lawyer is obliged to show respect for the legal system and other

375. *Id.* at 359.
376. *Id.*
377. *Id.*
378. Crowhorn v. Nationwide Mut'l Ins. Co., No. 00C-06-010 WLW, 2002 WL 1274052, at *5 (Del. Super. Ct. May 6, 2002).
379. *Id.* at *1.
380. *Id.* at *3.
381. *Id.*
382. *Id.*
383. *Id.* at *5.
384. *Id.*
385. Amax Coal Co. v. Adams, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992).
386. *Id.*
387. *Id.*
388. *Id.*
389. Bettendorf v. St. Croix Cnty., 754 N.W.2d 528, 531 (Wis. Ct. App. 2008).
390. *Id.* at 531–32.

lawyers.[391] The court rebuked Timmerman for "belligerence [that was] unwarranted and inappropriate."[392]

An Indiana lawyer was criticized for similar insults in *Mitchell v. Universal Solutions of North Carolina, Inc.*[393] His brief referred to opposing counsel's arguments as "ridiculous"[394] and "blatantly illogical."[395] The court reminded him that "righteous indignation is no substitute for a well-reasoned argument," stressing that a lawyer can argue "by patient firmness no less effectively than by belligerence of theatrics."[396]

2. Judicial Criticism for Incivility to Courts

Uncivil behavior toward a court prompted an Indiana court's lecture in *Clark v. Clark*.[397] That court disapproved of a brief's "intemperate language . . . regarding the trial judge's motives" but refused to "give such language dignity by repeating it."[398] The court then quoted a venerable 1906 case for the principles that a brief should not be a conduit for disrespect and that intemperate statements are counterproductive because they do not persuade a court.[399] The court, however, declined to strike the brief because that would deprive the client of a hearing.[400]

A Vermont court also lectured a lawyer in *Northern Security Insurance Co. v. Mitec Electronics, Ltd.*[401] There, among other derisive comments, lawyers for Mitec called the lower court's conclusions "ludicrous and inane."[402] The Vermont Supreme Court decried this lack of professionalism, stressing that, as an officer of the court and "a public citizen having special responsibility for the quality of justice," a lawyer should show respect for "the legal system and those who serve it."[403]

In another case, the court reminded counsel whose brief inappropriately alleged bias by the trial court that "an appeal is not a license to vilify the trial court."[404] The court cautioned counsel to "temper advocacy with civility."[405]

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391. *Id.*
392. *Id.*
393. 853 N.E.2d 953, 959 n.2 (Ind. Ct. App. 2006) (quoting Worldcom Network Servs., Inc. v. Thompson, 698 N.E.2d 1233, 1236–37 (Ind. Ct. App. 1998)).
394. *Id.* (quoting Reply Brief of Appellants at 2, *id.* (No. 29A02-0411-CV-931)).
395. *Id.* (quoting Reply Brief of Appellants, *supra* note 394, at 3).
396. *Id.*
397. 578 N.E.2d 747, 748 (Ind. Ct. App. 1991).
398. *Id.*
399. *Id.* at 748–49 (quoting Pittsburgh, C., C. & St. L. Ry. v. Muncie & Portland Traction Co., 77 N.E. 941, 942 (Ind. 1906)).
400. *Id.* at 749.
401. 965 A.2d 447 (Vt. 2008).
402. *Id.* at 453 (internal quotations omitted).
403. *Id.* at 453 n.3 (citing VT. RULES OF PROF'L CONDUCT preamble (2003)).
404. Avery v. State Farm Mut'l Auto. Ins. Co., 746 N.E.2d 1242, 1258 (Ill. App. Ct. 2001), *aff'd in part and rev'd in part*, 835 N.E.2d 801, 863 (Ill. 2005).
405. *Id.*; *see* Fleming v. United States, 162 F. App'x 383, 386 (5th Cir. 2006) (warning a lawyer who made inflammatory allegations against the trial court that *ad hominem* attacks on federal judges are not appropriate and could lead to sanctions in the future); Bond v. Texas, 176 S.W.3d 397, 401 (Tex. App. 2004)

3. Judicial Criticism for Incivility to Others

In *Moore v. Liggins*,[406] Moore's counsel disparaged a child support enforcement office after Moore was found in contempt for failing to pay child support.[407] The lawyer's appellate brief lashed out at the child support enforcement program as creating a "new class of slave owners" and a new group of slaves: "deadbeat dads."[408] The brief sarcastically said the system viewed fathers whose payments were in arrears as "child-hating, knuckle dragging cretin[s]."[409] It also compared enforcement proceedings to the Nazis' extermination of Jews and others.[410] The Indiana Court of Appeals stated that any value of these arguments was outweighed by "their inflammatory phrasing and their lack of support and development."[411] While the court did not sanction Moore's lawyer, it condemned his "inflammatory analogies" as "wholly inappropriate"[412] and reflecting a lack of professional responsibility that did "little to serve the interest of the client."[413]

IV. CONCLUSION

Incivility in the practice of law harms clients, stresses lawyers, and reflects poorly on the profession and the legal system. A prominent suggestion is that courts should take an active role in discouraging incivility. This Article examines how courts are actually handling incivility in lawyers' writing. While there is no way to know how often uncivil conduct goes unpunished, cases from the past twenty years show that numerous courts have imposed penalties for incivility in lawyers' written documents. Some lawyers have been disbarred for uncivil language, usually along with other offenses. Others have incurred official censure or reprimands, been sanctioned, had their writing stricken, or received embarrassing scoldings on the record.

By showing that courts can and do confront Rambo tactics in lawyers' writing, the cases discussed here may inspire courts and lawyers to continue the campaign for civility in the practice of law. That would foster the admirable public-spiritedness that is one of the legal profession's bedrock values.

(calling it "offensive" that a lawyer described the trial court as "despotic and 'erratic and irrational' ").

406. 685 N.E.2d 57 (Ind. Ct. App. 1997).

407. *Id.* at 60.

408. *Id.* at 66.

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.* at 66–67; *see* Mitchell v. Universal Solutions of N.M., Inc., 853 N.E.2d 953, 960 n.2 (Ind. Ct. App. 2006) (condemning the "inappropriate belligerence" of counsel who accused the opposing party of "pilfering" employees' wages).