



**Federal Bar  
Association**  
**San Diego Chapter**

**Civility Series Part III: Promoting  
Civility in the Legal Profession**

**MCLE Written Materials**

**December 8, 2020**

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United States District Court  
Southern District  
of California



**L O C A L R U L E S**

Revised as of:  
June 1, 2020

- b. **Notice after adoption.** Immediately upon the adoption of these rules or of any change in these rules, copies of the new and revised local rules must be provided to such publications and persons as the chief judge deems appropriate.

## Civil Rule 2.1 Professionalism

- a. **Code of Conduct.** The following Code of Conduct establishes the principles of civility and professionalism that will govern the conduct of all participants in cases and proceedings pending in this court. It is to be construed in the broadest sense and governs conduct relating to such cases and proceedings, whether occurring in the presence of the court or occurring outside of the presence of the court. This Code of Conduct is not intended to be a set of rules that lawyers can use to incite ancillary litigation on the question whether the standards have been observed, but the court may take any appropriate measure to address violations, including, without limitation, as set forth in Civil L. Rule 2.2.

1. **Principles of Civility.** To borrow from others who have considered the importance of civility in our state and federal courts, we should all understand that the law preserves our freedom, and it is the courts that preserve our laws. Fair, impartial and accessible courts are fundamental to the preservation of our democracy. We-- judges, lawyers, court staff, parties—all have a responsibility in ensuring that we preserve the legacy of this institution by conducting ourselves according to the Golden Rule—to treat others as we ourselves would like to be treated.

In seeking justice through the courts, attorneys and parties subject themselves to an inherently adversarial system. Although adversarial, the experience does not have to, and should not, be antagonistic or hostile. Civility is paramount and not to be confused with weakness. Civility in action and words is fundamental to the effective and efficient functioning of our system of justice and public confidence in that system.

The Federal Rules and this court's Local and Chambers' Rules serve as safeguards to ensure that the principles of equity and fairness govern the procedural course of all litigation. At the same time, these resources, without more, may not sufficiently quell incivility amongst those who litigate in this court. The court has therefore adopted the following Code of Conduct. No one is above the law and, equally important, no one is entitled to act in such a way that erodes the public's trust in the administration of justice, impartiality, and the search for the truth. Civility should not only be aspirational, but rather it should be inherent within us all. Nevertheless, this Code of Conduct serves as the court's reminder that we owe it to ourselves, one another, and our justice system to act in accordance with the principles of fairness and equal treatment that underpin the law of our land.

This court is committed to ensuring that all who work within it and come before it treat each other with decency, dignity, and respect. As such, the court expects that all who practice in this court will adhere to this Code of Conduct in all of their interactions within the courts of this judicial district, in order to nurture, rather than tarnish, the practice of law and to maintain the public's faith in the legitimacy of our judicial system. The Court acknowledges the substantial work of the San Diego County Bar Association in developing the Association's Attorney Civility and Practice Guidelines, which this Court has adopted, in substantial part, in this Code of Conduct.

**2. Duties Owed to the Court**

- a. We expect lawyers to be courteous and respectful to the court and all court and court-related personnel.
- b. We expect lawyers arguing for an extension of existing law to clearly state that fact and why.
- c. We expect lawyers appearing in court to dress neatly and appropriately and encourage their clients to do the same.
- d. We expect lawyers to be on time and adhere to time constraints.
- e. We expect lawyers to be prepared for all court appearances.
- f. We expect lawyers to attempt to resolve disputes promptly, fairly and reasonably, with resort to the court for judicial relief only if necessary.
- g. We expect lawyers to discourage and refuse to accept a role in litigation that is meritless or designed primarily to harass or drain the financial resources of the opposing party.
- h. We expect lawyers to honor and maintain the integrity of our justice system, including by not impugning the integrity of its proceedings, or its members.

**3. Duties Owed to Other Lawyers, Parties and Witnesses.**

- a. We expect lawyers to address legal arguments with other lawyers professionally, and not personally.
- b. We expect lawyers to treat adverse witnesses, litigants and opposing counsel with courtesy, fairness and respect.
- c. We expect lawyers to conduct themselves in the discovery process as if a judicial officer were present.
- d. We expect lawyers to not arbitrarily or unreasonably withhold consent to a reasonable request for cooperation or accommodation.
- e. We expect lawyers to refrain from attributing to an opponent a position the opponent has not clearly taken.
- f. We expect lawyers to be accurate in written communications intended to make a record.
- g. We expect lawyers to refrain from proposing a stipulation in the presence of the court or trier of fact unless the other parties have previously agreed to it.
- h. We expect lawyers to refrain from interrupting an opponent's legal argument unless making an appropriate objection for a legitimate basis.

- i. We expect lawyers in court to address opposing lawyers through the court.
- j. We expect lawyers to seek sanctions sparingly, and not to obtain a tactical advantage or for any other improper purpose.
- k. We expect lawyers to refrain from seeking to disqualify opposing counsel for any improper purpose or for any reason not supported by fact or law.
- l. We expect lawyers to encourage other lawyers to conform to the standards in this Code of Conduct.
- m. We expect lawyers to conduct themselves so that they may conclude each case amicably with the opposing party.

## Civil Local Rule 2.2 Discipline

- a. **General.** In the event any attorney engages in conduct which may warrant discipline or other sanctions, the court or any judge may, in addition to initiating proceedings for contempt under Title 18 U.S.C. 401 and Rule 42, Fed. R. Crim.P., or imposing other appropriate sanctions, refer the matter to the disciplinary body of any court before which the attorney has been admitted to practice.
- b. **Charge or Conviction of Felony**
  1. Any attorney charged with or convicted of a felony must report the charge or conviction within fourteen (14) days to the Clerk of the Court.
  2. An attorney on the court's CJA panel or one appointed by the court who is charged with a felony will not be assigned any further cases and will be relieved on cases on which the attorney is appointed until further order of the court. The attorney's cases will be reassigned as directed by the judge supervising those cases on which the attorney is relieved.
  3. A non-court appointed attorney charged with a felony must show cause why they should not be removed from any pending civil or criminal case due to a conflict of interest. It will be the attorney's burden to demonstrate to each judge assigned a case on which the charged attorney wishes to appear that there is no conflict and the attorney can appropriately discharge their duties to the client.
  4. Any attorney admitted to practice in this court who enters a plea of guilty to a felony, or is found guilty of a felony, must immediately be suspended from practice before this court. Upon the felony conviction becoming final, the attorney must be disbarred. The disbarred attorney may make a motion in this court within sixty days of disbarment for an order of modification of the disbarment order, as justice may require.

**d. Objections**

Objections to the magistrate judge’s findings and recommendation must be filed within fourteen (14) days of the entry of the magistrate judge’s findings and recommendation.

**e. Sentencing**

The magistrate judge must set the sentencing hearing on the calendar of the assigned district judge.

**f. Transcripts**

The clerk may order a transcript of the Rule 11 allocation and provide the district judge with a copy of the transcript at least seven (7) days before sentencing hearing if requested by the district judge.

## Criminal Rule 12.1 Rule 12 Motions

Motions under Rule 12, Fed.R.Crim.P must not be made prior to entry of a not guilty plea at initial arraignment.

## Criminal Rule 16.1.a Meet and Confer Requirement

Not later than fourteen calendar days after the arraignment on an Indictment or Information, the attorney for the defendant(s) and the attorney for the government must confer and attempt to agree on a timetable and procedures for the pretrial disclosure of materials set forth in Federal Rule of Criminal Procedure 16. Generally, this conference should be in person; however, in early disposition (fast track) cases or when it is impractical to meet in person, the conference may be conducted via telephone or email.

During the conference, or as soon as practicable thereafter considering the size and complexity of the case, the parties should consider ways in which to ensure the elimination of unjustifiable expense and delay and the expeditious government production of electronically stored information (“ESI”) and other voluminous discovery. If discovery includes ESI, the parties must discuss the appropriate form and format of the production of materials containing ESI. To the extent practicable, this material should be produced in a searchable and reasonably usable format.

Not later than seven calendar days prior to the first motion hearing, the parties must inform the court in writing of the agreed upon timetable for the production of discovery, including the Alien Registration File, body-port-or remote cam video, car/vehicle inspection, DEA drug reports, cell phone extraction data, and/or ESI where applicable, and any areas of disagreement.

# ARTICLES

## A Lesson in Civility

DAVID A. GRENARDO\*

### ABSTRACT

*The inherent importance of civility in the legal profession necessitates teaching civility by law schools. This Article demonstrates how civility applies to advocacy and the practice of law, the efficiency of our justice system, lawyer well-being, obtaining a job and professional identity formation, and public confidence in the legal system. The Article can assist courts, attorneys, and professors in understanding civility and its significance. Most critically, this Article provides a turnkey lesson plan for law schools on civility that professors can employ in a variety of classes including, among others, Professional Responsibility, Civil Procedure, and Constitutional Law. Teaching law students the importance of how to interact civilly with others, particularly opposing counsel, can help a law student enjoy a long and satisfying legal career while avoiding the negative consequences of incivility, which can inhibit and stain an attorney's career.*

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\* Professor of Law, St. Mary's University School of Law; Rice University, B.A., Duke University School of Law, J.D. The author would like to thank Professor Patrick Longan, the William Augustus Bootle Chair in Professionalism and Ethics and the Director of the Mercer Center for Legal Ethics and Professionalism at Mercer University School of Law, and Professor Benjamin Madison, the co-director of the Center for Ethical Formation & Legal Education Reform at Regent University School of Law, for providing invaluable insight and comments on an earlier draft. This Article would not have been possible without the work of the author's current and former research assistants, Savannah Files, Harry Church, Paige Andabaker, and Austin Laws, St. Mary's University School of Law J.D. Candidates, and Cali Franks, Rene Burnias, and Shaunte Collins, St. Mary's University School of Law J.D. The views expressed in this article are those of the author, and any mistakes, errors, or omissions are solely attributable to the author. © 2019, David A. Grenardo.



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## INTRODUCTION

The landscape of legal education continues to shift dramatically. The American Bar Association mandated several years ago that law students take at least six credits of experiential learning where they can develop the practice skills necessary to serve as effective lawyers.<sup>1</sup> The two most “well-known ways to meet [those] requirements [include] law clinics and field placements [i.e., externships and internships].”<sup>2</sup> Law clinics sometimes involve law students working with clients to help prepare their cases or even appearing in court with a student bar card under the supervision of a lawyer.<sup>3</sup> Externships and internships often consist of opportunities to work at law firms, the district attorney’s office, the public defender’s office, other government agencies, or with a judge. Law schools understand that experiential learning helps students to acquire the skills necessary to serve clients and function properly in the legal profession.

This Article contends that, in the expansion of experiential education, law schools need to prepare students in more than the traditional ways (e.g., legal research and writing). In particular, law schools must ensure that students are aware of the key role of civility in the legal profession. By using methods, questions, and teaching techniques set forth in this Article, students in externships and internships will be equipped to observe and ultimately make their own assessments of how civility has significant implications for the legal system, lawyers, and clients. Students will also learn the importance of civility in the practice of law.

To prepare students to succeed in clinics and field placements, as well as the practice of law, law schools must teach law students about civility. Former Chief Justice Warren Burger agreed. Over forty years ago, he noted that law professors should teach law students “that good manners, disciplined behavior and civility

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1. AMERICAN BAR ASSOCIATION, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 16–18 (2016).

2. *Id.*

3. *Clinical Program*, ST. MARY’S UNIV. SCH. OF LAW, <https://law.stmarytx.edu/academics/special-programs/center-legal-social-justice/clinical-program/#civiljustice> [<https://perma.cc/CK5Y-5ZGD>].

—by whatever name—are the lubricants that prevent lawsuits from turning into combat.”<sup>4</sup> Chief Justice Burger gave the following response to law school professors who believed that they only needed to teach law students how to think: “[L]awyers who know how to think but have not learned how to behave are [a] menace and a liability, not an asset, to the administration of justice.”<sup>5</sup>

Civility, which generally means treating others with courtesy, dignity, and respect, comprises an essential trait of a successful lawyer. The importance of civility in practice cannot be overstated. Former United States Supreme Court Justice Sandra Day O’Connor stated that greater civility increases a lawyer’s enjoyment of practice and the effectiveness of the justice system, while also improving the public’s perception of attorneys.<sup>6</sup> Civility also makes a lawyer a more effective advocate for a number of reasons, including that decision-makers, such as judges, “are more likely to be impressed by an advocate who is courteous and respectful to the decision-maker, opposing counsel, the litigants, and the legal process.”<sup>7</sup>

The consequences of incivility remain significant as well. Incivility may result in serious consequences to the careers of those law school graduates believing that the best approach to the practice of law includes incivility. The costs of incivility include losing a client’s case, ostracism from the legal community, increasing the costs of a case for a client, and promulgating the public’s negative perceptions of lawyers.<sup>8</sup> Thus, teaching law students how to interact with others in the legal system, including externship supervisors, opposing counsel, clients, support personnel in both law offices and in courts, should be as integral to legal education and preparing law students for the practice of law as is teaching Contract law.<sup>9</sup> The ABA agrees.

ABA Standard 302(c) mandates that law schools establish learning outcomes that include competency in, among other things, “the exercise of proper professional and ethical responsibilities to clients and the legal system.”<sup>10</sup> Civility

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4. *Excerpts From the Chief Justice’s Speech on the Need for Civility*, N.Y. TIMES, May 19, 1971, at 28.

5. *Id.*

6. Sandra Day O’Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 8 (1998).

7. Kevin Dubose & Jonathan E. Smaby, *The Power of Professionalism: Civility as a Strategy for Effective Advocacy*, 79 TEX. B.J. 432, 433 (2016).

8. Judith D. Fischer, *Incivility in Lawyers’ Writing: Judicial Handling of Rambo Run Amok*, 50 WASHBURN L.J. 365, 369 (2011) (citations omitted) (stating incivility can lead to lawyers losing cases for clients); *see, e.g.*, *Redwood v. Dobson*, 476 F.3d 462, 466–67, 470 (7th Cir. 2007) (censuring one lawyer and admonishing another for bringing frivolous motions); Patrick E. Longan, *Teaching Professionalism*, 60 MERCER L. REV. 659, 672 (2009) (stating that incivility increases costs for the client, slows down the judicial system, and makes some lawyers miserable); E-mail from Lamont A. Jefferson, Member, Am. Inns of Court and the Am. Coll. of Trial Lawyers, to author (August 3, 2018) (Mr. Jefferson believes that continuous incivility and unprofessionalism can lead to attorneys being ostracized in San Antonio).

9. Fischer, *supra* note 8, at 366–67; *see also* Debra Moss Curtis, *The Codification of Professionalism: Can You Sanction Lawyers Into Being Nice?*, 40 J. LEGAL PROF. 49, 51 (2015) (describing the need for professionalism in the legal curriculum).

10. AMERICAN BAR ASSOCIATION, *ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS* 15 (2016).

touches on pieces of a lawyer's professional responsibilities (such as honesty to the court and fairness to opposing counsel), which are covered in Professional Responsibility classes, but the concept and importance of civility go beyond the rules of professional conduct. In addition, a professor could teach the rules of professional conduct without even mentioning, let alone focusing on, the various important aspects of civility and being civil, which are discussed *infra* (Section I, Part A). As a result, many legal educators have called for incorporating civility into the law school curriculum.<sup>11</sup>

Poor attorney behavior appears in many places. For example, each of the following constitutes uncivil conduct: name-calling<sup>12</sup>; “unreasonably withholding consent” to continue a hearing or trial<sup>13</sup>; failing to honor commitments, such as cancelling a deposition when opposing counsel is en route to that deposition<sup>14</sup>; and using “any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel’s client.”<sup>15</sup> Denigrating opposing counsel in a brief or motion also constitutes a lack of civility.<sup>16</sup>

The worst of such attorney behavior is what is typically reported or discussed in cases or in the media. The ABA Journal, by way of example, included a story about a lawyer who was suspended by his firm for opposing a pregnant lawyer's

11. See, e.g., Peter C. Alexander, *Leadership in Legal Education Issue XIII: Law School Deans and “The New Normal”*, 46 U. TOL. L. REV. 251, 256–58 (2015) (recommending that deans of law schools adopt “the new normal” which encourages them to change how classes are taught, tailoring them to student needs, and to implement a system that adopts civility as a requirement in the legal curriculum); Bronson D. Bills, *To Be or Not To Be: Civility and the Young Lawyer*, 5 CONN. PUB. INT. L.J. 31, 39–40 (2005) (explaining that learning civility as a young attorney is instrumental to success, and teaching civility in law school would be advantageous); Nicola A. Boothe-Perry, *Standard Lawyer Behavior? Professionalism as an Essential Standard for ABA Accreditation*, 42 N.M. L. REV. 33, 37–38 (2012) (arguing that professionalism is a character trait not emphasized enough in law schools and recommending that law schools incorporate a movement toward more professionalism allowing students to develop professional traits that include civility); Raymond M. Ripple, *Learning Outside the Fire: The Need for Civility Instruction in Law School*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 359, 359 (2001) (defining civility as “the act of treating other people with courtesy, dignity, and kindness”); Sophie M. Sparrow, *Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism*, 13 J. LEGAL WRITING INST. 113, 119 (2007) (describing civility as “behavior in public which demonstrates respect for others and which entails curtailing one’s own immediate self-interest when appropriate” and stressing the importance of implementing professionalism across the curriculum and enforcing it with students, staff, and administration).

12. Staci Zaretsky, *Benchslap of the Day: Rude, Crude, and a Bad Attitude*, ABOVE THE LAW (May 5, 2012, 3:13 PM), <http://abovethelaw.com/2012/05/benchslap-of-the-day-rude-crude-and-a-bad-attitude/> [<https://perma.cc/MK77-S4CQ>] (citing *In re Ziman*, No. PDJ-2011-9067, 2012 WL 5286921 (Ariz. April 30, 2012), <https://www.azcourts.gov/Portals/101/FILED%204-30-2012%20REPORT%20AND%20ORDER%20IMPOSING%20SANCTIONS.pdf?ver=2014-06-26-184417-297> [<https://perma.cc/JDC7-VKU4>]) (involving an attorney who called a hospital attorney, who was faxing files, a “slut”).

13. See *Dondi Props. Corp. v. Commerce Savs. & Loan Ass'n*, 121 F.R.D. 284, 288 (N.D. Tex. 1988) (per curiam).

14. See, e.g., *Chevron Chem. Co. v. Deloitte & Touche*, 501 N.W.2d 15, 16–17, 21 (Wis. 1993) (resulting in sanctions against the culpable attorneys).

15. See *Dondi*, 121 F.R.D. at 288.

16. *In re First City Bancorporation of Tex., Inc.*, 270 B.R. 807, 810 (N.D. Tex. 2001) (describing how the sanctioned attorney referred to other attorneys' work in the case as “garbage”).

request for a continuance because the latter's "due date coincided with a trial date."<sup>17</sup>

Particularly egregious uncivil attorney conduct seems to flourish in email exchanges. One such exchange includes one male lawyer calling another male lawyer a "p\*ssy" and threatening, "If you want to be a man, any time, any place."<sup>18</sup> Another email, which the American Board of Trial Advocates ("ABOTA") uses for its national presentations on civility, includes the following:

While I am sorry to hear about your disabled child; that sort of thing is to be expected when a retard reproduces, it is a crap shoot sometimes retards can produce normal kids, sometimes they produce F\*\*\*ed up kids. Do not hate me, hate your genetics. However, I would look at the bright side, at least you definitely know the kid is yours.<sup>19</sup>

Deplorable uncivil behavior is not limited to litigation. In one transactional deal, lawyers left a scathing voicemail for opposing counsel that included criticizing opposing counsel's work as "sloppy" and "sh\*tty," while also stating that opposing counsel should just "be a monkey f\*\*\*ing scribe."<sup>20</sup>

Despite episodes of incivility in varying degrees in the legal profession,<sup>21</sup> the professional norm remains civility.<sup>22</sup> Moreover, lawyers should serve as exemplars of civility. Lawyers function as "guardians of the Constitution," the rule of law, and justice.<sup>23</sup> Former ABA president, Linda A. Klein, asserted that lawyers, "[a]s leaders in society, must ensure that civility once again becomes a quality

17. Debra Cassens Weiss, *Shook Hardy Lawyer in the Spotlight for Opposing Pregnant Lawyer's Continuance Request*, ABA JOURNAL, (July 26, 2018, 6:00 AM), [http://www.abajournal.com/news/article/shook\\_hardy\\_lawyer\\_in\\_the\\_spotlight\\_for\\_opposing\\_pregnant\\_lawyers\\_continuan/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/shook_hardy_lawyer_in_the_spotlight_for_opposing_pregnant_lawyers_continuan/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email) [<https://perma.cc/FVR5-LVJK>].

18. See *infra* Appendix I; Plaintiff's Motion for Sanctions at 5–6, *Buxton Arlington Pet, LLC v. Pete & Mac's Arlington, LLC*, 2013 WL 2170885 (Tex. Dist. Ct. April 15, 2013) (No. 348-256203-11).

19. See *infra* Appendix J; Justice William W. Bedsworth et al., *Civility Matters: Beyond Kim v. Westmoore Partners*, AM. BD. OF TRIAL ADVOCATES (Sept. 3, 2015), <http://ibc.chapman.edu/Mediasite/Play/d4d6da60b9ad422e93fc961412efa8431d> [<https://perma.cc/Q4VB-ZBTB>].

20. See Bedsworth et al., *supra* note 19. This recording is also on file with the author, and a transcription of this recording can be found in Appendix K of this Article.

21. Even jurists manifest incivility on occasion. Judge J. Frederic Voros, Jr., *Civility in a Time of Incivility*, UTAH B.J., July–Aug. 2017, at 22, 22–24. For example, a former United States Supreme Court Justice called the majority opinion in a case "pretentious and egotistic," while also calling another justice's argument "goobledy-gook." *Id.* at 23. In another instance, during a Fifth Circuit Court hearing, one judge told another judge in open court, "I want you to shut up long enough for me to suggest that perhaps. . . you should give some other judge a chance to ask a question." *Id.* at 24. Judge Voros, Jr. also recounts a Wisconsin Supreme Court judge allegedly calling the Chief Justice a "b\*tch" and threatening to "'destroy' her." *Id.* In a separate incident, that same Wisconsin Supreme Court justice allegedly choked another Wisconsin Supreme Court Justice. *Id.*

22. See, e.g., Bruce A. Green, *Teaching Lawyers Ethics*, 51 ST. LOUIS U. L.J. 1091, 1095 n.18 (2007) (quoting N.Y. COMP. CODES R. & REGS. tit. 22 §1500.2(c)) (mentioning that there are "norms relating to civility"); Sidney Ayabe, *Courtesy and Civility: Taking the High Road*, HAW. B.J., July 1995, at 4, 4 (stating that civility "represent[s an] accepted norm[] of professional behavior").

23. Tom Vick, *Civility and Professionalism Matter*, TEX. B.J., Apr. 2017, at 214.

that defines us.”<sup>24</sup> Former Chief Justice Warren Burger similarly stated that lawyers “are the living exemplars—and thus teachers—every day in every case, and in every court.”<sup>25</sup> He reminded lawyers that their “worst conduct will be emulated perhaps more readily than your best. When you flout the standards of professional conduct once, your conduct will be echoed in multiples and for years to come and long after you leave the scene.”<sup>26</sup>

Some law students come to law school with the preconceived notion that effective lawyers must be arrogant, obnoxious or rude, and engage in “Rambo” tactics, i.e., win at all costs viewing opposing counsel as combatants who can be trampled and destroyed without regard for collateral damage (such as one’s own reputation) or how combatants are treated.<sup>27</sup> Law schools must teach law students that civility makes a lawyer a better advocate, not a weak one.<sup>28</sup>

Civility plays a role in a lawyer’s advocacy and society’s view of the justice system, and it also affects how employers view lawyers.<sup>29</sup> The doctrine of professional identity formation involves educating law students and lawyers about what characteristics employers want, as well as how law students and lawyers must develop certain traits to be successful lawyers.<sup>30</sup> Civility represents one of those traits central to professional identity formation, as employers want lawyers who can interact respectfully with others, and civility enhances a lawyer’s ability to advocate effectively.<sup>31</sup> Many law schools understand the importance of professional identity formation as evinced by the fact that twenty-one law schools including Indiana, Florida, Michigan State, Wake Forest, and Tennessee, among others, require that their 1L students take a professional formation and development class, while two other law schools offer such a class as an elective (George Washington and UC Hastings).<sup>32</sup>

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24. Linda A. Klein, *One Word: Civility*, A.B.A. J., Feb. 2017, at 8.

25. *Excerpts From the Chief Justice’s Speech on the Need for Civility*, N.Y. TIMES, May 19, 1971, at 28.

26. *Id.*

27. *See, e.g.*, Fischer, *supra* note 8, at 365–67 (discussing several factors that may contribute to incivility in the legal profession).

28. Mercer Law School, for example, through its Center for Legal Ethics and Professionalism, created and implemented a required professionalism class for its first-year law students that includes a section on civility. *First Year Course on Professionalism and Professional Identity*, MERCER UNIV. SCH. OF LAW, <https://law.mercer.edu/academics/centers/clep/education.cfm> [<https://perma.cc/M5UA-D7N3>].

29. *See* Martin J. Katz, *Teaching Professional Identity in Law School*, 42 COLO. LAW. 45, 47 (2013) (“[E]mployers often note that students who have had substantial experiential learning opportunities are more thoughtful, more flexible, and better adapted to the complexities of law practice. Early indications are that this type of education creates lawyers who are both better suited for practice and more thoughtful about their roles.”).

30. *See id.* at 45 (“Professional identity is the way a lawyer understands his or her role relative to all of the stakeholders in the legal system, including clients, courts, opposing parties and counsel, the firm, and even the legal system itself (or society as a whole) . . . Professional identity goes beyond [ethical rules and precepts of professionalism] to encompass the ideals each of us holds regarding our professional roles, and how we apply those ideals to the complex situations we encounter in our professional lives.”).

31. *See* Dubose & Smaby, *supra* note 7, at 432–33.

32. *Professional Development Resources Database*, UNIV. OF ST. THOMAS, <https://www.stthomas.edu/hollorancenter/resourcesforlegaleducators/professionaldevelopmentdatabase> [<https://perma.cc/7MMS-GCYN>]. In nearly all cases, this course is distinct from and in addition to, the professional responsibility class

This Article, which summarizes civility in the legal profession, can assist courts, attorneys, and professors in understanding civility and its significance. This Article also provides a turnkey lesson plan for law schools on civility that professors can employ in several different classes. Section I of the Article, *Civility in the Legal Profession*, provides much of the substantive information that professors will need to know to teach the lesson. Part A of Section I includes the definition and examples of civility, while also discussing incivility and its significant costs. Part B discusses civility in the legal profession, including efforts to increase civility, as well as the relationship between civility and the professional identity formation movement in legal education.

Section II of this Article, *Materials, Methods, and Approaches to Teaching Civility in Law Schools*, provides teaching materials to facilitate a lesson on civility including questions, cases, and problems that professors can use in a variety of law classes to draw upon to teach civility. Part A of Section II includes discussion questions that will create, enrich, and guide the conversation with students on the topic of civility. Part B provides four case studies that serve as excellent examples of the application of civility to the legal profession and issues relating to civility. This part also discusses how law students can respond to incivility as lawyers. Part C includes two problems—one taken from a common, real-world scenario and the other from an actual case—that allow the class to apply and discuss civility, namely how law students can and should approach these situations as attorneys who embody civility. Finally, Part D briefly addresses the learning objective and assessment for the topic of civility.

This lesson on civility relates most closely to the ABA-required course of Professional Responsibility as it deals with the propriety of conduct by attorneys. Many schools now include Professionalism classes where this lesson would also fit perfectly.<sup>33</sup> Civility can also be taught in Legal Research and Writing classes, as well as clinical courses, where practical skills are taught.<sup>34</sup> Civility also permeates litigation, including how attorneys treat each other during a lawsuit. As a

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required by the ABA. See, e.g., *Professionalism and the Work of Lawyers Course Syllabus*, UNIV. OF ARK., LITTLE ROCK, <https://www.stthomas.edu/media/hollorancenter/pdf/ArkansasLittleRock.pdf> [<https://perma.cc/LU2S-W77H>]; *Foundations of Justice Course Syllabus*, UNIV. OF ST. THOMAS, <https://www.stthomas.edu/media/hollorancenter/pdf/St.Thomas.pdf> [<https://perma.cc/5YAK-ZAJK>]; *The Legal Profession Course Syllabus*, UNIV. OF THE PACIFIC, <https://www.stthomas.edu/media/hollorancenter/pdf/McGeorge.pdf> [<https://perma.cc/9EZZ-AL9Q>].

33. See *Professional Development*, *supra* note 32 (showing that eight schools require courses with one hour credits, four schools require courses with between two and three hour credits, and three schools require courses with between four and eight hour credits—for example, Mercer University's School of Law requires a three-credit course, Indiana University's School of Law requires a four-credit course, whereas Wake Forest University's School of Law requires a one credit course).

34. See Alison Donahue Kehner & Mary Ann Robinson, *Mission: Impossible, Mission: Accomplished or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 U. DAYTON L. REV. 57, 85–87 (2012); Donna C. Chin et al., *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing*, 51 RUTGERS L. REV. 889 (1999).

result, this lesson plan can easily be incorporated into any federal or state civil procedure class. This civility lesson or parts thereof also fit nicely into a Constitutional Law class, as First and Fourteenth Amendment issues of free speech by attorneys and due process and arise when enforcing civility, as a handful of jurisdictions do.<sup>35</sup>

The lesson is engaging and provides critical education on something that will promote and enrich each law student's practice—civility. Teaching law students the importance of how to interact civilly with others, particularly opposing counsel, can help a law student enjoy a long and satisfying legal career while avoiding the negative consequences of incivility, which can inhibit and stain an attorney's career.

## I. CIVILITY IN THE LEGAL PROFESSION

This section provides most of the substantive background information that the professor needs to teach a lesson on civility. Part A defines civility and incivility, while Part B discusses civility efforts in the legal profession, as well as civility's relationship with professional identity formation.

### A. THE IMPORTANCE OF BEING CIVIL

In the 2017 *Civility in America* annual survey, which asks Americans several questions about the state of civility in this country (and is discussed *infra*), the study provided the following definition: “[b]y civility, we mean polite and respectful conduct and expression.”<sup>36</sup> Professor Donald A. Campbell conducted a comprehensive study of over 140 civility codes from state and local bar associations.<sup>37</sup> He distilled those codes to arrive at the following common concepts of civility in the legal world, which involve treating others, including opposing counsel, parties, judges, court staff, colleagues, and co-workers with courtesy, dignity, and respect; civility also includes cooperation, restraint, and honesty<sup>38</sup>:

- (1) recognize the importance of keeping commitments and of seeking agreement and accommodation with regard to scheduling and extensions;
- (2) be respectful and act in a courteous, cordial, and civil manner;
- (3) be prompt, punctual, and prepared;
- (4) maintain honesty and personal integrity;
- (5) communicate with opposing counsel;
- (6) avoid actions taken merely to delay or harass;
- (7) ensure proper conduct before the court;
- (8) act with dignity and cooperation in pre-trial proceedings;
- (9) act as a role model to the client and

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35. Mari C. Haley, *Enforcing Civility*, 2017 TXCLE OIL AND GAS DISPUTES COURSE 12.X (2017) (listing Florida, Arizona, and South Carolina, among others, as jurisdictions that require civility from its lawyers).

36. WEBER SHANDWICK, CIVILITY IN AMERICA VII: THE STATE OF CIVILITY (2017), [https://www.webershandwick.com/uploads/news/files/Civility\\_in\\_America\\_the\\_State\\_of\\_Civility.pdf](https://www.webershandwick.com/uploads/news/files/Civility_in_America_the_State_of_Civility.pdf) [<https://perma.cc/BY2M-YXPZ>].

37. Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 141–42 (2011).

38. *Id.* at 109.



public and as a mentor to young lawyers; and (10) utilize the court system in an efficient and fair manner.<sup>39</sup>

The ethics rules provide the baseline of behavior necessary for attorneys to avoid sanctions,<sup>40</sup> while professionalism and civility reflect behavior that typically reaches well beyond what the professional conduct (or ethics) rules require.<sup>41</sup> Civility, though, sometimes overlaps with ethics rules as both deal with attorney conduct.<sup>42</sup> The ethics rules (i.e., the rules of professional conduct) require honesty and a duty of candor to the court (Model Rule 3.3) and fairness to opposing counsel (Model Rule 3.4).<sup>43</sup> Similarly, civility requires honesty and utilizing the legal system in a fair and efficient manner.<sup>44</sup> Notably of how civility is classified, failing to act civilly has serious negative repercussions. Regardless professionalism and civility are sometimes used synonymously in the legal profession.<sup>45</sup>

Incivility involves treating others with disrespect and acting in a manner that evokes scorn. “Texas Style Deposition,” an infamous YouTube clip starring the late Joe Jamail, provides a prime example of incivility.<sup>46</sup> In the video, the former Texas-based and highly volatile attorney Jamail swears at opposing counsel and calls him “fat boy.” Mr. Jamail also calls the witness he is deposing an a\*\*hole and a dumb son-of-a-b\*tch prior to threatening to fight the witness.<sup>47</sup> The other attorneys at the deposition also fail to display courtesy, dignity, and respect towards one another.<sup>48</sup> This clip demonstrates incivility, needless posturing, and the wasted time and energy that result from insulting one another when the parties, instead, should be conducting depositions by focusing on the evidence and testimony that the parties seek from the witness.

Another story helps illuminate incivility, as well as its negative consequences. In Florida, after scheduling depositions at a noisy Dunkin Donuts over the objection of opposing counsel, an attorney proceeded to do the following during the

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39. *Id.*

40. *Id.* at 142.

41. *Id.*

42. See Jayne R. Reardon, *Civility as the Core of Professionalism*, ABA BUS. L. TODAY, [http://www.americanbar.org/publications/blt/2014/09/02\\_reardon.html](http://www.americanbar.org/publications/blt/2014/09/02_reardon.html) [<https://perma.cc/MU34-LLCQ>].

43. MODEL RULES OF PROF'L CONDUCT R. 3.3, 3.4 (2016) [hereinafter MODEL RULES].

44. Campbell, *supra* note 37, at 109.

45. *Id.*

46. iowapublicdefender, *Texas Style Deposition*, YOUTUBE (June 27, 2007), <https://www.youtube.com/watch?v=ZlXmrvbMeKc> [<https://perma.cc/VEC3-5NM7>] (audiovisual excerpt from a Joe Jamail deposition). Professors can best capture the attention of students during the first few minutes of class, and this deposition clip will certainly help in doing so. See James M. Lang, *Small Changes in Teaching: The First 5 Minutes of Class*, CHRONICLE OF HIGHER EDUC. (Jan. 11, 2016), <http://www.chronicle.com/article/Small-Changes-in-Teaching-The/234869> [<https://perma.cc/LWW3-AQL6>] (stating that the “opening five minutes [of class] offer a rich opportunity to capture the attention of students and prepare them for learning”).

47. iowapublicdefender, *Texas Style Deposition*, YOUTUBE (June 27, 2007), <https://www.youtube.com/watch?v=ZlXmrvbMeKc> [<https://perma.cc/VEC3-5NM7>] (audiovisual excerpt from a Joe Jamail deposition).

48. *Id.*

depositions: wear shorts and t-shirts, play the video game “Angry Birds,” and draw male genitalia.<sup>49</sup> The attorney’s purported defense for his actions, which is typical for this type of behavior, was zealous advocacy.<sup>50</sup> The court disagreed and disqualified the lawyer and the law firm from the case for, among other things, the consistent disrespectful, unprofessional conduct.<sup>51</sup> As a result of the attorney’s uncivil conduct, the client lost the counsel of its choice. The disqualified attorney and his firm lost the opportunity to represent that client during the remainder of that case, and they lost profits from being unable to complete that case for the client. The attorney and the firm, however, gained national recognition for their outlandish behavior, which likely did not enhance the image of the legal profession for those who read that story.

The significance of civility can be best understood by looking at the damaging consequences of incivility.<sup>52</sup> Six major consequences exist. First, a lawyer may lose a case due to incivility.<sup>53</sup> “In a close case, civility may tip the scales toward a lawyer with a reputation for integrity, causing the uncivil lawyer’s client to lose the case.”<sup>54</sup> As in the Dunkin Donuts case, a lawyer may also lose a client if uncivil behavior leads to removal from a case.<sup>55</sup>

Second, uncivil behavior can result in higher litigation costs for the client via needless arguing about discovery, unnecessary motions to compel, and hearings on those motions that could have been avoided if the parties acted reasonably.<sup>56</sup> These situations must be distinguished from instances where the parties genuinely believe that resisting discovery, because of privilege, privacy, or harassment, is warranted, and motions to compel and hearings possess merit.<sup>57</sup> Third, gratuitous fighting about discovery or other resolvable issues leads to the depletion and waste of judicial resources, as courts must address and hear argument on needless motions.<sup>58</sup> Fourth, incivility amongst attorneys increases the stress lawyers must deal with, when the legal profession already suffers from the inherent stress created by client expectations and the numerous deadlines present in any case.<sup>59</sup> Obstreperous opposing counsel simply increases the stress encountered by

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49. *Bedoya v. Aventura Limousine & Transp. Serv.*, 861 F. Supp. 2d 1346, 1370 (S.D. Fla. 2012).

50. *Id.* at 1369.

51. *Id.* at 1371–73.

52. See, e.g., Sandra Day O’Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 8 (1998).

53. See, e.g., *Bedoya*, 861 F. Supp. 2d at 1347.

54. Fischer, *supra* note 8, at 369 (internal citations omitted).

55. *Bedoya*, 861 F. Supp. 2d at 1347.

56. *Redwood v. Dobson*, 476 F.3d 462, 466–67, 470 (7th Cir. 2007) (censuring one lawyer and admonishing another for bringing frivolous motions).

57. See FED. R. CIV. P. 26(b).

58. *Galle v. Orleans Parish Sch. Bd.*, 623 So. 2d 692 (La. Ct. App. 1993).

59. Dr. Rebecca Nerison, *Lawyers: Find Freedom from Anger, Anxiety and Stress*, STATE BAR OF N.M., <http://www.nmbar.org/NmbarDocs/formembers/JLAP/FreedomfromAngerandStress.pdf> [<https://perma.cc/MKS7-HUCP>].

lawyers in practice.<sup>60</sup> When opposing counsel is civil, on the other hand, and the attorneys maintain a good working relationship, then lawyers can more easily enjoy and focus on their jobs rather than dealing with a screaming, obnoxious, or rude attorney.<sup>61</sup> Fifth, attorneys who act in an uncivil manner can harm their reputation, which can harm their livelihood as a lawyer.<sup>62</sup> Moreover, an attorney may ostracize himself from the legal community if that community expects civility and the lawyer fails to treat others with dignity and respect.<sup>63</sup> Finally, incivility by attorneys helps perpetuate negative perceptions and stereotypes about lawyers and the legal system—namely that lawyers are arrogant, rude, obstreperous, and obnoxious jerks, and the client with the most abhorrent lawyer in the case will prevail.<sup>64</sup>

Law students must understand that the antithesis of passionate advocacy is not civility; those concepts can and should coexist.<sup>65</sup> The ABA Model Rules of Professional Conduct recognize that civility and zealous advocacy can and should co-exist harmoniously. For example, the preamble of the Model Rules provides that a lawyer has an “obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”<sup>66</sup> Moreover, comment 1 to Model Rule 1.3 regarding diligence reinforces the notion of civility, stating, “The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”<sup>67</sup> Zealous advocacy involves fighting aggressively for one’s client in an adversarial manner while remaining civil.<sup>68</sup>

Civility and zealous advocacy translate into actual practice when an attorney argues vigorously for her client and attacks the opposition’s arguments, not the

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60. John J. Jurcyk Jr., *Honor the Law!*, 77 J. KAN. BAR ASS’N 22 (2008), <https://www.regonline.com/custImages/260000/269600/Day1coursematerials.pdf> [<https://perma.cc/6C85-4DU4>].

61. *Id.*

62. See *Lawyer Bullies, Incivility: On Policing Lawyer Manners*, AM. BAR ASS’N (Oct. 2015), <http://www.americanbar.org/publications/youraba/2015/october-2015/the-civility-conundrum.html> [<https://perma.cc/QGP6-28T5>] (stating that respondents in the legal profession agreed that incivility makes it difficult to solve matters, makes the practice of law less satisfying, harms public confidence in the judicial system, and leads to increased litigation costs).

63. Interview with Lamont A. Jefferson, Member, Am. Inns of Court, in San Antonio, Tex. (May 20, 2014); Thomas E. Humphrey, “*Civil*” Practice in Maine, 20 ME. B.J. 6 (2005) (finding that “Maine is not unlike a small community, you are each apt to have your own short-list of colleagues who you regard as uncivil and unprofessional”).

64. See *Lawyer Bullies, Incivility: On Policing Lawyer Manners*, AM. BAR ASS’N, *supra* note 62.

65. Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 421 n.38 (2005).

66. MODEL RULES pmb1.

67. MODEL RULES R. 1.3 cmt. 1.

68. Campbell, *supra* note 37, at 107.

opposition itself or opposing counsel.<sup>69</sup> A lawyer must steadfastly argue on behalf of her client each and every opportunity she gets until a judge makes a ruling or a jury renders a verdict while refraining from personal attacks on opposing counsel.<sup>70</sup> Also, decision-makers, such as judges, respond positively to professionalism, meaning zealous advocacy should include civility.<sup>71</sup> In particular, decision-makers respond positively to civility because “decision-makers see themselves as participants in a dignified process of resolving disputes in a civilized way[.]” Overworked and underpaid judges do not want to waste their time “reading insults and personal attacks” when they could be reading about the “merits of the case[.]” Unprofessional behavior “damages credibility,” and incivility, which is unpleasant, creates “discomfort in the decision-maker [and] is not conducive to a favorable outcome.”<sup>72</sup>

Regardless of whether society or politics become (or remain) highly uncivil, lawyers should attempt to maintain civility in all of their interactions. A study published in 2017 on civility in America revealed the following findings: by December 2016, 93% of Americans felt civility is a problem in this country; 69% of Americans believed that the “United States has a major civility problem;” and 75% of Americans responded that incivility had reached a crisis level.<sup>73</sup> The incivility demonstrated in the 2016 presidential election included personal insults, bullying, and name-calling, but incivility has existed throughout the political history of this country.<sup>74</sup> Political opponents of Abraham Lincoln and the press labeled him as an “ignoramus,” “perjurer,” “buffoon,” and a “devil.”<sup>75</sup> Despite what occurs in the larger society and politics, law schools must teach its students the professional norms of being a lawyer, which include civility.<sup>76</sup>

After defining and discussing civility and incivility, the professor can illuminate the class on civility’s prominence and importance in the legal profession.

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69. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE, THE ART OF PERSUADING JUDGES 34–35 (2008) (advocating that attorneys should “[c]ultivate a tone of civility” and avoid attacking opposing counsel as it “undercuts the persuasive force of any legal argument”) (quoting Morey L. Sear, *Briefing in the United States District Court for the Eastern District of Louisiana*, 70 TUL. L.REV. 207, 224 (1995)).

70. J. F. Rydstrom, Annotation, *Propriety and Effect of Attack on Opposing Counsel During Trial of a Criminal Case*, 99 A.L.R.2d 508 (1965) (listing cases in which counsel has personally attacked opposing counsel during trial).

71. Dubose & Smaby, *supra* note 7, at 433; SCALIA & GARNER, *supra* note 69, at 34–35.

72. Dubose & Smaby, *supra* note 7, at 433.

73. See WEBER SHANDWICK, *supra* note 36, at 2–3; Nicole Spector, *Incivility in the U.S Is So Intense, Americans Feel Safest at Work*, NBC NEWS (June 21, 2017), <https://www.nbcnews.com/business/consumer/incivility-u-s-so-intense-americans-feel-safest-work-n775211> [<https://perma.cc/P8MM-P67Z>].

74. See Voros, *supra* note 21, at 22.

75. *Id.*

76. See, e.g., Green, *supra* note 22, at 1095 n.18 (mentioning that there are “norms relating to civility”); Ayabe, *supra* note 22, at 4 (stating that civility “represent[s an] accepted norm[] of professional behavior”).

## B. PROMOTING CIVILITY IN THE LEGAL PROFESSION

Efforts to increase civility and combat incivility grew based on the apparent decline of civility in the legal profession over the past few decades. This section discusses those various efforts, including civility codes, civility oaths, organizational efforts, and mandatory civility. This section also discusses how civility relates to the professional identity formation movement in legal education.

### 1. CIVILITY CODES

Civility codes “provide guidance to lawyers regarding how to conduct themselves in dealings with opposing counsel, clients, courts and third parties.”<sup>77</sup> They do not serve as a basis to sanction attorneys. Their purpose, according to Professor Campbell’s extensive research on civility codes, mentioned above, “is also to ensure that the image of the legal process is preserved and respected by the public, and to ensure that disputes are resolved in a timely, efficient, and cooperative manner.”<sup>78</sup>

Civility codes outline conduct “‘above and beyond the minimum requirements’ of ethical rules” and summarize “best practices” or “values” for practitioners.<sup>79</sup> The following are exemplars of rules found in a civility code:

- A lawyer owes, to opposing counsel, a duty of courtesy.<sup>80</sup>
- Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility.<sup>81</sup>
- A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct.<sup>82</sup>
- Ill feeling should not influence a lawyer’s conduct, attitude, or demeanor towards opposing lawyers.<sup>83</sup>

Civility codes serve as one method for local and state bars to increase civility and decrease incivility; adding civility into attorney oaths is another.

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77. Campbell, *supra* note 37, at 142.

78. *Id.*; see also *In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 633, 636 (S.C. 2011) (citation omitted) (stating that “[w]hen a lawyer fails to conduct himself appropriately, he brings into question the integrity of the judicial system, and, as well, disserves his client”).

79. Campbell, *supra* note 37, at 106–107; see also Josh O’Hara, *Creating Civility: Using Reference Group Theory to Improve Inter-Lawyer Relations*, 31 VT. L. REV. 965, 972 (2007) (arguing that civility codes, unlike the *Model Rules of Professional Conduct*, do more than outline the minimum standards of professional conduct, but also instruct attorneys on how to conduct themselves among other professionals).

80. *Dallas Bar Association Guidelines of Professional Courtesy*, DALLAS BAR ASS’N, <http://www2.dallasbar.org/documents/DBA%20ProfGLsCourtesy.pdf> [<https://perma.cc/8AJR-M9AE>].

81. *Id.*

82. *Id.*

83. *Id.*

## 2. CIVILITY OATHS

Twenty-one states, thus far, have added civility into their attorneys' oaths.<sup>84</sup> Those states include Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Louisiana, Michigan, Minnesota, Montana, Nevada, New Mexico, Ohio, Oregon, South Carolina, Texas, Utah, Virginia, and Washington.<sup>85</sup>

In 2015, Texas added civility into its oath with the following language: Attorneys will conduct themselves "with integrity and civility in dealing with and communicating with the court and all parties."<sup>86</sup> Previously-licensed attorneys are not required to take the oath again that now includes the civility language.<sup>87</sup> Nevertheless, the civility oath demonstrates Texas' commitment to civility in the legal profession.<sup>88</sup> Also, passage of the law that added civility into the oath explicitly excluded any language that allowed sanctions based on the oath. In other words, Texas legislatures ensured that adding civility into the oath did not create a mechanism to penalize or sanction attorneys due to uncivil behavior. Nevertheless, even in states with civility oaths that do not necessarily mandate civility, as well as states without civility oaths, courts still find ways to punish lawyers for their incivility.<sup>89</sup>

South Carolina, as opposed to Texas, not only allowed for the enforcement of civility through its attorney's oath,<sup>90</sup> but it also required every attorney licensed in South Carolina to re-take the civility oath.<sup>91</sup> In October 2003, South Carolina added civility to its oath and made civility mandatory using the following: "To

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84. *Attorney Oaths by State*, AM. BD. OF TRIAL ADVOCATES, <https://www.abota.org/index.cfm?pg=CivilityMattersOaths> [<https://perma.cc/A3PW-ARSR>].

85. *Id.*

86. *Oath Form*, TEXAS BAR ASS'N, [https://www.texasbar.com/AM/Template.cfm?Section=New\\_Lawyer\\_Forms\\_and\\_Fees1&Template=/CM/ContentDisplay.cfm&ContentID=29062](https://www.texasbar.com/AM/Template.cfm?Section=New_Lawyer_Forms_and_Fees1&Template=/CM/ContentDisplay.cfm&ContentID=29062) [<https://perma.cc/HZV9-JT59>].

87. See Joe Hyde, *State Bar of Texas Invites Lawyers to Take Civility Oath at Austin Ceremony*, SAN ANGELO LIVE (Oct. 20, 2015) <http://sanangelolive.com/news/texas/2015-10-20/state-bar-texas-invites-lawyers-take-civility-oath-austin-ceremony> [<https://perma.cc/L5K7-ZHC4>].

88. See *id.*

89. See, e.g., *Kohlmayer v. Nat'l R.R. Passenger Corp.*, 124 F. Supp. 2d 877, 879, 883 (D.N.J. 2000) (denying attorney's application for *pro hac vice* admission based on previous uncivil behavior by attorney); *Chevron Chemical Co. v. Deloitte & Touche*, 501 N.W.2d 15, 16–17, 21 (Wis. 1993) (sanctioning attorney for incivility based on, among other things, lawyer's efforts to obstruct discovery); *City of Jackson v. Estate of Stewart*, 939 So. 2d 758, 759 (Miss. 2005) ("[f]inding the lawyers' conduct to be unprofessional and rising to the level of incivility," the court "direct[ed] that the motion for rehearing be stricken from the files"); *In re Hillis*, 858 A.2d 325, 327–28 (Del. 2004) (imposing sanctions for incivility by a lawyer based on the inherent power of the court).

90. See *In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 633, 637–638 (S.C. 2011).

91. See *Attorney Oaths by State*, AM. BD. OF TRIAL ADVOCATES, *supra* note 84 (showing that South Carolina added civility to its oath on October 22, 2003); RE: Amendment to Rule 402, SCACR, 2003-10-22-03 (S.C. Oct. 22, 2013) available at <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2003-10-22-03> [<https://perma.cc/6DZB-E77R>] (stating that "all attorneys in the State [of South Carolina] will be expected to take the amended oath," which is dated October 22, 2003 and includes the added civility clause).

opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”<sup>92</sup>

The Supreme Court of Florida added civility to its attorney oath in September 2011 because of incivility amongst its members and in recognition of “[t]he necessity for civility in the inherently contentious setting of the adversary process.”<sup>93</sup> The oath includes the following, “To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”<sup>94</sup>

Entities such as ABOTA, which was instrumental in the addition of civility into attorneys’ oaths across the country, play a major role in civility in the legal profession.

### 3. ORGANIZATIONAL EFFORTS TO INCREASE CIVILITY

ABOTA, which consists of plaintiff and defense counsel, as well as judges, from across the nation, promotes civility in several prominent ways.<sup>95</sup> First, ABOTA seeks the addition of civility to attorney oaths in states across the nation.<sup>96</sup> Second, ABOTA created an educational program titled *Civility Matters* that it presents in various settings nationwide including bar events, law schools, and ABOTA’s own activities.<sup>97</sup> Finally, ABOTA drafted its own civility code, “ABOTA’s Principles of Civility, Integrity and Professionalism,” that consists of nearly forty rules of civility.<sup>98</sup>

American Inns of Court (“AIC”) represent another national entity committed to increasing civility in the legal profession. Former Chief Justice Warren Burger of the United States Supreme Court advocated for the creation of the English model of apprenticeship through Inns to combat the “diminishing standards of work product and the decline of civility at the American bar.”<sup>99</sup> The first American Inn began in 1980 in Utah, and now over 360 Inns exist across the country with more than 29,000 individuals participating.<sup>100</sup> Each Inn consists of approximately 80 members who are divided into groups that include judges,

92. S.C. APP. CT. R. 402(h).

93. *In re* Oath of Adm’n to the Fla. Bar, 73 So. 3d 149, 150 (Fla. 2011).

94. *Id.*

95. AM. BD. OF TRIAL ADVOCATES, <https://www.abota.org/index.cfm>. [<https://perma.cc/RN6P-4U9Q>].

96. See William B. Smith, *Civility, Setting the Tone for Respect!*, in CIVILITY MATTERS 8, 11 (Am. Bd. of Trial Advocates ed.), <http://home.innsforcourt.org/media/12354/civilitymattersmagazine.pdf> [<https://perma.cc/2BJA-JD4C>].

97. *Professionalism Ethics and Civility*, AM. BD. OF TRIAL ADVOCATES, <https://www.abota.org/index.cfm?pg=ProfEthicsCivility> [<https://perma.cc/L7WG-GSRV>].

98. *Id.*

99. Justice Donald Lemons, *Return to Civility: How the American Inns of Court Foundation Is Promoting Professionalism and Ethics Through Mentoring*, 76 TEX. B.J. 207, 207 (2013), <https://www.texasbar.com/Content/NavigationMenu/AboutUs/StateBarPresident/TransitiontoPractice/ReturnToCivility.pdf> [<https://perma.cc/R23D-EYTT>].

100. *Id.* at 208.

lawyers, law professors, and law students.<sup>101</sup> Inns meet monthly to discuss a topic and, typically, share a meal.<sup>102</sup>

The AIC focus on “professionalism, civility, ethics, and excellent legal skills at the American bench and bar.”<sup>103</sup> In particular, the AIC “are dedicated to the honorable goal of recovering civility in the legal profession—a goal much more likely to be achieved when the values and practices that serve this end are demonstrated personally by other members of the profession.”<sup>104</sup> The AIC believe that this goal is best accomplished through “committed mentoring programs.”<sup>105</sup> Although several local, state, and national entities support civility, only a handful of jurisdictions require civility from their lawyers, and those jurisdictions are discussed in the following part.<sup>106</sup>

#### 4. MANDATORY CIVILITY

A handful of jurisdictions, such as South Carolina and the Northern District of Texas, made civility mandatory for its attorneys.<sup>107</sup> Each jurisdiction enforces civility through sanctions.<sup>108</sup> Two cases from South Carolina that rely on the oath as a means for sanctioning attorneys form part of the basis of the reading for this lesson on civility, and those cases (along with two others) are discussed below. Prior to discussing those cases, this Article discusses the relationship between civility and professional identity formation, and it also provides questions on mandatory civility and professional identity formation and civility.

#### 5. CIVILITY’S RELATIONSHIP WITH PROFESSIONAL IDENTITY FORMATION

Several law schools focus on the professional identity formation of their students. The leading scholar on this topic, Professor and Director of the Holloran Center for Ethical Leadership in the Professions Neil Hamilton, describes the importance of professional identity formation as “foster[ing] each student’s internalization of (1) their responsibility to others (particularly the client), and (2) their responsibility to proactively develop toward excellence in all the professional

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101. *Id.*

102. *Id.*

103. *Id.* at 207–08.

104. *Id.* at 207.

105. *Id.*

106. *See In re Oath of Admission to the Fla. Bar*, 73 So. 3d 149, 150 (Fla. 2011) (recognizing “[t]he necessity for civility in the inherently contentious setting of the adversary process”); UTAH RULES OF PROF’L CONDUCT pmb1.; S.C. APP. CT. R. 402(h); N.M. RULES GOVERNING ADMISSION TO THE BAR R. 15-304.

107. Haley, *supra* note 35 (listing Florida, Arizona, and Michigan as the other jurisdictions requiring civility from its attorneys); *see, e.g., In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 633 (S.C. 2011) (analyzing South Carolina’s civility oath mandating civility); *Dondi Prop. Corp. v. Commerce Sav. & Loan Ass’n*, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc) (making civility mandatory).

108. *See, e.g., In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 634-5.



competencies needed to serve others well.”<sup>109</sup> Director Hamilton asserts that developing the competencies and traits that comprise a successful lawyer “increases [a law student’s] value to clients, legal employers, the profession, and society.” He argues that enhancing one’s professional identity formation gives law students a better chance of obtaining meaningful employment while improving the law school’s employment data because students will have a better chance of finding a job.<sup>110</sup>

Director Hamilton identifies six core competencies that law students should develop to become better attorneys.<sup>111</sup> He determined that employers want law students who exhibit these core competencies, and firms ranked the core competencies based on importance.<sup>112</sup> Hamilton surveyed large law firms, small law firms, the county attorney, and a legal aid office to determine which core competencies those entities considered the most important in a candidate they were considering hiring.<sup>113</sup> The synthesis of those surveys ranks the attributes or competencies that employers seek in hiring a new lawyer.<sup>114</sup> What becomes abundantly clear from the competencies and their rankings are the overlaps between the core competencies and civility and the importance of civility in hiring a new lawyer.<sup>115</sup>

For instance, the synthesis shows that integrity, trustworthiness, and honesty rank number one for hiring; maintaining honesty and personal integrity comprise one of the core common concepts of civility (as seen in the study by Campbell that analyzed 140 civility codes).<sup>116</sup> The competencies of dedication/responsive to clients and project management, including high quality, efficiency, and timeliness, correlate to the civility concept of being prompt, punctual, and prepared.<sup>117</sup> Other correlations also exist.<sup>118</sup> The overlap demonstrates that acting civil can also help a law student obtain a job.<sup>119</sup>

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109. Neil Hamilton & Sarah Schaefer, *What Legal Education Can Learn from Medical Education About Competency-Based Learning Outcomes Including Those Related to Professional Formation and Professionalism*, 29 GEO. J. LEGAL ETHICS 399, 403 (2016).

110. *Id.*

111. *Id.* at 409.

112. *Id.* at 434 n.135.

113. Neil W. Hamilton, *Changing Markets Create Opportunities: Emphasizing the Competencies Legal Employers Use in Hiring New Lawyers (Including Professional Formation/Professionalism)*, 65 S.C. L. REV. 547, 551–57 (2014).

114. *Id.*

115. *Id.* at 557.

116. *Id.*; see Campbell, *supra* note 37.

117. Hamilton, *supra* note 112, at 557.

118. The core competency of “effective written/oral communication skills” relates to the civility concept of communicating with opposing counsel; the competency of “initiates and maintains strong work and team relationships” relates to the civility concept of acting with dignity and cooperation in pre-trial proceedings and being respectful and acting in a courteous, cordial, and civil manner; and “delegation/supervision/mentoring” relates to the civility concept of acting as a mentor to young lawyers. Neil W. Hamilton, *Changing Markets Create Opportunities: Emphasizing the Competencies Legal Employers Use in Hiring New Lawyers (Including Professional Formation/Professionalism)*, 65 S.C. L. REV. 547, 557–58 (2014).

119. *Id.* at 571.

A comprehensive study by *Educating Tomorrow's Lawyers* reinforces the conclusion that new lawyers must act with civility to be successful.<sup>120</sup> The survey asked over 24,000 lawyers from across the country to “[i]dentify the foundations entry-level lawyers need to launch successful careers in the legal profession.”<sup>121</sup> The study concluded that “[n]ew lawyers need some legal skills and require intelligence, but they are successful when they come to the job with a much broader blend of legal skills, professional competencies, and characteristics that comprise the *whole lawyer*.”<sup>122</sup>

The survey asked respondents to answer questions in fifteen major categories, and it broke each of those categories into smaller topics.<sup>123</sup> Under emotional and interpersonal intelligence, “[r]espondents viewed the ability to treat others with courtesy and respect as the most important foundation for success right out of law school by a fairly wide margin. . . .”<sup>124</sup> In fact, nearly 92% of respondents answered that “[t]reat[ing] others with courtesy and respect,” which is the definition of civility, was “necessary in the short term” (or immediately) for the success of a new lawyer.<sup>125</sup>

In addition, integrity and trustworthiness, which also describe a major category of civility, scored the highest (92.3%) under the category of qualities and talents that are necessary immediately for success.<sup>126</sup> Similarly, professionalism was its own category.<sup>127</sup> Professionalism and civility are synonymous in the legal profession, and many of the subcategories in professionalism were viewed by over 90% of respondents as immediately necessary for success, including “[a]rrive on time for meetings, appointments, and hearings” (95.4%), and honor commitments (93.7%).<sup>128</sup> This corresponds directly to some of the common concepts of civility, such as “seeking agreement and accommodation with regard to scheduling and extensions” and “be[ing] prompt, punctual, and prepared.”<sup>129</sup>

The value of civility remains essential not just because clients and employers expect and seek it from lawyers, but also because civility remains consistent with the profession’s values and one’s own individual values such that lawyers should internalize and use civility to guide their actions.<sup>130</sup> The next section discusses the materials and methods necessary to teach this lesson on civility.

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120. Alli Gerkman & Logan Cornett, *Foundation for Practice: The Whole Lawyer and the Character Quotient*, EDUCATING TOMORROW’S LAWYERS (July 2016), [http://iaals.du.edu/sites/default/files/reports/foundations\\_for\\_practice\\_whole\\_lawyer\\_character\\_quotient.pdf](http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf) [<https://perma.cc/FB33-3DZG>].

121. *Id.*

122. *Id.* at 2.

123. *Id.* at 6.

124. *Id.* at 9.

125. *Id.*

126. *Id.* at 16, 26, 33.

127. *Id.* at 15.

128. *Id.*

129. Campbell, *supra* note 37, at 109 (finding ten common concepts of civility among lawyers).

130. Larry O. Natt Gantt, II & Benjamin V. Madison III, *Teaching Knowledge, Skills, and Values of Professional Identity Formation*, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 253, 253–54 (Deborah Maranville et al. eds., 2015).

## II. MATERIALS, METHODS, AND APPROACHES TO TEACHING CIVILITY IN LAW SCHOOLS

This section provides tools to professors who plan to teach civility in law school, including cases, problems, and discussion questions for use in a lesson on civility. As an initial matter, law professors should model what they are teaching. Modeling civility, in fact, may be one of the most effective means to teach law students civility.<sup>131</sup> Law professors sometimes represent the first lawyers whom law students interact with and encounter on a regular basis.<sup>132</sup> If law students see and hear law professors treating colleagues, staff, and law students with courtesy, dignity, and respect, then law students may be more likely to adopt like behavior because they might believe that is how lawyers should act.<sup>133</sup> On the other hand, if law professors treat others rudely in front of law students or the law students themselves, then some law students might consider that behavior by those instructing them as appropriate or acceptable for lawyers.<sup>134</sup> For example, one Evidence professor reportedly told a student in a class of about 150 students, “If you ever say that to a judge, I hope he tells you to shut the f\*\*ck up and sit down.”<sup>135</sup> Another professor, whom one student describes as “rude as hell,” told a student in her 40s, “[M]iddle aged women have no business in law school, they all should be home taking care of their families.”<sup>136</sup> Law professors must recognize their unique role in molding future lawyers, and law professors should serve as models of civility and professionalism.

Immediately following the discussion questions, case studies, problems, and suggestions for learning objectives and assessment found in this section, are Appendices “A” through “D,” which include a corresponding teaching outline for the various sections discussed *supra* – The Importance of Being Civil, Promoting Civility in the Legal Profession, Case Studies, and Problems. The teaching outlines include a list of the topics and areas that the professor can cover under each section, which correspond to the substantive material in this Article, as well as suggestions on which material to use to create PowerPoint slides, overheads, or handouts. The suggested material for PowerPoint slides, overheads, and handouts are also separately included as Appendices “E” through “H.” Appendices “I” through “L” provide additional audio and visual of egregious and horrendous acts

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131. See Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 117, 136 (2001).

132. Ripple, *supra* note 11, at 377, 379 (providing that “law professors have the unique role of being the first members of the legal profession to interact with law students on a professional basis”).

133. See *id.* at 379, 381.

134. See *id.* at 379–81.

135. Lisa G. Lerman, *First Do No Harm: Law Professor Misconduct Toward Law Students*, 56 J. LEGAL EDUC. 86, 91 (2006).

136. *Id.* at 90.

of incivility that a professor can use in this lesson.<sup>137</sup>

Thus, a professor need only read the body of this Article for the substantive content, use the teaching outlines to review and take into class, and adopt the suggested teaching materials to create PowerPoint slides, overheads, or handouts if desired. The only assigned reading necessary for the students includes the four cases discussed in Section II of this Article.<sup>138</sup>

The professor can start class by showing “Texas Style Deposition,” which is the YouTube clip (described *supra*) starring the late Joe Jamail.<sup>139</sup> The professor can then discuss the Angry Birds/Dunkin Donuts case (also discussed *supra*).<sup>140</sup> Next, the professor must define and explain civility and incivility, and give examples of each. The following part includes discussion questions for the class for use at the beginning or end of different substantive parts of the lesson.

#### A. DISCUSSION QUESTIONS

After a discussion of the Section I material, or even at the beginning depending on the professor’s preference, the professor may ask the following questions to guide the classroom discussion. Answers to help guide the discussion follow each question. Below are the topics followed by the questions and answers.

Topic: The Importance of Being Civil

Discussion Questions

1. What kind of attorneys do you think clients want? Some students will say clients want “bulldogs,” i.e., aggressive attorneys who will fight for their clients and not back down to opposing counsel. Some students might posit that clients want the types of attorneys portrayed on television or in the movies, which are typically ruthless, arrogant, and rude. What is critical at this point to impress upon law students is that a client’s main goal typically is to win, and a lawyer who demonstrates civility, integrity, and honesty will likely provide the client with the best chance to win. Indeed, an uncivil attorney can offend a judge or jury, which can cost a client a case. A client may need to be counseled that attorneys who are civil can be more effective, credible, and likeable to a judge or jury than uncivil lawyers, which can increase the civil lawyers’ chances of winning the case.

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137. See Bedsworth, *supra* note 19.

138. Westlaw’s version of these cases total 26 pages when one selects the option to print without the headnotes.

139. Iowapublicdefender, *Texas Style Deposition*, YOUTUBE (June 27, 2007), <https://www.youtube.com/watch?v=ZLxmrvbMeKc> [<https://perma.cc/VEC3-5NM7>] (audiovisual excerpt from a Joe Jamail deposition). Professors can best capture the attention of students during the first few minutes of class and this deposition clip will certainly help in doing so. See James M. Lang, *Small Changes in Teaching: The First 5 Minutes of Class*, CHRON. HIGHER EDUC. (Jan. 11, 2016), <http://www.chronicle.com/article/Small-Changes-in-Teaching-The/234869> [<https://perma.cc/LWW3-AQL6>] (stating the “opening five minutes [of class] offer a rich opportunity to capture the attention of students and prepare them for learning”).

140. *Bedoya v. Aventura Limousine & Transp. Serv., Inc.*, 861 F. Supp. 2d 1346 (S.D. Fla. 2012).

2. What kind of attorneys do you want you to be? Students might say they want to be attorneys that are respected by judges and juries. Other students might say that they want to be successful attorneys who win most of their cases. The key here again is to stress that successful attorneys and civil behavior can and should co-exist.
3. What kind of attorneys do you want to face on the opposing side? Most students will say they want an opposing counsel that will be reasonable. Students and lawyers do not want an opposing counsel who is obstreperous, needlessly combative, rude, or unwilling to compromise. When opposing counsel is uncivil, the costs to clients on both sides increase as the parties needlessly fight over every single issue.<sup>141</sup> Litigation, which includes discovery, settlement negotiations, and alternative dispute resolution mechanisms (such as mediation), involves a great deal of cooperation and interaction with opposing counsel, which most law students may not know or realize.

### Topic: Promoting Civility in the Legal Profession

#### Discussion Questions:

1. Can states regulate attorney behavior? State bars can regulate attorney behavior.<sup>142</sup> The practice of law is a privilege, not a right, and state bars determine the standard of behavior and conduct that its members must exhibit.<sup>143</sup>
2. Should civility be mandatory for attorneys? Some students will argue that civility is too vague a concept to enforce, and state bars should not and cannot make lawyers conform to one type of behavior. Other students will argue that attorneys should be held to a higher standard of conduct as representatives of the legal system and that higher standard of conduct requires attorneys act professionally and treat others with general decency and respect.
3. Will acting civilly make you a more desirable candidate for a legal job or a more effective lawyer? Yes, there are overlaps between what core competencies employers seek and the common concepts of civility, such as honesty, integrity, and trustworthiness, treating others with dignity and respect, and being punctual, prompt, prepared.

The next part looks at four cases, including two from South Carolina, which mandates civility from its attorneys through its attorney oath. This part also includes suggested ways law students can respond to incivility when they practice law. Part B concludes with discussion questions to prompt discussion.

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141. *Marcangelo v. Boardwalk Regency*, 47 F.3d 88, 90 (3d Cir. 1995) (“The extension of normal courtesies and exercise of civility expedite litigation and are of substantial benefit to the administration of justice.”).

142. MARGARET RAYMOND & EMILY HUGHES, *THE LAW AND ETHICS OF LAW PRACTICE* 11–19 (2d ed. 2009); *see, e.g.*, R. Regulating the Fla. Bar 3–3.1 (describing the Florida Bar’s jurisdiction and powers).

143. *In re Evans*, 169 P.3d 1083, 1090 (Kan. 2007) (“A license to practice law is a privilege not a right.”); *see Florida’s Standards for Imposing Lawyer Sanctions*, FLA. BAR ASS’N §§ 2.1-2.8, 4.4 (May 2015), <https://www.floridabar.org/wp-content/uploads/2017/04/standards-for-lawyer-sanctions.pdf> [<https://perma.cc/J4C2-YBZY>].

## B. CASE STUDIES

As stated above, the professor need only assign the following four cases, which total 26 pages, for the entire lesson. Each of these cases provides some understanding of civility in different contexts. For instance, the first case, *Dondi Prop. Corp. v. Commerce Sav. & Loan Ass'n*, sets forth several civility rules and discusses civility's importance in the legal profession. The second case, *In re Anonymous Member of S.C. Bar*,<sup>144</sup> covers the major arguments against mandatory civility, which include overbreadth and vagueness.<sup>145</sup> All of the cases in this section illustrate incivility in action and provide insight into the importance of civility.

### 1. DONDI PROP. CORP. V. COMMERCE SAV. & LOAN ASS'N

The seminal opinion of *Dondi* established “standards of litigation conduct” for civil actions in the Northern District of Texas.<sup>146</sup> The court reasoned that incivility and unnecessary obstructionist behavior “threaten[] to delay the administration of justice and [] place litigation beyond the financial reach of litigants.”<sup>147</sup> Judges and attorneys waste time and valuable resources dealing with “unnecessary contention and sharp practices between lawyers.”<sup>148</sup> Thus, the court in *Dondi*, based on its authority via the rules of civil procedure and its various (including inherent) powers as a court, adopted a number of standards of litigation conduct to combat incivility that included, but was not limited to, the following:

- A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.
- Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.
- A lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel's client.
- Lawyers will be punctual in communications with others and in honoring scheduled appearances, and will recognize that neglect and tardiness are demeaning to the lawyer and to the judicial system.
- If a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent.<sup>149</sup>

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144. 709 S.E.2d 633 (S.C. 2011).

145. *Id.* at 634–35.

146. *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284, 287–88 (N.D. Tex. 1988) (per curiam) (applying the standards of conduct to two cases, *Dondi's* and *Knight's*, which involved various fraud and deceptive trade practice claims, respectively).

147. *Id.* at 286.

148. *Id.*

149. *Id.* at 287–88.

The court made clear that “[t]hose litigators who persist in viewing themselves solely as combatants, or who perceive that they are retained to win at all costs without regard to fundamental principles of justice, will find that their conduct does not square with the practices we expect of them.”<sup>150</sup>

The *Dondi* case serves as a wonderful learning tool because it provides several of the practical reasons why civility is so valuable to lawyers and courts in litigation. Namely, civility enables the parties to focus on the issues in a case that matter rather than focusing on petty disputes or arguments centered on personal animosity between the parties and lawyers. Also, civility promotes efficiency and cooperation between opposing counsel where clients’ interests are not prejudiced. The case helps students understand the importance of treating others with courtesy and respect while maintaining honesty and candor based on the rules outlined by the court as they relate to the efficient functioning of the court and the administration of justice.

This case ties in well into any federal or state civil procedure class because it derives from litigation and discovery. It also fits in squarely with professional responsibility as it sets forth rules that deal with attorney misconduct.

## 2. IN RE ANONYMOUS MEMBER OF S.C. BAR

In the case of *In re Anonymous Member of S.C. Bar*, the South Carolina Supreme Court upheld the state bar’s mandatory civility oath as constitutional despite challenges based on the First and Fourteenth Amendments.<sup>151</sup> In *Anonymous*, a lawyer sent opposing counsel the following email in a disputed domestic relations matter where the lawyers represented the mother and father, respectively:<sup>152</sup>

I have a client who is a drug dealer on . . . Street down town [sic]. He informed me that your daughter, [redacted] was detained for buying cocaine and heroine [sic]. She is, or was, a teenager, right? This happened at night in a known high crime/drug area, where alos [sic] many shootings take place. Lucky for her and the two other teens, they weren’t charged. Does this make you and [redacted] bad parents? This incident is far worse than the allegations your client is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack head at night on or near . . .Street. Think about it. Am I right?<sup>153</sup>

The daughter of opposing counsel, whom the lawyer referenced in the email, was not a part of the case in any manner.<sup>154</sup> The opposing counsel’s spouse, also

150. *Id.* at 288.

151. *In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 633, 638 (S.C. 2011).

152. *Id.* at 637.

153. *Id.* at 636.

154. *Id.*

an attorney, made the complaint to the State Bar against the lawyer for incivility.<sup>155</sup>

The South Carolina oath reads, in relevant part, “To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications. . . .”<sup>156</sup> The lawyer accused of incivility sought to invalidate the South Carolina oath mandating civility based on two grounds: (1) lack of due process (i.e., fair notice and fair hearing) under the Fourteenth Amendment; and (2) First Amendment grounds. As for the first argument, as it typically goes, the lawyer argued that he should not be sanctioned because he lacked fair notice about what type of conduct constitutes incivility in violation of the oath because the term civility is too vague.<sup>157</sup> The court rejected this argument because his conduct, attacking the child-rearing abilities of the opposing counsel, fell well beyond any line of behavior wavering on civil and uncivil. In particular, the court noted that “even a casual reading of the attorney’s oath would put a person on notice that the type of language used in Respondent’s ‘Drug Dealer’ e-mail violates the civility clause.”<sup>158</sup>

As for the First Amendment argument, the lawyer believed that he should be able to say what he pleases to advocate zealously for his client, but the mandatory civility oath chilled his free speech.<sup>159</sup> The court rejected this argument as well.<sup>160</sup> After balancing the lawyer’s interest in his caustic speech against the state’s interests of administering justice and maintaining the “integrity of the lawyer-client relationship,” the court found that personal attacks on a fellow lawyer “compromises the integrity of the judicial process” and “undermines a lawyer’s ability to objectively represent his or her client.”<sup>161</sup> Without substantial protected speech involved in the case, the state’s interest in regulating attorney conduct prevailed.<sup>162</sup>

Thus, the court upheld the mandatory civility oath and reprimanded the attorney using a “private Letter of Caution with a finding of minor misconduct”—i.e., a private reprimand—for his despicable email.<sup>163</sup> The court found that the attorney showed sincere remorse and acknowledged his deplorable conduct.<sup>164</sup>

The constitutional law arguments found in this case allow a Constitutional Law professor to incorporate this lesson on civility, or parts of it, into her class. This lesson also ties in extremely well with Professional Responsibility because civility and professional responsibility focus on acceptable and unacceptable

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155. *Id.*

156. *In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 633, 637 (S.C. 2011).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 633, 636–38 (S.C. 2011).

162. *Id.*

163. *Id.* at 638.

164. *Id.*



attorney conduct. The personal email attack by the lawyer in this case demonstrates repugnant behavior that all attorneys should avoid.

Interestingly, this case involved an email between counsel that was not necessarily a part of discovery; it was simply a communication between the attorneys that was still subject to the civility oath.<sup>165</sup> Thus, professors can emphasize that civility reaches beyond discovery and the courtroom, and it includes all communications between opposing counsel.

### 3. IN RE WHITE

*In re White*<sup>166</sup> involved a zoning dispute between the Atlantic Beach Christian Methodist Episcopal Church (the “Church”) and the Town of Atlantic Beach (the “Town”).<sup>167</sup> The original dispute included a legal action that the Church filed against the Town that resulted in a settlement between the parties.<sup>168</sup> The settlement involved a dismissal of the Church’s action, the Town paying damages to the Church, and the Church agreeing to comply with the Town’s zoning requirements.<sup>169</sup>

Two years after the settlement, the new Town Manager sent a notice to the Church’s property owners regarding compliance with the zoning requirements.<sup>170</sup> Attorney Gary White, counsel for the Church, wrote a letter to the Church’s leaders regarding the Town Manager’s notice, and Mr. White copied the Town Manager and the Town’s attorney.<sup>171</sup> The letter questioned whether the Town Manager had a “soul,” stating also that the Town Manager had “no brain.”<sup>172</sup> The letter also called the “leadership of the Town pagans,” “insane,” and pig-headed.<sup>173</sup> The court found that these comments violated, among other things, the civility oath.<sup>174</sup> The court determined that the proper sanction for this attorney included a ninety-day (90) suspension and completion of the “Legal Ethics and Practice Program administered by the South Carolina Bar within six months of reinstatement.”<sup>175</sup>

This case fits nicely into any class as it relates to communications between opposing counsel and a letter to the client. It demonstrates that even one angry letter and name-calling can result in serious consequences—here, a 90-day suspension where the lawyer cannot practice. The case also highlights how attorneys should maintain civility during any dispute, even when those disputes are not

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165. *Id.*

166. 707 S.E.2d 411 (S.C. 2011).

167. *Id.* at 413.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *In re White*, 707 S.E.2d 411, 413 (S.C. 2011).

173. *Id.*

174. *Id.* at 416.

175. *Id.*

pending before the court in some form of litigation. This instance of incivility involved a dispute regarding the topic of zoning from a previously settled case. The opinion again illustrates how counsel should strive to treat others with dignity and respect at all times, not just during litigation or when they are inside the courtroom in front of a judge or jury.

#### 4. PEOPLE V. SCOTT

In *People v. Scott*, the defendant filed a motion to dismiss for lack of prosecution by the Assistant Attorney General, Zuleyma Chapman (“Chapman”).<sup>176</sup> In response to that motion, Chapman’s opposition brief included the following statements:

- Defense Counsel is irresponsible in the premature filing of its Motion to Dismiss[.]
- [Defense Counsel] is seeking to perpetuate a sham on the Court by filing the Motion which is without merit in law or fact.
- The Motion [to Dismiss] is nonsensical and a waste of both the Court’s time for entertaining the Motion and the People’s time for having to respond to a frivolous and irresponsible assertion by the Defense.<sup>177</sup>

The Defense Counsel sought sanctions against Chapman for these personal attacks in Chapman’s brief regarding Defense Counsel’s “character, intelligence, and integrity.”<sup>178</sup>

The court found that the words chosen by Chapman in her brief did not rise to the level of egregious conduct that warranted sanctions based on the court’s inherent power.<sup>179</sup> The court, though, thoroughly condemned Chapman’s conduct as “unprofessional,” “unwarranted,” and “wholly unacceptable.”<sup>180</sup>

The court quoted the “Preamble to the Federal Bar Association Professional Ethics Committee’s Standards for Civility in Professional Conduct,” pointing out several key aspects of civility.<sup>181</sup> One, “[c]ivility in professional conduct is the responsibility of every lawyer practicing in the federal system.”<sup>182</sup> Two, incivility to anyone in the legal process, such as opposing counsel, adverse parties, judges, and court personnel, “demeans the legal profession, undermines the administration of justice, and diminishes respect for both the legal process and the results of our system of justice.”<sup>183</sup> Three, “[u]ncivil conduct of lawyers or judges impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently.

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176. *People v. Scott*, No. SX-09-CR-709, 2010 WL 11452083, at \*1 (V.I. Super. Oct. 27, 2010).

177. *Id.*

178. *Id.*

179. *Id.* at \*2.

180. *Id.* at \*2-3.

181. *Id.*

182. *People v. Scott*, No. SX-09-CR-709, 2010 WL 11452083, at \*2 (V.I. Super. Oct. 27, 2010).

183. *Id.*

Such conduct may delay or deny justice and diminish the respect for law, which is a cornerstone of our society and our profession.”<sup>184</sup> The court admonished both lawyers that any further unprofessional conduct would be sanctioned.<sup>185</sup>

This case includes a variety of takeaways for students. First, the case illustrates that simply because a lawyer avoids sanctions for incivility does not mean the lawyer’s conduct was acceptable. A lawyer’s uncivil conduct, even if it does not result in sanctions by the court, can still demean the legal profession, waste the court’s resources, and prevent the efficient resolution of a case. Second, this case also provides an illustration of incivility within a brief, which further demonstrates that the words lawyers use in speech and writing should always be civil and professional. Finally, the *Scott* case shines a light on uncivil advocacy that attacks opposing counsel personally instead of attacking the merits of opposing counsel’s arguments. This case fits well into a Legal Research & Writing class and Civil Procedure because it deals with briefs. It also coincides with Professional Responsibility as it involves attorney misconduct.

### C. RESPONDING TO INCIVILITY

This is a good point in class to discuss how to respond to incivility. The natural response to incivility from opposing counsel, for instance, might be responding in kind with one’s own uncivil act to, among other things, avoid looking weak in front of one’s client.<sup>186</sup> This response, though, perpetuates incivility and might lead to sanctions for the responding attorney.<sup>187</sup> In general, one must “maintain a reputation of a ‘firm and fair, honest, no-nonsense, professional and courteous’ attorney.”<sup>188</sup> One approach to incivility includes ignoring it.<sup>189</sup> Another approach, based on the author’s personal experience, involves responding with civil and professional behavior, which sometimes results in the uncivil lawyers changing their behavior, and sometimes it does not. In addition, sometimes trying to interact in a more personal way with uncivil attorneys through face-to-face meetings or telephone calls can help “change their demeanor and soften their approach.”<sup>190</sup>

As far as particular circumstances, if the uncivil behavior takes the form of a nasty email or letter, then one should wait until after sleeping on the matter to respond.<sup>191</sup> If not, then one’s response email could wind up serving as the uncivil lawyer’s exhibit in a motion for sanctions against the responding lawyer.<sup>192</sup> If the

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184. *Id.* at \*3.

185. *Id.*

186. A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 374–75 (1998).

187. *Id.* at 375.

188. Haley, *supra* note 35, at Part VIII.

189. Dickerson, *supra* note 186, at 375.

190. Professionalism, Ethics and Civility Committee of ABOTA, *If Incivility Strikes . . . How Should You Respond With Civility In These Situations?*, [http://www.texasbarcle.com/Materials/Events/11381/149185\\_01.pdf](http://www.texasbarcle.com/Materials/Events/11381/149185_01.pdf) [<https://perma.cc/96X5-AKGF>] (last visited Feb. 21, 2018).

191. *Id.*

192. *Id.*

uncivil behavior occurs during a deposition, then the innocent lawyer can make a record of the uncivil behavior as grounds for terminating the deposition, obtaining more time to continue the deposition, or seeking sanctions against the uncivil lawyer.<sup>193</sup> Responding to incivility requires, above all other things, “strong self-control,”<sup>194</sup> which can be very difficult, particularly in stressful and high-pressure situations that are inherent in the practice of law.

Discussion Questions:

- a. How would attorneys in your state react to civility rules? How would they react to a mandatory civility oath?
- b. What could the lawyers have done differently in each of these cases?
- c. How can you respond to uncivil behavior as a lawyer?

The next part consists of two problems and their answers. The professor can pose each problem to the class and analyze each in turn.

A. Problems

The following problems—one hypothetical and the other based on an actual case—create an opportunity to discuss situations that a law student might face as an attorney and how an attorney can and should handle these situations.

Problem 1:

You represent a client in a case scheduled for trial on Monday.<sup>195</sup> Opposing counsel calls you on the Thursday before trial, and she requests that you agree to move the trial date because her father just passed away.<sup>196</sup> You speak to your client about the requested continuance, and your client wants to “play hardball.”<sup>197</sup> The client says, “Let’s not move the date. It may rattle opposing counsel if we proceed with the trial, or the other side may want to settle if it realizes it is forced to begin the trial without its lead counsel.”<sup>198</sup> Opposing counsel indicates that she will file the motion to continue trial with or without you, but she strongly prefers you stipulate to the continuance and sign off on a joint motion to continue the trial.<sup>199</sup>

Assuming the client will not suffer any prejudice if the trial is continued, should you oppose the motion to continue trial as your client currently wishes or should you go back to your client to argue why it should agree to a joint motion?<sup>200</sup>

193. Dickerson, *supra* note 186, at 376–77.

194. Daniel R. Coquillette et al., Massachusetts Continuing Legal Education, Inc., PROFESSIONALISM AND CIVILITY IN THE PRACTICE OF LAW, PPRM MA-CLE 1-1, § 2 (2014).

195. *See, e.g.*, RAYMOND & HUGHES, *supra* note 142, at 150.

196. *See, e.g., id.*

197. *See, e.g., id.*

198. *See, e.g., id.*

199. *See, e.g., id.*

200. *See, e.g., id.*

Answer:

You know that the client is right about the potential negative effects for the opposing party by proceeding to trial without its lead counsel or forcing settlement negotiations that could be favorable for your client, but you also know that a court will likely grant this request for continuance given the circumstances whether your client supports the continuance or not.<sup>201</sup> Moreover, if your client does decide to oppose the motion, then it will cost the client money to pay you to file an opposition, prepare for the hearing, and then argue at the hearing on the motion for a continuance. In addition, the judge, who may be the trier of fact as well, will likely hold you and your client in a negative light for opposing such a motion given your lack of empathy and compassion for another person. Furthermore, the Court will also waste resources because it will be required to review the opposing briefs and potentially hold a hearing.<sup>202</sup>

Students must understand that these types of situations, which involve attorneys asking for a continuance of a hearing or deposition or for an extension of time to respond to discovery, happen quite often in practice. Talking to your client about agreeing to the continuance serves as the best option. If you speak to your client and obtain permission to agree to the continuance, then it will save your client money, keep you and your client in good graces with the court, and it will avoid wasting judicial resources.<sup>203</sup> Finally, if you ever need a similar courtesy from opposing counsel in this case or the next, opposing counsel will be more likely to grant you that courtesy if you treat her the way you would want to be treated. You never know when you might need a continuance for a hearing or trial, or when you might need an extension to respond to discovery based on unexpected events that may arise in your personal life or practice or your client's life or business.

Civility includes cooperation,<sup>204</sup> and failing to cooperate with opposing counsel throughout litigation would result in unnecessary motions and disputes that would completely congest the courts. At the same time, civility does not mean acquiescing or agreeing to whatever accommodations opposing counsel requests without regard to one's own client.<sup>205</sup> For example, if the client's investors and management want and need the trial to commence as soon as possible on a bet-the-company case because they need to know (and plan for) whether the company will continue to exist, then the lawyer should reject a request for an extension by opposing counsel since it would prejudice the client's interest. The lawyer must always keep in mind what is best for the client, and civility and cooperation often benefit the client as shown in the first paragraph of this answer.

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201. See, e.g., *id.*

202. See, e.g., *id.*

203. See, e.g., *id.*

204. See Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601, 625 (2016) (discussing the importance of cooperation within civility).

205. See Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 302 (1995) (arguing that civility could constrain advocacy).

## Problem 2:

Lawyer personally attacks opposing counsel and lawyers involved in the case, both in writing and verbally, in a case pending in federal court.<sup>206</sup> Among other things, Lawyer insults the other lawyers with names and phrases including “‘stooges,’ ‘puppet,’ ‘weak p\*ssyfooting “deadhead”’ who ‘had been ‘dead’ mentally for ten years.’”<sup>207</sup> Lawyer describes the work of the other attorneys as “‘garbage,’ demonstrating ‘legal incompetence,’ and involving ‘ludicrous additional time and expenses.’”<sup>208</sup>

The court sanctions the lawyer \$25,000 for his uncivil conduct.<sup>209</sup> Lawyer appeals the sanctions. In the moving papers for the appeal, Lawyer insults opposing counsel again, this time denigrating the opposing counsel’s school, mentioning that its low rank is below that of his own alma mater, and noting opposing counsel was once fired from a law firm.<sup>210</sup>

Was Lawyer’s conduct improper at any stage of the proceedings? If Lawyer practices in a jurisdiction that requires civility, should the court sanction Lawyer? If the court does decide to sanction Lawyer, what should the sanction be?

## Answer:

The facts of this problem are taken directly from the case of *In re First City Bancorporation of Tex., Inc.*<sup>211</sup> In that case, the bankruptcy court, after several warnings to the attorney, Harvey Greenfield, fined Mr. Greenfield \$25,000.<sup>212</sup> Both the district court and the Fifth Circuit affirmed the bankruptcy court’s hefty sanction.<sup>213</sup> The court, citing *Dondi Prop. Corp. v. Commerce Sav. & Loan Ass’n*, rejected the notion that lawyers must be rude or offensive to serve as zealous advocates.<sup>214</sup> Greenfield should have focused on attacking the merits of any opposing arguments rather than personally attacking the other attorneys in the case.

The next part briefly discusses how a professor might frame civility as a course learning objective. It also includes ways to assess civility.

## D. LEARNING OBJECTIVES AND ASSESSMENT

Law professors may state the following as the course learning objective for civility:

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206. *In re First City Bancorporation of Tex., Inc.*, 270 B.R. 807, 809 (N.D. Tex. 2001), *aff’d sub nom. In re First City Bancorporation of Tex. Inc.*, 282 F.3d 864 (5th Cir. 2002).

207. *Id.* at 810.

208. *Id.*

209. *Id.* at 813.

210. *Id.*

211. *In re First City Bancorporation of Tex., Inc.*, 270 B.R. 807, 807 (N.D. Tex. 2001), *aff’d sub nom. In re First City Bancorporation of Tex. Inc.*, 282 F.3d 864 (5th Cir. 2002).

212. *Id.* at 809.

213. *Id.* at 814.

214. *Id.* at 812, (citing *Dondi Prop. Corp. v. Commerce Sav. & Loan Ass’n*, 121 F.R.D. 284, 288 (N.D. Tex. 1988) (*en banc*)).

By the conclusion of this class, each student will be able to do the following:

Understand the meaning and importance of civility, the costs of incivility, the role of civility in the legal profession, and apply the concept of civility to situations a law student may face as a practicing lawyer.<sup>215</sup>

Law professors can assess law students on the topic of civility by using a multiple choice question regarding civility on an exam, requiring a paper on civility of four or five pages (or longer depending on the importance placed on the topic and the class in which the professor is teaching) using the discussion questions as prompts,<sup>216</sup> or using peer assessments of civility if the students work in groups at any point in the class.<sup>217</sup> Regardless of how a professor assesses civility, it remains a vital topic for law students to learn.

### CONCLUSION

Law schools must prepare their students not only for clinics, internships, and externships, but also for the practice of law. One of the most critical aspects of practicing law includes dealing with opposing counsel, clients, and third parties in a respectful manner. Law students need to know how to interact effectively and cooperate with everyone in the legal profession, particularly opposing counsel. Devoting time in the law school curriculum to civility, along with professors modeling civility, will help law students understand the importance of civility in the practice of law and the administration of justice.

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215. This Course Learning Objective supports the required learning objective of ABA Standard 302—“the exercise of professional and ethical responsibilities to clients and the legal system.” ABA, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016-2017 § 302(c). Thus, the proposed civility lesson in this Article could form the basis to show a law school is meeting Standard 302(c).

216. See, e.g., Susan Swaim Daicoff, *Lawyer, Form Thyself: Professional Identity Formation Strategies in Legal Education Through “Soft Skills” Training, Ethics, and Experiential Courses*, 27 REGENT U. L. REV. 205, 211-12 (2015); Benjamin V. Madison, III & Larry O. Natt Gantt, II, *The Emperor Has No Clothes, But Does Anyone Really Care? How Law Schools Are Failing to Develop Students’ Professional Identity and Practical Judgment*, 27 REGENT U. L. REV. 339, 401-02 (2014-2015).

217. Alison Donahue Kehner & Mary Ann Robinson, *Mission: Impossible, Mission: Accomplished or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 U. DAYTON L. REV. 57, 94-95 (2012); Paula Schaefer, *A Primer on Professionalism for Doctrinal Professors*, 81 TENN. L. REV. 277, 301-04 (2014); Sophie Sparrow, *Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism*, 13 J. LEG. WRITING 113, 151-55 (2007) (discussing whether a law professor should grade civility and, if so, how).

## APPENDIX A

## The Importance of Being Civil

- Show the “Texas Style Deposition” YouTube Clip.
- Discuss the Dunkin Donuts/Angry Birds Depositions Case.
- Define Civility – treating others with courtesy, dignity and respect, as well as demonstrating cooperation, honesty, and restraint.
- Show a PowerPoint slide(s) (see Appendix E) that includes Sandra Day O’Connor’s quote on civility, as well as the ten common core aspects of civility.
- Discuss briefly the relationship between civility, professionalism, and ethics.
- Show a PowerPoint slide(s) on the costs of incivility (see Appendix E).
- Stress that the most successful attorneys are zealous advocates while remaining civil.
- Answer the Discussion Questions with the class using a PowerPoint slide if desired (see Appendix E).



## APPENDIX B

## Promoting Civility in the Legal Profession

- Discuss civility codes, including showing several exemplar rules (see Appendix F).
- Discuss civility being added into attorneys' oaths, and show South Carolina's oath (see Appendix F).
- Discuss ABOTA's and the American Inns of Court's efforts regarding civility.
- Discuss mandatory civility jurisdictions, including the rationale for it and the methods of enforcing it, including South Carolina through its attorney oath.
- Discuss the relationship between civility and professional identity formation.
- Answer the Discussion Questions with the class using a PowerPoint slide if desired (see Appendix F).

## APPENDIX C

### Case Studies

- Discuss each of the four cases in Section II of the Article.
- Answer the Discussion Questions with the class using a PowerPoint slide if desired (see Appendix G).

## APPENDIX D

## Problems

- Go through Problem 1 (see Appendix H for the Problem) and the Answer, and discuss how common requests for continuances and extensions are.
- Go through Problem 2 (see Appendix H for the Problem), and discuss the Answer. Talk about how briefs and oral argument should focus on the merits (or lack thereof) of the opposing side's arguments, rather than shortcomings of opposing counsel or the opposing party personally.

## APPENDIX E

## PowerPoint Slide(s) Material Regarding The Importance of Being Civil

- Civility means treating others with courtesy, dignity and respect, as well as demonstrating cooperation, honesty, and restraint.
- “More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public’s perception of lawyers.”— Former United States Supreme Court Justice Sandra Day O’Connor
- Ten common core aspects of civility:
  - (1) keep commitments and seek agreement and accommodation with regard to scheduling and extensions;
  - (2) be respectful and act in a courteous, cordial, and civil manner;
  - (3) be prompt, punctual, and prepared;
  - (4) maintain honesty and personal integrity;
  - (5) communicate with opposing counsel;
  - (6) avoid actions taken merely to delay or harass;
  - (7) ensure proper conduct before the court;
  - (8) act with dignity and cooperation in pre-trial proceedings;
  - (9) act as a role model to the client and public and as a mentor to young lawyers; and
  - (10) utilize the court system in an efficient and fair manner.
- Major costs of incivility:
  - (1) losing a case;
  - (2) increasing costs for clients;
  - (3) wasting judicial resources;
  - (4) increasing stress for attorneys;
  - (5) the attorney suffers professional harm; and
  - (6) perpetuating negative perceptions and stereotypes about lawyers and the legal system.

## Discussion Questions:

1. What kind of attorneys do you think clients want?
2. What kind of attorneys do you want you to be?
3. What kind of attorneys do you want to face on the opposing side?

## APPENDIX F

## PowerPoint Slide(s) Material Regarding Promoting Civility in the Legal Profession

- Examples of rules found in civility codes:
  - (a) A lawyer owes, to opposing counsel, a duty of courtesy.<sup>218</sup>
  - (b) Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility.<sup>219</sup>
  - (c) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct.<sup>220</sup>
- South Carolina’s civility language in its attorney oath:
 

“To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”
- Educating Tomorrow’s Lawyer Study regarding Professional Identity Formation competencies: Nearly 92% of lawyers answered that “[t]reat others with courtesy and respect,” which is the definition of civility, was necessary in the short term (or immediately) for the success of a new lawyer.<sup>221</sup>

## Discussion Questions:

1. Can states regulate attorney behavior?
2. Should civility be mandatory for attorneys?
3. Will acting civilly make you a more desirable candidate for a legal job or a more effective lawyer?

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218. *Dallas Bar Association Guidelines of Professional Courtesy*, DALLAS BAR ASS’N, [http://www.dallasbar.org/sites/default/files/dba\\_guidelines\\_of\\_professional\\_conduct\\_0.pdf](http://www.dallasbar.org/sites/default/files/dba_guidelines_of_professional_conduct_0.pdf) [https://perma.cc/8AJR-M9AE].

219. *Id.*

220. *Id.*

221. Alli Gerkman & Logan Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient*, EDUCATING TOMORROW’S LAWYERS, (July 2016), [http://iaals.du.edu/sites/default/files/reports/foundations\\_for\\_practice\\_whole\\_lawyer\\_character\\_quotient.pdf](http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf) [https://perma.cc/FB33-3DZG].

## APPENDIX G

## PowerPoint Slide(s) Material Regarding Case Studies

## Drug Dealer Email:

I have a client who is a drug dealer on . . . Street down town [sic]. He informed me that your daughter, [redacted] was detained for buying cocaine and heroine [sic]. She is, or was, a teenager, right? This happened at night in a known high crime/drug area, where alos [sic] many shootings take place. Lucky for her and the two other teens, they weren't charged. Does this make you and [redacted] bad parents? This incident is far worse than the allegations your client is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack head at night on or near . . . Street. Think about it. Am I right?<sup>222</sup>

## Discussion Questions:

1. How would attorneys in your state react to a mandatory civility oath?
2. What could the lawyers have done differently in each of these cases?
3. How will you respond to uncivil behavior as a lawyer?

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222. *In re* Anonymous Member of the S.C. Bar, 709 S.E.2d 633, 636 (S.C. 2011).

## APPENDIX H

## PowerPoint Slide(s) Material Regarding Problems

## Problem 1:

You represent a client in a case scheduled for trial on Monday.<sup>223</sup> Opposing counsel calls you on the Thursday before trial, and she requests that you agree to move the trial date because her father just passed away.<sup>224</sup> You speak to your client about the requested continuance, and your client wants to play “hardball.”<sup>225</sup> The client says, “Let’s not move the date. It may rattle opposing counsel if we proceed with the trial, or the other side may want to settle if it realizes it is forced to begin the trial without its lead counsel.”<sup>226</sup> Opposing counsel indicates that she will file the motion to continue trial with or without you, but she strongly prefers you stipulate to the continuance and sign off on a joint motion to continue the trial.<sup>227</sup>

Assuming the client will not suffer any prejudice if the trial is continued, should you oppose the motion to continue trial as your client currently wishes or should you go back to your client to argue why it should agree to a joint motion?<sup>228</sup>

## Problem 2:

Lawyer personally attacks opposing counsel and lawyers involved in the case, both in writing and verbally, in a case pending in federal court.<sup>229</sup> Among other things, Lawyer insults the other lawyers with names and phrases including “‘stooges,’ ‘puppet,’ ‘weak p\*ssyfooting ‘deadhead’” who ‘had been ‘dead’ mentally for ten years.’”<sup>230</sup> Lawyer describes the work of the other attorneys as “‘garbage,’ demonstrating ‘legal incompetence,’ and involving ‘ludicrous additional time and expenses.’”<sup>231</sup>

The court sanctions the lawyer \$25,000 for his uncivil conduct.<sup>232</sup> Lawyer appeals the sanctions. In the moving papers for the appeal, Lawyer insults opposing counsel again, this time denigrating the opposing counsel’s school,

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223. See e.g., MARGARET RAYMOND & EMILY HUGHES, *THE LAW AND ETHICS OF LAW PRACTICE*, 150 (2d ed. 2009).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *In re* First City Bancorporation of Tex., Inc., 270 B.R. 807, 809 (N.D. Tex. 2001), *aff’d sub nom. In re* First City Bancorporation of Tex. Inc., 282 F.3d 864 (5th Cir. 2002).

230. *Id.* at 810.

231. *Id.*

232. *Id.* at 809.

mentioning that its low rank is below that of his own alma mater, and noting opposing counsel was once fired from a law firm.<sup>233</sup>

Was Lawyer's conduct improper at any stage of the proceedings? If Lawyer practices in a jurisdiction that requires civility, should the court sanction Lawyer? If the court does decide to sanction Lawyer, what should the sanction be?

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233. *Id.* at 813.



## APPENDIX I

**Mallory A. Beagles**

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**From:** Sweeney, Martin [MSweeney@cozen.com]  
**Sent:** Friday, March 02, 2012 9:09 AM  
**To:** Sweeney, Martin  
**Cc:** Chad Arnette; Bill Warren; Mallory A. Beagles  
**Subject:** Re: Buxton lawsuit: Deposition of Rock Foster

Chad, you'd better call my cell below. No excuses.

Martin J. Sweeney  
Cozen O'Connor  
1717 Main Street  
Suite 3400  
Dallas, Texas 75201  
P: 214-462-3024  
F: 1-866-451-7976  
C: 214-507-4190

On Mar 2, 2012, at 12:26 AM, "Sweeney, Martin"

<MSweeney@cozen.com> wrote:

> You are a liar and a coward Chad. My motion will prove that.

>

> If you want to be a man, any time, any place.

>

> Otherwise we will allow Judge Womack to sort it out because you are gutless.

>

>Martin J. Sweeney

>Cozen O'Connor

>1717 Main Street

>Suite 3400

>Dallas, Texas 75201

>P: 214-462-3024

>F: 1-866-451-7976

>C: 214-507-4190

>

> On Mar 1, 2012, at 11:01 PM, "Sweeney, Martin"

<MSweeney@cozen.com> wrote:

>

> > And you are a p\*ssy.

>>

>> Martin J. Sweeney

>> Cozen O'Connor

>> 1717 Main Street

>> Suite 3400

>> Dallas, Texas 75201

>> P: 214-462-3024

>> F: 1-866-451-7976

>> C: 214-507-4190

>>

>> On Mar 1, 2012, at 11:00 PM, "Sweeney, Martin"

<MSweeney@cozen.com> wrote:

>>

>>> I'm threatening only your unprofessional behavior Chad.

>>>

>>> And, I will prove that. To demand artificial deadlines on these depositions is sanctionable when I told you that I would produce all three in March, when you whined about traveling in a Sunday, I accommodated that, as well. I have to line up three witnesses, and a local counsel, and I agreed there would be no need another subpoena p\*ssy.

>>>

>>> Martin J. Sweeney

>>> Cozen O'Connor

>>> 1717 Main Street



## APPENDIX J

**From:****Sent:** Thursday, October 09, 2008 2:59 PM**To:****Cc:****Subject:** RE: BROWNELL V VW

Three things Corky:

- (1) While I am sorry to hear about your disabled child; that sort of thing is to be expected when a retard reproduces, it is a crap shoot sometimes retards can produce normal kids, sometimes they produce F\*\*\*ed up kids. Do not hate me, hate your genetics. However, I would look at the bright side, at least you definitely know the kid is yours.
- (2) You are confusing realities again the retard love story you describe taking place in a pinto and trailer is your story. You remember the other lifetime movie about your life: "Special Love" the Corky and Marie story; a heart-warming tale of a retard fighting for his love, children, pinto and trailer and hoping to prove to the world that a retard can live a normal life (well kinda).
- (3) Finally, I am done communicating with you: your language skills, wit and overall skill level is at a level my nine-year could successfully combat; so for me it is like taking candy from well a retard and I am now bored. So run along and resume your normal activity of attempting to put a square peg into a round hole and come back when science progresses to a level that it can successfully add 50, 75, or 100 points to your I.Q.

## APPENDIX K

**Voicemail:**

We got your last message. Uh. I'll tell you very bluntly, uh, if you are tending in any way to, uh, send these emails for any purpose whatsoever, other than to vent, uh, my response to you is very simply going to be, uh, save your f\*\*\*ing breath. And if you have any issue you want to speak with McShade or myself about, call us and discuss them. If you send one more f\*\*\*ing email like this again, I can assure you your life on this deal is going to be very unpleasant because I'm going to get my client involved and we are going to make it very clear that you are not cooperating. So, our changes are necessary, the change was addressed in a global comment to you was to insert our client's address. You made a change without our authorization, whether you consider it material or not, again, I don't give a flying f\*\*\*. Make the f\*\*\*ing change, be the middle man monkey, or give us the job to do and we'll take care of it and we will do it properly. Your mortgage document was sloppy and sh\*\*ty, alright. We limited our comments and we made very specific comments. If you can't be a monkey f\*\*\*ing scribe then, you know what, let us do it. We will get one of our secretaries to handle it.

## APPENDIX L

**Deposition:**

**Answer:** Don't nail me on that.

**Question:** Did you obtain prior approval from the association for that change.

**Answer:** Actually, I'm assuming you people have gone through the files; the building files, and all the other necessary files. If you haven't, you're a fool. Uh, actually, it was an accommodation, uh, that we spoke about and we did never made a... It was an accommodation and we never made a formal application about it. And if you take exception to it, I'll put it back where it was, which is right on the [inaudible] line. You want me to do that?! I'll be glad to! Today, tomorrow, or next week! That's where it was! It was on the survey, it was on the survey! And I gently removed it! Am I going to be punished for it?! Good, I'll put it back!

**Question:** Was that a yes or a no?

**Answer:** It was a f\*\*\* you! . . . What's your question?

# abt1 REPORT

LOS ANGELES

SUMMER 2019



## CIVILITY

“As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.”

*California Attorney Oath  
(Cal. Rules of Court, rule  
9.7, effective 5/14.)*

████████████████████

**“[T]he necessity for civility is relevant to lawyers because they are the living exemplars—and thus teachers—every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best.”**

*—Lasalle v. Vogel (2019) 36 Cal.App.5th 127, 141,  
quoting Chief Justice Warren E. Burger, The Necessity for Civility  
(Address to the American Law Institute), 52 F.R.D. 211.*

████████████████████

## PRESIDENT'S MESSAGE



*Sabrina H. Strong*

Civility among lawyers is a topic I have wrestled with both inside and outside the courtroom. In this age of coarseness and division, the standards that we aspire to—that we're held to—have never been more important. As incoming president of the ABTL's Los Angeles Chapter a year ago, I recognized an opportunity and a responsibility to put these concerns into action. My goal: Find new, meaningful ways to promote civility.

I know that this cause is hardly new. I've lost count of how many lawyer organizations and courts have adopted civility guidelines—unfortunately to little effect, as best I can tell. But giving up is not an option.

So, as part of assembling the 2018-2019 and committee team, I created a new Civility Committee. I invited Michael Mallow to serve as chair and Celeste Brecht to serve as vice-chair, and they eagerly accepted. When they in turn invited board members to participate, about a third of our board volunteered—a sign, I think, of just how many of us take this issue to heart. By the end of the committee's

e. You are reading one of those projects: a special, extra-long issue of the Los Angeles Chapter's ABTL Report devoted entirely to civility. The diverse, distinguished authors here explore the sources of incivility, address the problems it causes, ask whether it works (spoiler: it doesn't), place it in the context of lawyer well-being and mindfulness, provide judicial perspectives, and suggest ways to counter it with civility.

We have no illusions that this issue, or any of our other projects, will suddenly tame our profession's worst excesses. We know that some lawyers are fundamentally unwilling to display—or may be incapable of displaying—the kind of professionalism we take for granted in ABTL members. But we believe that there are many other lawyers, particularly younger lawyers, who may yet be willing to examine whether they want to live their professional lives mired in toxicity. As you read this issue, we hope you will think of ways that you can help us reach them.

No matter how quixotic this quest may be, we must stand up and be counted among those who wish to preserve an ethical code that makes us proud to be lawyers.

Please read, think, and speak about this. The future of our profession depends on it.

*Sabrina H. Strong is a partner at O'Melveny & Myers LLP and the 2018-2019 President of the Los Angeles Chapter of the ABTL.*

ASSOCIATION OF BUSINESS TRIAL LAWYERS

# abtl REPORT

8502 E. Chapman Avenue, Suite 443  
Orange, California 92869  
(323) 988-3428 • Fax: (714) 602-2505  
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## CIVILITY REPORT INTRODUCTION



*Michael L. Mallow*

We have all encountered incivility. And if we honestly, most of us can think of a time when we were uncivil. What can we do about incivility? The answer is: a lot. But like many good things in life, civility begins at home.

Some years ago, I had a very important case for a very important client, and my behavior was less than a model of civility. I was outraged that opposing counsel—call him Paul—berated two of my associates during a discovery conference. The next day, there was a conference call between our two teams, including both sides' associates. Going into the call, I had a full head of steam. I was going to be the protector and champion of my associates. I quickly lashed out at Paul for how he treated my team the day before. From that less-than-auspicious start, tempers escalated, and civility quickly diminished to a point where the crosstalk was so severe that neither Paul nor I could hear what the other said.

But although Paul and I weren't listening to each other, our associates were surely listening. For reasons I can't now explain, at some point during the call it hit me that I was acting horribly and that I was being anything but the role model I wanted to be. I asked Paul if he was willing to put the conference call on hold and speak directly with me on a private line, just the two of us, with no associate audience. During that private call, I shared my epiphany: Paul and I were being jerks, and we owed our associates far better than that. He agreed. We decided to get back on the conference call, apologize to each other's associates for our behavior, and have a "do-over" of the call—this time as professionals rather than as bickering children.

The litigation against Paul and his team lasted for another years. During that time, there were many hard-fought issues, dozens of depositions, and numerous contentious hearings, including class and summary judgment. But Paul and I never had a negative word to say to or about each other for the remainder of the litigation, and we would

often have lunch or dinner together when we were on the road for depositions. It was a tough case, and Paul and I were tough adversaries for our clients' positions, but we kept the litigation in perspective—and we ended up becoming friends. It was one of the highlights of my career, not for the result, but for how Paul and I were able to conduct the litigation after that horrible conference call.

Civility is not about being soft, or giving in, or selling your client short. To the contrary, approaching the practice with civility is always in a client's, and in our own, best interest. Being civil is being able to listen, with intent and thoughtfulness; making an effort to understand the other side's point of view; and using what one learns to the client's best advantage. Being civil promotes and reduces cost because it obviates needless and wasteful arguments and disagreements. Being civil enhances the enjoyment of the profession for all because it reduces unnecessary adversity and enhances well-being. It allows us to focus on the issues that are the most important and material to our clients and the litigation.

Civility is much more than merely exchanging pleasantries. Nothing makes that clearer than this issue of the ABTL Report. The articles in this issue touch on the complexity and importance of civility. From what civility is, to what causes incivility, to ways of promoting civility and combating incivility, as Chair of the ABTL's Civility Committee, I hope that this issue of the ABTL Report can serve as a resource for enhancing professionalism in our profession.

Deep thanks go to the authors who dedicated substantial time and effort to the kaleidoscope of articles that makes up this special issue of the ABTL Report. And a very appreciative tip of the hat to our ABTL Report Editors—Robin Meadow, John Querio, and Jessica Stebbins Bina—whose vision, perseverance, and guidance made this issue a reality.

*Michael L. Mallow is a partner at Shook, Hardy & Bacon L.L.P. and is the Chair of the Los Angeles Chapter's Civility Committee.*

## A CIVILITY ROUNDTABLE

### THE 2019 ABTL BOARD RETREAT



Robin Meadow

At this year's Joint Board Retreat, hosted by the Los Angeles Chapter, nearly 100 lawyers and judges devoted Saturday morning to discussing the problem of incivility—what it is, why it exists, and what to do about it. Justice Brian Currey guided the conversation. This article summarizes some of the key points that emerged.

#### What Is Incivility?

The image that probably comes to mind when someone complains about incivility is overt abuse—name-calling, physical threats, ad hominem attacks in and the like. But the meeting participants focused more on the wide variety of contexts in which incivility arises.

For example, incivility can surface when a lawyer conveys disrespect of another lawyer's area of practice—maybe a lawyer whose practice focuses on big-ticket commercial class actions acts condescendingly toward someone who handles collection cases. Another breeding ground for incivility is age difference—experienced lawyers sometimes abuse newer lawyers who are

It wasn't until late in the meeting that one participant said, "Any conversation about civility must talk about gender and people of color." This kind of incivility often goes unnoticed by those who are not subjected to it, but it's widespread. One participant described how, during a break from a panel she was on, a long line of women waited to ask her and her co-panelists how to respond to gender/color bias. Surprising to at least some at the meeting was that not even bench are immune. (See Edmon & Jessner, *Gender Equality is Part of the Civility Issue*, in this issue.)

The causes of incivility are not always obvious. Discovery disputes and email exchanges were consistently recognized as common settings for incivility, but they are more symptoms (or perhaps facilitators) than causes. One participant suggested that, while business clients don't

necessarily want lawyers to be uncivil, high billing rates create high client expectations, which in turn may ratchet up the lawyers' perceived need to be "tough." Another noted that it's a fact of law life that junior lawyers are rewarded not for civility, but for the number of hours they bill—and incivility generally means more hours billed. And sometimes the nature of a particular case itself may create tension that leads to incivility: One or both sides may feel insecure about a issue, and that insecurity may trigger combativeness.

The way the discovery statutes work may also be an inducement to incivility: One can burden an opponent with a long, drawn-out discovery dispute and then, at the last minute, give in and avoid sanctions.

There was less consensus when the discussion turned to the strategy of villainizing an opposing party, as distinguished from that party's counsel. Some felt that this kind of conduct pushed the bounds of civility; others felt that, at least depending on the nature of the arguments made, it could be legitimate advocacy.

#### Why Be Civil?

In an era of coarsened discourse and hyper-partisanship, the advantages of civility may not be readily apparent. And, some may ask, if incivility furthers a client's cause, is it a virtue rather than a vice?

Not surprisingly, no one at the meeting agreed with that sentiment. The consensus was that any short-term advantage from incivility will ultimately be offset by long-term loss, either in the case itself or in damage to the uncivil lawyer's reputation. But most of the discussion focused on civility's advantages. (See Kuhl, *Winning Through Cooperation*, in this issue.)

Several participants talked about how civility furthered their own business development. Why? Because business development thrives on personal relationships, and civility fosters good personal relationships.

- One participant described a case in which he and his counterpart on the opposing legal team—both the most junior lawyers—were the only ones who could have a civil conversation. They developed a good relationship that some years later, after one had taken an in-house position,

*Continued on Page 6*

*A Civility Roundtable...continued from Page 5*

he hired the other to represent his company.

- An in-house lawyer described consulting different firms about a new case. Several firms talked about how tough they would be with the lawyer on the other side. She hired the firm that described its experience working effectively with that lawyer.

- Another in-house lawyer said, “When I hear and villainizing, I hear dollars.” Incivility costs money, and business clients generally don’t like that.

Another casualty of incivility—and a professional behavior—is one’s reputation. There were repeated comments about how your reputation follows you—how judges have long memories and talk to each other. Among other client the lawyer with the reputation for civility

And anyone interested in going on the bench needs to cultivate his or her reputation for civility. As one participant put it, those with judicial aspirations should behave every day as if their opposing counsel is going to out an evaluation form—because that’s exactly what will happen.

Finally, participants appeared to agree that a civil environment promotes lawyers’ well-being and general job satisfaction. (See Buchanan, *Breaking the Cycle of Incivility Through Well-Being*, and Bacigalupo, *Mindfulness*, both in this issue.)

### Being Civil

There is no lack of guidance about how to be civil. The Los Angeles Chapter has long had civility guidelines, which, along with numerous other guidelines, can be found on the ABTL website: [http://www.abtl.org/la\\_guidelines.htm](http://www.abtl.org/la_guidelines.htm). But these are more in the nature of guiding principles than practical advice. The meeting participants focused on the latter.

In one participant’s words, “Litigation should go back to being a contact sport.” There appeared to be universal agreement that the best way to promote civility is through personal contact and communication. For example:

- Start the case with a phone call to introduce yourself.
- When doing out-of-town depositions or hearings, invite opposing counsel to dinner—not to discuss the case or settlement, but just to spend time together.

- Pick up the phone: Conversations, rather than emails, make it harder to be uncivil.

- One judge has a strategy of ordering disputing lawyers to go share a cup of coffee without saying anything about the case.

- Invite opposing counsel to an ABTL event.

(See Segal, *A Civility Checklist*, in this issue.)

Civility in letters and emails should be easier because they aren’t—or at least shouldn’t be—spontaneous: Just pause (or wait a few hours) to read what you’ve written before hitting “send.” Civility in court should be easier still. One suggestion was to write memoranda in a way that encourages the judge to copy your language into the resulting order—a technique that will quickly weed out invective and ad hominem attacks.

Going deeper, participants talked about the importance of modeling civil behavior for others, most importantly junior colleagues: In one participant’s words, “Don’t just perform civility, practice it.” It’s not enough just to be civil to opposing counsel in front of a judge or other observers, but not elsewhere. You don’t promote civility when you a civil telephone conversation and then, after hanging up, say to others in the room, “What a jerk.” Language always matters, regardless of where or when you use it. In short, good mentoring breeds civility. (See Lanstra, *Teaching Civility*, in this issue.)

On the teaching front, Michael Mallow, chair of the Los Angeles chapter’s Civility Committee, noted that one of the committee’s projects—in which it hopes to enlist state-wide ABTL support—is to make civility a required MCLE subject. After all, the California Attorney Oath now requires lawyers to that “As an of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity.”

Others noted that being civil requires more than just being neutral. You can foster civility by showing respect for the other side. And you might thank opposing counsel when you’re able to resolve an issue cooperatively.

One’s mental attitude matters, too. Generalizations and stereotypes—not just gender-based or racial, but professional attributes like plaintiff/defense, big/small liberal/conservative—are counterproductive. Every opposing

*A Civility Roundtable...continued from Page 6*

counsel—and every judge—is an individual human being. There will be more civility when you think of them that way.

### The Judicial Perspective

The judicial at the meeting offered a wide range of experiences with incivility—not surprisingly, with discovery as the primary theme.

The most frequent comments focused on the of early, hands-on involvement by judges, principally in face-to-face informal conferences with follow-up. Last year saw the enactment of Code of Civil Procedure section 2016.080, which authorizes courts to hold “informal discovery conferences” to resolve issues the parties are unable to resolve by themselves. But some judges had already discovered this technique and were using it with great success. One judge essentially stopped hearing discovery motions, and instead brought the lawyers into chambers to discuss their disputes. As he put it, “Emails don’t count, letters don’t count. At the end of the day, everyone is going to get what they need for trial.”

Both judges and lawyers at the meeting stressed the highly positive impact of direct judicial participation in disputes. One judge who sometimes agrees to be available during depositions reported that, in many cases, the lawyers never call—they resolve the dispute rather than getting the judge involved. Likewise, when someone requests an informal conference, often the dispute magically disappears and the conference is never held.

But informality doesn’t always work, and several judges spoke about the need to impose civility in some cases. This can range from simply ordering lawyers to be civil, to requiring lawyers to the California Attorney Oath’s commitment to “dignity, courtesy, and integrity,” to more coercive measures (ordering the lawyers into the jury room to talk), to—of course—sanctions.

There was some discussion about whether judges should have the kind of with sanctions that Family Code section 271 provides: “[T]he court may base an award of attorney’s fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the

law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys.” But judges who spoke on this topic generally felt that the discovery statutes provide , that sanctions should be a last resort, and that generally they’re not needed when the judge gets personally involved.

But rules do help. One federal judge noted that the amendment to rule 37 of the Federal Rules of Civil Procedure to cover spoliation issues very reduced motion practice in that area.

Other judges spoke of positive reinforcement techniques, particularly complimenting lawyers for good behavior—on the record, so that clients can see it.

There was also a recognition that there are some controversies that all the goodwill in the world can’t resolve—the parties need the judge to make a decision so they can move on. And, as one participant put it, sometimes the lawyers need a judge to “save us from our worst impulses.” (See Currey & Brazile, *What Judges Can Do*, in this issue.)



Meeting participants recognized the reality that they were preaching to the choir—organizations like the ABTL tend to attract lawyers and judges for whom civility is a priority and the norm. But the hope is that by spending time together probing what civility really means and how we can improve our efforts to achieve it, the participants left the meeting with a better appreciation of the value of being civil and of inspiring civility in others.

**Robin Meadow** is a partner at Greines, Martin, Stein & Richland LLP and is a co-editor of the ABTL Report.

## BREAKING THE CYCLE OF INCIVILITY THROUGH WELL-BEING

Whatever the causes, the first step toward a real remedy to the incivility pandemic is recognition of the deeply destructive impact of uncivil conduct on individual lawyers who engage in it, on those subjected to it, on the bar as a whole, and ultimately on the American system of justice. It begins with recognition that civility is, and must be, the cornerstone of legal practice.



*Bree Buchanan*

As the old saying goes, “What goes around, comes around.” Uncivil, unprofessional, and downright hostile behavior invariably induces distress and diminished well-being of those subjected to it. Those who are low on the well-being scale can find that their distress becomes the driver of uncivil, or at least unprofessional, behavior. Throughout my years as director of a lawyers assistance program, I witnessed how substance abuse, depressive episodes, severe anxiety, misplaced aggression, and inability to sleep are routine responses by lawyers who are victimized by the bad behavior of others. (Given that you are reading this article, I expect that you could add to that list.) The distress of callers seeking our services triggered painful recollections of my earlier years as a litigator, when my own level of well-being—so often weighed down by extreme stress, alcohol abuse, and depression—impacted my level of professionalism with other lawyers.

Now, thirty years into my career and a decade into recovery from alcoholism, I find myself a leader in our country’s nascent lawyer well-being movement. Launched by the National Task Force on Lawyer Well-Being in 2016, this initiative well-being as a condition of health that exists on a continuum, from the absence of impairments, such as substance use and mental health disorders, to robust thriving across six dimensions that include occupational, intellectual, spiritual, emotional, social, and physical. With the hindsight gained from hard-earned personal experience and a systemic view of the profession, I see that incivility and well-being (or the lack of it) are intrinsically linked.

My first decade as a lawyer coincided with the 1980’s, a time when Gordon Gekko’s adage, “greed is good,” represented the general “win at all costs” ethos of the era. I began my career as a family law attorney at legal aid, defending victims of domestic violence with a righteous vengeance. While I was on the receiving end of intimidation tactics by opposing counsel and parties, including verbal bullying, I was committed to dishing right back whatever was dished out to me. I also incorporated this behavior into my view of what, who, and how a lawyer should “be.”

Emblematic of this attitude was my century-old photograph, small yet prominently placed over the entrance to our conference room, of an abattoir in which two butchers in their bloody gear smiled ghoulishly up at the camera. At the time, I was greatly amused by this stunt and never gave a thought to what it communicated about my professionalism. Instead, I felt that I was playing along with the ethos of family law litigation’s strategic incivility in which late Friday filings with three-day notices were routine, along with mind-numbing loads of discovery intended to abusively weigh down and kill the spirit of opposing parties and their lawyers. Achieving my client’s objectives should have sufficed, but “grinding my opponent down to a fine dust” was my internal *modus operandi*. Predictably, what I gave, I got in return. I missed more than one Christmas during my son’s early years because of expedited deadlines or last-minute hearings scheduled the following day.

What of the toll that this behavior took on me? As someone subjected to incivility, and even outright bullying, I took home with me the distress, exasperation, anger, and fear

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*Breaking the Cycle of Incivility...continued from Page 8*

that resulted from these experiences. I used our profession's most time-honored means of handling stress overload—alcohol. At first, it was two glasses of wine most nights. But consistent heavy usage, combined with a strong genetic propensity, ultimately led to an alcohol use disorder, mixed with multiple bouts of serious depression.

Having been in recovery for over nine years, I can now look back and see that I also used drinking to handle the internal distress I felt from being in “warrior mode.” It allowed me to continue acting in a manner that with my inherent nature and internal values. Additionally, my drinking resulted in a diminished capacity to practice law to the best of my ability. Suffering from a hangover or dealing with the energy that is a hallmark symptom of depression, I was left with a shortened fuse and lessened ability to function.

A pivotal point in my road to recovery was my experience with my state's lawyers assistance program. (This free and confidential service can be found through this directory: [https://www.americanbar.org/groups/lawyer\\_assistance/resources/lap\\_programs\\_by\\_state/](https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/).) In recovery, I've learned how to better care for myself. In working towards this goal, I have also become better (but not perfect) at taking care of, and treating well, those around me. While incivility still plagues the profession, a new mindset that highly values the physical and emotional well-being of its members is on the cusp of gaining widespread support. As part of that movement, the promotion of civility and professionalism is being put forth as a valid means of improving well-being among lawyers. I believe that the promotion of well-being can also be an effective way to intervene in the cycle of incivility. Treating one another better will result in each of us—not to mention the profession as a whole—being better.

The National Task Force on Lawyer Well-Being was formed in response to back-to-back studies that demonstrated the dismal state of well-being in lawyers and law students. Patrick R. Krill, Ryan Johnson, & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. Addiction Med. 46 (2016); Jerome M. Organ, David B. Jaffe & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the*

*Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. Legal Educ. 116 (2016). In 2017, it published a comprehensive report that laid out 44 recommendations for bringing about systemic change in how the profession as a whole addressed the well-being of its members. Bree Buchanan, et al., *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (2017), available at [www.lawyerwellbeing.net](http://www.lawyerwellbeing.net). In recognition of the integral relationship between civility and well-being, the authors put forth in Recommendation 6 the imperative that members of the legal profession “foster collegiality and respectful engagement throughout the profession.” *Id.* at 15. In support, the Task Force wrote that interactions among members “can either foment a toxic culture that contributes to poor health or can foster a respectful culture that supports well-being.” *Id.* Their words echoed what I found in my own years as a litigator and, later, as a lawyers assistance program director: “Chronic incivility is corrosive. It depletes energy and motivation, increases burnout, and inflicts emotional and physiological damage.” *Id.* Overall, it reduces our sense of well-being and, as I found, sets the stage in too many cases for the onset of impairments that ultimately lead to the degradation of our profession.

Chronic stress and distress are natural responses to living in the crucible of high stakes, “take no prisoners” litigation and legal practice, where sarcasm, rudeness, hostility, belittlement, and even downright bullying are characteristic. These strategies are intentionally used to wear down the opposing side, and they often have the result of doing just that. Living with the resulting uncomfortable feelings can be too painful; reaching for some means to self-medicate is all too common.

The 2016 nationwide study of 13,000 lawyers mentioned above found that between 21 and 36 percent qualify as “problem drinkers.” Organ, *supra*, at 129. In the survey of law students, researchers revealed that one-quarter fell into the category of being at risk for alcoholism. As a lawyers assistance program director, I found that alcohol was the “drug of choice” for 90 percent of the individuals experiencing a substance abuse problem who called our program. In 2019, alcohol consumption is still the most widely accepted way

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*Breaking the Cycle of Incivility...continued from Page 9*

to reduce stress, celebrate success, mourn losses, and often, simply end (or get through) each day. Over time, the anger, egotism, and selfishness experienced during inebriation begin to take over the alcoholic's personality through all hours of the day. Brain changes begin to occur that promote impulsive and uncivil behavior. The alcoholic's elaborate and impenetrable defense system renders impossible any insight into their actions—and any willingness to change absent the most egregious ramifications.

Lawyers are Type A, driven to succeed, and up against equally intense opposition. Attempting to achieve perfection in the midst of this dog-eat-dog world is also a perfect set-up for depression and anxiety. The lawyer study mentioned above found that more than one in four lawyers were struggling with some degree of depression. A frequent, but less recognized, manifestation of a depressed mood disorder—especially with men—is aggression, irritability, and anger. Hypersensitivity to others' actions can lead to lashing out and over-the-top reactions to what superficially appear to be minor slights. Depression in this guise may avoid detection until the person's condition worsens. Throughout this time, toxic incivility may become routine.



Many in the legal profession are concerned about what has been referred to as an “incivility pandemic.” Breaking this cycle of incivility requires, as Jayne Reardon rightly states, “a recognition that civility is . . . the cornerstone of legal practice.” Jayne Reardon, *Civility as the Core of Professionalism*, American Bar Association, Business Law Today, September 19, 2018, available at: [https://www.americanbar.org/groups/business\\_law/publications/blt/2014/09/02\\_reardon/](https://www.americanbar.org/groups/business_law/publications/blt/2014/09/02_reardon/). Recognition alone, however, is simply the beginning. Throughout the country, hortatory civility codes have been adopted, and these are an excellent step in that they serve to call our attention to the situation. I do believe, however, that we as a profession must look more

deeply at what lies at the root.

In addition to adopting standards that promote professionalism, we must pay attention to the well-being of individual lawyers—a rising concern of firms, courts, bar associations, regulators, and law schools. While I don't propose that maintaining consistent professionalism is a curative for alcoholism or depression, I do believe that a more civil work world can create an environment in which these disorders are less prevalent, and all lawyers can experience a heightened sense of well-being.

In our cover letter to the National Task Force's Report, my co-chair, James Coyle, and I wrote:

We are at a crossroads. To maintain public confidence in the profession, . . . and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members' state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.

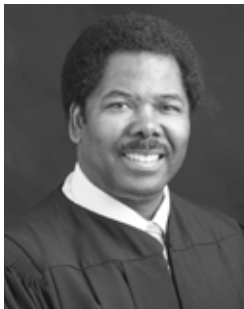
Well-being is intrinsically connected to collegiality, civility and professionalism. When one is diminished or improved, so follows the other. The current systemic efforts to enhance the well-being of lawyers will, I believe, have a positive impact on improving the civility of the profession. In turn —what goes around, comes around—that improved civility will foster enhanced well-being.

*Bree Buchanan, JD, MSF, is a Senior Advisor for Krill Strategies, LLC. She also serves as a founding co-chair of the National Task Force on Lawyer Well-Being and chair of the ABA Commission on Lawyers Assistance Programs.*

## SEVEN THINGS JUDGES CAN DO TO PROMOTE CIVILITY OUTSIDE THE COURTROOM



Justice  
Brian S. Currey



Presiding Judge  
Kevin C. Brazile

What can judges do to promote increased civility and professionalism among civil litigation lawyers outside the courtroom? We don't claim to have all the answers, and would welcome suggestions from colleagues, both on and off the bench. As a way of getting that discussion started, we offer seven things judges can do—and in many instances, are already doing—to promote civility:

### 1. Care about civility outside the courtroom and commit to doing something about it.

We promote civility as treating others with dignity, respect, and courtesy—treating others as you would like them to treat you. This includes conduct such as punctuality, preparedness, accommodating opposing counsel's reasonable requests, and communicating politely, both orally and in writing. In short—acting professionally.

As former U.S. Supreme Court Justice Sandra Day O'Connor said, "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers." Thus, increased civility offers benefits for all of us. Legal careers are too long for lawyers to spend them sniping with opposing counsel. Incivility drags lawyers down, increases their stress levels, and keeps them from doing their best work. It also gums up the wheels of justice, causing delays and unnecessary work for lawyers and judges. This in turn costs clients time and money. Uncivil conduct also interferes with settlement, increasing both client costs and judicial workloads. The animosity built up between counsel in interchanges outside the courtroom often spills

over into the courtroom, needlessly consuming time and tax dollars. As one author has observed, despite indications from social science that people are more easily persuaded by those they like, "oftentimes counsel enter settlement negotiations with a genuine hostility towards opposing counsel. Because disputants generally dislike each other due to their animosity, it is essential that opposing counsel maintain a respectful and cooperative relationship that creates this 'liking' social obligation. Counsel should work together to grant discovery extensions and accommodations, when feasible, and to avoid toxic communications. By doing so, counsel can create a 'liking' dynamic that will increase the chances of getting what they ask for during litigation and settlement negotiations." (S. Feldman Hausner, *Psychology and Persuasion in Settlement* (2019) 32 Cal. Litigation 31, 34.)

Incivility also is bad for judges. It interferes with our shared goal of fair, timely, and efficient resolution of cases. It slows cases down and increases judicial workloads by fomenting needless discovery disputes and other unnecessary motions. It erodes the judicial process and the public's perception of it. And let's face it: Dealing with lawyer incivility can be unpleasant. We believe that justice is a serious business that demands professionalism and mutual respect. We don't relish supervising or disciplining lawyers who act like truculent children.

Incivility is equally bad for juries. Lawyers who fail to accord respect to one another almost always fail to honor and respect the citizens drafted to serve on juries. They keep them waiting. They bore them with overly-long, uninspired, or ill-prepared trials. They don't respect jurors' time or appreciate their service. Consequently, many people would rather have a root canal than serve on a jury. That's a shame, because most who serve on juries in cases tried by competent, professional, and respectful lawyers and judges enjoy the experience, and look forward to returning.

Finally, incivility erodes public support for the legal system and as Justice Arthur Gilbert noted, "debases the legal profession." (*Crawford v. JPMorgan Chase Bank, N.A.* (2015) 242 Cal.App.4th 1265, 1266.) At a time when we must strive to preserve court budgets, we need our constituents to value and respect the legal process.

So, as judges we have good reason to commit to reducing or eliminating incivility in the profession.



## 2. Understand the problem.

As we communicate with lawyers, we hear increasing complaints about incivility. Perhaps more lawyers behave badly now, or perhaps lawyers complain more about it. Either way, incivility is a problem that needs to be acknowledged, studied, and remedied.

We encourage more rigorous study of incivility in the legal profession. Most of what we have seen and heard is anecdotal. But we are trained to resolve issues based on evidence, and here we admittedly have seen little professional literature on the nature, scope, and methods of remediating the problem. Incivility in the workplace generally may be better understood than incivility in the legal profession. Psychologists and human resources professionals who study workplace incivility have useful information to share. Bar groups could recruit some of those experts to develop research-based programs to reduce incivility among lawyers.

Based on what we've heard from lawyers and our own experiences, we know uncivil lawyers come in many unappetizing We've borrowed or adapted some of the following non-exclusive categories from another author (Futeral, *How to Deal with a Lawyer*, available at <https://www.charlestonlaw.net/dealing-difficult-opposing-attorney>) and have added some of our own:

- **Bullies.** These lawyers are rude to opposing counsel, witnesses, and opposing parties. They make threats and demands. Bullies may hurl insults or make snide comments. They may threaten opponents with unwarranted sanctions and include sanctions requests in most of their many motions. In court and in motion papers, these lawyers will accuse opposing counsel and parties of every imaginable misdeed. At their most extreme, they will display extreme anger management issues, invade others' personal space, and ask to "take it outside."

- **Obstructionists.** These lawyers make everything Phone calls and emails go unanswered. Depositions go unscheduled. Routine interrogatories and document demands are met with objections and without any substantive responses. Document production slows to a crawl. Meeting and conferring is unproductive. At

depositions, they make long speaking objections. Time drags on and costs escalate.

- **Paper Tigers.** These lawyers generate frequent letters and emails, all of them unproductive. Their opponents' interrogatories receive lengthy responses containing no new information. Despite reams of correspondence, little gets resolved between the lawyers. Left unchecked by the judge, these lawyers will repetitive discovery motions, and every other imaginable motion, all of which baselessly accuse the other side of misdeeds it did not commit.

- **Other "Bad Apples."** This catchall category includes pathological liars, racists, misogynists, and others who simply cannot get along with others. We cannot ignore reports that new lawyers, women lawyers, LGBTQ lawyers, and lawyers of color are victimized by incivility at least in part because of their youth or inexperience, gender, race, gender identity, and/or sexual orientation. As guardians of justice, this is something we cannot abide.

- **The Misguided.** These lawyers received little training, or were trained by members of the previous four groups. Perhaps they watched too many "lawyer" TV shows glorifying slickness over substance, or implying that the ends justify the means. Perhaps they are emulating the proliferation of incivility in the political sphere. Bad as they are, we view these lawyers with some optimism. These folks are our targets. They are the ones we will proselytize with the gospel of civility. Perhaps they can be saved.

Although the last category may be our targets, we cannot ignore the others. We should not give up hope that they are ultimately teachable—but if they aren't, we must be diligent in our efforts to keep them from contaminating the profession for others and interfering with the administration of justice.

## 3. Model, inspire, and set expectations for good behavior.

Common experience and social science research that, left unchecked, incivility begets more misconduct in an unfortunate downward spiral of unpleasantness. (See, e.g., Andersson & Pearson *Tit for Tat? The Spiraling Effect*

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of *Incivility in the Workplace* (1999) 24 Acad. Mgmt. Rev. 452, available at <https://journals.aom.org/doi/full/10.5465/amr.1999.2202131>.) Judges have unique abilities to help stem the tide by modeling good behavior, inspiring collegiality and professionalism, and demanding good behavior by lawyers working on cases on the judges' dockets.

Judges model good behavior by treating lawyers, jurors, witnesses, litigants, court staff, and others with respect. We are obligated to do so by the California Code of Judicial Ethics because appropriate judicial demeanor "is essential to the appearance and reality of fairness and impartiality in judicial proceedings." (Rothman, Cal. Jud. Conduct Handbook (3d ed. 2007) § 2.46, p. 93.) "Maintaining decorum and dignity, and being courteous and patient, sets the gold standard in the courtroom for everyone . . . and provides all with a greater level of satisfaction with the outcome and, obviously, improves the public' *Ibid.*)

Modeling good behavior is a start, but isn't enough. Judges can and do inspire and overtly demand professionalism and civility outside the courtroom. For example, judges may express their expectations in the "Courtroom Information" posted for each civil department on the Los Angeles Superior Court's website. This document also may be made available to lawyers at counsel tables. Here's an excerpt from the guidelines Justice Currey used in his courtroom when he was a superior court judge:

The Court's goal of fair, timely, and resolution of cases can only be achieved with the assistance and cooperation of counsel and self-represented parties. Knowledgeable, well-prepared lawyers who cooperate with each other and the Court streamline the litigation process, thereby conserving client and judicial resources. Therefore, the Court expects and requires the highest degree of professionalism from counsel appearing in this department, including knowledge of, and strict compliance with, the Code of Civil Procedure, the California Rules of Court, the Los Angeles County Court Rules, and the California Attorney Guidelines of Civility and Professionalism. The Court intends to treat everyone with respect and courtesy, and expects all those involved . . . to do the same. Uncivil or unprofessional behavior will not be tolerated.

The judge may repeat these exhortations at initial status

conferences and hearings, using a shorthand version: "I intend to treat lawyers who appear before me with respect. In return, I expect lawyers to treat the Court and each other with respect and professionalism."

#### 4. Facilitate civility.

Incivility can be reduced through positive interactions among lawyers. It is harder (but admittedly not impossible) for lawyers to be nasty to someone they know. Judges can encourage lawyers to meet productively early in the case and perhaps reduce potential future For example, at an initial status conference, the judge might suggest that counsel immediately go for coffee to discuss the case further—or even to discuss anything but the case. The judge could emphasize his or her expectation that counsel work cooperatively, treat each other courteously and respectfully, and collaborate to schedule and complete discovery.

Most lawyers behave well in court. Generally, incivility happens out of the judge's view. Usually, it has something to do with discovery, because that is the context in which lawyers most frequently interact outside the courtroom. A judge can communicate—early and often—high expectations for good attorney conduct in discovery and intolerance of incivility. Among other things, a judge may communicate distaste for unnecessary discovery disputes. California has a detailed Code of Civil Procedure and various practice guides that take virtually all the mystery out of what is required in the discovery process. A judge may express an expectation that attorneys will research and understand their discovery obligations, and work cooperatively to complete discovery with minimal court intervention. At the same time, the judge may make clear to the parties that he or she is available to help with issues requiring judicial assistance (such as thorny privilege issues), or with ways to exchange information while reducing burden and expense. And the judge may also want to emphasize an intention to rein in incivility and any shirking of discovery obligations.

More and more judges require parties to have both meaningful lawyer-to-lawyer discussions (not a cursory exchange of emails) and an informal discovery conference with the court before a discovery motion may be In effect, these

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judges opt to conduct an informal discovery conference “on [their] own motion” in every case. (Code Civ. Proc., § 2016.080.) How best to conduct these sessions is beyond the scope of this article, but we have several suggestions with respect to civility.

First, the informal discovery conference provides an opportunity for the judge to gauge how the parties interact. Do they work together professionally and productively? Have they held productive meet and confer sessions that narrow the issues? If not, the informal discovery conference is a good opportunity for the judge to restate ground rules and reinforce expectations about professionalism and common courtesy. The judge should call out and express disapproval of any incivility, whether revealed in “meet and confer” correspondence or personal interactions. If you see something, say something. Say “Stop it.”

Second, the judge can model a pragmatic approach to discovery aimed at eliminating gamesmanship. Discovery is not a game of “Gotcha.” It is intended to facilitate an exchange of relevant information and to avoid surprise at trial. At the informal discovery conference, the judge can underscore the goal of working together to reduce discovery costs and burdens—while stressing that everyone will get what they need for trial.

Finally, the parties should leave the conference with instructions from the judge to conduct further in-person meetings to narrow or eliminate disputes, requiring them to meet and accomplish something. The “something” might be a detailed schedule for all remaining depositions, or a document production schedule, or anything else that is useful and requires cooperative interaction. By emphasizing the need to meet rather than exchange email, the judge gets the participants to work together.

**5. Be a good coach— help lawyers  
be civil to one another.**

We often are asked by exasperated lawyers how to deal with an uncivil opponent. Obviously, judges cannot give ex parte tips to one side or another, but they can share suggestions with counsel at initial status conferences and similar occasions. Because these suggestions come from the judge, lawyers need not worry that their professional courtesy will be mistaken as a sign of weakness. Here are some thoughts a judge could share with lawyers:

a. Be proactive. At the start of a new case, reach out to opposing counsel. Introduce yourself. Perhaps offer to go to the other lawyer’s to meet, or meet for coffee or lunch. Make clear you are not arranging a meeting to seek settlement, serve papers, or make demands. The meeting may be short. It may even be awkward. But it will show your respect and help set a courteous tone.

b. Rudeness is contagious and spreads. Don’t bite. Don’t catch the disease.

c. Stay calm and be mindful. Equanimity is as mental calmness, composure, and evenness of temper, especially in a situation. Display equanimity.

d. If you encounter incivility, say something. Label it. Be direct. “John, you are being rude. Can we discuss this in a professional manner?”

e. Use humor.

f. Fight rudeness with kindness. While rude behavior may be a misguided way to assert control, it also might be a response to stress, pressure, frustration, or some other form of unhappiness. (See *Five Ways to Deal with Rudeness in the Workplace*, available at <https://www.mindtools.com/pages/article/five-ways-deal-with-rudeness.htm>.) Be sympathetic and solution-driven.

g. Be a good role model. Demonstrate civility. Lead by example.

h. Defend colleagues. If you witness incivility directed at another lawyer, politely ask the offending lawyer to rephrase or otherwise act in a more courteous manner. Remember, “the most effective tools for erasing incivility in the profession may be the judges and lawyers willing to tamp down uncivil behavior the moment it emerges.” (Filisko, *You’re Out of Order! Dealing with the Costs of Incivility in the Legal Profession* (2013) ABA Journal, available at [http://www.abajournal.com/magazine/article/youre\\_out\\_of\\_order\\_dealing\\_with\\_the\\_costs\\_of\\_incivility\\_in\\_the\\_legal](http://www.abajournal.com/magazine/article/youre_out_of_order_dealing_with_the_costs_of_incivility_in_the_legal).) Step in. Know the rules. (See, e.g., Super. Crt. L.A. County Local Rules, Chap. 3, App. 3.A *Guidelines for Civility in Litigation*,

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available at <https://www.lacourt.org/courtrules/CurrentRulesAppendixPDF/Chap3Appendix3A.PDF>.) “Counsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility.” (*Id.*, § (1)(2).)

- i. Enlist help from colleagues. Have a plan. If need be, bring serious episodes to the court’s attention.
- j. Join and support bar organizations that promote civility.

### 6. Be a problem solver.

Judges can and should tailor their approach to individual cases. For example, if a party brings to the judge’s attention that one or more lawyers disrupts depositions by making uncivil remarks or lengthy, intemperate speaking objections, the judge could devise a plan for dealing with that particular issue.

The judge might offer to be available by telephone so that deposition exchanges can be read back by the reporter, or other issues can be resolved in real time. Judges committed to reducing incivility will give these calls priority, even recessing a trial to take the call. (Most judges have found that merely being available to take a call usually causes lawyers to act more reasonably and work through their problems rather than call the judge.) Or the judge might order the next several depositions to be taken in her jury room, and make herself available to monitor the situation. Or require an additional camera in the deposition room that captures lawyer misconduct if the complaint is unprofessional conduct like making faces or placing feet on the table.

If the problem is that “nasty” correspondence has replaced meaningful dialogue, the judge might order the parties to conduct the next meet and confer session in person in her jury room, and offer to sit in for some period.

Some of these options may seem unappealing or unduly time-consuming, but dealing with incivility is worth the effort in the long run.

### 7. Apply sanctions as a last resort.

“Sanctions are a judge’s last resort. At bottom, they are an admission of failure. When judges resort to sanctions, it means we have failed to adequately communicate to counsel what we believe the law requires, failed to impress counsel with the seriousness of our requirements, and failed even to intimidate counsel with the fact we hold the high ground: the literal high ground of the bench and the high ground of the state’s authority. We do not like to admit failure so we sanction reluctantly.” (*Interstate Specialty Mktg., Inc. v. ICRA Sapphire, Inc.* (2013) 217 Cal.App.4th 708, 710.) And imposing sanctions against a lawyer seems a poor response to incivility, because sanctions are unlikely to build bridges between warring counsel.

And yet, sanctions serve their purpose when other methods fail. They “can level the playing field. If we do not take action against parties and attorneys who do not follow the rules, we handicap those who do. If we ignore transgressions, we encourage transgressors.” (*Ibid.*) And sanctions provide a way for clients to recover some of the added costs incivility can cause.



No doubt, our seven suggestions are just a few of the things judges might do to promote civility, and hopefully our colleagues will chime in with others. In addition, many judges already lend their voices in support of efforts to promote courtesy and professionalism. For example, they participate in bar association civility training sessions, write articles like this one, and discuss the topic at bench/bar events. Nevertheless, the scourge of incivility persists. Whatever we may be doing as a profession, it seems we need to do more.

*Hon. Brian S. Currey is an Associate Justice of the California Court of Appeal, Second Appellate District, Division Four.*

*Hon. Kevin C. Brazile is Presiding Judge of the Los Angeles County Superior Court.*

## INCIVILITY AS A PROBLEM OF LAW FIRM RISK MANAGEMENT



T. John Fitzgibbons

There was a plaintiff's lawyer who was so famous among the defense bar that his last name became a verb. Let's call him Mr. Niceguy. His strategy was to accommodate his opponent's every wish throughout discovery. Whatever extension was requested would be granted; whatever the opponent wanted in discovery would be given. Time and time again, adversaries found themselves lulled into complacency and unprepared for trial. When the time for trial arrived, the friendly lawyer would use that situation to his client's advantage, either to extract a favorable settlement or to win a jury verdict. All with a smile on his face, and a twinkle in his eye. Other defense lawyers familiar with this lawyer would nod knowingly and say, "You got Niceguyed."

Contrast that strategy with the behavior of the bullies and obstructionists who are the reason for this edition of the ABTL Report. When faced with one of them, most among us redouble our efforts. We are going to beat this person, even if it kills us. It boggles the mind that such people would want to motivate their opponents to turn over every rock and investigate every argument. But that is what happens—they act badly, and we suffer increased stress and sleepless nights, consumed in an effort to beat the uncivil lawyer.

This human dynamic explains why incivility presents a risk management issue. Incivility makes bad case outcomes more likely. And that reality often leads to a later malicious prosecution claim, an order imposing sanctions or referring for discipline, or a legal malpractice claim or fee dispute.

**Malicious prosecution.** Incivility towards an adversary makes it more likely that after the matter is over, that adversary will pursue a malicious prosecution case against the uncivil lawyer.

To prove malicious prosecution, a plaintiff must show that (1) the defendant (lawyer or client) initiated or continued to prosecute an action against the plaintiff that resulted in a

termination favorable to the plaintiff; (2) the defendant lacked probable cause to prosecute the action; and (3) the defendant prosecuted the action with malice. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740.)

A lawyer's incivility is relevant to the third element: "Malice 'may range anywhere from open hostility to indifference.'" (*Soukup v. Law of Herbert* (2006) 39 Cal.4th 260, 292 (*Soukup*)). Though it generally requires a showing that an action is brought for an improper purpose (such as to harass or to force a settlement of meritless claims), evidence of antagonistic threats and "bad blood" between lawyers also can show malice.

Evidence of a lawyer's hostile, unsupported threats can satisfy a malicious prosecution plaintiffs' burden of showing probability of success to defeat an anti-SLAPP motion. In one case, the evidence included physical threats for refusing to accept a settlement offer, as well as evidence that the lawyer told the plaintiff that his client had named her in the lawsuit "to prevent her from making trouble for him in the future." That incivility, coupled with a refusal to dismiss the plaintiff once the evidence was indisputable that there was no plausible claim against her, led the court to conclude that the plaintiff could show malice. (*Soukup, supra*, 39 Cal.4th at pp. 295-296.)

In another case, the court held that a lawyer's admission that there was "bad blood" between himself and his adversary supported the court's decision that the plaintiff could show malice. The lawyer's client at length about how much she hated the adversary. The court observed that the lawyer did not dissociate himself from his client's comments; to the contrary, without performing any research on the applicable law, the lawyer accused his adversary of ethical violations. That to show that when the lawyer pursued the meritless case, he acted with malice. (*Lanz v. Goldstone* (2015) 243 Cal. App.4th 441, 467-468.)

**Sanctions.** The most common risk of incivility is the imposition of sanctions. Case law is replete with examples of sanctions for incivility. Some of the more egregious examples have made it into the legal press or the blogosphere.

In one case, a lawyer was sanctioned for her conduct at a deposition, which included throwing iced coffee towards her opposing counsel. Though the lawyer claimed that she

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accidentally spilled the coffee, the district court found that unpersuasive in light of evidence from the deponent (her own client): “[T]he deponent that [the lawyer] threw her coffee in opposing counsel’s direction, and that he saw coffee on opposing counsel’s bag, computer, and person.” (*Loop AI Labs Inc. v. Gatti* (N.D.Cal. Mar. 9, 2017, No. 15-cv-00798-HSG) 2017 WL 934599, at p. \*17 (*Loop AI Labs*)). The court reporter also provided an that corroborated the deponent’s account. (*Ibid.*)

The court then noted that rather than apologize—as most people would had the spill been accidental—the lawyer “sought to justify her behavior and called the resulting sanctions motion ‘outrageous’ and ‘baseless.’” (*Loop AI Labs, supra*, 2017 WL 934599 at p. \*17.) The court’s opinion of this conduct was crystal clear: “No excuse (not even [the lawyer]’s belief that [opposing counsel] ‘insulted her’ by telling her to ‘be quiet’) can justify [the lawyer]’s on-the-record use of profanity and the ensuing outburst that resulted in her hurling her coffee in opposing counsel’s direction.” (*Ibid.*)

The coffee incident and other conduct led the court to conclude that a terminating sanction was appropriate and necessary, a decision by the Ninth Circuit. (*Loop AI Labs Inc. v. Gatti* (9th Cir. 2018) 742 Fed.Appx. 286.) In addition to revoking the attorney’s pro hac vice admission in that case, the court said that it “will not grant such admission in any future cases before the undersigned.” (*Loop AI Labs, supra*, 2017 WL 934599 at p. \*18.) The lawyer’s misconduct destroyed her client’s case—putting her at risk for a malpractice claim—and ruined her reputation.

**Referral for discipline.** Incivility isn’t just reserved for interactions with opposing counsel; it sometimes appears in court and can subject the uncivil lawyer to a referral to the State Bar. In a recent appellate case, a lawyer was reported to the State Bar for potential discipline for describing the trial court’s ruling as “succubistic.” The court pulled the of “succubus” from Webster’s Dictionary: “‘a demon assuming female form to have sexual intercourse with men in their sleep—compare incubus; demon, strumpet, whore.’” (*Martinez v. O’Hara* (2019) 32 Cal.App.5th 853, 857 (*Martinez*)).

The appellate court concluded that this description of the

female trial judge’s ruling “constitutes a demonstration, ‘by words or conduct, [of] bias, prejudice, or harassment based upon . . . gender.’” (*Martinez, supra*, 32 Cal.App.5th at p. 858.) The court’s ire over the lawyer’s choice of words was apparent: “We cannot understand why plaintiff’s counsel thought it wise, much less persuasive, to include the words ‘disgraceful,’ ‘pseudohermaphroditic misconduct,’ or ‘reverse peristalsis’ in the notice of appeal.” (*Ibid.*)

In referring the lawyer to the State Bar, the court invoked Business and Professions Code section 6068, subdivision (b), which requires lawyers to “maintain the respect due to the courts of justice and judicial The court also noted that the conduct could violate new Rule of Professional Conduct 8.4.1, which prohibits lawyers “from unlawfully harassing or unlawfully discriminating against persons on the basis of protected characteristics including gender.” (*Martinez, supra*, 32 Cal.App.5th at p. 858, fn. 9.)

In other jurisdictions, ABA Model Rule 3.2 has been invoked to discipline lawyers for incivility on the basis that the conduct needlessly increased the cost of litigation or wasted judicial resources. (See, e.g., *Attorney Grievance Com’n of Maryland v. Mixter* (Md. 2015) 109 A.3d 1, 60; *Obert v. Republic Western Ins. Co.* (D.R.I. 2003) 264 F.Supp.2d 106, 110-112.)

California has adopted a Rule 3.2, which prohibits a lawyer from “us[ing] means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.” (Rules Prof. Conduct, rule 3.2.)

Other jurisdictions also have invoked ABA Model Rule 8.4(d) to discipline uncivil behavior; that rule provides that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.” (See, e.g., *In re Abbott* (Del. 2007) 925 A.2d 482, 484-485; *The Florida Bar v. Norkin* (Fla. 2013) 132 So.3d 77, 87; *Disciplinary Counsel v. Cox* (Ohio 2007) 862 N.E.2d 514, 517.)

California has adopted Rule 8.4(d) verbatim. (Rules Prof. Conduct, rule 8.4(d).)

**Legal malpractice and fee disputes.** Perhaps not surprisingly, there are fewer examples in the case law for what appears anecdotally to be true: Uncivil lawyers face more claims

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for legal malpractice than civil lawyers. Certainly, a lawyer whose client's case is dismissed on a terminating sanction based on the lawyer's conduct would likely face a legal malpractice claim. But in addition to that situation, there are at least four reasons that uncivil conduct increases malpractice risk.

*First*, incivility contributes to legal malpractice claims because the most common response among competitive lawyers when faced with incivility is to increase their efforts to beat the uncivil lawyer. Those extra efforts add up—the opposing lawyer's performance improves. That improvement makes an adverse result in the matter the uncivil lawyer is handling more likely.

Employing the opposite strategy, “Mr. Niceguy” was much more successful—he lulled his opponents into a false sense of security and advanced his client's interests. Lawyering is hard: Why motivate adversaries to do more than they are already doing?

*Second*, overheated lawyers often suffer from poor judgment. Those who over every issue, big or small, lose the perspective needed to distinguish between issues that matter and those that don't. That can lead to time spent on trivial issues to the neglect of the critical ones. That, in turn, can increase the risk of losing the case and having the client second-guess the failure to focus on what mattered.

*Third*, incivility between counsel makes a later legal malpractice case more to defend. In any legal malpractice case, the opposing counsel in the underlying case can be a key witness. It is hardly surprising that those defending a claim would prefer to have those key witnesses be friendly—or, at the very least, neutral—towards the lawyer being sued.

This is especially relevant in cases in which a former client has settler's remorse and sues the lawyer who handled the settlement. In those cases, a central issue is whether the client's adversary in the underlying case would have offered a better settlement—and that evidence often comes from opposing counsel.

*Finally*, an uncivil lawyer may struggle with client relationships because there is a tendency among lawyers who are not civil to mistreat everyone around them. For many lawyers, this isn't a switch that they can turn on for adversaries

and turn off for clients and colleagues. It is ingrained in them to treat others disrespectfully.

Again and again, we see legal malpractice claims in which the lawyer has been rude to the client, the client becomes with the lawyer, and the client then pursues a claim against the lawyer. This can happen through a standalone legal malpractice case or as a cross-claim in an action to collect unpaid fees. And it can happen in a matter in which the lawyer did not make obvious mistakes, such as when the client has settler's remorse or second-guesses the lawyer's judgment calls.

Even when these cases lack merit, they are embarrassing, disruptive, and expensive to defend. The lawyer's emails with colleagues criticizing the client—emails the lawyer thought the client would never see—become discoverable. They then show up as evidence that the lawyer was doing a poor job for the client.

But even when lawyers reserve their bad conduct only for their adversaries, scorched-earth tactics can because clients later balk at the cost. That can lead to a malpractice case that is a fee dispute in disguise: The client's true complaint is that he or she paid a lot but received little of value in return.



For Mr. Niceguy, civility was a strong weapon in his arsenal—and if he last, that wasn't the reason. He would undoubtedly agree that incivility creates risks:

- Incivility increases the likelihood that a lawyer will face a malicious prosecution claim or sanctions.
- Incivility may violate the rules of professional conduct. Though lawyers are expected to zealously represent their clients, the rules forbid bullying and abusive conduct because that conduct delays or prolongs the proceedings and results in needless expense.
- Incivility increases the likelihood that a lawyer will face a legal malpractice or fee dispute claim, and it makes those claims harder to defend.

*T. John Fitzgibbons is a specialist in legal malpractice law. He practices at Robie & Matthai.*

## TEACHING CIVILITY



*Allen Lanstra*

As the type of attorney who is reading a volume of the ABTL Report on civility, you are probably not experiencing an awakening about whether you practice civility. But our responsibility doesn't end with ourselves. Teaching others is essential. So here are some suggestions for fostering a culture of civility around

you—from senior attorney, to junior associate or law clerk, to summer associate and law student. If enough of us appreciate the impact that good mentoring can have on the civility of those we mentor, it may help reverse the erosion of civility.

- Civility is not a performance. The discussion about civility in our profession often examines the issue in the vacuum of conduct between litigation parties, where we frequently witness the most outrageous acts. But civility transcends mere politeness and courtesy in bilateral relations. If you speak poorly of opposing counsel when you hang up the phone, you are treating civility like an acting performance and suggesting to your colleagues that being civil is fake. Notwithstanding the frustration, stress, and competitiveness of our profession, try implementing civility as part of the entire practice.

- Do not assign the worst motives. You are not a bad person for thinking that opposing counsel may be doing something improper—you're an attorney responding to the environment you were raised in. But pause and apply your analytical skills and think objectively. If we condition younger attorneys to presume that most opposing counsel are proceeding improperly and with malice aforethought, we lead them to believe that we operate in a system where courtesy and professionalism are exceptions, not the rule.

- Do not ask younger attorneys to do uncivil acts just so you don't have to. Don't force younger attorneys to do something that you would rather not do yourself—particularly without arming them with authority to resolve the issue any way they see. If you have a good reason to do the unusual, such as refusing a scheduling request or deadline extension because

it hurts your client's interests, then picking up the phone and discussing that with opposing counsel yourself shouldn't be that hard. Don't send a messenger just to deliver an uncomfortable message, because doing so tends to breed incivility.

- Teach that civility is not weakness. Because it's not. You can still stand up for your clients. You can still make the arguments that are necessary. You can still be an advocate and use your persuasive skills. You can even still become upset about the way opposing counsel is acting. But civility and effectiveness are not mutually exclusive.

- Be accommodating. If a request really prejudices your client, ok. But I'm pretty certain that nearly every judge will tell us that she couldn't tell the difference between a brief written in 40 days versus 30 days. Good attorneys will do what they need to do in 30 days, regardless whether you jam them. All you've done is jam them (which is not civil). Treating scheduling as a game is petty.

- Set your own tone. As competitive, type-A, proud overachievers, lawyers probably find this the hardest task to execute. When opposing counsel lacks civility, your choices are to jump in the mud or maintain the high ground. Follow your better instincts.

- Opposing counsel is not your annoying sibling. Don't start stuff. Re-read and re-read your communications to opposing counsel before you send them to eliminate those shots across the bow, the passive-aggressive verbiage, and most of all, the unnecessary threats to seek sanctions.

- Encourage new attorneys to get to know people. It's undeniable that we treat our friends differently than strangers, and we aren't so anxious to assign malfeasance to someone whom we know and understand. The organized Bar—and the ABTL in particular—provide great opportunities for young/new lawyers to get to know people. It's hard to be uncivil to someone with whom you just completed a collaborative project that benefited the profession.

- Encourage new attorneys to pick up the phone. It's not as good as meeting in-person, but the phone works—if only because we want to get off the phone. It's a tremendous tool to cut through confusion or break down the presumption that the other side has the worst motives. Talk



*Teaching Civility...continued from Page 19*

it out. Email's convenience and speed aren't well suited for resolving difficult issues, and email is more likely to foster misunderstanding than resolve it.

- Force them to write a letter. When a young attorney is amped up and wants to act back, challenge him or her to put it in a letter. The formality of letters carries with it a certain expectation of civility that often pauses our emotions and stops us in our tracks.

- Make them wait. Teach them to avoid reacting. Act after thinking. That usually means not responding immediately to that upsetting email. And make them re-read the email and re-read it again before sending it.

- Disclose your own stories, mistakes, and development. We all make mistakes. Some we pay for, and some we just regret. If you learned anything, share it. The best trial lawyers say they learn from what they did wrong, not from what they did correctly.

- Include younger attorneys. Even if the client won't pay for it, have younger lawyers shadow you as often as you can, whether it's a deposition or hearing, or just a phone call. Just as nothing teaches lawyering skills better than watching an accomplished lawyer in action, so too can you model civility.

- Treat everyone with respect. This is where it all starts. Make sure your young attorneys respect everyone they interact with—not just opposing counsel, but everyone within your

- The listener has the power, not the speaker. As much as most of us ended up here because we like to talk or were told that we could dominate a debate, most of us prosper as attorneys because of our listening skills and patience. And you can't be uncivil when you're really listening (listening with eye-rolls doesn't count). Teach your younger lawyers this indispensable skill.

- Don't take yourself too seriously. Show your younger lawyers a healthy sense of self-deprecation, which will help them—as it helps you—shrug off perceived slights or rudeness from others.

*Allen Lanstra is a partner at Skadden, Arps, Slate, Meagher & Flom LLP.*

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## GENDER EQUALITY IS PART OF THE CIVILITY ISSUE



*Justice  
Lee Smalley Edmon*



*Judge  
Samantha P. Jessner*

At a recent ABTL joint board retreat, there was a session dedicated to a discussion of civility in the legal profession. Toward the end of a several-hour discussion, it was posited that any discussion of civility in the legal profession must include a discussion about the very different treatment that women receive compared to their male colleagues. While gender discrimination is obviously a serious issue in society as a whole, the legal profession should lead in the effort to eliminate gender bias. Rather than viewing gender discrimination as an entirely separate issue, we treat it here as a subcategory of incivility in the legal profession. With that in mind, we explore the persistence of unequal treatment of women in the law and make suggestions for promoting civility and respect in the profession.

### Gendered Incivility in the Legal Profession

Despite the record numbers of women graduating from law school and entering the legal profession in recent decades, as well as the increase in women judges and women in leadership positions—not to mention the “Me Too” movement—women in the legal profession continue to encounter unfair treatment. In a 2018 survey of more than 7,000 women in the profession, half reported that they had been bullied in connection with their employment, and a third reported that they had been sexually harassed in the workplace. In addition, unequal treatment does not cease once a woman joins the judiciary. For example, a 2017 study conducted at the Pritzker School of Law at Northwestern University concluded that female United States Supreme Court justices are interrupted three times as often as their male counterparts.

Incivility can take many forms. The most common category consists of disrespectful behaviors, ranging from mild discourtesy to extreme hostility. Examples include condescension, interruption, profanity, and derogatory comments of a gendered nature, such as comments about an attorney’s pregnancy or appearance.

Common complaints by women lawyers include being interrupted inappropriately or “talked over” while speaking, jokes and comments that are sexist, and comments that trivialize gender discrimination.

Other common examples reported by women lawyers include being professionally discredited. The misbehavior includes implicit or explicit challenges to their competence, being addressed unprofessionally (such as with terms of “endearment”), being critiqued on their physical appearance or attire, and being mistaken for nonlawyers (such as court reporters or support staff). A judge reported, “People tell me all the time I don’t look like a judge even when I’m in my robe at official events.” An attorney recalled an incident in which, when she stated her appearance on behalf of a shopping mall owner, the judge remarked that she was dressed as though she had just come from a shopping trip to the mall.

Less frequent—but still reported with regularity—are the most obvious forms of gender-based incivility, such as sexually suggestive comments or sexual touching.

The conclusion is inescapable that sexism is alive and prevalent in the legal profession, and that sexism finds its expression in incivility. The underlying reasons for sexism are varied, but among the obvious culprits with respect to the practice of law are that women remain underrepresented, particularly in leadership roles; there are fewer women than men on the bench; and there are enduring stereotypes with respect to the proper role of women in society.

### The Costs of Incivility

The ramifications of incivility must not be trivialized as just part of the fabric of everyday life. Research shows that incivility makes people less motivated and harms their performance. One study showed that medical teams

*Gender Equality is Part of the Civility Issue...continued from Page 21*

exposed to rudeness performed worse not only in all their diagnostics, but in all the procedures they did. This was mainly because the teams exposed to rudeness didn't share information as readily as others, and they stopped seeking help from their teammates. There is no reason to believe this dynamic is limited to the medical field.

Incivility causes individuals to feel less satisfied with their work, to cut back on their efforts at work, and to experience greater job stress. Incivility siphons energy away from workplace tasks, and sometimes it causes employees to leave their jobs.

When incivility shows up in the courtroom, in the presence of jurors and others who pass through the court system, it diminishes respect for and confidence in the legal system. To quote Justice Sandra Day O'Connor, "When people perceive gender bias in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law."

### **Promoting Civility in the Profession**

While the demographics of the bench and bar have evolved over recent decades, sexism has proved difficult to dislodge. After all, the Rules of Professional Conduct proscribe sex discrimination, but it persists anyway. Working toward gender parity will help eliminate disparate treatment of women in the law, and will lead to enhanced civility in the profession.

On a more personal level, there are things each of us can do, through our own actions and in setting expectations with those around us. We can begin by simply being mindful. When someone makes an inappropriate casual remark or joke, we can simply refuse to engage. But we should not just be silent. While there is no need to turn every situation into a cause célèbre—it's probably counterproductive to do that—if you have a personal rapport with the individual who behaved unprofessionally, a private moment together can be a powerful way to advocate your values of civility.

If you are subjected to abusive behavior, or are a witness to it, come forward. The primary deterrent of reporting is fear—fear of damaging one's professional image, fear of

harming a client's case, or fear of antagonizing a judge. It takes courage to blow the whistle, particularly when the wrongdoer wields power. Thankfully, however, we have seen a sea change in recent years, and women are now less reluctant to come forward. The courts and law firm leadership should strive to provide attorneys with safe and effective mechanisms to report mistreatment.

While we need to address uncivil behavior, it is also essential to recognize and take note of the civil behavior that we want to promote. If a colleague handled a difficult situation with grace and restraint, commend them on how well they handled it, and point it out to others. In doing so, you will help promote a culture of civility.

### **The Benefits of Civility**

Apart from basic decency, there are other benefits to civility. Lawyers who behave with civility report higher personal and professional rewards, and conversely, lawyer job dissatisfaction is often correlated with unprofessional behavior by opposing counsel. Also, in the Internet era, a lawyer's reputation for civility is more vital than ever—a single uncivil outburst may haunt an attorney for years.

Lest you worry, nice guys do not finish last. In a biotechnology firm, a study showed that those who were seen as civil were twice as likely to be viewed as leaders, and they performed significantly better. Individuals who were viewed as civil were also seen as being important, powerful, and competent. If you're civil, you'll also be more effective.

Each of us can be more mindful and can act, when the opportunity arises, to promote civility. In doing so, we can help eliminate general incivility—as well as gender-related incivility—in the legal profession. At the same time, we also enhance our own well-being and sense of satisfaction with our chosen field.

*Hon. Lee Smalley Edmon is the Presiding Justice of the California Court of Appeal, Second Appellate District, Division 3.*

*Hon. Samantha P. Jessner is the Supervising Judge of the Civil Division of the Los Angeles Superior Court.*

## WINNING THROUGH COOPERATION



Judge Carolyn B. Kuhl

“Winning through intimidation” became a catchphrase in the 1970s after a book by that title caught on and eventually became a New York Times bestseller. It was written by a formerly disgruntled real estate agent who eventually became successful enough to buy a Lear Jet. It includes

such insights as, it isn’t what a person says or does that matters but what his “posture” is when he says or does it. Not exactly the kind of attitude a judge appreciates in a lawyer.

Not everything about the digital age has been an improvement, but computer simulation has given us some evidence-based approaches to problems that previously had been left to self-proclaimed motivational experts. We now know that in many realms of human endeavor, cooperation yields better success for both parties even when they operate in an adversary setting. That is, adversaries each may be able to achieve a better result through cooperation than either could obtain by trying to win at the expense of the other. This conclusion is demonstrated in the work of Professor Robert Axelrod, Professor of Political Science and Public Policy at the University of Michigan, and a recipient of the National Medal of Science.

In his book, *The Evolution of Cooperation*, Professor Axelrod sets up a game based on the “Prisoner’s Dilemma,” a classic game theory exercise. In Axelrod’s variation of the game, a player obtains: (1) the biggest payoff for winning at the expense of the other player, meaning that one player takes an aggressive position and wins when the other adopts a cooperative strategy; (2) an intermediate payoff when both sides choose to cooperate; and (3) the lowest payoff when both players attempt to win at the expense of the other player, meaning that both are made worse off by mutual combat. Axelrod announced an online tournament in which participants were challenged to develop a strategy

to obtain the highest score when the game was played over and over indefinitely. Participants in the tournament included computer scientists, mathematicians, economists, psychologists, sociologists and political scientists.

The winning strategy was surprisingly simple. The best strategy was to cooperate with the other player and thereafter to attempt to win at the other’s expense only when the other player had refused cooperation in the previous move. Professor Axelrod discerned four properties that tended to make a game strategy successful: (1) avoiding unnecessary conflict by cooperating as long as the other player does; (2) responding in kind to an uncalled-for provocative act by the other; (3) “forgiveness” (returning to cooperation) after responding to a provocation; and (4) clarity of behavior so that the other player can adapt to your pattern of action. “Nice” strategies—those that started with cooperation and responded to conflict without perpetual punishment—achieved higher scores.

Axelrod’s findings do not suggest that we abandon the adversary system of litigation. Nothing is more conducive to finding the truth than cross-examination. Nothing is more helpful to a correct determination of a legal issue than briefing by opposing, well-informed advocates.

However, the choices available to litigation adversaries in their use of pretrial procedures fit the circumstances described by Axelrod in his game. Litigation adversaries are likely to have an indefinite number of interactions in the course of litigation. The rules of civil procedure should be directed toward allowing presentation of legal and factual issues to the decisionmaker (judge or jury) in a fair manner. But we all know that those rules also can be used as a tool for one party to attempt to obtain an advantage at the expense of the other *regardless of the underlying merits*.

In the “game” of pretrial litigation, a provocative act might be use of the rules by one side to attempt to achieve an advantage without reference to the merits or the substance of the case. Think of propounding overbroad discovery for

*Winning Through Cooperation...continued from Page 23*

the sole purpose of burdening the other side. The proponent of the discovery might attempt to achieve a “high score” by increasing the other side’s litigation costs. But if the other side responds in kind, both sides lose; that is, both sides get the low score in the “game.” If the overbroad discovery yields only objections, both sides’ litigation costs are increased with no countervailing benefit to either. Each side could do better by cooperating (i.e., propounding and responding to discovery in accordance with a fair understanding of the rules.)

To take another example, counsel for a party might refuse an extension of time to respond to discovery in an attempt to force the other side to lose all of its objections. The counsel who refuses the extension hopes for an advantage that is not warranted by the merits of the case—a “high score.” However, the other side may convince the judge to forgive the late objections. In that case, both sides have incurred expense to no good end—a “low score” for both (and the counsel that refused the extension likely will incur an additional penalty by annoying the judge). If the refusal to grant an extension leads to a “tit-for-tat” response, neither side gains an advantage.

In litigation, procedure should be the servant of substance. That is, the goal of the rules of civil procedure is not for one side or the other to “win.” Rather, procedural rules are intended to create an even playing field so that each side can obtain the facts underlying the dispute and present those facts and applicable law effectively to a decisionmaker. The purpose of civil litigation is fair dispute resolution. Judges focus on deciding cases based on the substantive merits of each side’s position. Not surprisingly, judges are impatient with gamesmanship and lawyers’ short-sighted procedural gimmicks.

Winning at the “game” of litigation should be about both sides presenting their best case on the merits. As Axelrod advises:

Asking how well you are doing compared to how well the other player is doing is not a good standard unless your goal is to destroy the other player. In most situations, such a goal is impossible to achieve, or likely to lead to such costly conflict as to be very dangerous to pursue.

Axelrod’s analysis demonstrates that starting with cooperation and returning to mutual cooperation as soon as possible helps both sides. He also concludes that when adversaries believe they are likely to see each other again, and when they have the ability to inform themselves about the prior actions of an opponent, cooperation is more likely to emerge. These conclusions are consistent with the observation that, in litigation specialties (for example, construction defect) or other close-knit practice groups, lawyers tend to find ways to cooperate on procedural aspects of a case. Axelrod’s conclusions also suggest why organized bar associations are useful to their members. Opportunities to interact and develop personal relationships in ways that build trust reduce incentives to provocative behavior and increase expectations that cooperation will be reciprocated.

Axelrod’s work demonstrates that, while it might “feel good” to win a procedural point now and then at your adversary’s expense, in the long run the probabilities are against you and you are likely to end up a loser. The evidence shows that “winning through intimidation” is oxymoronic.

*Hon. Carolyn B. Kuhl is a Judge of the Los Angeles County Superior Court and sits in its Complex Civil Litigation Program.*

## STRENGTHENING RESILIENCE THROUGH MINDFULNESS



Judge Paul A. Bacigalupo

How often do you feel mentally drained before you've even started your day? Perhaps it's because you've made dozens of mental decisions, thinking about something in the past and anticipating a future event, meeting, or deadline. While this is part of being human, this article will address how you can use the core strength of what we call resilience to lift the cognitive and emotional load of life. You can also use tools, such as mindfulness, to practice becoming more resilient in your professional and personal life.

Resilience is the ability to “bounce back” from experiences and deal with life's challenges, even when those events are overwhelming or devastating. “If you are carrying an excessive load, you can either decrease the load or increase the capacity to lift the load,” says Amit Sood, M.D., author of the Mayo Clinic *Handbook for Happiness*.

Some people are born with characteristics of resilience or a more positive outlook. But the rise of resilience research demonstrates that it isn't necessarily a trait that people either have or don't have. Resilience involves behaviors, thoughts and actions that can be learned and developed. Research also demonstrates that people's resilience is enhanced by training and makes a measurable difference in the experience of stress, anxiety, chronic fatigue and mindful attention.

The practice of resilience changes the structure of our brains, a process called neuroplasticity. Dan Siegel, M.D., in his groundbreaking book *Mindsight, The New Science of Personal Transformation*, explains that neuroplasticity involves the capacity for new neural connections and growing new neurons in response to experience. It can occur throughout our lifespan.

Having been on the bench since 2000 as a judge of the State Bar Court, the Supervising Judge of the Southern California Alternative Discipline Program, and for the last 17 years as a judge of the Los Angeles Superior Court, I've seen my fair share of attorneys who are burned out. Not all

lawyers are prepared for the high surrounding client relationships, the belligerency of opposing counsel, the wrangle of the courtroom and personal crises. When lawyers bring the baggage of unmanaged stress—professional and personal—into the courtroom and their work environment, it can lead to avoidable adverse consequences.

Chronic incivility—rudeness, disrespect, belittling others, speaking in a condescending tone—is unhealthy. No judge or member of the courtroom staff looks forward to dealing with lawyers in this condition. At the same time, there are plenty of judges who already feel overburdened by heavy dockets, weighty decisions, repeated exposure to disturbing evidence and traumatized parties and victims, anxiety over time limits, social isolation, false and misleading public attacks and the threat of recall and election challenge. We are all vulnerable and susceptible to stress and burnout. Given the destructive nature of incivility, we all need to be able to recognize these problems in ourselves so as to keep them from interfering in our relationships with others and improve our well-being.

Do you wonder if you need to increase your resilience? Dr. Sood suggests asking yourself a simple question. “Over the last month, how stressed have I felt on a scale of 1—being not at all—to 10?” He says, “If you are above a 5, you can be helped by resilience.”

Many resources are available to improve resilience, including the Mayo Clinic resilience training program. Online courses can also be found at Berkeley's Greater Good Science Center in partnership with Rick Hanson, Ph.D., at *The Resilience Summit*. Some of the fundamentals of resilience training are: **Social**—having good nurturing relationships to help you better withstand life's challenges; **Spiritual**—live a life full of meaning; **Physical**—getting regular exercise, sleep and a healthy diet; **Emotional**—boosting your ability to sustain positive emotions and recover quickly from negative ones; **Mental**—heightening focus and improving mindset through mindfulness, meditation and yoga.

*Strengthening Resilience...continued from Page 25*

What exactly is mindfulness and meditation? These terms are often used interchangeably, but they're not the same. "Mindfulness is awareness that arises through paying attention, on purpose, in the present moment, non-judgmentally," says Jon Kabat-Zinn, Ph.D., Professor of Medicine Emeritus at the University of Massachusetts Medical School, founder of the Mindfulness-Based Stress Reduction (MBSR) Clinic (in 1979), and best-selling author of *Full Catastrophe Living: Using the Wisdom of Your Body and Mind to Face Stress, Pain and Illness* and *Wherever You Go, There You Are: Mindfulness Meditation in Everyday Life*.

Mindfulness involves focusing on the breath to cultivate attention on the body and mind as it is moment to moment. You allow your thoughts to come and go and not get attached to them. Mindfulness is about retraining your brain (neuroplasticity). When you are being actively mindful, you are noticing and paying attention to your thoughts, feelings and behaviors and how you react to them. This is a practice and requires both consistency and time.

Many say they can't sit still with their thoughts and feelings for more than a few minutes because their mind won't stop wandering. Some research suggests that mind-wandering comprises as much as 50% of waking life. We can all relate to mind-wandering and having off-task thoughts during an on-going task or activity, something that impacts our sensory input and increases errors in the task at hand. Paying attention and noticing and being in the moment reduces mind-wandering and helps you achieve equanimity, especially while under stress. The beauty of mindfulness is that you can practice it anytime, anywhere, and with anyone. Just a few minutes of mindfulness every day can clear away distracting thoughts, storylines and emotional baggage.

Mindfulness and meditation embody many similarities and can overlap. Meditation can be an important part of a mindfulness practice. It typically refers to a formal, seated practice that focuses on opening your heart, expanding awareness, increasing calmness and concentrating inward.

Mindfulness is associated with calm, and that's all the more reason why the U.S. Army has initiated mindfulness training for its soldiers to intensify mental focus, improve discernment of key information under chaotic circumstances, and increase memory function. Likewise, Fortune 500 companies such as Apple, Google, Nike, Procter & Gamble and Aetna incorporate meditation practice into their work environments, believing that meditation helps employee mental health and well-being, reduces stress, and improves listening and emotional intelligence.

Kabat-Zinn says, "The best way to capture moments is to pay attention. This is how we cultivate mindfulness. Mindfulness means being awake. It means knowing what you are doing." Making mindfulness part of your daily routine isn't a lot of work and can be integrated into many repetitive activities. Exercise like walking, hiking, and yoga are excellent times to cultivate mindfulness. Cooking, art, and music are opportune moments. Even gardening, housework, and doing chores are activities when, instead of letting your mind go somewhere else, you can use the time to focus on the task at hand.

Mindfulness is broadly accepted as a mainstream strategy with positive results to improve resilience and well-being. It helps you maintain a realistic sense of control and choices, especially how to react in a given situation. It helps you maintain a positive outlook and perspective and accept change. It can literally impact your mind and body, your professional and interpersonal relationships, your career and daily life.

*Hon. Paul A. Bacigalupo is a judge of the Los Angeles Superior Court and President of the California Judges Association.*

## A CIVILITY CHECKLIST



*Judge Suzanne H. Segal*

Checklists are often easier to follow than general advice. Why not a checklist for civility? This list is organized loosely according to the Federal Rules of Civil Procedure and the Central District of California Local Rules. While these suggestions follow the federal rules, the underlying concepts apply equally to practice in state court.

### 1. Initiate the rule 26 meeting with a diplomatic e-mail.

The Rule 26(f) meeting is a unique opportunity to set a positive and respectful tone for the entire life of the case. Start with a diplomatic email—or better still, call—using language that conveys a sincere interest in working cooperatively with your opponent. Of course, you may also include references to your client’s view of the case, to allow the other side to understand your client’s perspective. Just use diplomatic language—language really matters when trying to work cooperatively with an opponent.

Rule 26(f) requires that parties confer “as soon as practicable” or at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). It is easy to take the Rule 26(f) meeting for granted, perhaps as an annoying obligation, but it is truly an opportunity. You can use it to establish an expectation of civility for the entire case, particularly in the way you approach the “easy gives,” i.e., the time, place and manner of the meeting. When and where the meeting takes place will not change the outcome of the case, but if you offer to meet in person at your opponent’s on their schedule, at their convenience, you will begin the relationship with your opponent in a positive way. Offering to meet on your opponent’s schedule communicates that you respect them. Rule 26 does not dictate who initiates the meeting. You will enhance the likelihood of a good relationship with the other side by starting off with a professional and diplomatic call or email at the earliest possible moment with an invitation to meet.

### 2. Educate your

Clients may complain that if you are too accommodating from the outset, you will be seen as not truly on their behalf. The possibility of this concern suggests a need for a different type of early meeting—an early meeting with the client. From the beginning of the case, your client should have a clear understanding of how you intend to interact with your opponent. Emphasize to the client that you expect to advocate on their behalf, but that it is important for you to remain civil and professional at all times. You may need to explain that it is always in the client’s best interest that correspondence or emails (which often become exhibits in discovery disputes) are phrased in a respectful manner, even when disagreements with the other side arise.

Approaching the Rule 26 meeting with diplomacy in mind does not mean advocacy. The best lawyers make their Rule 26 initial disclosures as complete as possible, prior to the early meeting, and use the Rule 26 meeting to demonstrate their level of preparation and command of the case. The message from your email and the early meeting disclosures should be that, although you are very interested in a cooperative relationship with opposing counsel, you are more than prepared for the adversarial battle that may lie ahead.

### 3. Discovery for the purpose of discovery.

It is easy to approach discovery practice as a less meaningful aspect of a case, or as a necessary evil to be dealt with by using form interrogatories or form requests for production. However, when you draft your discovery requests carefully, with focus and purpose, you can advance your case without antagonizing your opponents. This kind of discovery is proportional to the case, limited to the essential information necessary to resolve the issues in dispute, and served in a manner that is consistent with civility. In addition to developing useful information earlier than if you invite opposition, appropriate discovery can open the door to productive settlement discussions—by serving targeted but not abusive discovery, you force your opponent to on aspects of the case that might prompt settlement. However,



*A Civility Checklist...continued from Page 27*

if discovery is used exclusively as a weapon, to pain on an opponent by the burden imposed or served in a manner that would antagonize any reasonable party, it is likely to impede any effort to get along with opposing counsel and may interfere with efforts to settle. It will also be transparent to the court that you are using discovery for improper purposes. Use discovery for the purpose of discovery, and your opponent and the court will recognize your efforts as legitimate investigation and pretrial preparation.

#### **4. Avoid the “drive-by” meet and confer.**

Like the Rule 26(f) conference, approach the Rule 37 meet and confer as an opportunity to create more goodwill. Avoid the “drive-by” meet and confer, even if your opponent seems to prefer that approach. As with the Rule 26 meeting, pick up the phone or send a diplomatic email to initiate the meet and confer, and be cooperative regarding the date and location of the meeting. You will earn goodwill from your opposing counsel by reducing the stress in their life—show up in person and on time, and go to your opponent’s when it is convenient for them. Although Local Rule 37 requires opposing counsel to attend the meet and confer at the moving counsel’s the rule also provides that the parties may agree to meet “someplace else.” Provide whatever responses you can to demonstrate that you intend to fairly and honestly litigate the case. At the very least, you will narrow the discovery issues in dispute, reducing the cost of the litigation for your client and allowing the court to focus on the most. At best, you might settle the case.

#### **5. Take advantages of informal discovery conferences with the court.**

In 2015, Rule 16 was amended to include the following language: “The scheduling order may: . . . (v) direct that before moving for an order relating to discovery, the movant must request a conference with the court.” The Advisory Committee notes discussing the amendment observed: “Many judges who hold such conferences them an way to resolve most discovery disputes without the delay and burdens attending a formal motion . . . .” These “informal discovery

conferences” are now required by almost every Magistrate Judge in the Central District prior to the of a discovery motion, and are also used by many state court judges. Take advantage of the opportunity to have a judge participate in your discovery meet and confer, helping you and your opponent reasonable solutions to your discovery disagreements. Start the conference by saying something positive about your opponent in front of the judge. This will set an optimistic tone for the conference and may increase the likelihood that your opponent will work cooperatively with you. By using the informal discovery conference, you may resolve discovery disputes in a less combative environment and avoid potential friction with your opponent.

#### **6. Always rise above.**

Lawyers often suggest that they were “dragged” into a by their opposing counsel’s combative or abusive behavior. While opposing counsel’s conduct should not be condoned, it is best to “rise above” it and not sink down to the level that someone else may want you to sink to. If your opposing counsel is antagonizing you, remember that the more respectful and polite you are in the face of such behavior, the better you and your client will look before the court.

#### **7. Focus on meaningful motion practice.**

Are Rule 12 motions to dismiss (demurrers in state court) simply delay tactics? Or do they actually move the case forward? The answer is probably yes and yes. Sometimes early motion practice is for the purpose of delay, but on other occasions, a Rule 12 motion is necessary to resolve a fundamental legal question. To increase the likelihood of civility (and to improve your relationship with the court), avoid the “delay tactic” motions, even if your client wants you

Local Rule 7 requires that parties hold a meet and confer prior to any motion. Some lawyers may be skeptical of this requirement. Why would an opponent change a position in the case, simply because of a meeting? It is true that the Local Rule 7 meeting may be most effective for motions involving non-dispositive relief, i.e., motions that

*A Civility Checklist...continued from Page 28*

do not resolve ultimate issues in a case. However, even if you are meeting to discuss an issue that you do not believe your opponent will compromise on, the meeting can be yet another opportunity to develop a productive relationship with your opponent. View the Local Rule 7 meeting as another diplomatic mission: Even if you do not resolve the motion, you may lay the foundation for settlement.

### **8. Set yourself up to settle well.**

I once had a supervisor who frequently reminded me that, in his view, I had only two goals as a litigator—to win or settle well. As a judge who has conducted hundreds of settlement conferences, I can comfortably say that personal animosity between clients or lawyers is one of the most common impediments to “settling well.” Strong feelings of anger or resentment, which sometimes increase over the life of a case, greatly interfere with the logical decision-making necessary for effective negotiations. If civility has not been your priority from the outset, or if civility was lost along the way, it is to recover a cooperative working relationship with your opponent when you attempt to settle a case.

### **9. Improve your trial preparation experience with cooperation.**

Possibly the most painful phase of a case, if lawyers are not getting along, is the trial preparation phase. No other phase requires more cooperation between the lawyers than preparation of the pretrial documents. Local Rule 16 requires joint exhibit lists, joint jury instructions, joint witness lists, and a joint pretrial conference order, among other things. The requirement that documents, exhibits, orders, jury instructions, and other items be prepared jointly means that your life will be far simpler if you have already established a cooperative relationship with opposing counsel. At the end of the trial, remember to either win with humility or lose with grace. Whatever the outcome, you want the judge, the jurors, your opponent and your client to view you as someone who knows how to handle the situation with professionalism and dignity.

### **10. Forgive yourself, forgive others.**

Following this checklist does not mean that you will never have bad days. You will make mistakes. You will make decisions you regret. You might lose your temper or say something you wish you could take back. Or you might take a position in a case that antagonizes someone, even if your

When you make a mistake, it; apologize if appropriate; learn from it; forgive yourself; and move on. If you took a position that aggravated your opponent, look for an opportunity to repair that relationship.

Forgiveness is powerful. Try to recall a moment where someone forgave you for a mistake or showed you that they were willing to forget a past Remember how positive that experience was and apply it to your professional life. Putting aside past moving on, and seeking to develop new friendships are the building blocks for civility to spread. Start your case with diplomacy, maintain civility and professionalism throughout and forgive mistakes and it’s possible that, win or lose, you may end the case with a new professional colleague or at least a respectful opponent.

*Hon. Suzanne H. Segal is a United States Magistrate Judge in the Central District of California.*

8502 E. CHAPMAN AVENUE  
SUITE 443  
ORANGE, CA 92869

PRSRT STD  
U.S. POSTAGE  
**PAID**  
LOS ANGELES, CA  
PERMIT NO. 200

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## ***CONTRIBUTORS TO THIS ISSUE:***

*Hon. Paul A. Bacigalupo is a judge of the Los Angeles Superior Court and President of the California Judges Association.*

*Hon. Kevin C. Brazile is Presiding Judge of the Los Angeles County Superior Court.*

*Bree Buchanan, JD, MSF, is a Senior Advisor for Krill Strategies, LLC. She also serves as a founding co-chair of the National Task Force on Lawyer Well-Being and chair of the ABA Commission on Lawyers Assistance Programs.*

*Hon. Brian S. Currey is an Associate Justice of the California Court of Appeal, Second Appellate District, Division 4.*

*Hon. Lee Smalley Edmon is the Presiding Justice of the California Court of Appeal, Second Appellate District, Division 3.*

*T. John Fitzgibbons is a certified specialist in legal malpractice law. He practices at Robie & Matthai.*

*Hon. Samantha P. Jessner is the Supervising Judge of the Civil Division of the Los Angeles Superior Court.*

*Hon. Carolyn B. Kuhl is a Judge of the Los Angeles County Superior Court and sits in its Complex Civil Litigation Program.*

*Allen Lanstra is a partner at Skadden, Arps, Slate, Meagher & Flom LLP.*

*Michael L. Mallow is a partner at Shook, Hardy & Bacon L.L.P. and is the Chair of the Los Angeles Chapter's Civility Committee.*

*Robin Meadow is a partner at Greines, Martin, Stein & Richland LLP and is a co-editor of the ABTL Report.*

*Hon. Suzanne H. Segal is a United States Magistrate Judge in the Central District of California.*

*Sabrina H. Strong is a partner at O'Melveny & Myers LLP and the 2018-2019 President of the Los Angeles Chapter.*