



Let Future Historians Wonder

I generally spend this column discussing how to write effectively. But let's consider another question: In what circumstances should you consider not writing at all?

I've dropped hints in past columns that I'm more than a little bit obsessed with Lin-Manuel Miranda's *Hamilton: An American Musical*. And in many ways, Alexander Hamilton—both the historical figure and Manuel's interpretation of him—presents many positive examples for the legal writer. In other ways, however, he's a cautionary tale.

Take, for example, the Reynolds incident. Hamilton engaged in an extramarital affair. The woman's husband, James Reynolds, knew of the affair and blackmailed Hamilton for years. When Reynolds was jailed in connection with a financial scam, he asked Hamilton for help. Hamilton refused, and Reynolds hinted to some of Hamilton's political rivals that Hamilton was involved in the scam. Although Hamilton resolved that accusation,

he couldn't restrain himself from continually needling his political enemies in print. Eventually, one of his political rivals used the Reynolds incident to publicly revive accusations of financial misconduct.

Hamilton's response? He confessed the affair, tryst by tryst, in excruciating detail in what came to be known as The Reynolds Pamphlet. The first U.S. sex scandal exploded. Although the Pamphlet cleared Hamilton of financial misconduct, it ended his political career and, despite his widow Eliza's tireless efforts, it tarnished his legacy, arguably until Miranda gave it a public polishing over two centuries later.

The lesson? Some things do not belong in writing. We know this.

We tell our clients this, and we become frustrated when they do not follow our advice. We see the results of bad decisions to put things in writing in courtrooms, newspapers, and splashed across the Internet. And yet, lawyers—even smart lawyers, like Hamilton—write things that they shouldn't every day.

Inflammatory Language, Personal Attacks

Hamilton frequently dashed off strongly worded pamphlets—sometimes anonymously published, but often not—criticizing and impugning the integrity of his rivals. This earned him enemies and sometimes alienated those who could have supported him.

As lawyers, we may find ourselves frustrated with opposing counsel, opposing parties, judges, and even co-counsel and clients. It may be very satisfying to draft a snide email or letter. But unless you'd want something attached as an exhibit to a motion or a pleading, don't put that frustration into writing. And refrain from slipping personal attacks on opposing counsel into motions or pleadings. If you must highlight bad behavior—in a motion for sanctions, for example—stick to listing the damning facts

without editorializing. Your arguments will seem more credible and less personal.

Personal Matter on Office Computers

Early in my career, I spent time reviewing client documents (and materials on client-employee hard drives) for relevance and privilege, preparing to respond to requests for production. Attorneys who have conducted that type of document review know that you see all kinds of things that the computer user never intended some random stranger to see. Most of that material is marked "not relevant" and never produced, but it's still potentially embarrassing. You also learn that the company's IT department can access anything on any employee's computer easily. And we've all heard stories where these materials made their way to the media or went viral.

Sensitive or Privileged Information

Need to communicate bad news to a client or discuss bad facts in your case with another attorney in your office? Need to counsel a subordinate regarding work performance or other embarrassing topics? Rather than dashing off an email, consider walking down the hall or picking up the phone. You may need to document some aspects of the conversation in writing later, but it's generally best to deliver upsetting information in person. Writing can seem impersonal, and of course you want to avoid putting statements in writing that might embarrass someone unless absolutely necessary. Even if something is privileged, that doesn't prevent it from landing in the hands of someone whom you would not want to read it. But no one can forward a one-on-one conversation. No one can thoughtlessly add a third party to an in-person discussion already in progress, appending all that previous sensitive material to an unrelated, unprivileged discussion.

When a lawyer wrote an ill-advised statement in 1792, it might live on one piece of paper; any copies were laboriously made by hand. Now, our mistakes can travel instantaneously and last forever. "When in doubt, don't write it" might be a good rule of thumb. **BT**

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