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HEADNOTES

And those were some of the nicer emails. Far from aberrational, these emails are just more colorful versions of what many of us find in our in-boxes from time to time as our adversaries' zealous advocacy gets the better of them.

According to *Webster's*, "professionalism" is defined as "the skill, good judgment, and polite behavior that is expected from a person who is trained to do a job well." Query then, if lawyers routinely engage in impolite—or worse—behavior and thus do not exhibit "professionalism," do we deserve to be called "professionals"?

Before answering, let's take a step back and try to determine how and why we got to where we are today. Communications with our clients, our opposing counsel, and our courts are very different today than they were 25 years ago. We didn't use email. Instead, we wrote letters.

Google "letter writing" and you'll see repeated references to "the lost art of . . ." We no longer thoughtfully dictate letters for our assistants to transcribe—a fact that may help explain our change in the treatment of others. We likely edited our thoughts before dictating them for a third party to hear. In addition, we reviewed that transcribed letter—likely multiple times—to make sure our thoughts were clear, appropriately stated, and grammatically correct. Thus, we thought about our words before we signed the final letter and had an assistant mail it.

Jump forward to today and consider how little we think before we hit "Send." Somehow we've developed a nagging belief that we're obligated to immediately respond to upsetting emails. Previously, if we received a letter from opposing counsel with inaccurate or misleading comments, we took the opportunity to read it several times as we dictated a response. And our rejoinder often went out the following day. With the benefit of another 24 hours, we had more than ample opportunity to cool off and think more rationally about our response.

By contrast, when we receive a particularly disturbing email, we feel compelled to

fire back an immediate response, lest the sender believe he has "gotten the better" of us. Do we self-edit? Rarely. Do we ask an objective third party to review our words before we send them to our opponent? Likely not. Do we even take the time to re-read the email that was drafted in the heat of the moment? Not often enough. While we instruct our children to "count to 10" before reacting to an upsetting situation, we exempt ourselves from this sound advice. Yet, how often have we sent an immediate, vitriolic email response, only later to regret some of our word choices?

Emails replace not only letter writing but also face-to-face and phone conversations. We've all dealt with people who write blistering emails but are perfectly friendly and polite in person or on the phone. Somehow we feel invincible behind the keyboard.

Do we deserve to be called "professionals"? Most of the time. But as email has supplanted other forms of communication, we need to take a hard, introspective look at ourselves. The ABA Model Rules of Professional Conduct exhort us to "demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 5 (1983). We should remind ourselves of those words every time our computer boots up and our email programs open—for the sake of our profession. ■

CIVILITY

Do We Deserve to Be Called Professionals?

ELIZABETH L. YINGLING

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In 2010, the Florida Supreme Court sanctioned two lawyers for unprofessional emails. An *ABA Journal* article included some excerpts, including the following exchanges: "Better check the garbage man that comes by your trailer to make sure [your children] don't look like him." "[M]any of [my cases] were more important/significant than these little . . . claims that are handled by bottom feeding/scum sucking/loser lawyers like yourself." Debra Cassens Weiss, *Lawyers Sanctioned for E-Mail Insults, Including "Scum Sucking Loser" Comment*, A.B.A. J., Jan. 3, 2011.

ATTICUS REVISITED

In Search of Atticus Finch

BY CHIP BABCOCK

The author is a litigation partner at Jackson Walker LLP, in Houston and Dallas.

Atticus Finch, who sometimes went by the name of Gregory Peck, was not a litigator. In fact, "he had a profound distaste for the practice of criminal law" and made

a living mostly on people's "entailments" and making "somebody's will so airtight can't anybody mess with it." HARPER LEE, *TO KILL A MOCKINGBIRD* at 22, 104 (35th Anniversary ed., Harper Collins 1995) (1960).

But in a small town like Maycomb, Alabama, in the early 1930s, a lawyer handled what there was. And one day Judge Taylor came calling with a request familiar to most trial lawyers. "I know you're busy and the children need your time but . . ." Would Atticus consider an appointment to defend an African American man, Tom Robinson, who was accused of raping a white woman?

The movie version of the book *To Kill a Mockingbird* captures in Atticus's face the conflict we all feel about doing one's duty measured against the toll such a case will take on us and our families. After a few seconds' hesitation Finch tells the judge, "I'll take the case."

As he explained later to his young daughter Jean Louise, Scout as she was known, he accepted the representation for a number of reasons. "The main one is, if I didn't I couldn't hold up my head in town, I couldn't represent this county in the legislature, I couldn't even tell you (or your brother) not to do something again," he said. *Id.* at 86.

Litigators are aware that "simply by the nature of the work, every lawyer gets at least one case in his lifetime that affects him personally," Atticus, a single parent, told his young daughter. "This one's mine I guess."

Most of us know the rest of the *To Kill a Mockingbird* story. Atticus and his children battle racial slurs and physical assault, Tom Robinson is convicted but the jury is, remarkably, out several hours because Atticus has tried a great case. The author, Harper Lee, wins a Pulitzer Prize, Gregory Peck receives an Academy Award as best actor. People name their babies Atticus.

And then this summer *Mockingbird's* sequel, *Go Set a Watchman*, was published. The book follows Scout 20 years

later, after she has moved to New York but returns home to visit Atticus. *Watchman* was met with outrage; not the literary sort (although there was that) but violent reaction to the critics' perception that Atticus is revealed as a "white supremacist" (*Literary Review*), "a bigot" (*New York Times*), and "a reactionary extremist . . . who joined the Ku Klux Klan" (NPR). It is as if the vast readership of *Mockingbird*, or at least the critics, felt that they have been fooled and betrayed. Atticus Finch is not who they thought he was. Quick, let's rename the babies!

Not so fast. The Atticus Finch of *Mockingbird*, for me anyway, is the same man in both books—worthy of admiration despite his flaws. In measuring the true character of Atticus Finch, one should start with the premise that, as the song from the Broadway musical *Avenue Q* says, "Everybody's a Little Bit Racist." What separates right thinking people from their opposites is an effort to overcome their prejudices.

One of my heroes growing up in the Deep South was Reuben Askew, a member of the Florida legislature and later one of its most widely admired and respected governors. Askew grew up in Pensacola, Florida, less than 200 miles south of Harper Lee's home of Monroeville, Alabama, which served as the inspiration for the fictional Maycomb. Lee was born in 1926; the governor two years later. Askew's wife's maiden name was Harper.

While running for the Florida legislature in 1958, the year when Harper Lee was purportedly writing *Watchman* and, in fact, composing *Mockingbird*, Askew was confronted by a heckler who yelled out "You're a n***** lover," to which the candidate replied, "Yes I hope so . . . the trouble is that I don't love them enough. The difference between you and me is that you're satisfied with your prejudices and I am trying to overcome mine." Steve Bousquet, *Former Florida Gov. Reubin Askew Dies at 85*, MIAMI HERALD, March 13, 2014, www.miamiherald.com/news/

politics-government/article1961313.html. Atticus held to the same creed.

After Scout was taunted at school about her father being a n***** lover, she asked him, "you aren't really a n*****-lover, then, are you?" to which he replied, "I certainly am. I do my best to love everybody...[.]" *MOCKINGBIRD, supra*, at 124. Atticus tried to overcome his prejudices, as all right-thinking people do. By Governor Askew's standards, he may have fallen short. By today's standards, he certainly did. But measured against his times, his actions in both *Mockingbird* and *Watchman* speak louder than the words of white supremacy he spoke to Scout near the end of the second book, set in the early 1950s.

The people who put Atticus on a pedestal after *Mockingbird* raised him too high, and those who attack his character after *Watchman* set him too low. As one reviewer noted, "*Watchman* tells the painful but necessary truth about white racism in 1950s Alabama and in white America generally today, and it offers a bitter but timely dose of disillusion about racial progress and comforting fiction." Elaine Showalter, *Death of a Mockingbird*, LITERARY REVIEW (August 23, 2015), <https://literaryreview.co.uk/death-of-a-mockingbird>.

The Atticus Finch of most people's mind's eye after *Mockingbird* was fiction. *Watchman* administers a healthy dose of reality, but we should not discount the book because it tarnishes our idea of this American icon. And we should not be surprised that the man who raised his children to be unbiased, who was respectful to all people no matter their race, who opposed (not joined) the KKK, and who defended an innocent black man with all his considerable skill and passion did not completely escape the conventional social mores of his time. As one reviewer wrote: "Maybe *Watchman* really was a sequel—a follow-up by an author who learned more about the prospects of post-racial progress than she'd

hoped to. If readers several decades ago weren't ready for such honesty, perhaps they are now." Sophie Gilbert, *Go Set A Watchman: What About Scout?*, ATLANTIC (July 17, 2015), www.theatlantic.com/entertainment/archive/2015/07/go-set-a-watchman-what-about-scout/398825/. ■

FIRST-TIME LAWYER

I'm a Lawyer, Not a Fighter: Conquering Lawyer Bullies

KELLEY BARNETT

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The word "bully" conjures up many images. There's the playground bully. The teen bully. The workplace bully. And in the new millennium, there's the cyberbully. But what about the lawyer bully?

Litigation by nature is adversarial. But the lawyer bully is one who preys on younger or less experienced lawyers. The lawyer bully yells. Interrupts. Belittles. Harasses. The lawyer bully often strikes during depositions or communications when no judge is present to put the bully in her place. But fear not. With a little preparation, the following tips should help any lawyer conquer the lawyer bully.

Keep your cool. First and foremost, don't sink to the bully's level. Don't lose your temper or respond in kind. The best line of defense is to be calm and take the high road. If the bully has an outburst or interrupts you during a deposition or conversation (a common bullying tactic), let him finish, even if he's yelling. Then say, "Please don't interrupt me" or "I'm not going to continue this discussion if you're going to act like this." For me, as a younger

lawyer, one of my personal favorites was to ask the yelling bully: "Why are you yelling?" There are few acceptable answers to that question, and if you're in a deposition, you've just made a record that the bully is yelling. It is also OK to calmly tell the bully that he's being unreasonable and to point out inappropriate behavior. Don't do what I've seen other young lawyers do, saying "OK, I'll move on."

What about written communications? If you're responding to a nasty letter, kill 'em with kindness. For example, instead of "Dear Mr. Smith, you're an unprofessional jerk," write "Dear Mr. Smith, thank you for your recent letter. . . .". The rule of thumb is to keep your communications simple and professional.

Set the tone early. At the first sign of an issue, tell opposing counsel that you won't tolerate inappropriate behavior. For example, at the first speaking objection during a deposition (assuming they're improper in your jurisdiction), let counsel finish her rant, and then politely ask her to refrain from making further speaking objections. If she makes a second speaking objection, repeat your request and tell her you'll contact the court if she continues. On the third, but no later than the fourth, speaking objection, let her finish her objection, and then advise her that you are contacting the court (bring the court's contact information with you).

What about face-to-face meetings or telephone conversations? If opposing counsel turns belligerent, immediately tell her that you won't tolerate it and will limit all communications to writing if it continues. In any bullying situation, stand your ground, follow through, and do what you said you were going to do. Otherwise, you'll just encourage the bully to continue.

Know the rules. Learn the federal, state, and local rules that apply to typical bully situations. For example, the Federal Rules and many state rules prohibit speaking objections. And for the bully who likes to instruct the witness not to answer deposition questions, the Federal Rules prohibit

such an instruction unless necessary to preserve a privilege, enforce a limitation directed by the court, or present a motion under Federal Rule of Civil Procedure 30(d)(3). If, after asking the bully to state the basis for his instruction, you believe the instruction is improper under the applicable rule, advise the bully that you'll contact the court if he persists. Also, learn the rules governing the circumstances under which you're permitted to terminate a deposition or request sanctions. In every situation, bring the rules with you so you can be armed with the knowledge to help you shut down the bully's tactics.

Make a record. In depositions, make a record of opposing counsel's inappropriate behavior ("let the record reflect that Ms. Jones is yelling at the witness, rolling her eyes, and just threw her pen"). And once you realize you're dealing with a bully, don't allow depositions to go off the record. For any situation, keep a trail of written communications in case you need to involve the court at some point. But remember, never say or write anything that you'd be embarrassed to have the judge or jury hear or read.

Pick your battles. Some battles are more important than others. Don't argue every issue. Exercise the option to involve the court only on critical points. Don't retreat when you or your client are being harassed. But otherwise focus on the important issues and let the other ones slide.

Don't take it personally. Every lawyer encounters a bully at some point. Bullies can cause unnecessary anxiety and even make the non-bully lawyer question his or her abilities. But at the end of the day, the bully's behavior has nothing to do with you. So shake it off and don't give up.

Follow these tips and, even if you don't win the case, you'll conquer the bully. ■