The State Bar
of California

OPEN SESSION
AGENDA ITEM
704 MARCH 2022

DATE: **March 24, 2022**

TO: **Members, Board of Trustees**

FROM: **Randall Difuntorum, Program Director, Office of Professional Competence**

SUBJECT: **Discussion Regarding California Civility Task Force Proposals – Proposed Action Plan**

EXECUTIVE SUMMARY

The California Civility Task Force (CCTF) is a joint project of the California Judges Association and the California Lawyers Association. Following the CCTF's study, CCTF developed four proposals to improve civility in California's legal profession. These proposals include changes to: the Minimum Continuing Legal Education (MCLE) requirements; the California Rules of Professional Conduct; and the oath required for all attorneys upon admission. This memorandum provides an action plan recommended by staff for the State Bar's evaluation of these proposals.

BACKGROUND

To give context to the CCTF proposal, a brief summary of the State Bar's prior activity is provided. The State Bar has played a key role in advancing attorney civility. In 2006, the Board formed an Attorney Civility Task Force to study and recommend aspirational standards for attorney civility and professionalism. In 2007, the Board adopted the California Attorney Guidelines of Civility and Professionalism as a model set of guidelines for members, voluntary bar associations, and courts to use and implement in a way that is effective for the local legal community. Soon after, the guidelines were put to use by attorney bar associations and courts. For example, they were adopted in 2008 by the Board of Directors of the Riverside County Bar Association, and the Superior Court of California, County of Sacramento, added the guidelines as an appendix to their local rules.

The State Bar returned to the issue of attorney civility in 2013 when the Board Committee on Operations approved the public comment circulation of a new proposed

California Rules of Court, rule 9.4. The proposed rule sought to append a dignity, courtesy, and integrity statement to the oath that is required to be taken by all persons who are certified for admission to practice law. The development of this rule was a collaborative effort with the American Board of Trial Advocates that was engaged in a nationwide effort to promote attorney civility. The Board adopted the rule and submitted it to the Supreme Court on January 9, 2014, and the rule was approved by the Court effective May 27, 2014.

Detailed information and links regarding the attorney oath are posted at the State Bar's website on a webpage dedicated to attorney civility and professionalism resources. The California Attorney Guidelines of Civility and Professionalism are also featured at that webpage as a part of a Civility Toolbox. In addition, the webpage has a sample resolution for attorney bar associations to use when adopting the guidelines and a sample court order for courts to implement the guidelines. A comprehensive Civility PowerPoint presentation is also available that can be used for outreach and education on the guidelines.

Civility and professionalism have also been included in the State Bar's educational initiatives and in the revisions to the Rules of Professional Conduct. Attorneys admitted after February 1, 2018, are required to complete a 10-hour MCLE New Attorney Training Program, and this curriculum includes a module on attorney civility. The comprehensive revisions to the Rules of Professional Conduct that became operative November 1, 2018, include a new disciplinary standard providing that it is misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." (Rule 8.4(d).)

Consistent with the State Bar's past leadership role, the Board is now being presented with another opportunity to contribute to the advancement of attorney civility and professionalism. In a February 17, 2022, letter to the chair of the Board and the State Bar executive director, the Honorable Brian S. Currey, Associate Justice, Court of Appeal, Second Appellate District, Division 4 provides an overview of the work of CCTF and presents CCTF's proposals for the Board's consideration. As noted in the letter, the State Bar originally created CCTF, but it was later adopted as a joint project of the California Judges Association and the California Lawyers Association, with Board Vice-Chair Brandon Stallings serving as one of two co-vice-chairs of the task force. The letter also encloses a draft resolution that the Board might adopt for the purpose of formally evaluating CCTF's report and recommendations. The February 17 letter is provided as Attachment A; the CCTF report is provided as Attachment B. In the discussion below, the CCTF's proposed specific recommendations for evaluation and possible implementation are presented, together with a staff recommended action plan.

DISCUSSION

I. THE CCTF RECOMMENDATIONS

The February 17 letter enumerates the following four CCTF proposals that are described as "four powerful, concrete, realistic, and achievable proposals to reduce incivility:"

1. Mandate one hour of attorney MCLE devoted to civility training, to be included in the total number of MCLE hours currently required. Approved civility MCLE programs should highlight the link between bias and incivility and urge lawyers to eliminate bias-driven incivility.

2. Provide optional training to judges on the need to model civility and curtail attorney incivility, both inside and outside the courtroom, explaining the tools available to them to do so.

3. Enact meaningful changes to State Bar disciplinary rules, prohibiting repeated incivility and clarifying that civility is not inconsistent with zealous representation.

4. Require all lawyers, not just those who took the oath after the 2014 rule change, to affirm or reaffirm during the annual license renewal process that: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

Justice Currey explains that: "The first, third and fourth recommendations fall within (or partially within) the purview of the State Bar. On behalf of the Task Force, I respectfully request that the Board of Trustees examine and evaluate these proposals using a full and fair process that includes consideration of the views of staff, subject matter experts, professional organizations, members of the profession, and the public, as well as consultation with the Chief Justice and Judicial Council."

Regarding the proposal to revise the disciplinary rules, Justice Currey specifically suggests that "the Board of Trustees consider an initial review by COPRAC for further vetting and refinement."

To summarize his request, Justice Currey asks that the Board adopt a resolution: "(a) [r]eceiving the Task Force report; (b) [s]upporting increased civility in legal profession; and (c) [d]irecting staff to develop a plan for a full and fair evaluation of the proposals, including public input and further refinement, and if warranted, implementation of the recommendations.

II. PROPOSED ACTION PLAN

Staff concurs with the view that the first, third, and fourth recommendations warrant the State Bar's evaluation and possible implementation, as they represent reforms that could enhance attorney civility and professionalism consistent with the past efforts of the State Bar. To this end, the following action plan is proposed for the Board's adoption.

1. Staff will review the CCTF recommendation to amend the MCLE requirements to mandate one hour of attorney MCLE devoted to civility training, to be included in the total number of MCLE hours currently required. Following this review, staff will submit to the Board a specific public comment proposal that includes any necessary

proposed amendments to applicable State Bar Rules, Rules of Court, or other affected laws.

2. COPRAC will be asked to review the CCTF recommendations to amend the Rules of Professional Conduct to prohibit repeated incivility and to clarify that civility is not inconsistent with zealous representation. Following this review, COPRAC will submit to the Board a public comment proposal for any amendments that COPRAC believes would be enforceable and consistent with the purpose and function of the rules as disciplinary standards, as opposed to aspirational guidelines.

3. Staff will prepare a public comment proposal for implementing the CCTF recommendation that all lawyers be required to affirm or reaffirm during the annual license renewal process that: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity."

4. When the forgoing matters are circulated for public comment, the staff will conduct stakeholder and other outreach using social media among other strategies for garnering the interested person and subject matter expert input described in the February 17 letter.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

None

RECOMMENDATIONS

Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

> **RESOLVED**, that the Board of Trustees accepts for evaluation the September 2021 report of the California Civility Task Force with appreciation to the taskforce members for its work developing proposals for improving civility in California's legal profession; and it is

FURTHER RESOLVED, that the Board of Trustees adopts the staff's recommended action plan for evaluating the California Civility Task Force proposals as follows: (i) staff will review the proposal to add a new civility training requirement for minimum continuing legal education; (ii) COPRAC will review the proposal to amend the California Rules of Professional Conduct to address lawyer conduct that constitutes repeated incivility and to clarify that civility is not inconsistent with a lawyer's zealous representation of a client; and (iii) staff will review the proposal to add a requirement that each lawyer annually affirm or reaffirm their commitment as an officer of the court to conduct themselves with dignity, courtesy, and integrity.

ATTACHMENTS LIST

A. Letter dated February 17, 2022, to the Chair of the Board and the State Bar Executive Director, from the Honorable Brian S. Currey, Associate Justice, Court of Appeal, Second Appellate District, Division 4

B. Initial Report of the California Civility Task Force (September 2021)

ATTACHMENT A

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
DIVISION FOUR
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

BRIAN S. CURREY
ASSOCIATE JUSTICE

TELEPHONE
(213) 830-7438
brian.currey@jud.ca.gov

February 17, 2022

VIA EMAIL

Mr. Ruben Duran
Chairman of the Board of Trustees
The State Bar of California
180 Howard Street
San Francisco, CA 94105
ruben.duran@bbklaw.com

Ms. Leah Wilson
Executive Director
The State Bar of California
180 Howard Street
San Francisco, CA 94105
leaht.wilson@calbar.ca.gov

Re: California Civility Task Force Proposals

Dear Ruben and Leah:

As Chair of the California Civility Task Force, I am delighted the State Bar Board of Trustees will, at its March 24-25, 2002 meeting, consider the recommendations contained in the Task Force's September 2021 initial report, entitled "Beyond the Oath: Recommendations for Improving Civility." I hope you will share the report and this letter with the Trustees in advance of that meeting. The full report is available at www.CalJudges.org/Civility.

As you know, Alan Steinbrecher, then Chair of the State Bar Board of Trustees created the Task Force. It was later adopted as a joint project of the California Judges Association (CJA) and California Lawyers Association (CLA) in cooperation with the State Bar. The Task Force is comprised of a diverse group of distinguished lawyers and judges from throughout the state. Their names and biographical information are included beginning on page 17 of the report. As you also know, State Bar Board of Trustees Vice Chair Brandon Stallings serves as one of two Vice Chairs of the Task Force. Former CLA President Heather Rosing is the other.

As the report makes clear, incivility among lawyers is bad for the legal profession and the public. Incivility increases stress and job dissatisfaction among lawyers and judges. Stress can contribute to mistakes, burnout, or substance abuse by lawyers. Incivility also increases costs and delays in litigation and legal transactions, thereby increasing costs for the public. Moreover, some

incivility is a manifestation of bias, with young lawyers, women lawyers, and lawyers from underrepresented groups disproportionally on the receiving end of intemperate remarks and abusive misbehavior. As stated in the report, "If our profession is serious about increasing diversity and embracing justice, it must reduce incivility directed at attorneys who come from underrepresented groups. Doing so would be consistent with the State Bar's Strategic Plan, which includes (as part of Goal 4 of that plan) promotion of 'policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves.'"

The report makes four powerful, concrete, realistic, and achievable proposals to reduce incivility:

> 1. Mandate one hour of attorney MCLE devoted to civility training, to be included in the total number of MCLE hours currently required. Approved civility MCLE programs should highlight the link between bias and incivility and urge lawyers to eliminate bias-driven incivility.
>
> 2. Provide optional training to judges on the need to model civility and curtail attorney incivility, both inside and outside the courtroom, explaining the tools available to them to do so.
>
> 3. Enact meaningful changes to State Bar disciplinary rules, prohibiting repeated incivility and clarifying that civility is not inconsistent with zealous representation; and
>
> 4. Require *all* lawyers, not just those who took the oath after the 2014 rule change, to affirm or reaffirm during the annual license renewal process that: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

The first, third and fourth recommendations fall within (or partially within) the purview of the State Bar. On behalf of the Task Force, I respectfully request that the Board of Trustees examine and evaluate these proposals using a full and fair process that includes consideration of the views of staff, subject matter experts, professional organizations, members of the profession, and the public, as well as consultation with the Chief Justice and Judicial Council. Finally, we ask that the Board of Trustees implement these proposals as informed by the evaluation process.

We recognize our recommendations will benefit from further discussion and refinement by stakeholders and the public. Some are controversial. The proposed changes to the State Bar's disciplinary rules, for example, will require careful consideration of First Amendment issues and reservations expressed by important stakeholders. (I have enclosed a partial list of organizations that have endorsed the Task Force's proposals. I also enclose letters from the CLA and CAL-ABOTA boards expressing support for three of the Task Force's recommendations but expressing reservations about the proposed disciplinary rule change.) With respect to that proposal, we suggest the Board of Trustees consider an initial review by COPRAC for further vetting and refinement. The Task Force would like to participate as we have ideas for improving the proposal contained in the report. Similarly, in recognition of the work the State Bar has

embarked on in rehabilitating lawyers, the proposal regarding the changes to the Rules of Professional Conduct proposes the development of a diversion program so repeat offenders could be paired with mentors to address the root causes of their incivility. We recognize that significant work needs to be done to flesh out necessary details.

I spoke briefly with the Chief Justice about the proposals shortly after the report was released. She indicated she would appreciate a careful evaluation of the proposals by the State Bar, with a report to her of the pros and cons.

With this in mind, I write today to request that the Board of Trustees adopt a resolution:

(a) Receiving the Task Force report;

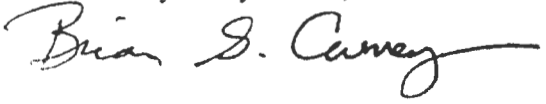
(b) Supporting increased civility in legal profession; and

(c) Directing staff to develop a plan for a full and fair evaluation of the proposals, including public input and further refinement, and if warranted, implementation of the recommendations.

A draft resolution is enclosed for your consideration.

On behalf of the Task Force, I extend my thanks to you and he State Bar Board of Trustees, and look forward to working collaboratively with all of you for the benefit of the profession and the public.

Very Truly Yours,



Justice Brian S. Currey

cc: Chief Justice Tani Cantil-Sakauye
California Civility Task Force Members

Enclosures: Draft Resolution, Partial List of Endorsements, Letters from CLA and CAL-ABOTA

Draft

Resolution to Evaluate and Consider Implementation of Certain California Civility Task Force Proposals

RESOLVED, that the Board of Trustees (a) receives the California Civility Task Force's September 2021 report entitled "Beyond the Oath: Recommendations for Improving Civility," and (b) expresses its support for increasing civility and professionalism in the legal profession, in furtherance of the State Bar's mission of public protection and enhancing diversity in the legal profession.

Moreover, the Board of Trustees directs staff to recommend a work plan for evaluation and potential implementation of the following proposals of the California Civility Task Force, including receiving and considering input from stakeholders including professional organizations, subject matter experts, members of the profession, the Task Force, the Chief Justice, the Judicial Council, and public comment:

1. A State Bar Rule change that would require one hour of minimum continuing legal education (MCLE) devoted to civility training. This proposal would not increase the total number of MCLE hours required for each lawyer.

2. Changes to the Rules of Professional Conduct designed to promote civility in the practice of law, in furtherance of the State Bar's mission, with attention to First Amendment considerations and the potential for a diversion program as discussed in the Task Force report.

3. Assuming the Judicial Council is open to considering a change to California Rule of Court 9.7 that would require *all* lawyers, not just those who took the oath after the 2014 rule change, to affirm or reaffirm during the annual license renewal process that: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity," accomplishing this affirmation or reaffirmation during the State Bar's annual license renewal process.

Draft

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Moreover, the Board of Trustees directs staff to recommend a work plan for evaluation and potential implementation of the following proposals of the California Civility Task Force, including receiving and considering input from stakeholders including professional organizations, subject matter experts, members of the profession, the Task Force, the Chief Justice, the Judicial Council, and public comment:

1. A State Bar Rule change that would require one hour of minimum continuing legal education (MCLE) devoted to civility training. This proposal would not increase the total number of MCLE hours required for each lawyer.

2. Changes to the Rules of Professional Conduct designed to promote civility in the practice of law, in furtherance of the State Bar's mission, with attention to First Amendment considerations and the potential for a diversion program as discussed in the Task Force report.

3. Assuming the Judicial Council is open to considering a change to California Rule of Court 9.7 that would require *all* lawyers, not just those who took the oath after the 2014 rule change, to affirm or reaffirm during the annual license renewal process that: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity," accomplishing this affirmation or reaffirmation during the State Bar's annual license renewal process.

Partial List of Endorsements of Civility Task Force Recommendations
as of 2.16.22

Asian Pacific American Bar Association – Los Angeles
Asian Pacific American Women Lawyers Alliance (APAWLA)
Association of Business Trial Lawyers (ABTL)- Northern California
Association of Business Trial Lawyers (ABTL)-Los Angeles
Association of Business Trial Lawyers (ABTL)-Inland Empire
Association of Business Trial Lawyers (ABTL)-Orange County
Association of Business Trial Lawyers (ABTL)-Central Valley
Association of Business Trial Lawyers (ABTL)-San Diego
Association of Business Trial Lawyers (ABTL)-Los Angeles
Bar Association of San Francisco (BASF)
California Judges Association (CJA)
Conference of California Public Utility Counsel ("CCPUC")
Japanese American Bar Association
California Chapters of the American Board of Trial Advocates (CAL-ABOTA)
(endorsement of recommendations 1, 2, and 4)
California Lawyers Association (CLA)
(endorsement of recommendations 1, 2, and 4)
Los Angeles Chapter of American Board of Trial Advocates (LA ABOTA)
Los Angeles County Bar Association (LACBA)
Los Angeles County Bar Association (LACBA)- Litigation Section
Multi-Cultural Bar Alliance of Southern California
San Diego County Bar Association
San Diego Defense Lawyers
Women Lawyers Association of Los Angeles (WLALA)

CALIFORNIA
LAWYERS
ASSOCIATION

November 29, 2021

Via E-mail

Justice Brian S. Currey, Chair
Heather Rosing, Vice Chair
Brandon Stallings, Vice Chair
California Civility Task Force

Re: Beyond the Oath: Recommendations for Improving Civility

Dear Justice Currey, Ms. Rosing, and Mr. Stallings:

We submit these comments on behalf of the California Lawyers Association (CLA) in response to the Initial Report of the California Civility Task Force. We commend the tremendous work of the Task Force and share a commitment to address and curb incivility in the legal profession. We have the following comments on the four recommendations in the Initial Report.

1. Require one hour of MCLE devoted to civility training, included in the total number of MCLE hours currently required. Approved civility MCLE programs should highlight the link between bias and incivility and urge lawyers to eliminate bias-driven incivility.

   CLA supports this recommendation.

2. Provide training to judges on the need to both curtail incivility and model civility, both inside and outside the courtroom, explaining the tools available to them to do so.

   CLA supports this recommendation.

3. Enact meaningful changes to State Bar disciplinary rules, prohibiting repeated incivility and clarifying that civility is not inconsistent with zealous representation.

   Although CLA would encourage further exploration of this possibility, and offers all of its resources as part of that process, we have several concerns about this recommendation.

400 Capitol Mall, Suite 650
Sacramento, CA 95814
916-516-1760
calawyers.org

- **Definitional and Related Concerns**

Our first concern surrounds the definition of "incivility." The current proposal defines "incivility" for purposes of the rules as "discourteous, abusive, harassing, or other significantly unprofessional conduct" and notes that the Task Force is "open to adding further definitional language so lawyers can have clarity about what conduct is and is not prohibited."

We agree that clarity and certainty are key considerations, but also caution that creating *any* definition of "incivility" raises issues that should be considered carefully by all interested stakeholders. Given our complex, evolving, and richly diverse society, manners of communication and the notion of what is "civil" vary by region, time, location, and numerous other factors.[1] Views of acceptable norms in one context may not be the same as views of acceptable norms in a different context. What account, if any, will be given in a definition to factors such as race, ethnicity, national origin, gender, sexual orientation, gender identity, gender expression, age, and religion?

A related concern is the potential impact of the definition – along with complaints and enforcement that would follow – on people of color and women in particular. The Initial Report and the attached material repeatedly mention bias and prejudice with the goal of reducing or eliminating both. We share this goal and do not dispute, as the Interim Report notes, that "young lawyers, women lawyers, lawyers of color, and lawyers from other marginalized groups are disproportionately on the receiving end" of incivility. A civility rule of professional conduct could help address this issue. At the same time, the identical rule could be harmful to and have a disproportionate impact on these same attorneys when used against them by others making claims of incivility based on conduct perceived as "inappropriate" or "too aggressive" or "out of line."[2] In reviewing this proposal, one of our members recently reported on a young, Black, female colleague who was berated by a judge for making the same types of arguments the white, male attorney regularly makes. Although this could certainly have been the result of implicit bias against the attorney, the key point is that identical speech and conduct can be perceived in a different way, depending upon the speaker and actor. Although not the intent, there is a general concern that a civility rule of professional conduct could be used to stifle the voices and advocacy of younger, more diverse attorneys.

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[1] See, e.g., Who Decides What's "Civil"?
https://www.learningforjustice.org/magazine/who-decides-whats-civil

[2] See, e.g., When Civility Is Used As A Cudgel Against People Of Color
https://www.npr.org/sections/codeswitch/2019/03/14/700897826/when-civility-is-used-as-a-cudgel-against-people-of-color

We acknowledge that the stated intent is a rule clarifying that civility is not inconsistent with "zealous representation." Although this might provide some level of comfort, it does not resolve the definitional concerns. The outer boundaries of "zealous representation" are not set or defined, potentially resulting in additional lack of clarity and certainty in the rule. Stated otherwise, when would the line be crossed from zealous representation (permitted under the rule) into incivility (prohibited by the rule)?

- **First Amendment Concerns**

This proposal would add a Comment to California Rules of Professional Conduct, rule 8.4, stating that a lawyer violates paragraph (d) of that rule "by repeated incivility while engaged in the practice of law or related professional activities." Current Comment [6] of the same rule states: "This rule does not prohibit those activities of a particular lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution." The Interim Report also notes: "We are aware that making incivility a breach of the rules of professional conduct may be controversial in some circles. Some lawyers may have First Amendment concerns. Others may be concerned that a single misstep could land them in hot water with the State Bar. Our proposal should allay both concerns. Our task force members are ardent defenders of the First Amendment and have no interest in deterring lawyers from advocating controversial legal positions."

We appreciate and share the view that First Amendment rights must be ardently defended. We expect that any civility rule of professional conduct is less likely to be invoked in the context of advocating controversial legal positions and anticipate that the vast majority of complaints would arise in the context of discovery and other routine out-of-court matters. Notwithstanding the statement in Comment [6] of rule 8.4, we believe crafting (and enforcing) a rule of professional conduct that does not in fact prohibit activities protected by the First Amendment raises very legitimate issues and that further exploration of these issues is needed.

- **Concerns About Use (or Misuse) of the Rule**

We are concerned that a rule of professional conduct could end up being weaponized in the hands of litigants, opposing counsel, business rivals, political rivals, and others. It is relatively easy to file a complaint with the State Bar and trigger an investigation and there is no cost to make the accusation. Although the State Bar investigation is confidential, a complaint that becomes public once disciplinary charges have been filed can, by itself, cause harm. Defending against an accusation can cost a significant amount of money, even for a successful exoneration.

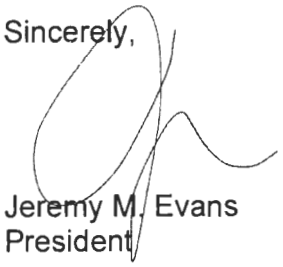
We also note that the rules of professional conduct are intended to regulate professional conduct of *lawyers* through discipline. Self-represented litigants are not bound by these same rules. There are many cases with a represented litigant on one side and a self-represented litigant on the other side. What consequence, if any, are there to a self-represented litigant who acts in an uncivil manner? Would the incentives to file a complaint with the State Bar differ between cases where both sides are represented by counsel (and can equally file a complaint, whether initially or in retaliation to the other side's complaint where both sides claim incivility) and cases where one side is represented but the other is not?

4. Require *all* lawyers, not just those who took the oath after the 2014 rule change, to affirm or reaffirm during the annual license renewal process that: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

   CLA supports this recommendation.

We appreciate your consideration of our comments and look forward to the opportunity to work on proposals to improve civility in the practice of law.

Sincerely,



Jeremy M. Evans
President

CAL-ABOTA

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American Board of Trial Advocates

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* Deceased

CAL-ABOTA
Resolution in Support of the California Civility Task Force

Whereas, the California Civility Task Force is a joint project of the California Judges Association (CJA) and the California Lawyers Association (CLA); and

Whereas, the governing board of CAL-ABOTA has been provided with the Task Force's Initial Report entitled Beyond the Oath: Recommendations for Improving Civility; and

Whereas, CAL-ABOTA agrees with and embraces the Task Force's efforts to improve civility in the legal profession;

NOW THEREFORE, CAL-ABOTA hereby respectfully:

1. Endorses Proposal 1 of the Task Force Initial Report and asks the State Bar Board of Trustees to mandate one hour of civility MCLE training for attorneys (without increasing total MCLE hours). Some portion of the civility training should be devoted to making the profession more welcoming to underrepresented groups by addressing the link between incivility and bias.

2520 Venture Oaks Way, Suite 150 • Sacramento, California 95833
Telephone: (916) 239-4087 • Fax: (916) 924-7323 • Web: *www.cal-abota.org*

2. Endorses Proposal 2 of the Task Force Initial Report and asks the Chief Justice, as head of the Judicial Council, and the Center for Judicial Education and Research Advisory Committee (CJER) to provide voluntary training to judges on promoting civility inside and outside courtrooms.

3. Endorses Proposal 4 of the Task Force Initial Report and asks the Supreme Court to amend Rule of Court 9.7 to require all attorneys, when annually renewing their licenses to practice law, to swear or affirm: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity;" and,

4. Urges the Chief Justice, Judicial Council, and State Bar to take further appropriate action to improve civility in the practice of law.

5. CAL-ABOTA has carefully reviewed Proposal 3 of the Task Force Initial Report and the related proposed changes to the Rules of Professional Conduct, attached as Appendix 8 to the Initial Report. After careful consideration, CAL-ABOTA has unresolved concerns with both the Proposal and the related changes to the Rules of Professional Conduct, and as such reserves its endorsement at this time.

Dated: October 25, 2021

Walter M. Yoka, President
On Behalf of the Board of Directors
California Chapters of the
American Board of Trial Advocates
(CAL-ABOTA)

BEYOND THE OATH:

Recommendations for Improving Civility

Initial Report of the California Civility Task Force

A joint project of the California Lawyers Association and the California Judges Association

September 2021

Introduction

In 2014, the California Supreme Court—at the recommendation of the State Bar of California Board of Trustees—took a significant step aimed at improving civility among California lawyers. It adopted what is now Rule 9.7 of the California Rules of Court, adding new language to the attorney oath of admission. The new rule required anyone thereafter admitted to practice law in the Golden State to swear or affirm: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

The change resulted from an admirable effort by the American Board of Trial Advocates (ABOTA) and its allies to inspire greater focus on civility and professionalism by convincing states to add civility language to their oaths. Pat Kelly, then Chair of the State Bar Board of Trustees and now a member of this task force, drafted the language and shepherded the effort in California. The hope was and is that the oath's aspirational language would influence new lawyers to embrace civility.

The changed oath signaled a renewed commitment to civility by the legal profession. But while the commitment remains, incivility persists. Most lawyers entered the profession before 2014 and have never taken the oath. And many who have taken the oath seem to have forgotten their promise. In an era marked by coarseness and political division, the legal profession suffers from a scourge of incivility. Discourtesy, hostility, intemperance, and other unprofessional conduct prolong litigation, making it more expensive for the litigants and the court system. Moreover, incivility among lawyers extends beyond litigation, interfering with, if not derailing, transactions of every kind. It can create toxic workplaces. And unfortunately, young lawyers, women lawyers, lawyers of color, and lawyers from other marginalized groups are disproportionately on the receiving end.

The time has come for remedial action beyond the oath. This report sets forth four concrete, realistic, achievable, and powerful proposals to improve civility in California's legal profession. Through this initial report, the California Civility Task Force asks its sponsoring organizations, the California Lawyers Association (CLA) and the California Judges Association (CJA), to endorse

these proposals and join in asking the State Bar and Supreme Court to implement them.

1. Require one hour of MCLE devoted to civility training, included in the total number of MCLE hours currently required. Approved civility MCLE programs should highlight the link between bias and incivility and urge lawyers to eliminate bias-driven incivility.
2. Provide training to judges on the need to both curtail incivility and model civility, both inside and outside the courtroom, explaining the tools available to them to do so.
3. Enact meaningful changes to State Bar disciplinary rules, prohibiting repeated incivility and clarifying that civility is not inconsistent with zealous representation; and
4. Require *all* lawyers, not just those who took the oath after the 2014 rule change, to affirm or reaffirm during the annual license renewal process that: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

The California Civility Task Force

The California Civility Task Force is a joint project of the CLA and CJA. It consists of approximately 40 leading lawyers and judges from across the state, all committed to fairness, justice, and the improvement of the legal profession. A list of members, with biographical information, is attached as Appendix 1.

The task force is sui generis, having arisen from grass-roots concern about incivility and having been embraced by the State Bar of California, CLA, and CJA.

In 2019, leaders of the Association of Business Trial Lawyers (ABTL) from across the state gathered for a weekend retreat. More than one hundred prominent judges and lawyers spent several hours addressing incivility and possible responses to it, in a wide-ranging discussion moderated by Court of Appeal Justice Brian Currey.

Not content merely to talk about incivility, the participants resolved to do something about it. First, the Los Angeles ABTL chapter published a summary of the discussion and a collection of articles growing out of it. A copy is attached as Appendix 2. Second, on behalf of this group, Justice Currey approached Alan Steinbrecher, then Chair of the Board of Trustees of the State Bar, to inquire about the possibility of implementing one of the group's proposed solutions: designating one hour of the existing MCLE requirement for civility training. Steinbrecher's response was to appoint Justice Currey as Chair of this task force, and request that Justice Currey assemble a talented and diverse group of judges and lawyers, examine the issues, and return with a series of proposals. He also designated Brandon Stallings, a member of the State Bar Board of Trustees, to serve as Vice Chair of the task force. At the suggestion of Steinbrecher's successor, Sean SeLegue, and with enthusiastic support from their respective leadership, responsibility for the task force later shifted from the State Bar to CLA and CJA. Both organizations added additional members to the task force, and Heather Rosing, who served as the first president of CLA, was named a Vice Chair of the task force.

The members of the task force wish to express their gratitude to the State Bar, CLA, and CJA for their support of the task force and demonstrated interest in improving civility in California.

The Need to Readdress Incivility

Thirty years ago, dealing with a case whose very existence it attributed to a "fit of pique between counsel," the First District Court of Appeal addressed this entreaty to California lawyers: "We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel. All too often today we see signs that the practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the

slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle." (*Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 641.

What's happened since? Despite repeated calls for course correction from every corner of the profession, incivility has only increased. Bullying, intimidation, and nastiness have too often replaced discussion, negotiation and skillful, hard-fought advocacy. We have reached the point where it has become increasingly necessary to remind some of our number that "Objectifying or demeaning a member of the profession, especially when based on gender, race, sexual preference, gender identity, or other such characteristics, is uncivil and unacceptable." (*Briganti v. Chow* (2019) 42 Cal.App.5th 504.)

"The timbre of our time has become unfortunately aggressive and disrespectful. Language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse. This isn't who we are." (*In re Mahoney (2021)* 65 Cal.App.5th 376.)

We are professionals. We are officers of the court. We are governed by Rules of Professional Conduct, or in the case of judges, Canons of Ethics. We are not just vendors or suppliers who come into the court to do business; we are justice's lifeblood. The judicial system is not a collection of buildings, it's a collection of people and principles. And we have been entrusted with its safekeeping. The problems and conflicts with which we deal—like those encountered by our fellow professionals in medicine and science and engineering—are too important to be obscured and marginalized by aggression and chicanery.

We know this. And the courts have been trying for decades to get us to address it. "'[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.) Now is the time for us to live up to our responsibility as exemplars.

Civility matters not simply because lawyers are examples to others on how to engage competing ideas and interests. It matters because our system of justice simply cannot function fairly and reliably with systemic incivility. In a 2020 Gallup Poll, a meager 21% of respondents rated lawyers as having very high/high honesty and ethical standards.[1] The perceived incivility between lawyers and between lawyers and judges, as often portrayed in the media, is a significant driver in the poor perception of lawyer honesty and professionalism. Why does this perception matter? Because a populace that does not perceive lawyers—who are the gateway to accessing justice—to be honest and ethical translates to a populace that does not trust its legal system. Lawyers are the last line of defense for the Rule of Law, the sine qua non of the freedoms we hold so dear. If we lose the trust of our colleagues and our fellow citizens, we put those freedoms at risk.

We also owe it to ourselves as human beings. Ours is an exceptionally stressful profession. At its best, it can take a toll on the individuals who practice it, and what we're seeing today is not the profession at its best. According to a recent study by the ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation, nearly 21% of lawyers are problem drinkers and over 36% *admit to* struggling with alcoholism. Another 9% *admit to* prescription drug abuse. Another study shows 28% fighting depression. A working environment described by one court as "rife with cynicism, awash in incivility" (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 293) will continue to exacerbate these numbers if we don't take steps to ameliorate them. We deserve better for ourselves and our loved ones.

We are professionals, and "[c]ivil behavior is a core element of attorney professionalism. As the guardians of the Rule of Law that defines the American social and political fabric, lawyers should embody civility in all

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1 (https://news.gallup.com/poll/328136/ethics-ratings-rise-medical-workers-teachers.aspx.)

they do. Not only do lawyers serve as representatives of their clients, they serve as officers of the legal system and public citizens having special responsibility for the quality of justice. To fulfill these overarching and overlapping roles, lawyers must make civility their professional standard and ideal." (J. Reardon, *Civility as the Core of Professionalism,* Business Law Today, September 2014 (ABA Business Law Section).)

Our system of justice requires lawyers to exercise honesty, integrity and accountability, without which, the system will fail. In a 2014 survey of Illinois lawyers (, 85% of respondents reported experiencing some instance of uncivil or unprofessional behavior within 6 months of the survey. Examples included playing hardball (such as not agreeing to reasonable requests for extensions); inflammatory writings; and—reported by over 16% of respondents—misrepresenting or stretching the facts or negotiating in bad faith.[2] All are counter to the dictates of our professional conduct rules.

Whether in litigation or a transactional context, our adversarial system requires zealous representation. But an adversarial system should not be confused with an acrimonious one. Zealous representation in an adversarial system still necessitates objective analysis, active listening to the other side's position to best address adversarial points and the need to focus on the ultimate goal of the system, which is the resolution of issues. As Jayne Reardon, Executive Director of the Illinois Supreme Court Commission on Professionalism, observed, "research conclusively bears out, (1) civil lawyers are more effective and achieve better outcomes . . . " and ". . . clients evaluate a lawyer who exhibits civility and professionalism as a more effective lawyer." *Civility as the Core of Professionalism, supra.*

In contrast, rampant incivility leads to an inability to analyze cases and legal positions because incivility clouds meaningful analysis. Incivility breeds a lack of self-responsibility. Incivility erodes adherence to an honor system. And most critically, incivility justifies unfounded vilification of others

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2 (https://2hla47293e2hberdu2chdy71-wpengine.netdna-ssl.com/wp-content/uploads/2015/04/Study-of-Illinois-Lawyers-2014.pdf)

Understanding that it is such a critical component of effective advocacy, how can civility be promoted among lawyers? The attorney oath is a good start; but it's only a start. Civility takes effort and training. Promising to be civil without a continuous reminder of the promise allows the promise to fade. We are convinced that the initiatives we have laid out in this report will start us back onto the high road on which our practice should travel.

Restoring civility will not be easy, but it must be done. And soon. Every generation of uncivil lawyers teaches incivility to the next. We must act now, and act decisively. "If this be quixotic, so be it; Rocinante is saddled up and we are prepared to tilt at this windmill for as long as it takes." (*Kim v. Westmoore Partners*, *supra*, 201 Cal.App.4th 267, 293.)

Proposals of the California Civility Task Force

Proposal 1: Ask the State Bar Board of Trustees to mandate one hour of civility MCLE training (without increasing total MCLE hours). Some portion of the civility training should be devoted to making the profession more welcoming to underrepresented groups by addressing the link between incivility and bias.

Our first proposal is to ask the State Bar Board of Trustees to amend State Bar Rule 2.72 (which contains MCLE requirements) to require, as a part of the existing total MCLE hours required, one hour of civility training. For most lawyers, a total of twenty-five hours is required during each MCLE compliance period. Of the required hours, at least four must be devoted to legal ethics, at least one must deal with recognition and elimination of bias in the legal profession, and at least one must address substance abuse or other mental or physical issues that impair a lawyer's ability to provide competent legal service. Our proposal would *not* increase the total number of hours required. Instead, it would require that at least one of the existing required hours be devoted to civility.

The goal is to promote courtesy, integrity, and professionalism in the bar. We believe mandatory MCLE civility programs could and should educate

attorneys about the economic and human costs of incivility; provide lawyers with reasons and tools to change their own behavior if they are uncivil; teach lawyers how to help those who are uncivil change their behavior; help lawyers deal with stress and dissatisfaction caused by toxic uncivil behavior; and reduce bias-driven incivility.

Voluntary continuing legal education programs on civility already exist, of course. The problem is that attendees are self-selected: Those most committed to civility (including those who have been victimized by incivility) are the most likely to attend. Thus, these courses tend to "preach to the choir." Making civility education mandatory would bring those who need education the most into the tent. All attendees would be able to reflect on their own behavior, and become empowered to make necessary improvements.

Task force members have reviewed existing civility programs available online. Some programs are decidedly better than others. We envision that mandating civility education would spur the creation of excellent new programming on the topic by California MCLE providers. To aid in that effort, we have provided the following additional resources. Appendix 3 includes a list of California cases dealing with civility and a summary of key cases. Appendix 4 contains a table and memorandum identifying and describing some individuals who have expertise in workplace incivility generally (i.e., not limited to the legal profession). It also includes a list of some individuals who have written or spoken about incivility. The listings do not purport to be exhaustive, and the mere fact that a name is listed does not imply that the task force endorses that person's views. Appendix 5 describes referral and dispute resolution techniques that have been employed in other jurisdictions to resolve disputes among lawyers, and in private and public organizations to resolve disputes among employees. Although we are not currently recommending that California adopt such a program, the idea warrants further study.

The amended MCLE rule should specify that some portion of civility training must be devoted to addressing the link between incivility and bias. If our profession is serious about increasing diversity and embracing justice, it must

reduce incivility directed at attorneys who come from underrepresented groups. Doing so would be consistent with the State Bar's Strategic Plan, which includes (as part of Goal 4 of that plan) promotion of "policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves." Appendix 6 is a memorandum authored by task force members exploring bias-driven incivility in the legal profession. An important article by Justice Lee Edmond and Judge Samantha Jessner entitled "Gender Equality is Part of the Civility Issue" is included in Appendix 2. These resources could be used as starting points for programming on this topic.

The task force is grateful that the State Bar already requires at least two hours of MCLE dealing with the recognition and elimination of bias in the legal profession and society, including one hour focusing on implicit bias and the promotion of bias-reducing strategies. We believe that melding the topics of incivility and bias, as we have proposed, would be a powerful tool to accomplishing our collective goal of a more open and welcoming profession.

The task force considered whether the mandatory civility MCLE requirement should be limited to lawyers who practice in a litigation environment. Based on anecdotal reports, however, we have concluded that lawyers in non-litigation practices also encounter incivility, including bias-driven incivility. We therefore believe it would be appropriate to require civility MCLE training for all lawyers.

Proposal 2: Ask the Chief Justice, as head of the Judicial Council, and the Center for Judicial Education and Research Advisory Committee (CJER) to provide specific training to judges on promoting civility inside and outside courtrooms. CJA should commit to do the same.

The task force believes judges can and should play a critical role in improving courtesy, integrity, and professionalism among lawyers. Judges can and often do serve as civility role models. These judges set the stage for improved civility by making clear that civility and professionalism are expected norms both inside and outside the courtroom. The profession would benefit from new

training programs designed to arm judges with tools to have a greater impact on promoting civility among lawyers.

Judges receive training and continuing judicial education from multiple sources. For example, new judges attend New Judge Orientation and later attend Judicial College. All judges are required to complete specified hours of continuing judicial education. Some continuing judicial education is provided through the Center for Judicial Education and Research Advisory Committee (CJER). CJA is another significant provider of excellent judicial education programs. Judges also attend other judicial education programs and MCLE programs. And of course, judges frequently teach continuing education programs for other judges and lawyers.

The task force's second proposal is to have CLA and CJA ask the Chief Justice, as head of the Judicial Council, to ask CJER to develop and promote programs specifically designed to educate judges on the need both to model civility and to require civility and professionalism both in and out of the courtroom. We also ask CJA to commit to developing and promoting such programs. Task force members Judge Wendy Chang and Judge Stuart Rice are developing a new PowerPoint presentation on the topic. It can be adapted for use by other judges who are willing to present on the topic. The presentation is a work in progress and will be beta tested and refined. The current version is attached as Appendix 7. Also, Appendix 2 contains an article by Justice Currey and then Los Angeles County Superior Court Presiding Judge Kevin Brazile entitled "Seven Things Judges Can Do to Promote Civility Outside the Courtroom," and an article by Justice Lee Edmon and Judge Samantha Jessner entitled "Gender Equality is Part of the Civility Issue." The two articles could be used as a starting point for additional judicial education programs on promoting civility, and can be used as handouts at any such program.

Proposal 3: Ask the State Bar Board of Trustees to recommend to the Supreme Court revisions to the Rules of Professional Conduct to clarify that repeated incivility constitutes professional misconduct and that civility is not inconsistent with zealous advocacy.

Other states have provisions in their rules of professional conduct making clear that incivility is not required for zealous client representation. Some states also have rules specifying that incivility constitutes professional misconduct.

Our proposal for similar rules in California is contained Appendix 8.

We suggest several modifications to clarify that civility is consistent with zealous advocacy.

California already has a rule specifying "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." Rule 8.4(d). One of our proposals would add a comment that a lawyer may violate this rule "by repeated incivility while engaged in the practice of law or related professional activities." The language is intended to preclude disciplinary proceedings based on an isolated incident of incivility or conduct unrelated to the profession. Our proposal defines "incivility" for purposes of the rules as "discourteous, abusive, harassing, or other significantly unprofessional conduct."

We are aware that making incivility a breach of the rules of professional conduct may be controversial in some circles. Some lawyers may have First Amendment concerns. Others may be concerned that a single misstep could land them in hot water with the State Bar. Our proposal should allay both concerns. Our task force members are ardent defenders of the First Amendment and have no interest in deterring lawyers from advocating controversial legal positions.

Similarly, we are open to adding further definitional language so lawyers can have clarity about what conduct is and is not prohibited. In *United States v. Wunsch* (9th Cir. 1996) 84 F.3d 1110, the Ninth Circuit concluded that

California Business & Professions Code §6068(f)'s admonition that lawyers should abstain from "offensive personality" was void for vagueness, but appeared to find no such problem with the phrase "conduct unbecoming a member of the bar." We are confident that a rule can be drafted that gives attorneys sufficient notice of what conduct violates the rule.

Another issue is the rules' scope—should they apply only when lawyers are representing clients, when they are acting in any professional capacity (including participating in bar association activities), or at all times? The current oath requires lawyers to pledge to strive to conduct themselves "at all times" with dignity, courtesy and integrity. We propose language limiting the rule's application to when the lawyer is practicing law or engaged in professional activities. Some might prefer a rule limited to when a lawyer is representing a client. We acknowledge reasonable minds may differ on this issue.

In any event, we view our proposal as a starting point. We would fully expect the State Bar rulemaking bodies to take public input, consider alternative language, and craft a rule that best serves the public and the profession. We look forward to assisting in that process.

We share the view that a single misstep or isolated outbreaks of incivility should not result in State Bar discipline, which is why our proposal only applies to "repeated incivility." Indeed, we hope the mere existence of a disciplinary rule prohibiting incivility will spur civility.

Finally, we suggest that the State Bar develop a diversion program that would allow those charged for the first time with repeated incivility to avoid disciplinary proceedings by completing a civility mentorship program that could be modeled after judicial demeanor mentorships. The lawyer being mentored would pay for any costs. Ideally, judges would also be able to refer lawyers to this program, and allow layers to complete the program in lieu of paying sanctions for incivility.

Proposal 4: Ask the Supreme Court to amend Rule of Court 9.7 to require all attorneys, when annually renewing their licenses to practice law, to swear or affirm: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

As noted above, since 2014, the California Rules of Court have required every lawyer newly admitted to practice in California to take an oath that includes a civility pledge: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity." (Cal. Rules of Court, rule 9.7, enacted in 2013 as rule 9.4.) But incivility continues to plague the profession. Part of the problem is that most lawyers were admitted to practice before 2014 and have never taken the civility pledge. As one part of a multi-pronged response to incivility, the Civility Task Force recommends amending Rule 9.7 (or adding a new rule) to require all attorneys to take the civility pledge annually. For example, the rule could be amended to read:

Rule 9.7. Attorney Oath <u>and Civility Pledge</u>

(a) Oath required when admitted to practice law

In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

(b) <u>Annual civility pledge</u>

<u>Each active licensed attorney must take or reaffirm the civility pledge described in subsection (a) of this rule each year when paying annual bar dues. The State Bar must adopt appropriate procedures to ensure compliance with this requirement.</u>

(c) <u>Failure to take or reaffirm annual civility pledge</u>

<u>Failure to take or reaffirm the civility pledge as required by this rule may result in [administrative suspension/involuntary inactive enrollment].</u>

The procedure could be as simple as checking a box when renewing online or by mail.

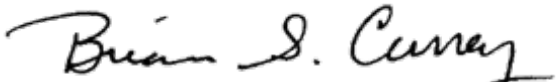
We are all in this profession together, and all lawyers should take the aspirational civility pledge.

Conclusion

The time has come for our profession to take additional steps to promote civility. We have made four significant proposals and ask that our sponsoring organizations, CLA and CJA, adopt resolutions embracing them.

Task force members are committed to sharing these proposals with the legal community and engendering support for them. We also commit to working with the Supreme Court, the Judicial Council, the Judicial Council Rules Committee, the State Bar Board of Trustees, and the State Bar Committee on Professional Responsibility and Conduct to fine tune these proposals or consider others.

Thank you for your support of the task force and for considering our views.



Justice Brian S. Currey, Chair
On behalf of the
California Civility Task Force

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Justice Brian S. Currey, Chair

Justice Currey is honored to serve on the California Court of Appeal, Second Appellate District. He praises his talented, distinguished, and cordial colleagues, top-notch staff, and the generally excellent quality of lawyers who practice before his court. Together they enable the court to exercise its duty to do justice in the wide variety of cases before it.

On the civility front, he chairs the California Civility Task Force, a joint project of the California Lawyers Association (CLA) and California Judges Association (CJA), in cooperation with the State Bar of California. He authored a leading case linking (and condemning) incivility and bias, *Briganti v. Chow*, 42 Cal.App.5th 504 (2019), and co-authored a key article outlining ways judges can encourage civility in the legal profession. *See* B. Currey & K. Brazille, "Seven Things Judges Can Do to Promote Civility Outside the Courtroom," Summer 2019 ABTL-LA Report 11, 12-13.

Governor Jerry Brown appointed him to the Court of Appeal in 2018. The Commission on Judicial Appointments unanimously confirmed his appointment after the JNE Commission bestowed an "exceptionally well qualified" rating. Prior to his appointment, he served *pro tem* in Divisions 1 and 3 of the Second District Court of Appeal.

Before his elevation to the Court of Appeal, he served four years as a Judge of the Los Angeles County Superior Court. His assignments included presiding over a misdemeanor criminal courtroom, handling a wide variety of cases as the only civil judge at the Compton Courthouse, and serving in the Complex Civil Litigation Court.

In 2010, Los Angeles Mayor Antonio Villaraigosa appointed him as Counsel to the Mayor, and later also Deputy Mayor for Economic and Business Policy. In those roles, he served on the Mayor's small executive team, and oversaw the City departments responsible for the airport, port, convention center, planning, building and safety, and other key functions. His time at City Hall gave him an insider's understanding of how government works and a deeper understanding of public policy issues facing the Golden State.

Before that, he spent nearly 30 years litigating complex cases at O'Melveny and Myers LLP, one of the state's oldest, largest, and most highly regarded law firms. He performed various roles, including Vice-Chair of the firm's award-winning litigation department. While at O'Melveny, he served on a *pro bono* basis as counsel to the Christopher Commission after the Rodney King incident, was a member of the Los Angeles County Bar Association's task force on criminal justice reform, and secured a Supreme Court victory

allowing the U.S. Census to more accurately count traditionally undercounted groups. His firm was honored for a pro bono program he helped create whereby its lawyers gained trial experience by serving as deputy prosecutors for several smaller cities. He also received an award from an environmental organization for his pro bono work in Southern California.

Justice Currey serves on the CJA Executive Committee and represents appellate judges on CJA's Executive Board. Before going on the bench, he served for many years on the Board of Trustees of the Los Angeles County Bar Association (LACBA) and the Executive Committee of LACBA's Litigation Section. He was a lawyer representative to the Ninth Circuit Judicial Conference, Chair of the Magistrate Judge Selection Committee for the Central District of California, and chaired LACBA's federal courts committee. He has been a member of ABTL-LA's Board and Judicial Advisory Committee. He is or has been a member of several other important professional associations. He speaks and writes on legal issues, and has taught at the USC Gould School of Law.

Justice Currey attended the University of California, Davis, where he was recognized as the outstanding male graduate, and the University of Virginia Law School, where he served on the editorial board of the *Virginia Law Review*.

In his spare time, he likes running, hiking, kayaking, fly-fishing, and enjoying life with family and friends. *Rev. 8.21.*

Heather L. Rosing, Vice Chair
Shareholder and CEO, Klinedinst Attorneys
Immediate Past President, California Lawyers Association

Heather L. Rosing is a Shareholder with Klinedinst PC, with five offices across the West. Ms. Rosing chairs the firm's Professional Liability and Ethics Department and serves as the newly elected CEO and President. Ms. Rosing litigates and tries complex malpractice and fraud cases, advises in the areas of ethics and risk management, and serves as an expert witness. In her decades of defending lawyers and other professionals, Ms. Rosing has numerous notable victories in legal malpractice cases in state court, federal court, and arbitration. She also defends judicial officers before the Commission on Judicial Performance. Well known for her advocacy and contributions to the profession, Ms. Rosing was one of 18 lawyers honored as "Lawyer of the Decade" by the Daily Journal in January 2021.

A certified specialist in legal malpractice and a former member of the ABA Standing Committee on Lawyers' Professional Liability, Ms. Rosing also served as an appointed advisor to the Rules Revision Commission of the State Bar of California, which recommended wholesale revisions to the Rules of Professional Conduct (adopted in large part by the California Supreme Court in 2018), and an appointed member of the Mandatory Insurance Working Group of the State Bar. She frequently speaks on a pro bono basis on issues pertaining to malpractice, ethics, and risk management across California and the country. Ms. Rosing was also appointed to serve as the co-vice chair of the Civility Task Force, which is a joint effort among the California Lawyers Association (CLA), the State Bar, and the California Judges Association (CJA). Ms. Rosing is also a member of the CJA's Judicial Fairness Coalition, which focuses on education about the judicial branch and the importance of judicial independence.

In 2018 and 2019, Ms. Rosing served as the inaugural President of the CLA, the largest statewide voluntary Bar Association in the country. During her tenure, she launched the organization with a focus on its 16 Sections, the California Young Lawyers Association, governmental affairs, bar relations, and initiatives in the areas of diversity, access to justice, and civics education. Under her leadership, CLA took over the Annual Meeting, which has brought together judges, lawyers, and organizations from across the State for several days of meetings for over 80 years. Ms. Rosing now is the President of the philanthropic sister organization of CLA, the California Lawyers Foundation (CLF). CLF is focused on supporting organizations, causes, and projects related the core CLA initiatives.

Previously, she served for four years on the State Bar of California's Board of Trustees as Vice-President, Treasurer, and Chairperson of the Regulations, Admissions, and Discipline Oversight Committee. A strong advocate for judicial and legal diversity, Ms. Rosing served as President of ChangeLawyers (formerly the California Bar Foundation), which awards pipeline grants, scholarships, and fellowships across the State. Ms. Rosing has served in leadership roles of many other organizations, including as President of the San Diego County Bar Association in 2008, where she launched a Diversity Fellowship Program, spearheaded a civility initiative, and founded a pro bono program to assist active duty servicemembers.

The recipient of numerous accolades, Ms. Rosing was recognized by the *Daily Journal* as Top Lawyer of the Decade in 2021 as well as Top 100 Lawyers in California (2018-2021). Best Lawyers recognized Ms. Rosing as Lawyer of the Year for 2022 in Legal Malpractice Law Defense. She also has been

frequently honored by *San Diego Super Lawyers*, including Top 25 Women San Diego Super Lawyers, Top 50 San Diego Super Lawyers, and Number 1 Attorney in San Diego County. Ms. Rosing was named Woman of Influence in Law 2021 by the *San Diego Business Journal* which previously honored her as CFO of the Year (2011, 2014, 2016). She is the recipient of the San Diego Law Library Foundation's Excellence in Public Service Award (2019), Fastcase 50 (2019), Earl B. Gilliam Bar Foundation's Corporate Commitment to Diversity Award (2016), Lawyer of the Year by the San Diego Defense Lawyers (2015), and the Exemplary Service Award by San Diego Volunteer Lawyer Program (2014).

Brandon Stallings, Vice Chair

Brandon Stallings is a Deputy District Attorney V at the Kern County District Attorney's Office. He is a Supreme Court appointee to the State Bar Board of Trustees and has served on the board for the past six years. He currently sits as chair of the Regulation and Discipline Committee which oversees the discipline, judiciary, probation and rehabilitation offices of the Bar. He has served as chair of the Audit Committee, chair of the Programs Committee, liaison to the Committee on Professional Responsibility and Conduct Committee during the rewriting of the Rules of Professional Conduct, Appointment Liaison, Member of the Ad Hoc Commission on the Discipline System and is Liaison to the Probation Department Re-design and Collaborative Justice Working Group. Mr. Stallings is former chair of the Young Lawyers Section of the Kern County Bar, Court Advisory Committee, former member of the Board of Directors for the Kern County Bar Association and presents at undergrad and law schools on legal ethics, professional responsibility, ethical issues facing prosecutors, overview of the criminal justice system, prison gangs and basic legal principles. He chairs the Mothers Against Drunk Driving Auxiliary Committee for Kern County and sits of the New Wine Church Board and advises on a committee addressing drug addiction programs administered by the church.

Tad Allan

Tad Allan is Of Counsel in O'Melveny & Myer's Los Angeles office, having recently retired following 32 years as a partner in the firm's Business Trial and Litigation Practice. His practice focused on automobile and aviation industry litigation, and he also played a leading role in many of the firm's large, highly visible trials.

In the automotive industry, Tad has extensive expertise in automotive dealer litigation, including dealer terminations and dealer network issues, class actions and general commercial litigation. Tad prevailed in more than a dozen trials for his automobile manufacturer clients, which included American Honda Motor Company, General Motors, and Ford Motor Co.

Tad also represented major airlines and aviation manufacturers in air crash cases, commercial litigation and in regulatory issues, such as FAA safety investigations. Among the airline and aviation industry companies Tad has represented are Atlantic Aviation, China Eastern Airlines, United Airlines, U.S. Airways, Alaska Airlines, Flying Tigers Airlines, Lockheed (now Lockheed Martin), and Sikorsky.

Outside of the automotive and aviation industries, Tad has played instrumental roles in many high-stakes trials. For example, Tad was a member of the trial team that obtained a defense jury verdict in a $12 billion antitrust case brought by Rambus, Inc. against the firm's client Hynix Semiconductor, Inc., a result that was hailed by the *Daily Journal* as one of the Top Defense Verdicts of 2011.

Tad served on the California State Bar's Commission on Judicial Nominees Evaluation from 2011-13. He also served in many leadership positions within O'Melveny for associate development, including training, work assignment and mentoring.

Illustrative Professional Experience

Guimei v. General Electric Co., 172 Cal. App. 4th 689 (2009) (case arising out of air crash in China properly stayed in favor of proceedings in China, on forum non conveniens grounds)

Daugherty v. American Honda Motor Co., Ltd., 144 Cal. App. 4th 824 (2006) (auto manufacturer not liable for defects that do not manifest within the warranty period)

In re Claremont Acquisition Corp., 186 B.R. 977 (C.D. Cal. 1995), aff'd, 113 F.3d 1029 (9th Cir. 1997) (GM's decision to reject a prospective dealer upheld since based on objective, performance-related criteria)

Woods v. Saturn Distribution Corp., 78 F.3d 424 (9th Cir. 1996) (award of arbitration panel consisting of Saturn employees and dealers enforced notwithstanding charge of "evident bias")

Education

George Washington University, J.D., 1981 University of California at Berkeley, B.A., 1976

Hon. Katherine A. Bacal,
Judge Bacal is the supervising judge of the San Diego Superior Court's civil division, where she also handles an independent calendar. In the past, Judge Bacal presided over family and criminal matters, including handling felony arraignments for two years in the Chula Vista courthouse.

Before being appointed to the bench by Governor Arnold Schwarzenegger in January 2008, Judge Bacal was a partner/principle at Baker & McKenzie LLP. She started her legal career at Gibson, Dunn & Crutcher LLC. Judge Bacal received her law degree from the University of Texas at Austin and her undergraduate degree from the University of Redlands, Johnston Center, where she graduated Phi Beta Kappa with a liberal arts degree.

Judge Bacal was the judicial liaison to the San Diego County Bar Association's Legal Ethics Committee for several years. She is also a member of the judicial advisory board of ABTL, San Diego and the current co-chair of its civility committee. Judge Bacal is also the chair of the San Diego Superior Court's local rules committee. Serving in all of these roles, Judge Bacal was on the subcommittee that proposed revised civility guidelines adopted by the SDCBA and included in the San Diego Superior Court's local rules. Judge Bacal is a member of the California Judges Association and has presented updates to its membership. She is also a long-time member of the Advisory Board of Lawyers Club of San Diego. Before being appointed to the bench, Judge Bacal was Lawyers Club's president and received Lawyers Club's Belva Lockwood Award in 2015. Judge Bacal is also a member of the Louis M. Welsh Chapter of the American Inns of Court (which focuses on professionalism, ethics and civility) and is a two-time former small-group leader.

Sarah J. Banola
Ms. Banola is the Founding Partner of BRB Law LLP. She

concentrates her practice in the areas of professional responsibility, regulatory law, and employment law. Her professional responsibility practice includes representing lawyers and law firms in matters related to legal ethics, legal negligence, attorney-client fee disputes, professional discipline, State Bar admission, and conflicts of interest. She is a member of the California Bar's Committee on Professional Responsibility and Conduct (COPRAC) and was appointed to serve as the Vice Chair of COPRAC for the

2021-2022 Committee year. Ms. Banola is a past chair and current member of the Bar Association of San Francisco's (BASF) Legal Ethics Committee, a Board member of the Conference of California Public Utility Counsel (CCPUC), and a member of Women in Public Utilities (WIPU) and California Lawyers Association's Civility Task Force. Ms. Banola is a frequent lecturer and author on the law governing lawyers. She serves as a contributing editor to the professional responsibility chapter of the California Practice Guide on Employment Litigation and the legal malpractice chapter of the California Practice Guide on Claims and Defenses, published by the Rutter Group. She has also moderated a panel on lawyer impairment for COPRAC's 24th Annual Statewide Ethics Symposium and presented on civility guidelines before BASF.

Kendra L. Basner

Kendra Basner is a partner at O'Rielly & Roche LLP. She is an experienced litigator and certified specialist in legal malpractice law. Ms. Basner devotes her practice to counseling and advising lawyers, law firms, in-house corporate counsel, legal service providers and related businesses concerning legal ethics, risk management, and law practice planning and compliance with the unique perspective gained through advocating on behalf of lawyers in civil cases and State Bar discipline matters. Ms. Basner also serves as a consultant and expert on legal malpractice matters and related litigation.

After beginning her legal career as a prosecutor, Ms. Basner was a partner at an Am Law 200 firm where she spent over a decade defending lawyers and other professionals in civil cases and disciplinary actions in addition to advising on legal ethics and risk management matters. She is certified as a specialist in legal malpractice law by the State Bar of California Board of Legal Specialization. Knowing and appreciating the true obstacles and risks that lawyers, law firms and legal services face allows Ms. Basner to target issues and streamline the solutions to minimize the risk of liability.

Ms. Basner is a thought leader in legal ethics and law firm risk management both in California and nationally. She frequently speaks at local, national and international events on topics related to legal ethics, legal services, legal malpractice and law firm compliance; and she regularly contributes to legal industry publications and resources. In November 2020, Ms. Basner published anarticle,"12 Steps to a Healthier Law Practice in 2020: Step 11– Actions Speak Louder Than Words" which addresses the state of civility in

California. A complete list of Ms. Basner's recent publications and presentations can be found at: https://oriellyroche.com/attorney/kendra-l-basner/

Ms. Basner holds membership and leadership roles in some of the legal industry's most important professional groups addressing the pressing issues that face law firms and legal services today, including serving as an Editorial Board member of the ABA/BNA Lawyer's Manual on Professional Conduct; a Board member and Future of Lawyering Committee member for the Association of Professional Responsibility Lawyers (APRL); a Fellow of the American Bar Foundation; a selected member of the California Lawyers Association's (CLA) Civility Task Force; a past member of the State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC); and a member of the Attorney Discipline Defense Counsel (ADDC).She is also a current member and the Immediate Past Chair of the Bar Association of San Francisco's (BASF) Legal Ethics Committee, for which she was honored with BASF's 2019 Award of Merit. Ms. Basner also previously served on the Ethics Committee for USA Lacrosse.

Justice William W. Bedsworth

Justice William W. Bedsworth is the longest serving justice in the history of the 4th District Court of Appeal, Division 3. His 24 years on the court have included many noteworthy opinions including *People v. Garcia* (2000) 77 Cal.App.4th 1269, the first gay rights precedent in California, which prompted the California legislature to change its law governing jury selection to bar peremptory challenges on the basis of sexual preference. He has also authored several civility precedents, most notably *Kim v. Westmoore Partners* (2012) 201 Cal.App.4th 267 and *Lasalle v. Vogel* (2019) 36 CalApp.5th 127, and is a frequent speaker on national and statewide civility panels. In 2017, the California Chapter of the American Board of Trial Advocates honored him by creating the William W. Bedsworth Judicial Civility Award.

A graduate of Loyola Marymount University and Berkeley Law, Justice Bedsworth serves on the Board of Visitors of UCI Law School. He served on the Board of Directors of the National Conference of Christians and Jews and was a principal in Fair Share 502 (a charity whose 10 members raised almost a million dollars for homeless children).

He was the Hispanic Bar Association's Judge of the Year in 1997, the Celtic Bar's Judge of the Year in 2012, and received the LGBT Lavender Bar Association's first Leadership Award in 2011. In 2015, he was given the

David G. Sills Award, the Orange County Bar Association's Lifetime Achievement Award for appellate law. He was the 2018 recipient of the Franklin G. West Award, the highest honor bestowed by the Orange County Bar Association.

In addition to law review articles, he has published in the lay press, most recently in Sierra and Coast magazines. His monthly humor column "A Criminal Waste of Space" is nationally syndicated, and self-described as the most aptly named feature of the dozen legal publications in which it appears. He has won several awards for it, including six from the California Newspaper Publishers Association. In 2019 he won the California Newspaper Publishers Association contest to identify the best newspaper column in California.

In 2010, he was chosen for one of George Mason University's coveted Green Bag awards – the two other winners in his category were Nina Totenberg of NPR and Jeffrey Toobin of *The New Yorker*. In 2019, his opinion in *Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156, was chosen by Green Bag as the recipient of one of five awards nationwide for "exemplary legal writing."

In 2003, *The Times of London* gave him its Judicial Wisdom of the Year award for recognizing that "There is no non-culpable explanation for monkeys in your underpants." His third collection of legal humor, *Lawyers, Gubs and Monkeys*, was published by Van de Plas Publishing in 2017.
Justice Bedsworth lives with his wife Kelly and their surfeit of cats in Laguna Beach, California. He worked as a National Hockey League goal judge for 15 years (he proudly wears a 2007 Stanley Cup ring) and was the subject of a story in *ESPN The Magazine* entitled "Justice of the Crease."

Michelle L Burton

Michelle Burton is an owner and the Managing Partner of Burton Kelley LLP, a women owned, civil litigation firm specializing in complex insurance coverage, bad faith defense, insurance defense, professional liability, regulatory compliance, and construction defect. Ms. Burton has obtained numerous jury trial defense verdicts for her clients against multi-million dollar claims throughout California. In addition to her trial practice, Ms. Burton is a Certified Appellate Specialist and has authored and argued numerous writs and appeals addressing insurance-related matters. She has mediated, negotiated and resolved thousands of property claims throughout California and Washington.

Ms. Burton frequently provides webinars on claims handling, coverage issues and litigation strategies. Ms. Burton has been a speaker at the DRI on emerging coverage issues for the Cannabis industry. The Combined Claims Conference on Property Appraisals and the ABTL on jury selection and use of technology in the court room. Ms. Burton has served as the President of the San Diego Chapter of the Association of Business Trial Lawyers (2018) where she started a Civility Committee to restore civility in the practice of law. The Civility Committee was expanded to all ABTL Chapters and became a statewide mission with collaboration between the bench and the bar. Ms. Burton is one of the ABTL representatives on the State-Wide Civility Task Force. She has been recognized as a Lawyer of Distinction in Civil Litigation (2015-2020), Super Lawyer (2018-2021), AVVO Top-Rated Lawyer (2018-2021) and in *Lawyer Monthly's* Women in Law Awards (2018). She is also a Fellow of the American Bar Foundation, for her commitment to the legal profession and her community. Ms. Burton was also President of Run Women Run for 10 years, a political action committee devoted to the mentorship and advancement of women in politics.

Ms. Burton obtained her B.S. degree from San Diego State University and her law degree from California Western School of Law. Ms. Burton is licensed in California and Washington.

Judge Wendy Chang

Judge Wendy Chang is a Judge of the Los Angeles Superior Court, assigned to an unlimited civil Independent Calendar courtroom. She was appointed by Governor Brown.

Prior to her appointment, Judge Chang was a leading national voice in the law governing lawyers, focusing her practice on the representation and counseling of lawyers and law firms, and having been a frequent national and local speaker and author on the subject. She was a certified specialist in legal malpractice law by the State Bar of California. She currently serves as a member of the State Bar of California State Bar's working group on Closing the Justice Gap and the 2021 California Lawyers Association Civility Task Force. Judge Chang previously served as a member of the State Bar of California's Task Force on Access Through Innovation of Legal Services,1 as an advisor to the State Bar of California's Commission for the Revision of the Rules of Professional Conduct (II) and also as Chair the State Bar of California's Standing Committee on Professional Responsibility and Conduct. She also served on the American Bar Association's Standing Committee on

Ethics and Professional Responsibility and on Los Angeles County Bar Association's (LACBA) Professional Responsibility and Ethics Committee. Judge Chang is a co-chair of the National Asian Pacific American Bar Association's Judiciary & Executive Nominations and Appointments Committee, and has served in that capacity since 2007. Ms. Chang served on LACBA's State Appellate Judicial Evaluation Committee for 6 years, and is former chair of the Appointive Office committee for the Women Lawyers Association of Los Angeles. She is a former member of the Board of the National Association of Women Lawyers, and a former president of the Southern California Chinese Lawyers Association. Judge Chang was also a contributing editor to Ronald E. Mallen "Legal Malpractice" treatises (2018 edition), published by Thomson Reuters.

Judge Chang received her juris doctor from Loyola Law School, Los Angeles, and her bachelor's degree from the University of California Los Angeles.

David Carr

David C. Carr, an attorney in private practice in San Diego, California, specializes in ethics advice to lawyers, California State Bar discipline defense, and attorney licensing.

Mr. Carr is a 1986 graduate of Loyola Law School in Los Angeles. Following several years of practice in commercial law and business litigation, Mr. Carr joined the State Bar of California as a staff attorney in 1989. He served as counsel to the State Bar's audit and review panel from 1989 to 1992. Mr. Carr served on the National Organization of Bar Counsel's advisory committee to the American Bar Association's McKay Commission on discipline enforcement in 1991.

He moved from oversight of the discipline system in 1992 to prosecuting cases as a deputy trial counsel in the discipline prosecutor's office of the State Bar. After five years trying discipline, admissions and reinstatement cases before the State Bar Court Hearing Department, Mr. Carr began to specialize in appellate advocacy before the State Bar Court's Review Department, resulting in 10 published decisions between 1997 and 2000.

During the shutdown of the State Bar in 1998 after former Gov. Pete Wilson's veto of the State Bar dues bill, Mr. Carr worked as an unpaid volunteer in the discipline system. He argued as amicus counsel to the California Supreme Court that a special master be appointed to oversee discipline

system spending, an idea adopted by the Supreme Court in its decision reviving the discipline system (In re Attorney Discipline System (1998) 19 Cal.4th 582.)

After the Supreme Court ordered a special dues assessment, Mr. Carr became an assistant chief trial counsel and manager of the general trials unit in Los Angeles in 1999. He also worked on discipline policy issues as the chief trial counsel's liaison with the State Bar's Committee on Professional Responsibility and Conduct (COPRAC) and the State Bar Court Executive Committee.

Mr. Carr returned to private practice in 2001 and his hometown of San Diego in 2002. He is a member of the San Diego County Bar Association, where he is active on the Legal Ethics Committee. Mr. Carr is a member of the Association of Professional Responsibility Lawyers (APRL), the ABA Center for Professional Responsibility, and the Association of Discipline Defense Counsel (ADDC), where he served as president from 2008 through 2011. He is also a member of COPRAC for the 2018-2021 term. As an adjunct faculty member, Mr. Carr has taught responsibility at the Thomas Jefferson School of Law in San Diego.

Mr. Carr grew up in the South Bay suburbs of San Diego and attended high school in the small desert community of Borrego Springs. After high school, he attended UCLA, where he graduated with a degree in history in 1978.

Judge Linda H. Colfax

Judge Linda H. Colfax, a San Francisco Superior Court Judge since 2011, currently sits in the criminal division of the court, supervises the preliminary hearing courts, and presides over serious preliminary hearings. Judge Colfax has also served as a juvenile court judge and family court judge, has presided over both civil and criminal trials, and served on her court's appellate panel for three years. and Executive Committee for 4 years.

Currently, Judge Colfax is a Vice President of the California Judges Association (CJA), a co-chair of the LGBT Judicial Officers of California (LGBT-JOC), a co-chair of CJA's Task Force on the Elimination of Bias and Inequality, and an active board member of the International Association of LGBTQ Judges.

Judge Colfax believes local service and involvement is equally important. She serves on the San Francisco Superior Court's Executive Committee, co-teaches the Bench Demeanor Training for temporary judges, serves as San

Francisco Superior Court's co-coordinator for the Judicial Council's Judges in the Classroom program, and has volunteered to mentor those seeking appointment to the bench both through her local court and the LGBT-JOC.

Prior to her election to the San Francisco bench, Judge Colfax worked as a San Francisco deputy public defender. Judge Colfax earned her A.B. from Harvard and her J.D. from the University of Michigan. While attending Michigan, Judge Colfax was one of the founding members of the Michigan Journal of Race and Law and served as an Articles Editor.

Outside of the legal world, Judge Colfax most enjoys spending time with her wife and 2 young adult children and friends, traveling, biking, walking her dogs, rock climbing or gardening.

Judge David J. Cowan

Judge David J. Cowan is Supervising Judge of the Civil Division of the Los Angeles County Superior Court. In that capacity, he is responsible for assignment of trials around the County, among other duties pertaining to managing Civil, including the PI Hub, I/C, UD and Small Claims courts, as well as the Complex Program. Judge Cowan is also active in this role in working with numerous local bar associations on issues of importance to the Bench and Bar and in ensuring the Court is responsive to lawyers' needs and concerns. In particular, he has instituted Bench Bar Working Groups on addressing the effects of the pandemic on Civil jury trials, as well as related to management of employment cases.

Previously, Judge Cowan was an Assistant Supervising Judge of Civil and sat in an I/C courtroom at the Mosk Courthouse.

Judge Cowan was formerly Supervising Judge of the Probate and Mental Health Depts. While in Probate, after initially handling a calendar of decedent estates, trusts, conservatorship and guardianship cases, he went on to focus on long cause or complex trials and settlement conferences.

Judge Cowan is a member of the Probate and Mental Health Advisory Committee to the Judicial Council of California, as well as Vice-Chair of the Probate Law Committee of the Calif. Judges Ass'n. He is also a member of numerous LASC committees, including Chair of the Special Civil Jury Trials Committee, as well as on the Court's COVID-19 Working Group.

Judge Cowan was appointed a Judge by Governor Jerry Brown in 2014. Previously, Judge Cowan served as a Court Commissioner. For much of that

time, Judge Cowan handled a Family Law calendar at the Santa Monica Courthouse.

Prior to going on the bench, Judge Cowan practiced business and real estate litigation for seventeen years. He started at Rogers & Wells, now known as Clifford Chance. Later, he had his own office.

Judge Cowan is a graduate of Univ. of Calif., Hastings College of the Law and Columbia University.

Judge Cowan has also taught as an Adjunct Professor at Loyola Law School on various subjects for more than ten years. He is a frequent speaker to different Bar groups on a variety of legal issues.

Jeremy M. Evans

Jeremy M. Evans is the Chief Entrepreneur Officer (CEO), Founder & Managing Attorney at California Sports Lawyer®, representing entertainment, media, and sports clientele in contractual, intellectual property, and dealmaking matters. Evans is an award-winning attorney and industry leader based in Los Angeles.

His clients range from *Fortune 500* companies to entrepreneurs, athletes, entertainers, models, directors, television showrunners and film producers, studios, writers, individuals and businesses in contractual, intellectual property, formation, production, distribution, negotiation, and dealmaking matters. Evans is a graduate of the University of California, Los Angeles (UCLA) with a Bachelor of Arts in Political Science with an Emphasis in American Politics (BA '05), Thomas Jefferson School of Law with a Juris Doctor (JD '11), Pepperdine University Rick J. Caruso School of Law with a Master of Laws in Entertainment, Media, and Sports Law (LLM '18), and Pepperdine University George L. Graziadio School of Business and Management with a Master of Business Administration in Entertainment, Media, and Sports Management (MBA '20).

Evans is a faculty member at California State University, Long Beach, (CSULB) and American Public University | American Military University, where he teaches Collegiate Sports Administration, Sports and Recreation Facility Management, Sports Communication, Sports Marketing, Promotion, and Public Relations, Sports Law, Sales and Promotions in Sport, and professional development courses in the two graduate sport management programs. He writes a weekly column for Sports Radio America and produces and hosts a weekly podcast “Bleav in Sports Law”, ranked the number one

sports law podcast in the world, with the Bleav Podcast Network. He currently serves as President-Elect of the California Lawyers Association (CLA), Secretary of the California Lawyers Foundation, and co-captain of outreach in Southern California with the Sports Lawyers Association.

Within the California Lawyers Association, he serves on the Joint Task Force on Civility in the Legal Profession with the California Judges Association and State Bar of California, co-chairs the Member Engagement Committee, is Ex-Officio to the Governance Committee, Chair of Sponsorships for the CLA Annual Meeting and Solo & Small Firm Summit, and Ex-Officio to The State Bar of California Liaison. With the non-profit arm of the CLA, the California Lawyers Foundation, he serves as Secretary and on the Fundraising and Governance & Nominations Committees, while leading the Signature Event Series programing.

Evans is also U.S. Production Counsel with MediaMonks | S4 Capital, one of the largest advertising agencies in the world.

Prior to opening California Sports Lawyer®, Evans worked as a Graduate Law Clerk at the Superior Court of California, advising judicial officers in civil and criminal law and motion matters. Prior to law school, he worked as the associate director for corporate finance at Quinn Emanuel Uquhart & Sullivan LLP. He has also worked as a legislative aide and field representative in the California State Legislature and continues to work on local and national campaigns.

Todd G. Friedland

Mr. Friedland is a founding partner of the business litigation firm Stephens Friedland LLP where his practice focuses on commercial litigation and strategic counseling including matters related to corporate governance and fiduciary duty, complex contract and manufacturing disputes, trade secrets, unlawful business practices, business torts, and real estate issues. Prior to forming Stephens Friedland LLP, Mr. Friedland practiced with the multi-national law firm of Pillsbury Winthrop Shaw Pittman. Mr. Friedland was also a Judicial Law Clerk to the Honorable Paul Boland and the Honorable Alexander H. Williams of the Los Angeles Superior Court, and a Judicial Extern for the Honorable Alicemarie H. Stotler, U.S. District Court, Central District of California.

Mr. Friedland has served the legal community in a variety of positions including: President of the Orange County Bar Association (2016); President

of the OCBA Charitable Fund (2017); President of the Association of Business Trial Lawyers - Orange County (2020); President of the Constitutional Rights Foundation Orange County (2010); and President of Project Youth OCBF (2021). Mr. Friedland has served and continues to serve on numerous committees including the OCBA Editorial Advisory Committee, Mentoring Committee, and Leadership Committee.

Mr. Friedland is the recipient of numerous recognitions that include being AV rated by Martindale-Hubbell, named a Southern California Super Lawyer (2011-2021), listed in Best Lawyers in America (2015-2021) and U.S. News & World Report Best Law Firm (Litigation) (2016-2021), awarded Top 50 Attorneys in Orange County (2018-2021).

As President of the Orange County Bar Association, Mr. Friedland created the Civility Task Force which drafted the OCBA Civility Guidelines. Today, those guidelines constitute the preamble to the Orange County Superior Court's Local Rules. Mr. Friedland currently co-chairs the Civility Task Force and is a frequent lecturer on civility issues. His presentations entitled "Don't Let Covid Infect Your Civility and Professionalism" and "Civility: Always the Right Path" have reached hundreds of legal professionals, students and court externs. Justice Sandra Day O'Connor stated: "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." Mr. Friedland wholeheartedly agrees.

Ryan Harrison

Ryan Harrison, Sr. is an associate in the Sacramento, California, office of Jackson Lewis P.C. His practice focuses on defending employers in single plaintiff litigation matters in state and federal court, and at arbitration. He also has experience litigating labor disputes before the Public Employment Relations Board and litigating employee disciplinary matters and grievances in labor arbitration. He is also an experienced investigator, having conducted hundreds of neutral investigations for public and private sector employers regarding issues of unlawful discrimination, retaliation, conflicts of interest, embezzlement, and government corruption. Ryan has also provided advice and counsel for local government entities on ethics issues falling under the purview of the Fair Political Practices Commission.

Prior to his legal career, Ryan served as a dignitary protection law enforcement officer in the California State Senate, later returning to the institution as a policy consultant, and then becoming the principal internal

investigator for the Senate Rules Committee during the height of the #MeToo movement.

During law school, Ryan externed for the Chief Justice of the Supreme Court of California and competed on the number one nationally ranked UC Hastings Moot Court competition team. Ryan also co-founded a student legislative lobbying corps that helped secure a substantial apportionment to the law school enabling the construction two new campus buildings and the renovation of a third.

Ryan is committed to serving his community. In addition to his service on multiple state and local boards, he has served as a planning commissioner and as a Board of Appeals Commissioner for the City of West Sacramento.

Jeanne Fugate

Jeanne Fugate has a wide-ranging practice, focusing primarily on employment litigation and complex civil litigation. Jeanne is a first chair trial lawyer. She obtained a multi-million dollar verdict in a trade secret misappropriation case after a three-week jury trial, which was affirmed in full on appeal. She has led internal investigations for corporate clients related to numerous issues, including #metoo sexual discrimination and hostile work environment claims, and has in many cases successfully resolved those claims before litigation was filed. Jeanne was named as a Top 100 Woman Lawyer in California by The Daily Journal in 2018 and 2019. Jeanne was also recognized by the Los Angeles Business Journal on its "Thriving in Their 40s" list (2020) and as a Most Influential Women Lawyer (2017).

Jeanne is actively involved in bar and civic organizations in Los Angeles and across the state. In addition to her work on the Civility Task Force, Jeanne was involved in discussions aimed toward increasing civility in the legal profession while serving on the Board of the Association of Business Trial Lawyers (ABTL). Jeanne also chaired several ABTL-LA committees, including the Dinners Committee and the Annual Seminar organization committee.

Jeanne is President of the Board of California Change Lawyers (fka California Bar Foundation), which has a mission to increase diversity, inclusion, and access to justice throughout the California legal system. For the past seven years, Jeanne has served on the Board of Civil Service Commissioners for the City of Los Angeles, which oversees the appeals of the 60,000 City employees as to hiring and disciplinary issues and served terms

as the President (2018-2020) and Vice President (2016-2017). She is deeply involved with the Los Angeles chapter of the Federal Bar Association, co-chairing the Government Relations committee.

Jeanne, the daughter of two public school teachers, enjoys giving CLEs on a number of topics, including trial presentation, deposition taking and preparation, and providing mentoring and advice for more junior attorneys on a number of topics.

Jeanne clerked on the Ninth Circuit and the Southern District of New York.

Skyler Gray

Skyler Gray is an associate attorney at Goodwin Procter LLP in their emerging technologies practice. Skyler formerly served as Deputy Legal Counsel to Los Angeles Mayor Eric Garcetti. She graduated summa cum laude from UC Irvine School of Law and summa cum laude from UCLA with a B.A. in Communication Studies, College Honors. She clerked for the Hon. Joseph R. Goodwin of the U.S. District Court for the Southern District of West Virginia.

Marisa Hernández-Stern

Marisa Hernández-Stern is a Supervising Deputy Attorney General in the California Department of Justice Worker Rights & Fair Labor Section. Marisa graduated from Brown University and UCLA School of Law. After working at the U.S. Department of Justice Civil Rights Division, Voting Section, Marisa clerked for the late Hon. Judge Harry Pregerson, Ninth Circuit Court of Appeals. She previously worked at two private public interest law firms, Traber & Voorhees and Hadsell Stormer Renick & Dai, and Neighborhood Legal Services of Los Angeles County.

Marisa served as the 2020 President of the Mexican American Bar Association of Los Angeles County (MABA) and is the longtime chair, and current co-chair, of the MABA Judicial Externship & Scholarship Program. She is a board member of Federal Bar Association-Los Angeles and Los Angeles County Bar Association Litigation Section Executive Committee, and recently completed her term as Trustee on the Brown University Alumni Association Board of Governors. Marisa has been recognized by the Hispanic National Bar Association as a 2021 "Top Lawyer Under 40" and Super Lawyers Rising Star. She is a past recipient of the UCLA Academic Senate

Diversity, Equity, and Inclusion Award, which recognizes contributions to further a diverse, impartial, and inclusive academic environment at UCLA.

Tamila C. Jensen, Esq.

Ms. Jensen is a graduate of the University of California at Berkeley and earned her law degree from the University of California at Davis School of Law. She recently earned an LLM in Transnational Commercial Practice, Lazerski University, Poland. Ms. Jensen has an active practice in Los Angeles where she represents private professional fiduciaries and lay people in the Probate Courts. The focus of her practice is elder law and real property. She is past president of the Los Angeles County Bar Association. Ms. Jensen has taught widely including at Indiana University School of Business, and seminars at the School of Law, Debrechen, Hungary, and at the European School of Law and Economics, Pristina, Kosovo. Ms. Jensen participates in several volunteer activities including the Foreign Direct Investment (FDI) international moot court arbitration competition. Ms. Jensen is on the board of directors of Neighborhood Legal Services Los Angeles. She is a certified mediator and participates as a settlement officer in volunteer mediation and arbitration programs through LACBA. She has authored many articles including the recent "Scalia's Lasting Legacy: Debating the Constitution - The Living Constitution," *Valley Lawyer*, May 2016.

Patrick M. Kelly

Patrick M. Kelly is one of the pre-eminent mediators, trial lawyers, litigators, law firm leaders and professional association leaders in the country. He has vast experience in numerous substantive areas that he will bring to bear in efficiently, effectively and economically resolving matters as a mediator, arbitrator or referee. During his lengthy career, Mr. Kelly has tried, litigated, arbitrated, mediated and/or settled thousands of cases involving the following areas of law: Insurance Coverage and Bad Faith, Employment, Personal Injury, Product Liability, Professional Liability, Class Actions and Complex Litigation, Commercial Litigation, Premises Liability and Sports Litigation

<u>INSURANCE EXPERTISE</u>

From 1980 to 2019, Mr. Kelly served as Partner and Senior Counsel at Wilson Elser Moskowitz Edelman & Dicker LLP, an international litigation firm founded in insurance defense. His practice focused on advising and

representing insurance carriers in coverage matters and defending individuals and companies in high-stakes professional liability and commercial cases. He also handled numerous insurance bad faith, insurance coverage, product liability, premises liability, employment litigation, ski resort liability and railroad liability matters. He has particular experience with class actions involving directors and officers (D&O) liability, product liability, employment and consumer fraud claims.

From 1980 through 2013, Mr. Kelly served as the firm's Los Angeles Region Managing Partner, Western Region Managing Partner and Director of Litigation, and Member of the firm's Executive Committee. He also served as General Counsel to Snow Summit Ski Corporation, an owner of several ski resorts in California.

Mr. Kelly is a frequent author, columnist and lecturer in numerous subjects including trial tactics, insurance coverage and bad faith, personal injury, and professional liability. He is an original co-author of Insurance Litigation, The Rutter Group California Practice Guide, a frequently cited insurance treatise in California, and continues to edit the Directors and Officers chapter of the publication.

HONORS & AWARDS

Shattuck-Price Outstanding Lawyer Award, Los Angeles County Bar Association, Southern California Lawyer of the Year (Arbitration), The Best Lawyers in America, Griffin Bell Volunteer Achievement Award, Dispute Resolution Services, Top 100 Lawyers in California, Daily Journal, MetNews Person of the Year, Metropolitan News Enterprise, Bench Bar Coalition Advocacy Award, Bench-Bar Coalition, Diversity Award, State Bar Council on Access and Fairness, Lifetime Achievement Award, Association of Ski Defense Attorneys, Repeatedly recognized by Marquis Who's Who in American Law, as a Super Lawyer, as a Best Lawyer, and as one of the the Irish Legal 100EDUCATION & TRAINING

Mediating the Litigated Case (40 hours), Straus Institute for Dispute Resolution
40-Hour Mediation Training Program, Los Angeles County Bar Association
J.D., Loyola Law School, Los Angeles, California
B.A., Pomona College, Claremont, California
LEADERSHIP POSITIONS

Mr. Kelly's reputation as a problem solver and community leader have been recognized by his peers on both sides of the litigation spectrum. He has been elected to numerous professional organizations and leadership positions,

including:, President of the State Bar of California, President of the Los Angeles County Bar Association, Associate of the American Board of Trial Advocates (ABOTA), Fellow of the International Academy of Trial Lawyers, President of the Professional Liability Underwriting Society (PLUS), President of Dispute Resolution Services, President of the Coalition for Justice, Federation of Defense and Corporate Counsel

He also served multiple terms as a Los Angeles Delegate to the American Bar Association House of Delegates and the Steering Committee of the Open Courts Coalition.

SERVICE TO THE JUDICIARY

Mr. Kelly was elected or appointed to several positions working with the California Judiciary, including:

Member of the California Judicial Council, the board chaired by the Chief Justice that oversees the California Judicial Branch, including all California courts

Special Advisor to the Executive Committee and Commissioner for the Commission on the Future of the California Courts, which developed the recommendations guiding development of the courts

President of the the Coalition for Justice, which supports the independence of the judiciary

One of 11 members and Chair of the Rules Committee for the Commission on Judicial Performance, which administers judicial discipline in California state courts

In Federal Court, Mr. Kelly served two terms as a Lawyer Representative to the 9th Circuit and the Federal Magistrate Selection Committee.

SERVICE TO THE COMMUNITY

In pursuing his service to the community, Mr. Kelly was a member of the Boards of Directors of numerous community service organizations, including the Legal Aid Foundation of Los Angeles, the Constitutional Rights Foundation, and Loyola Law School of Los Angeles. He was also appointed by the then-mayor as a Commissioner of the Los Angeles Homeless Services Authority.

ARTICLES

California State Bar, California Lawyers Association, Los Angeles County Bar Association, International Academy of Trial Lawyers, American Board of Trial Advocates, Association of Business Trial Lawyers.

Beverly Hills Bar Association
Association of Ski Defense Attorneys
Claims and Litigation Management Alliance
Irish American Bar Association
Cowboy Lawyers
American Bar Association
Professional Liability Underwriting Society
Chancery Club of Los Angeles

Mr. Kelly's background and accomplishments have been the subject of numerous profiles in legal publications. He is also a frequent author and columnist.

Jessica Kronstadt

Jessica Kronstadt is a Deputy District Attorney for the Los Angeles County District Attorney's office. Ms. Kronstadt is currently assigned to the Sex Crimes Division, where she prosecutes child sexual abuse matters. In July 2021, Ms. Kronstadt was recognized by the Daily Journal as one of its "Top 40 Under 40" lawyers. Ms. Kronstadt received a Distinguished Young Alumna Award from Washington University in St. Louis School of Law in April 2019. She currently serves as President of the Women Lawyers Association of Los Angeles (WLALA). She was recognized as WLALA's "Changemaker of the Month" in April 2018. She has been acknowledged by Los Angeles Magazine as a "Rising Star" in public interest. Ms. Kronstadt received her B.A. from Yale University, where she was a member of the Varsity Women's Volleyball Team. Ms. Kronstadt received her J.D. from Washington University in St. Louis School of Law. After graduating from law school, Ms. Kronstadt worked as a litigation associate at Latham & Watkins and as a staff attorney at Bet Tzedek Legal Services. She has served on the WLALA Board of Governors since 2012. Ms. Kronstadt also serves on the Los Angeles County Bar Association's President's Task Force on Racial and Social Justice. She has also served on the Executive Committee of the Criminal Justice Section for LACBA, and as a board member of the California Young Lawyers Association. Ms. Kronstadt is a past Co-Chair of the Young Lawyers

Division of the Los Angeles Chapter of the Association of Business Trial Lawyers. She has run in and successfully completed five marathons.

Arnold Lee

Arnold Lee is an Assistant City Attorney for the City of Pasadena. He received his J.D. from Southwestern Law School and his B.A. in history and political science from UCLA. He currently serves as the President of the Asian Pacific American Bar Association of Los Angeles County and is a member of the Diversity Advisory Committee for the UCLA Alumni Association. He is also the immediate past-president of the Asian Pacific Alumni of UCLA and is a former board member of OCA - Greater Los Angeles, a civil rights organization dedicated to advancing the social, political, and economic well-being of Asian Americans and Pacific Islanders (AAPIs). Prior to practicing law, Arnold served as staff, intern, and volunteer on many statewide, legislative, and local candidate and issue campaigns. Additionally, he has served in leadership positions in statewide and local political organizations and advocated for voter education and voter outreach by providing training and resources to activists.

Commissioner Cynthia Loo

The Honorable Cynthia Loo received her Juris Doctorate from the University of Southern California. She has been a Superior Court Commissioner for the Kern Superior Court since 2016. In 2014 she served as a Commissioner for the Mariposa Superior Court and from 2000-2013 she served as a subordinate judicial officer with the Los Angeles Superior Court.

Much of her career as well as time off the bench, has been devoted to public service, efforts focused on inclusion and diversity in the legal profession, and access to justice.

While in law school, she interned at AYUDA, a non-profit agency assisting low-income individuals in domestic violence, immigration, juvenile, family law and unlawful detainer cases. She was a legal intern for the late U.S. District Court Judge Edward Rafeedie, as well as a law clerk at the Equal Employment Opportunity Commission.

Cynthia worked from 1991-1999 at the Children's Law Center of Los Angeles representing abused children. Prior to her judicial duties, she volunteered with the Legal Aid Foundation's Unlawful Detainer Equal Access Project as

well as the Los Angeles Superior Court / Los Angeles County Bar Association's Domestic Violence Project, where she returned to volunteer the Summer of 2013.

Cynthia was an adjunct law professor at the Peoples College of Law (PCL) from 2005 to 2013 where she taught criminal procedure, juvenile law, family law and evidence. PCL is a non-profit law school that trains lawyers devoted to social justice and was opened in part to give those historically denied access to legal training an opportunity to go to law school. Tuition is affordable because the professors donate their salaries back to the law school.

In 2005 Cynthia received the "Outstanding Judicial Officer of the Year" award from the Los Angeles County Juvenile Court's Bar Association. She received a "Community Leadership Award" by the Asian Pacific American Dispute Resolution Center and was awarded a "Teachers Making a Difference Award" in 2011. She received the 2014 "Public Service Award" from the Asian Pacific American Bar Association of Los Angeles County and in June 2017 the "President's Award" from the Asian Pacific American Women Lawyer's Alliance.

Cynthia is most proud of her efforts regarding inclusion and elimination of bias. She was the 2013-2014 Chair of the State Bar's Council on Access and Fairness, which during her tenure among other accomplishments implemented a state-wide pipeline into the legal profession program in collaboration with several well-respected community colleges, universities and law schools; as well as several state-wide diversity on the bench programs in collaboration with Governor Brown's office.

She is a past co-chair of the Multicultural Bar Alliance of Southern California and a past President of the Asian Pacific American Women Lawyers Alliance.

In 2016, she was a founding member for the Multicultural Bar Alliance of Kern County, a co-chair in 2020 and continues to serve a judicial advisor. On behalf of the MCBA she has organized and moderated several programs aimed at "bringing the law alive" - introducing students and new lawyers to the contemporary practice of law, the satisfaction of a legal career, and the role and responsibility we all have as leaders in the community of setting a good example of mutual respect and fairness, as well as the importance of "giving back."

Amy R. Lucas

Amy Lucas is a partner at O'Melveny and Myers, LLP. She is an accomplished litigator and trial lawyer who has guided clients to victories in

high-profile, high-stakes matters. Her adept skills—during and after trial, in discovery, and before litigation—have yielded success on complex cases at all levels. She regularly counsels clients on contract and intellectual property disputes, mass tort and product liability cases, business torts, and class actions.

Amy has represented a diverse range of clients, including some of the most influential companies in the world. Her dedication and diligence have produced headline-making results for clients—and in some cases, kept clients out of the headlines. Her knowledge runs deep across industries, including the pharmaceutical, finance, technology, entertainment, automotive, and new media sectors.

In addition to her regular practice, Amy devotes significant time to pro bono matters, and has represented clients in criminal trials, civil litigation, and administrative hearings, including in federal and state courts of appeals and the US Supreme Court.

Mike Madokoro

Mike Madokoro is the Managing Partner of the Los Angeles office of Bowman and Brooke LLP, a national law firm of trial lawyers representing domestic and international corporations in complex litigation. With more than 31 years of experience, Mike is a highly sought-after trial attorney who defends the world's largest automotive and product manufacturers in high-exposure product liability litigation. Mike's clients have taken advantage of his trial and litigation skills, relying on him to manage national discovery programs.

Mike has developed a wide range of product liability litigation experience and has also defended against allegations of premises liability, toxic tort liability, employment wrongful termination, qui tam claims, and other business litigation matters across the country. A graduate of UCLA and the University of the Pacific, McGeorge School of Law, Mike was the President of the Japanese American Bar Association in 2019, is active on the Board of JABA's Educational Foundation, and is a member of the California Lawyer's Association's Statewide Civility Task Force, the National Asian Pacific American Bar Association, California Minority Counsel Program, Multicultural Bar Alliance, Defense Research Institute, and Japan America Society. Mike currently serves as the Secretary for the Executive Committee of the Los Angeles County Bar Association's Litigation Section, where he has also co-chaired the Court Alerts, Breakfast at the Bar, Brown Bag Lunch, and Programs Committees. Mike has moderated two programs on Civility in the

Courtroom and in the Practice of Law for the LACBA Litigation Section featuring judges from the United States District Court for the Central District of California, the Los Angeles County Superior Court, and the California Court of Appeals. He is a Co-Chair of the LACBA Affinity and Affiliate Bar Group's Homelessness Service Initiative. Previously, Mike has also served on LACBA's Outstanding Juist Award Committee.

In addition to having been honored as a Southern California Super Lawyer for seven years (2007-2013), he was named one of the Most Influential Minority Attorneys by the Los Angeles Business Journal (2018), has been named to the Lawyers of Color Power List twice (2014 and 2020), and named as a Client Service All-Star by BTI Consulting Group (2017). Due in part to Mike's commitment to diversity and inclusion, Bowman and Brooke was awarded the CMCP's Drucilla Stender Ramey Majority-Owned Law Firm Diversity Award (2015). In 2018, Mike was the first runner-up in the Leukemia & Lymphoma Society's Man of the Year, Los Angeles Chapter, fundraising campaign.

Michael Mallow

Michael Mallow is the managing partner of Shook, Hardy & Bacon's Los Angeles office and is a co-chair of the firm's national Class Action & Appellate Practice Group. Michael is a trial lawyer and for more than twenty years, has focused his practice primarily on defending consumer class and regulatory actions throughout California and nationally. Michael also represents clients in general commercial litigation and counsels clients on minimizing litigation risk.

Michael is proud of the strong relationships he has created and maintained with opposing counsel in his cases. He is an outspoken advocate for civility and served as the founding chair of the Los Angeles Association of Business Trial Lawyers' Civility Committee. In this role, he helped create the Los Angeles ABTL's Civility Report that was published in the Summer of 2020, and which was dedicated to articles about civility, many of which were authored by members of the Civility Task Force.

Michael's efforts to better the bar and legal profession include serving as a member and former co-chair of the Los Angeles County Bar Association, Litigation Section, Complex Court Committee; an officer and member of the Board of Governors of the Los Angeles ABTL; a member of the Los Angeles County Bar Association, Litigation Section Executive Committee; and the founding co-chair of the Cambridge Class Action Defense Forum.

Michael is the recipient of numerous accolades, including recognition by Chambers USA in the categories of California Litigation: General Commercial, and Product Liability: Consumer Class Action; and The Legal 500 United States in Dispute Resolution – Product Liability, mass torts and class actions: automotive/transport and consumer products. Law360 named him one of the "Transportation MVPs of the Year" in 2018, and a "Privacy & Consumer Protection MVP" in 2012. BTI Consulting Group recognized him as a "BTI Client Service All-Star" in 2012. Southern California Super Lawyers has honored him for Class Action/Mass Torts, Business Litigation and Civil Litigation Defense from 2005-2022. In 2005, Michael was included in the "Top 20 Under 40" listing of the Daily Journal Extra. Michael also received the President's Volunteer Service Award from the President's Council on Service and Civic Participation.

When not practicing law, Michael is an avid marathoner, triathlete and four-time Ironman, completing Ironman Maryland (2018), Ironman Vineman (Sonoma County, California, 2016), Ironman Cozumel (2015) and Ironman Boulder (2014).

Alan M. Mansfield

Mr. Mansfield is of Counsel at Whtley Kallas LLP. He has practiced primarily in the area of national health care, privacy, and consumer class action and public interest litigation since 1989. His clients have included such public interest organizations as the California Medical Association, the Independent Physical Therapists of California, the Utility Consumers Action Network and Privacy Rights Clearinghouse.

Mr. Mansfield was one of the lead counsel in *Garrett v. City of Escondido*,465 F.Supp. 2d 1043 (S.D. Cal. 2006), in the U.S. District Court for the Southern District of California, which successfully challenged the legality of the City of Escondido's immigration landlord-tenant enforcement ordinance. Based on that and other work in the community performed by both him and the previous firm for which he was the managing partner (Rosner & Mansfield LLP), he and his firm was awarded the 2007 Public Service by a Law Firm Award by the San Diego County Bar Association. He currently volunteers as a *pro tem* commissioner for the San Diego County Superior Court handling small claims and traffic matters.

Mr. Mansfield is the Past President of the Association of Business Trial Lawyers, San Diego Chapter. Over the last several years when he was an

officer, ABTL helped lead the state-wide discussion of concrete actions to take on a state-wide basis to address issues of civility. Such discussions in part lead to the adoption effective January 1, 2020 of the Preface to the Local Rules of the San Diego County Superior Court referencing and expecting all attorneys to follow the San Diego County Bar Association's Attorney Civility and Practice Guidelines. (He also is a Master member of the Enright Inn of Court, and has been a team leader for numerous committees responsible for making presentations to members of Inn, including several addressing issues of civility and implicit bias. Previously Mr. Mansfield was a Lawyer Representative to the Ninth Circuit Judicial Conference, Southern District of California (6/2008 to 6/2010), where he helped create and make presentations to the Southern District of California Judicial Conference, including on issues of diversity in the legal profession.

Mr. Mansfield received his B.S. degree, *cum laude*, in Business Administration - Finance from California Polytechnic State University, San Luis Obispo in 1983 and his *Juris Doctorate* degree from the University of Denver School of Law in 1986. He is admitted to the Bar of the State of California, to the United States District Courts for all Districts of California, to the United States District Court for the Districts of Colorado, Michigan and New Jersey, to the Second, Third, Fifth, Sixth, Ninth and Tenth Circuit Courts of Appeal, and to the Supreme Court of the United States of America.

Robin Meadow

Robin Meadow is a partner at Greines, Martin, Stein & Richland LLP, a Los Angeles-based appellate boutique. He joined the firm in 1994 after 23 years as a trial and appellate lawyer at a large commercial firm. His practice continues the substantive focus he developed in his earlier years—business disputes, real estate, partnerships, and probate and entertainment law. But, like most appellate lawyers, he is a generalist, and at GMSR he has handled multiple significant appeals involving healthcare, family law, personal injury, and bankruptcy.

Recognition of Mr. Meadow's appellate practice includes: California Lawyer of the Year, California Lawyer Magazine (the "CLAY" award), for his work on Estate of Duke (2015) 61 Cal.4th 871; the Los Angeles County Bar Association's Pamela E. Dunn Appellate Justice Award (2014); Best Lawyers' Los Angeles Appellate Practice "Lawyer of the Year" (2013, 2018); named in Best Lawyers for Appellate Law, Bet-the-Company Litigation, and Trusts

and Estates; and named in Chambers and Partners USA as a Band 1 Appellate Litigator in California.

Mr. Meadow has long believed in the importance of civility, and over the course of his 50-year career he has learned first-hand that participation in the organized bar is one of best ways to practice and promote civility. He has been a member of the California Academy of Appellate Lawyers since 1988, serving as president in 2005-2006, and has been a Fellow of the American Academy of Appellate Lawyers since 2000. He is also a member of Chancery Club of Los Angeles and the Association of Business Trial Lawyers. His leadership roles in law-related settings include multiple terms as a trustee of the Los Angeles County Bar Association; chairing or co-chairing multiple LACBA committees, including Appellate Courts, Arbitration Executive Committee, Judicial Evaluation and Juvenile Justice; serving as LACBA's representative to the committee that oversaw the design of the Edmund D. Edelman Children's Court; and ultimately serving as LACBA president in 2003-2004. He has served on the boards of the ACLU Foundation of Southern California and Public Counsel, and was president of Public Counsel in 1994 1995. He assisted in creating the Second District Court of Appeal's Pro Bono Project and Self-Help Clinic.

In his capacity as co-editor of the ABTL Report of the Los Angeles chapter of the ABTL, Mr. Meadow played a major role in creating the Report's Summer 2019 issue on civility, and he authored the article reporting on the civility roundtable at the 2019 Joint Board Retreat. He has also served on the ABTL-LA's Civility Committee.

Jonathan A. Patchen

Jonathan A. Patchen, a partner in the Litigation Department, is a leading technology and commercial trial lawyer focusing on complex civil litigation, trials and arbitrations. He has first-chaired bench and jury trials in federal and state court, arbitrated disputes, and briefed and argued cases on appeal.

Mr. Patchen has substantial experience handling disputes involving trade secrets and other intellectual property, breach of contract, breach of fiduciary duty, partnership and corporate governance, professional liability, and other complex business issues. He counsels leading companies across the consumer brands, bioscience, technology and financial services industries on a range of

technology disputes, with a particular focus on trade secrets, employee mobility, contract and fiduciary duty claims.

Mr. Patchen received a J.D. (magna cum laude) from Harvard Law School in 2003, where he served as Managing Editor of the *Harvard International Law Journal*. He received a B.S. in Economics and a B.A. in Political Science from the University of Wyoming in 2000, where he was a member of Phi Beta Kappa. Following graduation from law school, Mr. Patchen was a judicial clerk for the Hon. Ronald Gould of the Ninth Circuit U.S. Court of Appeals.

Mr. Patchen currently serves as Northern District of California Lawyer Representative and a member of the Advisory Board of the Ninth Judicial Circuit Historical Society. He is a member of the Board of Governors for the Association of Business Trial Lawyers (ABTL), Northern California Chapter and is advisor to, and former voting member of, the Executive Committee of the Litigation Section of the California Lawyers Association. He is also a member of the Executive Board of the Harvard Law School Association, Northern California Chapter.

Mr. Patchen has also served as a member and chair of the Bar Association of San Francisco's Judiciary Committee, as a member and chair of the Executive Committee for the Litigation Section, and as Symposium Chair for the 2015 Complex Courts Symposium. Mr. Patchen has organized or participated in numerous other professional panels, including organizing a panel regarding "Civility in the Law" through the ABTL.

Bradley S. Pauley

Brad Pauley is a partner at Horvitz & Levy LLP in Burbank, where his practice focuses exclusively on civil appeals and writs. He currently serves as President of the Los Angeles County Bar Association (LACBA). Founded in 1878, LACBA is one of the nation's largest voluntary metropolitan bar associations. Through its Professional Responsibility and Ethics Committee, LACBA regularly issues ethics opinions that are of value to judges and lawyers throughout the State. Brad has served as a LACBA Officer or member of its Board of Trustees since 2016. He also served as Chair of LACBA's Appellate Courts Section from 2015 through 2017.

Brad has long been active in the American Bar Association. Until recently, he represented LACBA in the ABA House of Delegates. He also served as Chair of the ABA's Council of Appellate Lawyers from 2014 to 2015 and, in that

capacity, he served on the Boards of both the ABA's Appellate Judges Conference and the Appellate Judges Education Institute (AJEI).

Brad began his legal career at Paul, Hastings, Janofsky & Walker LLP in Los Angeles, where he was a member of the firm's professional responsibility committee. He received his B.A., summa cum laude, from the University of California, Los Angeles, and received his law degree from UCLA School of Law. While at UCLA Law, he studied professional responsibility and ethics under the late California Supreme Court Justice Cruz Reynoso. Brad is admitted to practice before the state courts of California as well as the U.S. Court of Appeals for the Ninth Circuit and the United States Supreme Court.

Bryan R. Reid

Bryan Reid is a partner in the San Bernardino office of Lewis Brisbois Bisgaard & Smith and a member of the firm's Long-Term Care & Elder Law Practice. Mr. Reid's civil trial practice focuses on the defense of healthcare and long term care providers in professional negligence, elder abuse and related claims. He also has significant experience litigating cases in the field of sports and recreation liability having represented some of the most well-known names in professional sports.

Bryan is a Fellow of both the American College of Trial Lawyers and the International Society of Barristers. He is also an active member of the American Board of Trial Advocates, currently serving as a co-chair of the organization's national committee on Professionalism, Ethics and Civility. He has also served as president of CAL-ABOTA (representing the seven California chapters) and the San Bernardino/Riverside chapter of ABOTA.

A graduate of Southwestern University School of Law's SCALE program in 1991, Bryan has been awarded the Jennifer Brooks Lawyer of the Year Award by the Western San Bernardino County Bar Association (2019-2020) and Arthur W. Kelly, Jr. Civility Award by the San Bernardino and Riverside County Chapter of ABOTA (2016). Bryan has also been identified as one of the top 100 Civil Defense Litigators for Southern California by America's Top 100 and he enjoys an AV Rating by Martindale-Hubbell.

Bryan is admitted to practice before:

The State Bar of California
United States District Court for the Central District of California
United States Courts of Appeals for the Ninth Circuit
United States Supreme Court

Judge James R. ("Reg") Reilly

Judge James R. Reilly was appointed to the Alameda County Superior Court by Governor Brown in February 2018. He is currently assigned to a Civil Direct Calendar Department in Oakland. Since his appointment, he has also had assignments in Criminal Court in Oakland and the General Civil Department (restraining orders, unlawful detainer, and small claims) in Hayward. Before his appointment, Judge Reilly practiced civil litigation for 30+ years in San Francisco, with a focus on commercial litigation and product liability litigation. He has been a member of the American Bar Association, the San Francisco Bar Association and, currently, the Alameda County Bar Association. Additionally, he has served as an arbitrator for the Counties of Alameda and Contra Costa, as a mediator for the County of Contra Costa, and as a judge pro tem for the County of San Francisco. Before his legal career, Judge Reilly was an officer in the United States Navy for seven years, serving in the Third and Seventh Fleets. He earned his A.B. from the University of California at Berkeley and his J.D. from the University of San Francisco.

Judge Stuart M. Rice

Stuart M. Rice is a Judge of the Superior Court assigned to a civil independent calendar court in the Stanley Mosk Courthouse. He was appointed by former governor Arnold Schwarzenegger on July 27, 2005 after having served as a court commissioner from March 1, 2003 until his appointment. While a commissioner, he served as president of the California Court Commissioners Association. Judge Rice is a recent past- president of the California Judges Association while also serving a one-year term as a member of the Judicial Council.

He currently serves on the Judicial Council's Civil and Small Claims Committee and is a board member for the California Judges Foundation. Through the foundation, Judge Rice has established the Adam Z. Rice Memorial Scholarship Award, a needs-based scholarship for aspiring law students. He also serves as a member of the statewide task force on Civility in the Legal Profession.

Judge Rice is chair of the LASC Temporary Judge Committee, Legislative and Government Relations Committee and serves as a member of the Court's Executive Committee and Civil Jury Trial Committee. He was president of

the Benjamin Aranda III chapter of the American Inns of Court (an organization devoted to enhancing civility in the legal profession) in 2013-2014.

In 2012, Judge Rice was presented with the Judge William E. MacFaden Award as Judge of the Year by the South Bay Bar Association. He was honored in June 2021 with the Justice Sandy Lucas Judge of the Year Award by the Long Beach Bar Association. He received the Outstanding Mentoring Award from CA State University Dominguez Hills for leading the court observer program for undergraduates interested in a career in the law.

Judge Rice is a frequent speaker and educator and has been on the faculty of the Witkin Judicial College from 2005 to the present. He has taught numerous classes to judicial officers, attorneys, and court staff on a variety of subjects specializing in bench conduct and demeanor, high conflict personalities, and bias.

Prior to joining the bench, Judge Rice was an associate at Gottlieb, Gottlieb and Stein from 1978-1983 and then a senior partner at Rice and Rothenberg. He was the President of the Long Beach Bar Association in 2000 and the Long Beach Barristers in 1983. He also served as a member of the State Bar Board of Governors, the JNE Commission and the Legal Services Trust Fund Commission. He received a bachelor's degree magna cum laude from Tufts University and a J.D. from Northeastern University School of Law.

Michael Schonbuch

Michael Schonbuch attended The State University of New York at Albany on a Full New York State Regents Scholarship. He graduated from the Boston University School of Law in 1990 and promptly relocated by himself to Los Angeles in order to lift weights at Gold's Gym Venice and to become a trial lawyer.

Michael was admitted as an Associate to The American Board of Trial Advocates (ABOTA) in the year 2000 and currently holds the rank of Advocate. He was the President of The Association of Southern California Defense Counsel in 2015 and The President of California Defense Counsel in 2018. Michael became the President of The Los Angeles Chapter of ABOTA in 2020 and held that position through June of 2021. He is the Course Director of The Jack Daniels ABOTA Trial School at Loyola Law School and a frequent presenter at multiple ABOTA Masters in Trial Programs. Michael frequently teaches trial skills and civility at events hosted by ASCDC,

CAALA, ABOTA as well as various law schools including Loyola and Pepperdine. He is also a Fellow in The American College of Trial Lawyers.

Douglas N. Silverstein

Douglas N. Silverstein has devoted more than a quarter century career to litigating labor and employment cases. He is a founding partner of Kesluk, Silverstein, Jacob & Morrison, P.C., and leads the firm's trial, labor and employment, and class action efforts. Doug has been recognized by fellow attorneys, the national news media, and the general public as an employment law expert, and regularly writes and lectures on labor issues.

For over a decade, Doug exclusively represented companies at the national labor and employment law firms of Morgan, Lewis & Bockius; Ballard, Rosenberg, Golper & Savitt; and Littler Mendelson. He has represented numerous Fortune 1000, 500, 100 and 50 corporations. In addition to his employment law experience, Doug has substantial traditional labor experience before the National Labor Relations Board. He served as Southern California lead counsel in the 2003 grocery strike. Doug has also litigated ERISA cases with significant amounts at stake.

For the past 17 years, Doug has focused his practice on protecting the rights of employees in a wide variety of areas, including discrimination, harassment, retaliation, wrongful termination, whistleblowers, trade secrets, non-competes, and wage and hour class actions. In addition to his litigation practice, Doug negotiates employment and severance agreements on behalf of executives.

He has handled and argued cases in the California Supreme Court, California Courts of Appeal, Second, Ninth and D.C. Circuits, and has numerous published opinions establishing law on issues of first impression. More importantly, he takes cases to trial. In the last ten years, Doug has taken 19 cases to trial, winning 18 of them. In his last six trials where punitive damages were at issue, he obtained punitive damages in all six. Doug has been appointed lead class counsel in more than 100 wage and hour class, collective and representative actions.

Prior to joining a law firm, Doug was a Judicial Extern Clerk to former Chief Judge Alex Kozinskiof the Ninth Circuit, and a Judicial Extern Clerk to Judge Irving Shimer of the Los Angeles County Superior Court.

Doug is the Immediate Past Chair of the Los Angeles County Bar Association (LACBA) Litigation Section Executive Committee, where he meets regularly with federal and state court judges, and bar leaders to advance the cause of justice. He also serves on the Los Angeles Superior Court Bench Bar Committee. Doug will serve as the President of the Consumer Attorneys Association of Los Angeles (CAALA) in 2022, and is a past Chair of CAALA's Las Vegas Convention, the largest plaintiff's trial convention in the country. Doug currently serves on the California Civility Task Force, and seeks to foster civility throughout the practice of law. Admitted to practice before all state and federal courts in California, Doug is a member of the American, California, and Los Angeles County Bars Labor and Employment Law Sections, the National and California Employment Lawyers Associations, the American Association for Justice, and the Consumer Attorneys Organizations of California and Los Angeles.

For seven years straight, Doug has been honored as one of the top labor and employment attorneys in California by *The Daily Journal*. In the past ten years, Doug has had more than 50 speaking and writing engagements. He has been consistently designated a Super Lawyer, and was even asked to evaluate other labor and employment attorneys under consideration for being named a Super Lawyer.

Doug earned his J.D., *magna cum laude*, at Whittier Law School, where he was the Senior Articles Editor of the *Whittier Law Review*, won numerous awards in moot court and for academics, and received several merit scholarships. He earned his M.B.A. at Nova University, where he was awarded special recognition for outstanding academic achievement, and was a Henry King Stanford Scholar at the University of Miami, Florida, where he earned his B.A.

Through his class action practice, Doug has secured contributions in the hundreds of thousands of dollars to legal aid foundations in California that provide access to justice for those unable to afford it. Doug has been a Board Member and General Counsel of the non-profit Tripod, the leading education and support organization for deaf children and their families. He is also an Honorary Board Member of the Los Angeles Trial Lawyers for Charity (LATLC). Doug is conversant in Spanish. Doug coached his children on numerous sports teams, winning several league championships and the state championship in soccer, before his kids realized they could go further without him as their coach and became hockey players. Prior to becoming an attorney, Doug worked as a sommelier.

Chuck Thompson

Charles Thompson serves as the Co-Chair of the firm's Labor & Employment Wage & Hour Class and Collective Action Litigation group. He focuses his practice on employment litigation and counseling representing clients through all phases of Class Actions and Single Plaintiff cases. Charles has wide-ranging experience litigating employment-related issues for public and private companies, having handled over 1,000 employment matters for clients ranging from Fortune 500 companies to Silicon Valley startups. He has tried employment, commercial, and professional liability cases to verdict and directed verdict, has litigated and appealed cases from California State Courts to the United States Supreme Court, and is a Fellow of the prestigious College of Labor and Employment Lawyers.Charles represents employers in wage and hour cases, as well as EEOC class actions, in state and federal courts across the United States and has broad experience appearing before the California Department of Fair Employment and Housing, the Division of Labor Standards Enforcement, the Employment Development Department, and the United States Equal Employment Opportunity Commission and the Department of Labor.

In addition to his trial and counseling work, Charles serves as a private and judicial mediator and arbitrator, and has acted as a pro-tem judge upon request of the court. He has broad experience in binding arbitrations and trial. He has taught trial advocacy, diversity, employment and substance abuse to clients and industry organizations.

Throughout his career, Charles has been a champion for diversity and has served on the Executive Committee of the board of Directors for the Justice & Diversity Center of The Bar Association of San Francisco. He actively supports and promotes diversity efforts and collaborates with clients on diversity issues.

Emilio Varanini

Emilio Varanini is Supervising Deputy Attorney General, Healthcare Rights and Access Section, Public Rights Division, at the California Attorney General's Office.

He has the honor of serving as President of the California Lawyers Association, following in the footsteps of the organization's first President, Heather Rosing. As President, his aim is to help CLA achieve its mission by expanding its presence and deepening its commitment on diversity, equity, and inclusion issues, both within CLA and with external stakeholders. He also seeks to help CLA deepen its presence on access to justice and civic empowerment issues to enable it to meet its commitment to the rule of law. And he focuses on helping CLA continue its commitment to providing value to the profession and to its members, through helping the Sections continue and expand their offerings, through supporting its arm for young and emerging attorneys, the California Young Lawyers Association, and through the initiation of the Future of the Profession Task Force. He also has continued to build and strengthen CLA's ties with the Legislature, the State Bar, the Judicial Council, and the judiciary - including the California Judges Association. Previously, he served as CLA's Vice President.

He also served as a Delegate to the ABA House of Delegates, leading CLA's first-ever delegation to the Mid-Year Meeting in February of 2019..

Hon. Brian C. Walsh (Ret.)

Judge Walsh served on the Santa Clara County Superior Court for 20 years prior to his retirement on November 30, 2020. Currently, he is a mediator and arbitrator with JAMS, working out of its Silicon Valley office in San Jose.

Judge Walsh is a member of the California Lawyers Association Civility Task Force. Also, he is a member of the California Judges Association, the Santa Clara County Bar Association, and the Board of Governors of ABTL's Northern California Chapter and co-editor of its ABTL Report.

As President of the Santa Clara County Bar Association in 1992, Judge Walsh was the architect of that bar's Code of Professionalism, which was used as a model for the California Attorney Guidelines of Civility and Professionalism adopted by the State Bar in 2007.

While a lawyer, Judge Walsh was the President of the California Association of Local Bars and the Chair and Founder of the California Bench-Bar Coalition. He was named his county's Professional Lawyer of the Year in 1999, given its Byrl Salsman Special Award for Contributions to the Community and the Profession in 2002, and honored with the State Bar's Professional Responsibility Award in 2016.

Judge Walsh was Presiding Judge of his Court in 2013 and 2014 and Chair of the State Trial Court Presiding Judges Advisory Committee. Judge Walsh was twice a member of the Judicial Council of California and was a member of the California State-Federal Judicial Council for 16 years. He was a member of the Supreme Court Judicial Ethics Advisory Committee from 2002-2013 and of the State Bar Attorney Civility Task Force from 2006 to 2008.

During his last 4 years on the bench, Judge Walsh presided in the Court's Complex Civil Litigation Department. His previous judicial assignments included Civil Trials, Family Law, and Felony Trials. By appointment of the Chief Justice, he served on the Court of Appeal, Sixth Appellate District for a total of two years

His honors include: ABOTA San Francisco Bay Area Chapter's Trial Judge of the Year in 2019, Santa Clara County Bar Association Outstanding Jurist in 2014, Trial Lawyers' Judge of the Year in 2012, and the 2011 Santa Clara County Bar Association Diversity Committee Unsung Hero.

Judge Walsh received his J.D. from UC Berkeley School of Law, and his B.A. from the University of Notre Dame. He was admitted to the California State Bar in 1972 and was also admitted to the bars of the U. S. District Court (N. D. Cal), the U. S. Court of Appeals for the Ninth Circuit, and the United States Supreme Court

Daniel L. Warshaw

Daniel L. Warshaw is a civil litigator and trial lawyer who focuses on complex litigation, class actions, and consumer protection. Mr. Warshaw has held leadership roles in numerous state, federal and multidistrict class actions, and obtained significant recoveries for class members in many cases. These cases have included, among other things, antitrust violations, high-technology products, automotive parts, entertainment royalties, intellectual property and false and misleading advertising. Mr. Warshaw has also represented employees in a variety of class actions, including wage and hour, misclassification and other Labor Code violations.

Mr. Warshaw played an integral role in several of the firm's groundbreaking cases. In the In re TFT-LCD (Flat Panel) Antitrust Litigation, he assisted in leading this multidistrict to trial and securing $473 million in recoveries to the direct purchaser plaintiff class. After the firm was appointed as interim co-lead counsel in In re Credit Default

Swaps Antitrust Litigation, Mr. Warshaw along with his partners and co-counsel successfully secured a $1.86 billion settlement on behalf of the class.

Mr. Warshaw's cases have received significant attention in the press, and Mr. Warshaw has been profiled by the Daily Journal for his work in the digital download music cases. In 2019 and 2020, Mr. Warshaw was named as one of the Daily Journal's Top Plaintiff Lawyers. And in 2020 he was also named one of the Daily Journal's Top Antitrust Lawyers. Additionally, Mr. Warshaw has been selected by his peers as a Super Lawyer (representing the top 5% of practicing lawyers in Southern California) every year since 2005.

Mr. Warshaw has assisted in the preparation of two Rutter Group practice guides: Federal Civil Trials & Evidence and Civil Claims and Defenses. Mr. Warshaw is the founder and Chair of the Class Action Roundtable. The purpose of the Roundtable is to facilitate a high-level exchange of ideas and in-depth dialogue on class action litigation and encouraging civility from within the plaintiff bar.

Neil J. Wertlieb

Neil J. Wertlieb is an experienced transactional lawyer, educator and ethicist, who provides expert witness services in disputes involving business transactions and corporate governance, and in cases involving attorney malpractice and attorney ethics.

Mr. Wertlieb is the current Co-Chair and a Founding Member of the Ethics Committee of the California Lawyers Association, and a member of the Civility Task Force of the California Lawyers Association. He is a former Chair of the Ethics Committees of both the California State Bar and the Los Angeles County Bar Association, and a former Chair of the Business Law Section and both its Corporations Committee and Business Litigation Committee.

Mr. Wertlieb is a Special Deputy Trial Counsel, appointed by the California State Bar to investigate and prosecute attorney misconduct when the State Bar's Office of Chief Trial Counsel may be conflicted.

Mr. Wertlieb has practiced transactional law for over three decades, most recently as a Partner at Milbank LLP, where his practice focused primarily on acquisitions, securities offerings and restructurings. He also served as the

Chair of the firm's Ethics Group responsible for Milbank's California practices.

He is currently an Adjunct Professor at UCLA School of Law, where for the past two decades he's been teaching transaction skills. He is also a visiting adjunct lecturer at UC Berkeley School of Law, Santa Clara School of Law and USC Gould School of Law, and a Senior Advisor, Milbank@Harvard, at Harvard Law School Executive Education.

He is the General Editor of *Ballantine & Sterling: California Corporation Laws*, a 7-volume treatise on the laws governing corporations and other business entities in California, and an Editor of both *Litigating and Judging Business Entity Governance Disputes in California* and *Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel*.

Mr. Wertlieb received his law degree in 1984 from the UC Berkeley School of Law, and his undergraduate degree in Management Science from the School of Business Administration also at the University of California at Berkeley. He also served as a Judicial Extern for Justice Stanley Mosk on the California Supreme Court. He is admitted to practice in California, New York and the District of Columbia.

Christopher P. Wesierski

Christopher Wesierski has been vetted and approved for 6 trial organizations all of which are difficult to get into and require nomination and thorough vetting: American Board of Trial Advocates; American College of Trial Lawyers; International Society of Barristers; Litigation Counsel of America; International Academy of Trial Lawyers; and Federation of Defense and Corporate Counsel. He was selected as CAL-ABOTA Trial Lawyer of The Year in 2019. Chris Wesierski has spoken on multiple occasions about civility to many groups including the Association of Southern California Defense Counsel (ASCDC). He has also received the Angelo Palmieri award for maintaining the legal profession's highest tradition of professionalism and civility by the Robert Banyard Inn of Court. The Orange County Council, Boy Scouts of America, recognized Christopher Wesierski as its 2018 Man of Character. The Character Award honors excellence in personal character as displayed through positive ethics, high integrity, and community impact. He was the 2020 President of CAL-ABOTA.

Judge Monica F. Wiley

The Honorable Monica F. Wiley was appointed to the San Francisco Superior Court Bench on September 1, 2009 by Governor Arnold Schwarzenegger. Judge Wiley is the second African American female judge appointed to the San Francisco bench. During her tenure with the San Francisco Superior Court, Judge Wiley has presided in the civil, criminal, family, delinquency and dependency departments in both trial and calendar courtrooms. Judge Wiley is currently the Supervising Judge of the Unified Family Court and serves as a member of the Court's Executive Committee, the Alternative Dispute Resolution Committee, the Personnel Committee, the Public Outreach Committee, the Technology Committee, and the Events/Collegiality Committee. Judge Wiley is a member on the 2019-2021 Judicial College Steering Committee, a member of the faculty for the California Center for Judicial Education (CJER) for New Judges Orientation (NJO), and a faculty member for the B.E. Witkin Judicial College. She serves on the CJER Juvenile Curriculum Committee and is an Adjunct Professor at U.C. Hastings College of the Law where she teaches an advanced Trial Advocacy course.

Prior to her appointment, Judge Wiley was a senior associate at the law firm of Carlson, Calladine & Peterson LLP in San Francisco handling catastrophic personal injury and wrongful death cases for individual and corporate defendants. Before joining the private sector, Judge Wiley worked as a Deputy City Attorney in the San Francisco City Attorney's Office for over ten years litigating complex personal injury matters and civil rights actions. She served as lead trial counsel in 27 jury trials both in state and federal court.

Judge Wiley earned her J.D., cum laude, from Howard University School of Law. She received her bachelor's degree in Political Economies of Industrial Societies from the University of California at Berkeley and is a four-year letter winner as a member of the women's intercollegiate basketball team. Go Bears!

As a practicing attorney, Judge Wiley was admitted to the United States District Court, Northern District of California, and the Ninth Circuit Court of Appeals. Judge Wiley currently serves as a task force member on statewide committees focused on civility and the elimination of bias in the legal profession and on the advisory committee of Centro Legal De La Raza's Youth Law Academy. Judge Wiley is a life member of the California Association of Black Lawyers (CABL), the Association of African American

California Judicial Officers (AAACJO) and is the past Chair of the Judicial Council of CABL.

Judge David Wolf

David Wolf is currently the Supervising Judge for North Kern and helped open and is assigned to Kern County's Prison Court. Judge Wolf has been working with the Public Defender's Office, the DA's Office, CDCR and others to make certain that state prison inmates have access to justice. Prison Court coordinates with all of these justice partners to allow inmates to appear in court via video appearance and meet with their lawyers by video. The bulk of requests to use the system come from the inmates themselves. Inmates have requested to use the video appearance system for numerous reasons including for health, programing (not missing college classes etc.) and safety reasons. The program, according to statistics provided by CDCR, is saving tax payers over a million dollars annually, all while providing greater access and service.

In addition to volunteering on the Civility Task Force, Judge Wolf is also the co-chair for the Kern County Elimination of Bias committee, works with the Prison Crimes Council, and volunteers with the Academic Decathlon, Mock Trial and We the People, and with prelaw and law school programs. He is the chair of the Bench and Bar committee, and a member of the Technology/Facilities and Felony/Criminal committees. Currently, he is working to develop a state-wide judicial Prison Crimes committee to help address improving state-wide access to justice and to provide a resource to judges for this unique area of the law.

Appendix 2: ABTL Report, Los Angeles Chapter, Summer 2019

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl

LOS ANGELES

REPORT

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 officer 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 first meeting, they already had a long list of projects to pursue.

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 firmly 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
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REPORT
8502 E. Chapman Avenue, Suite 443
Orange, California 92869
(323) 988-3428 Fax: (714) 602-2505
Email: abtl@abtl.org www.abtl.org

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CIVILITY REPORT INTRODUCTION

Michael L. Mallow

We have all encountered incivility. And if we reflect 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 five years. During that time, there were many hard-fought issues, dozens of depositions, and numerous contentious hearings, including class certification 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 efficiency 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 free-flowing 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 briefing, 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 struggling with their first depositions or trials.

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 officers 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 rapid-fire 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 firm 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 difficult 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 sufficiently 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 fighting and villainizing, I hear dollars." Incivility costs money, and business clients generally don't like that.

Another casualty of incivility—and a beneficiary of 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 benefits, the lawyer with the reputation for civility and reasonableness will get the benefit of the doubt.

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 fill 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. 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 filings 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 finish 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 affirm that "As an officer 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 affirmatively 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 firm, liberal/conservative—are counterproductive. Every opposing

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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 officers 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 benefit 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 affirm 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 flexibility 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 sufficient flexibility, 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 significantly 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 defines 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 benefit of 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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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 conflicted 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 deflated 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/.) 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. 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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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/. 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:

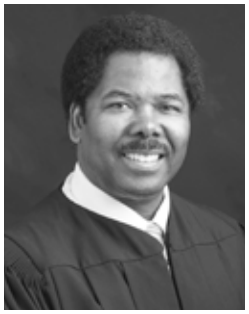
> We are at a crossroads. To maintain public confidence in the profession, . . . and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members' state 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 define 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 conflict, 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 fight 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.

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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 flavors. We've borrowed or adapted some of the following non-exclusive categories from another author (Futeral, *How to Deal with a Difficult 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 difficult. 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 file 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 confirm 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's confidence in the judicial institution. " (*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 efficient 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 conflict. 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 difficult issues requiring judicial assistance (such as thorny privilege issues), or with finding 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 filed. 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 office 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 defined as mental calmness, composure, and evenness of temper, especially in a difficult 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.) 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*., § (l)(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 briefly 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 figurative 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 first 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 Offices of Herbert Hafif* (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 testified 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 sufficed 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 confirmed 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 affidavit 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 affirmed 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 filings 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 "succubustic." The court pulled the definition of "succubus" from Webster's Dictionary: "'a demon assuming female form to have sexual intercourse with men in their sleep—compare incubus; demon, fiend; 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 officers." 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 modified 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 fight 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 difficult 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 dissatisfied 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 difficult 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 backfire 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 finished last, that wasn't the reason. He would undoubtedly agree that incivility creates significant 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 certified 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 fit. 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

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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 firm, from the messenger up to the most senior partner.

• 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

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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 r*egardless 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

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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 difficult 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 conflict 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. On-line 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.

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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 scientific 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.

And all the benefits are free.

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 office, 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 client on the benefits of civility.

Clients may complain that if you are too accommodating from the outset, you will be seen as not truly "fighting" 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 fiercely 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 sacrificing 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 first 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 reflect on aspects of the case that might prompt settlement. However,

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A Civility Checklist...continued from Page 27

if discovery is used exclusively as a weapon, to inflict 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 office when it is convenient for them. Although Local Rule 37 requires opposing counsel to attend the meet and confer at the moving counsel's office, 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 difficult disputes. 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 find them an efficient 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 filing 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 find 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 conflict 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 to file them.

Local Rule 7 requires that parties hold a meet and confer prior to filing any motion. Some lawyers may be skeptical of this requirement. Why would an opponent change a significant 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

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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 difficult 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 position is completely justified.

When you make a mistake, fix 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 conflict. Remember how positive that experience was and apply it to your professional life. Putting aside past conflict, 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.*

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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.

Appendix 3: Key California Civility Cases

- *Lossing v. Superior Court* (1989) 207 Cal.App.3d 635.
- *Green v. GTE California, Inc.* (1994) 29 Cal.App.4th 407
- *People v. Chong* (1999) 76 Cal.App.4th 232.
- *Green v. GTE California, Inc.* (1994) 29 Cal.App.4th 407.
- *Pham v. Nguyen* (1997) 54 Cal.App.4th 11.
- *D.M. v. M.P.* (Nov. 30, 2001, G023935) [nonpub.opn.].
- *DeRose v. Heurlin* (2002) 100 Cal.App.4th 158.
- *In re S.C.* (2006) 138 Cal.App.4th 396.
- *Ahanchian v. Xenon Pictures, Inc.* (9th Cir. 2010) 624 F.3d 1253.
- *Marriage of Davenport* (2011) 194 Cal.App.4th 1507.
- *Kim v. Westmoore Partners, Inc.,* (2011) 201 Cal.App.4th 267.
- *Wong v. Genser* (Nov. 30, 2012, A133837) [nonpub. opn.].
- *People v. Whitus* (2012) 209 Cal.App.4th Supp. 1
- *Interstate Specialty Marketing Inc. v. ICRA Sapphire Inc.* (2013) 217 Cal.App.4th 708.
- *In re Marriage of Lewis,* (Nov. 3, 2015, B255900) [nonpub. opn.].
- *Martinez v. Dep't of Transportation* (2015) 238 Cal.App.4th 559.
- *Sullivan v. Lotfimoghaddas* (June 18, 2018, B279175) [nonpub. opn.].
- *Fridman v. Beach Crest Villas Homeowners Ass'n,* No. (Mar. 19, 2018, G052868) [nonpub.opn.].
- *Flack v. Nutribullet, L.L.C.* (C.D. Cal. 2019) 333 F.R.D. 508.
- *Lasalle v. Vogel* (2019) 36 Cal.App.5th 127.
- *La Jolla Spa MD, Inc. v. Avidas Pharms., LLC* (S.D. Cal. Aug. 30, 2019, No. 17-CV-1124-MMA(WVG)) 2019 WL 4141237.
- *Briganti v. Chow* (2019) 42 Cal.App.5th 504.

- *Martinez v. O'Hara* (2019) 32 Cal.App.5th 853.
- *Block v. Bramzon,* (Jan. 22, 2021, B292129/ B297198) [nonpub. opn.].
- *In re Mahoney* (2021) 65 Cal.App.5th 376.
- *Karton v. Ari Design & Construction* (2021) 61 Cal.App.5th 734.
- *Mayorga v. Mountview Properties Ltd. P'ship* (Apr. 9, 2021, B298284) [nonpub. opn.].
- *Karton v. Ari Design & Constr., Inc.,* (2021) 61 Cal.App.5th 734.
- *In re Mahoney* (2021) 65 Cal.App.5th 376.

MEMORANDUM

To: Justice Brian Currey, California Civility Task Force
From: Amy Lucas, Larson Ishii
Date: September 10, 2021
Re: Civility Caselaw Research

In preparation for the Task Force's civility report recommending the adoption of a California state bar MCLE civility requirement, this memorandum serves as a summary catalog of California cases addressing civility (and the lack thereof). For this memo's purposes, analysis of the orders and opinions below focuses primarily on the issues of civility involved and not necessarily the relevant legal holdings. Cases are divided into three broad categories of incivility and subcategories within each: Part I outlines incivility directed at opposing counsel, Part II involves incivility related to different biases, and Part III details incivility aimed at the judiciary.

I. Incivility Directed at Opposing Counsel

A. Rude Behavior

1. *La Jolla Spa MD, Inc. v. Avidas Pharms., LLC*, No. 17-CV-1124-MMA(WVG), 2019 WL 4141237 (S.D. Cal. Aug. 30, 2019)

The district court granted sanctions against defendant's counsel in the amount of $28,502.03 for atrocious acts of incivility and unprofessional conduct primarily relating to a deposition. At the deposition, defendant's counsel "continuously interrupted, lodged frivolous objections, improperly instructed [her client] to not answer questions, and extensively argued with [opposing counsel]." *Id.* at 3. The court examined numerous examples of defendant's counsel's inappropriate comments on the record including:

- "You know what? While there's no question, I'm going to ask you to speed this up and say: Are there any products on that list that they did not manufacture? Can we do it quicker? . . . Yeah, I know you think it's important to waste our time, but we're trying to get out of here and with concern – out of courtesy for everyone's time." *Id.* at 10.
- "Objection; there's been no foundation laid for the fact it's an email. Do you want to do that first? . . . No, that's not the way to do it. Come on, Counsel." *Id.* at 11.
- The court described the following exchange as a "troubling tirade" in which "the cold, typed words of the transcript truly do not do justice to the tone and tenor of [defendant's counsel's] sustained harassment of [plaintiff's counsel]":
    - [Defendant's counsel]: No, the Court didn't say anything about timing. The witness – the witness is doing the best she can. And we moved this precisely for your convenience. Don't start doing that game. You've wasted plenty of time.
    - [Plaintiff's counsel]: Do you need to take a break?
    - [Defendant's counsel]: No, don't talk to my witness, ever. Don't you ever talk to my witness. Do you understand how threatening that is?
    - [Plaintiff's counsel]: Why are you standing up?
    - [Defendant's counsel]: And how unprofessional that is?
    - [Plaintiff's counsel]: Why are you standing up?
    - [Defendant's counsel]: Because you're a male exercising male privilege and talking to my witness in a situation where she's already nervous. And you're talking to her directly? That's, first of all, a violation of the ethical rules, as you know.
    - [Plaintiff's counsel]: Why are you standing up?
    - [Defendant's counsel]: We're going to take a break. Come on, Margie, let's take a break.
    - [Plaintiff's counsel]: You're leaning over the table.

- [Defendant's counsel]: Yes, because of your threatening nature . . . Because you threatened my witness just now. Don't you ever talk to her directly. *Id*. at 18.

- "[Defendant's counsel] disparaged [plaintiff's counsel] and his case throughout the deposition, calling the case 'garbage' or maligning him personally and the nature of his questioning (see, e.g., 'Again, you're belaboring the witness, you have so many 'belief' questions.'); ('If you keep asking questions that are objectionable, we're really not getting anywhere. So let's go, come on Counsel. Ask questions that are good ones.'); ('Ask a real question with a noun, a topic and date.')). *Id*. at 21. (internal citations omitted).

Altogether, the court found defendant's counsel had "violated the basic standards of professionalism expected of all attorneys . . . was not courteous or civil; acted in a manner detrimental to the proper functioning of the judicial system; disparaged opposing counsel; and engaged in excessive argument, abusive comments, and delay tactics at [client's] deposition. The sheer volume of [defendant's counsel's] antics belie any notion of mistake or negligent conduct on her part but rather disturbingly reveal a systematic effort to obstruct [opposing counsel] for no good or justifiable reason or purpose. [Defendant's counsel] undeniably acted in bad faith." *Id.* at 23.

After lamenting the current state of the legal profession in which attorneys engage in scorched-earth tactics to make litigation as painful as possible, the court found itself obligated to act. Remarking that unchecked incivility "erodes the fabric of the legal profession," this case was such an extreme example of misconduct that required sanctions. *Id.* at 3. The court concluded: "Never before in this Court's nearly ten-year tenure have the sanctions the Court imposes today been more fitting and more deserved by an attorney. [Defendant's counsel's] atrocious conduct at the [client] deposition in particular fell far below the standard of professional conduct becoming an attorney practicing before this—or any other—Court. There may be a fine line between zealous advocacy and unprofessional conduct, but [defendant's counsel] trampled that line long before barreling past it." *Id.* at 25.

2. *In re Marriage of Davenport*, 194 Cal. App. 4th 1507 (2011)

The appellate court affirmed the trial court's order awarding sanctions and attorneys' fees under Section 271 of the Family Code in part due to incivility by petitioner's counsel. The court observed that the record was replete with inappropriate correspondence by counsel "that contained

abusive, rude, hostile, and/or disrespectful language." *Id.* at 1534. The court went on to highlight a few particular instances of incivility including:

- In a letter regarding nonappearance for a deposition: "Once again, you offer the same tired, old, and shopworn excuse. Your continued blustering about mutually agreeable dates, efficiency and promptness, and convenience is pathetic when your client's actions negate any semblance of cooperation. Talk is cheap. Actions speak louder than words. Your credibility is at stake here." *Id.*
- In a separate letter: "Enough already with the delays . . . . We don't accept your implication that you didn't already have [the Request to Inspect] . . . Perhaps you didn't look hard enough, because we filed a Motion to Compel . . . in which I attached RTI Set one to my Declaration. Or you weren't counting that copy. . . . Your last paragraph rings hollow." *Id.* at 1534-35.
- In another letter: "We've noticed that, in the past, you have had some trouble keeping things straight. We also noticed that you tend to stretch things somewhat too far in the name of appearances. . . . It's no surprise, then, that your letter of 8/7/08 appears to be an attempt to create a false and misleading exhibit for use at a later law and motion hearing so that your client can sit in court with a halo over his head, and so you can say 'look how many times Ken offered to settle!' That wouldn't surprise us at all, given your practice of attaching a large pile of exhibits to your declarations without any testimony from you concerning their truth." *Id.* at 1535.

The court noted counsel's comments violated California Attorney Guidelines of Civility and Professionalism that reminds attorneys of their obligations to act professionally with opposing counsel and instructs attorneys to avoid hostile, demeaning, or humiliating words. The court concluded that effective advocacy does not require incivility and reminded all counsel: "Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive." *Id.* at 1537.

3. *DeRose v. Heurlin*, 100 Cal. App. 4th 158 (2002)

The appellate court imposed sanctions in the amount of $6,000 against appellant's counsel for filing and prosecuting a frivolous appeal to delay an adverse judgment and cover up his dishonesty and mishandling of client trust funds. While the sanctions were for bringing and maintaining a frivolous

appeal, in chronicling counsel's misconduct, the court recounted numerous instances of rude and offensive behavior made by appellant to opposing counsel. Appellant's counsel had not responded to opposing counsel's repeated attempts to obtain documents, prompting opposing counsel to suggest his lack of cooperation constituted unprofessional conduct. Counsel told opposing counsel to "educate himself" on attorney liens, he would "see [him] in court," and "I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit." *Id.* at 162.

In response to statutory offers to compromise, appellant's counsel had replied "Let me ask: from what planet did you just arrive. It is my full intent to take judgment against Mr. DeRose on July 11, 2000 when my motion for summary judgment is heard, move for sanctions against you and your firm and do all in my power to see that you, and your firm, suffer to [the] full extent possible through a subsequent claim for malicious prosecution and, very likely, a malpractice action by your ex-client Mr. DeRose when he is presented with a fee demand for thousands of dollars. . . . [Y]ou can take [the American Board of Trial Advocates] Code of Professionalism and shove it—where this case is concerned. When all is said and done, you, Mr. Day and Mr. DeRose will be so very, very sorry this course was pursued." *Id.* at 165. Counsel's incivility continued as he later described opposing counsel as "a frightened Brier [sic] Rabbit who is now stuck to a tar baby of a case in which his client is on the hook for significant damages, attorney's fees, costs, etc.," and a "scared man looking for any way to avoid significant personal liability." *Id.* at 166. The court was clear in remarking that appellant's counsel's "conduct ha[d] been disgraceful" and published their opinion as a reminder and lesson to the bench, bar, and public. *Id.* at 161.

4. *Mayorga v. Mountview Properties Ltd. P'ship*, No. B298284, 2021 WL 1326695 (Cal. Ct. App. Apr. 9, 2021)

In a footnote affirming the trial court's decision to set aside a default judgment for respondent's reasonable mistake, the appellate court noted incivility in respondent's counsel's briefing. In a dispute over an apartment, appellant as tenant had filed an action against respondent landlord alleging uninhabitable conditions, while respondent had initiated eviction proceedings. Given the eviction proceeding was dismissed, respondent did not file a response to the uninhabitable conditions complaint, alleging his attorneys led him to believe it had been dismissed as well. The court noted that respondent's counsel's reference to appellant's "sloth and stealth" and having "extreme lack of hygiene" was "unnecessary to the resolution of the issues on appeal, and violate[d] the 'civility oath' as well as [California's]

civility guidelines." *Id.* at n. 4. However, the court did not "take further action in light of counsel's apology at oral argument." *Id.*

5. *In re Marriage of Lewis*, No. B255900, 2015 WL 6692239 (Cal. Ct. App. Nov. 3, 2015), *as modified on denial of reh'g* (Dec. 1, 2015)

In affirming the lower court's settling of a marital estate, the appellate court noted to both parties "attacks on the character of opposing counsel are not well-received in this court, and pejorative adjectives, including those directed towards the parties and the trial court, do not persuade." *Id.* at 2. While appellant's counsel disputed the trial court's findings of certain assets as community property, charging appellant for inappropriate transfers of money, and awarding more than $25,000 per month in support, the court held appellant's counsel had failed to meet his burden by not adequately pleading his argument or citing to the record.

In a footnote, the court highlighted the inappropriate attacks on opposing counsel in both parties' briefing. Respondent's brief improperly used the word "mantra" in claiming why appellant did not pay respondent and asserted "[appellant] does not believe that the rules apply to him and that he is one of those people who takes his anger and greed beyond the bounds of reason." *Id.* at n. 3 (internal quotations omitted). Appellant's brief accused opposing counsel of "'[t]aking the low road,' of characterizing [respondent's counsel's] argument as a 'a vain effort to make up for the deficiencies in her proof,' of describing an expert's testimony as 'gibberish.'" *Id.* Appellant's briefing also improperly criticized the trial court as having "commit[ed] a 'whopping' miscarriage of justice, of paying 'lip service' to a legally recognized distinction, and of having 'plucked [numbers] out of thin air' . . . 'The trial court has no discretion to use overblown financial figures to determine spousal support. As with all computer programming, garbage in, garbage out.'" *Id.*

6. *In re S.C.*, 138 Cal. App. 4th 396 (2006)

In affirming the orders of the juvenile court declaring a 15-year old minor with Down syndrome dependent and finding it detrimental to return to her mother's custody after being sexually abused by her stepfather, the appellate court referred the opinion to the California State Bar due to the gross misconduct contained in appellant's briefing. The court noted that appellant's 202-page opening brief was "a textbook example of what an

appellate brief should not be." *Id.* at 400. The court further described appellant's brief as "failing to provide meaningful legal analysis and record citations for complaints raised," (*Id.* at 408) and "an unprofessional and, in many respects, virulent brief." (*Id.* at 401.)

The court commented that appellant's brief "attack[ed] the character and motives of a social worker in this case" by gross exaggeration of the facts. *Id.* at 413. Appellant's counsel mischaracterized a physical examination as providing zero support of penetration when the examination was in fact inconclusive as it never occurred. Second, appellant's counsel mischaracterized the interviews by social workers with the minor as showing she "cannot distinguish between truth and fantasy," when the interviews actually showed "a developmentally disabled girl who clearly understood the difference between being truthful and telling a lie." *Id.* Appellant's counsel also misrepresented: (i) orders by the juvenile court regarding visitation, which were clearly refuted by the record; (ii) holdings of appellate decisions cited, which were clearly refuted by the court's review; and (iii) quoted expert authorities, which upon examination were not expert statements, but a recasting of her cross-examination questions.

The court took great issue with "the uncivil, unprofessional, and offensive advocacy employed by appellant's counsel" in attacking the mental ability of the minor, as "[t]he attack [was] stunning in terms of its verbosity, needless repetition, use of offensive descriptions of the developmentally disabled minor, and misrepresentations of the record." *Id.* at 420. Appellant's counsel "*attribute[d] to the judge* a statement that the minor, 'with an IQ of 44' and 'test results . . . in the moderately retarded range in all areas, is more akin to broccoli, than to a single celled amoeba,'" when in fact those were appellant's counsel's words. *Id.* at 421. Appellant's counsel also mischaracterized the expert witness in saying, "Dr. Miller think[s] [the minor is] pretty much a tree trunk at a 44 IQ." *Id.* Appellant's counsel belittled the minor's testimony about being sexually molested by accusing the minor of having "several more versions of her story, worthy of the Goosebumps series for children, with which to titillate her audience." *Id.* Appellant's counsel additionally described the minor's testimony as "jibber jabber," "meaningless mumble," "mumbles, in a world of her own," and "little more than word salad." *Id.*

The court also admonished appellant's counsel for disparaging the trial judge by making unsupported assertions the judge acted out of bias. Appellant's counsel claimed the trial judge pressed the minor into saying words the judge wanted and mischaracterized the judge's words to claim he admitted he was biased. In examining the record, the court noted the judge had asked questions to understand the minor's testimony and "no reasonable

attorney could interpret the judge's questions of the minor as a biased effort to help DHHS prove its case." *Id.* at 423. Next, the court remarked appellant's counsel had taken one statement by the trial judge out of context: "So that whole process is one in which I was very active, and I wasn't just an impartial person sitting on the sidelines evaluating the child." *Id.* In the proper context it was not an admission of bias, but "an observation that because of the minor's developmental disability, the judge was unable to just sit back to hear and observe her testimony; instead, he was required to get involved in the questioning in order to ensure that he understood the minor's answers." *Id.* at 424.

7. *D.M. v. M.P.*, No. G023935, 2001 WL 1527713 (Cal. Ct. App. Nov. 30, 2001)

The appellate court reversed the trial court's sanctions against (i) the mother's counsel in the amount of $368,000 and $16,200, and (ii) the ex-husband's counsel in the amount of $297,000 holding the lower court had abused its discretion. The underlying case involved a paternity suit for increased child support brought by the mother against the father, whom she had a child with while married to her husband (whom she later divorced, i.e., ex-husband). The father had previously recognized the child as his own, paying monthly child support, as it there was little doubt he was the father given the ex-husband had previously had a vasectomy. However, when confronted with a paternity suit, the father resisted a DNA-test and the mother's suit and requests for attorneys fees claiming she must first overcome the statutory presumption the ex-husband was the father given their marriage. After a drawn out litigation, the father was eventually found to be the rightful father, but the trial judge awarded sanctions against counsel for the mother and ex-husband for over-litigating the case, bad-faith tactics, and general incivility.

The appellate court held the trial court erred in finding the mother's counsel over-litigated the case by "acting frivolously in trying to obtain pendente lite support and fees." *Id.* at 6. Instead, the court noted "[t]he main reason that this paternity case took such a ridiculously long time to try was the father's insistence on litigating the issues of the nature of the ex-husband's relationship with the child and the reason for the mother's delay in bringing suit." *Id.* Under the basic facts of the case, there was "enough there for a 'preliminary determination' of paternity," meaning the mother's counsel's requests for fees was not frivolous. *Id.*

The appellate court also held that trial court abused its discretion in awarding sanctions for perceived bad faith tactics delaying the litigation and general incivility. The lower court had stated "this case has not been a pleasant one for the court," warned "many of the behaviors that [the court] observed could conceivably be career threatening," and laid a trap "to confirm that counsel had continued to engage in bickering, accusation and miscommunication between the parties and their counsel" after being instructed otherwise. *Id.* at 3-4. The trial court found inappropriate behavior among all parties' counsel: (i) mother's counsel had filed frivolous motions to obtain fees and lied about delaying the filing because of fear; (ii) ex-husband's counsel had frivolously attacked the integrity of opposing counsel while also giving false testimony about an abortion; and (iii) father's counsel had insinuated opposing counsel were "padding the bills" or "milk[ing] the case." *Id.* at 4. The appellate court disagreed held that the mother's counsel's attempts to gain fees and support were not frivolous given the facts of the case, the sanctions for false statements contravened traditional due process, and that the ex-husband's counsel's attacks on the integrity of opposing counsel were not frivolous given the record.

While the court noted the "growing incivility among attorneys has commanded considerable attention," the court remarked this appeal "presents a textbook case of incivility among attorneys, but unfortunately also presents a textbook case in how not to go about correcting it." *Id.* at 8. In reversing the sanctions, the court remarked: "No doubt the trial judge's motive here was a worthy one. Civility in the profession ought to be promoted by a strong hand from the bench. But sanction orders (particularly large ones) must surely be a disfavored means of doing so. Given the intense competitive pressures facing lawyers today, the opportunity *to have your opponent pay part of your client's bill* has become too much of a temptation: Judges have the duty to curb counsel's temptation in that regard." *Id.* Further, the court noted the danger in waiting to oppose sanctions at the end of case, as well as the unsuitability of laying a trap, because it risks "all kinds of conduct, ranging from lack of professional courtesy to something really bad will be[ing] jumbled together," so that "the relationship between the bad conduct and the amount of sanctions will be attenuated." *Id.*

8. *Sullivan v. Lotfimoghaddas*, No. B279175, 2018 WL 3017190 (Cal. Ct. App. June 18, 2018)

The appellate court affirmed the judgment of the trial court and denied appellant's motion for a new trial based in part on inappropriate arguments made by respondent's counsel to the jury. Appellant's counsel had requested

a new trial after the jury found respondent was not negligent concerning a car crash between the parties. The court denied appellant's counsel's motion because any misconduct was not prejudicial and appellant's counsel had not properly objected at trial. In affirming the lower court, the court did note two instances of unprofessional and uncivil conduct by respondent's counsel when addressing the jury during closing arguments.

Respondent's counsel had improperly appealed to the jury's self-interest by arguing the community's time and resources were being wasted for two trials "all based upon lies." *Id.* at 7. Respondent's counsel continued stating "if as a community we allow that type of misuse of scarce resources and good people's time, that maybe Shakespeare was right: First thing, let's kill all the lawyers." *Id.* The court noted respondent's counsel's argument was an improper and troubling argument to be made, especially because it was unsupported by any evidence.

Further, the court admonished respondent's counsel's "questionable advocacy" in commenting on the fact appellant's son was present during appellant's cross examination. *Id.* at 8. Respondent's counsel had said, "the plaintiff chose to allow his son to sit in this courtroom while he was cross-examined and shown to have lied at a public forum by his own testimony. He allowed his son to observe him in an attempt to misuse and manipulate this process for financial gain. That's wrong. That's really wrong. And killing all the lawyers won't fix that." *Id.* The court noted in making a "jury argument that attacks a litigant's personal integrity, impugns his parenting decisions, and gratuitously suggests the exercise of his constitutional right to petition the courts is worse than murdering attorneys, falls below the level of acceptable advocacy and civility that courts and bar associations are striving to restore in our profession." *Id.* Citing the ABTL civility guidelines, the court issued a reminder that "[e]ven when advocating zealously, counsel must recognize there are lines that are not to be, and need not be, crossed." *Id.*

9. *Fridman v. Beach Crest Villas Homeowners Ass'n*, No. G052868, 2018 WL 1373398 (Cal. Ct. App. Mar. 19, 2018)

In a protracted litigation between a couple and their homeowner's association, the appellate court concluded by urging the parties to return to civility. The original dispute was regarding the alleged improper installation of air conditioners in which the Fridmans were successful in their arbitration and were awarded attorneys' fees. As the homeowners association had no assets, to be awarded the money a writ of mandate was needed to compel a special assessment to pay the fees. While the Fridmans received this, they also lost a subsequent suit against the homeowners association president,

declared bankruptcy, and assigned the right to the fees to their attorneys. During bankruptcy, the Fridmans attempted to enforce their writ of mandate, but were denied as they no longer had a beneficial interest.

As the court concluded its denial of Fridmans' motion, they "strongly urge[d] all sides to quickly and civilly resolve the litigation between them before even more attorney fees are expended." *Id.* at 8. The court noted that various other courts had chronicled the rampant incivility among the parties: "The amount of energy which the parties have devoted to this litigation, and the extraordinary degree of venom they have poured on each other, make it clear that this case is more of a personal vendetta than a rational attempt by the parties to protect their legitimate interests. To say that either of these parties is acting in 'good faith' stretches the common meaning of that phrase to the breaking point." *Id.* (internal citation omitted). The trial court commented, "Finally, this Court notes the lack of professional civility and courtesy displayed by counsel in this action. The Motion, Opposition, and Reply are replete with harsh accusations, personal attacks, and unsupported tirades. Such attacks have no place in litigation." *Id.*

10. *Block v. Bramzon*, 2021 WL 223154 (Cal. Ct. App. Jan. 22, 2021)

This unpublished decision is included here due to the conduct and statements at issue in the decision.

Dennis P. Block dba Dennis P. Block & Associates ("Block") is a leading landlords attorney, and his firm handles unlawful detainer matters through employee attorneys, including co-Plaintiffs Gold, Rahsepar, and office manager Riesen. (Collectively Block and co-plaintiffs are referred to as "Plaintiffs"). *Id.* at *1. BASTA is a tenant rights law firm, founded by Bramzon, and defends unlawful detainer actions through employee attorneys. *Id.*

Block sued BASTA, Bramzon and another BASTA attorney Schulte, alleging that Defendants created, administered, and maintained a website, "dennisblock.com", and a twitter handle "@dennispblock" with the name "not Dennis Block", and the author named "Very Stable Genius Not Dennis P. Block," all without Block's permission. *Id.* at *1-2. Both the website and twitter account were alleged to post defamatory and derogatory comments, as well as post Block's personal cell phone number, home address, and photos of Plaintiffs and family members. *Id.* Defendants were also alleged to spam Block's law firm with, at times, thousands or more solicitations per day. *Id.* at *2.

Defendants filed anti-SLAPP motions to the complaint, contending that the twitter statements were statements made in connection with an issue of public interest, arguing that Block had made himself a public issue and the twitter account was merely a parody of Block's actual twitter feed. *Id.* at *3. The Court of Appeal disagreed. While eviction is an issue of public interest, Defendants' tweets were too tangentially related to constitute protected speech. *Id.* at *5. As to the allegedly libelous statements, Block's "trustworthiness" is also too tangentially related. *Id.* "A majority of the statements consist of vulgar and/or adolescent personal insults, misogynistic, racist, and xenophobic comments, and other slurs having nothing to do with any reasoned discussion of trustworthiness, competence, or any other 'public issue or an issue of public interest.'" *Id.* (*See, e.g.* "Dennis Block & Associates is helping to #MAGA by evicting one latino at a time!"; "My associate Nasti Hasti really needs to start wearing longer skirts to court. Or underwear. Or [omitted]"; "A client called to complain that our Manisha Bajaj was 'dressing like a prostitute'. I told him until wait until he sees 'Nasti Hasti' Rahsepar!'"). [Further example tweets at quoted at page 5 and in the footnotes.]

The Court also found the tweets not to contribute to a public debate. *Id.* at *6. Recognizing the parties as frequent opposing counsel, the purpose of the tweets were to slam an adversary. *Id.* Finally, non-communicative acts, like the website's redirection of visitors from "dennisblock.com" to another firm website, or spamming Block's firm, are not protected acts. *Id.* The Court concluded with a comment on civility, and required the parties to brief the issue of whether or not the comments were a string of incivility (which Defendants conceded) but also, questioned whether they constituted an ethical violation. *Id.* at *7. The matter was remanded to the trial court to make this determination, and to determine sanctions, if appropriate. *Id.*

The author of this summary opines that the appellate court's question highlights the limitations of California's ethics rule as compared to the Model Rule on antidiscrimination. Some of the tweets openly sexually harassed and/or commented on an opposing counsel's gender and ethnicity in a sexually harassing way, and/or appeared directed towards inciting racial or national hostility. However, under California Rules of Professional Conduct Rule 8.4.1, discipline would not likely be prohibited, because although they are about opposing counsel, they are not made "in the representation of a client." By contrast, those same tweets would be a violation of Model Rule 8.4(g), which covers conduct "related to the practice of law," without requiring a nexus to a client matter. California expressly rejected the broader scope of the Model Rule. (*Compare Martinez v. O'Hara* (2019) 32 Cal. App. 5th 853, where counsel's reference to the female judicial officer's ruling as

"succubustic" and accusing the trial court of intentionally refusing to follow the law as conduct justifying referral to the State Bar.)

B. Unfounded Accusations or Representations

1. *Karton v. Ari Design & Constr., Inc.*, 61 Cal. App. 5th 734 (2021), *as modified on denial of reh'g* (Mar. 29, 2021), *review denied* (June 23, 2021)

The appeals court affirmed the trial court's decision to award only $90,000 in attorney fees to appellant of the $292,140 sought, in part due to the incivility of appellant's briefing. Appellant had successfully represented himself in an underlying action concerning the construction of his home by respondents, who were shown to have been unlicensed. After winning the award, appellant (with another counsel) asked for a large amount of attorney fees, but the trial court found the request excessive and awarded a lower amount.

The lower court noted that appellant's briefing for attorney fees "was replete with attacks on defense counsel such as that defense counsel filed 'knowingly false claims of witness tampering,' 'her comments were frivolous,' something was 'typical of the improper tactics employed by defendants and their counsel,'" and contained around 300 pages of extra documentation that went "so far beyond what was necessary on this matter." *Id.* at 741-42. The lower court attributed some of the over-litigation to appellant seeming "agitated about this case" as it was "your personal matter, and . . . you have strong feelings about this case and strong feelings about the course of this litigation and how it has proceeded." *Id.* at 742.

In affirming the lower court's fee amount, the court noted that attorney skill is a factor in deciding whether to adjust a fee amount, and "civility is an aspect of skill" where "excellent lawyers deserve higher fees, and excellent lawyers are civil." *Id.* at 747. The court highlighted the importance and desirability of civility for litigation for multiple reasons. First, civility "is an ethical component of professionalism." *Id.* Second, civility lowers the costs of dispute resolution by making it more efficient by "allowing disputants to focus on core disagreements and to minimize tangential distractions." *Id.* In contrast, incivility acts as "sand in the gears" and "can rankle relations and thereby increase the friction, extent, and cost of litigation . . . turn[ing] a minor conflict into a costly and protracted war" where "[a]ll sides lose, as does the justice system." *Id.*

The court further observed that when appellant's counsel was questioned about his incivility, appellant "respond[ed] to criticism of their personal attacks by attacking." *Id.* Counsel "continued to assert opposing

counsel was a liar," despite the record "not finding someone knowingly made false statements." *Id.* at 748. Next, counsel defended calling opposing counsel's comments frivolous despite not being able to cite any finding of fault from the letter in question. Finally, counsel claimed "denigrat[ing] the actions of opposing counsel as 'typical of the improper tactics employed by defendants and their counsel,'" was within the scope of approved advocacy. *Id.* Appellant's counsel continued attacks on appeal demonstrated that the lower court was "within its discretion to conclude the [appellant] conducted litigation that was less than civil" and reduce the requested attorney fees. *Id.* The court remarked that all counsel should be mindful that in fee-shifting cases, "low blows may return to hit them in the pocketbook." *Id.* at 747.

2. *Kim v. Westmoore Partners, Inc.*, 201 Cal. App. 4th 267 (2011)

The appellate court sanctioned respondent's counsel in the amount of $10,000 regarding inappropriate conduct on appeal. Under false pretenses, counsel received an extension to file their response brief and ultimately submitted a brief that was almost identical to another brief counsel had filed in another case. As part of the duplicate brief, counsel included identical accusations against opposing counsel of professional misconduct in "falsely arguing the case" and "that the appeal is frivolous, and a request for sanctions in the amount of $20,000." *Id.* at 291. Even more egregious, counsel had reduced such accusations to boilerplate by simply redacting the facts of the earlier brief.

While the court took issue with much of counsel's conduct, it was especially troubled by counsel's use of boilerplate accusations: "It is difficult for us to express how wrong that is. Sanctions are serious business. . . . A request for sanctions should be reserved for serious violations of the standard of practice, not used as a bullying tactic." *Id.* at 293. The court then recognized the unfortunate reality that the legal profession is "rife with cynicism, awash in incivility." *Id.* However, the court resolved: "It is time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions." *Id.* The court was clear that sanctions should be reserved only for serious and significant instances of misconduct and incivility such as dishonesty and bullying.

C. <u>Litigation Tactics Unbefitting the Profession</u>

1. *Ahanchian v. Xenon Pictures, Inc*. 624 F.3d 1253 (9th Cir. 2010)

Ahanchian filed a complaint against Defendants for copyright infringement, breach of an implied contract, and unfair competition in violation of the Lanham Act. *Id.* at 1256. During the trial, Defendant sought an extension and Ahanchian exhibiting "professional courtesy expected of officers of the court" agreed. *Id.* But the district court rejected the extension. The district court set the trial date for November 18, 2008. *Id.* The discovery cutoff date was September 2, 2008, and the last day for hearing motions was on September 15, 2008. *Id.* August 25, 2008 was the last date to file any motion for summary judgment. *Id.*

On August 25, 2008, Defendants moved for summary judgment seeking dismissal of all Ahanchian's claims, and for terminating sanctions resulting from a discovery dispute, with roughly 1,000 pages of supporting exhibits and declarations. *Id.* Under the local rules governing briefing schedules, September 2, 2008—the day after Labor Day— was the deadline for Ahanchian to file his opposition, i.e., he had eight days, three over the Labor Day weekend, to draft his oppositions to the motions. *Id.* Ahanchian asked the Defense counsel to stipulate a week's extension, so they could review the voluminous documents and because the lead attorney on the case was out of town on a pre-planned engagement. *Id.* Defense counsel refused. *Id.* at 1257. The next day, Ahanchian filed a motion with the court to grant an extension and defense counsel opposed it. *Id.* The Court denied the extension. *Id.* at 1258.

On September 5, 2008, Ahanchian filed his opposition, three days late, with an ex parte application seeking permission to make the late filing. *Id.* at 1257. Defendant also opposed this motion. *Id.* On September 10, 2008, the district court granted Defendant's summary judgment while simultaneously denying Ahanchian's ex parte application. *Id.* Additionally, the district court also awarded the Defendants attorney fees. *Id.* at 1258. Ahanchian appealed. *Id.*

The Ninth Circuit Court of Appeals reversed and found the district court had abused its discretion. *Id.* at 1260. As it pertains to the initial request for an extension to file the opposition, the Court found Ahanchian's counsel had a good cause for requesting the extension and thus it should have been granted. *Id.* There was no proof that Ahancian's counsel was acting in bad faith or that granting the extension would have made it unfair to Defendants. *Id.* The trial court, had it had doubts about either "should have held an evidentiary hearing or sought more information, instead of summarily denying the request." *Id.* By its order, the trial court "doom[ed]"

Ahanchian's case "on the impermissible ground that he had violated a local rule." *Id.* Turning next to the request to allow the late filed opposition, the Court again found the district court had abused its discretion by applying an impermissible *per se* rule instead of the equitable balancing test required by circuit precedent. *Id.* at 1262.

The Court next turned to defense counsel, who contributed to the district court's errors, and who "disavowed any nod to professional courtesy, instead engaging in hardball tactics designed to avoid resolution of the merits of this case." *Id.* at 1263. Finding that counsel had taken knowing advantage of the time constraint created by local rules, the federal holiday, and lead counsel's out of state obligation, and further compounded the prejudice to Ahanchian by fiercely opposing Ahanchian's efforts to rectify the situation, the Court cited to the California Attorney Guidelines of Civility and Professionalism, §1:

> "The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice."

Id.

2. *Flack v. Nutribullet, L.L.C.*, 333 F.R.D. 508 (C.D. Cal. 2019)

In a footnote ruling on an *ex parte* motion, the court generally cited the ABTL "Civility" report as reminder of counsels' professional obligations to one another. In the course of scheduling medical examinations of the plaintiff, defendant's counsel sent an email on November 13, 2019, to plaintiff's counsel requesting parties to formally stipulate plaintiff would attend the examinations once physicians were secured. Plaintiff's counsel did not respond to the email, prompting defendant's counsel to file an *ex parte* motion. In the footnote, the court noted that while plaintiff's counsel may have been extremely busy and had a good explanation for not responding, "the better practice is to promptly respond to communications from opposing counsel, even if only to acknowledge receipt of a request, to demonstrate respect for one's opponent." *Id.* at n. 1.

3. *Lasalle v. Vogel*, 36 Cal. App. 5th 127 (2019)

In reversing a $1 million default judgment against appellant related to a legal malpractice claim, the appellate court grounded their justification on

basic standards of professionalism in Section 583.130 of the Code of Civil Procedure, which mandates cooperation among the parties. Appellant had been sued by respondent's counsel for legal malpractice and appellant did not respond to the complaint within 35 days, or after respondent's counsel's letter on the 36th day threatening to enter a default judgment if appellant did not respond by the close of the next day. Two weeks after respondent's counsel had requested an entry of default, appellant retained counsel and filed a motion to set aside default, explaining her failure to file an answer as a result of being a single mother practicing law while also taking care of her family, going through a divorce, and receiving notice her property and residence had gone into default. The lower court denied appellant's motion and entered a default judgment. Under its analysis of Section 583.130, the court accepted appellant's explanation for delay as adequate and rejected respondent's counsel's tactics of unreasonably short deadlines to reach default judgment as unethical and contrary to law and legislative policy. The court hoped in future situations, "opposing counsel [would] act with 'dignity, courtesy, and integrity.'" *Id.* at 141.

The court also used its opinion as a warning that the legal "profession has come unmoored from its honorable commitment to the ideal expressed in section 583.130" and "urge[d] a return to the professionalism it represents." *Id.* at 130. Its analysis began by addressing the history of California courts battling incivility and unprofessionalism over the past 30 years by advising the bench and bar to practice with more civility. The court remarked: "Courts have had to urge counsel to turn down the heat on their litigation zeitgeist far too often. And while the factual scenarios of these cases differ, they are all variations on a theme of incivility that the bench has been decrying for decades, with very little success." *Id.* at 134. Citing the California state bar's attempts to fix the problem with a civility requirement, the court observed that "the problem is not so much a personal failure as a systemic one." *Id.* Finally, the court ended their opinion by citing remarks by former Chief Justice Warren Burger that "[L]awyers who know how to think but have not learned how to behave are a menace and a liability . . . to the administration of justice . . . [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." *Id.* at 141.

4. *Pham v. Nguyen*, 54 Cal.App.4th 11 (1997)

Pham sued Nguyen for dental malpractice. *Id.* at 14. Four days before trial, both parties requested a continuance claiming they did not have time to

depose their expert witnesses. *Id.* The trial court denied their request. *Id.* On the day of trial, Nguyen requested a continuance, arguing that her expert witness would be unavailable. *Id.* The trial judge denied the continuance and at the conclusion of the trial, the judge found in favor of Pham. *Id.*

Ngyuen appealed contending it was an abuse of discretion to deny the continuance, particularly in light of Code of Civil Procedure §595.2, which states: "In all cases, the court shall postpone a trial, or the hearing of any motion or demurrer, for a period not to exceed thirty (30) days, when all attorneys of record of parties who have appeared in the action agree in writing to such postponement." *Id.* The Court of Appeals affirmed the trial court's decision to deny the continuance finding the statute was "directory." *Id.* at 15. Even if both parties sought a continuance. *Id.* The Court emphasized that the courts should respect the legislative policy and grant continuances under CCP §595.2 when it is practical. *Id.* But when the accommodation is "impractical, the judicial control reposed in the court by the Constitution must prevail." *Id.*

However, the Court cautioned against being too strict on granting continuances, stating the Court aims to provide a more respectful environment for litigation. *Id.* at 17. "The law should also encourage professional courtesy between opposing counsel—which is precisely what the Legislature did in section 595.2. The law should not create an incentive to take the scorched earth, feet-to-the-fire attitude that is all too common in litigation today. Bitterly fought continuance motions are not particularly productive for either the administration of justice generally or the interests of the litigants particularly. When opposing counsel needs a continuance, courts should look to section 595.2 as a statement of policy in favor of professional courtesy, not churlishness." *Id.*

Ultimately, the Court affirmed the decision to deny the continuance because Nguyen failed to provide any substantial explanation as to why the expert was unavailable. *Id.* at 18. Furthermore, there was no indication that Nguyen's witness was under subpoena. *Id.*

5. *Green v. GTE California, Inc.*, 29 Cal.App.4th 407 (1994)

Green sued defendant for wrongful termination. *Id.* at 408. On June 23, 1993 defense counsel was to conduct Plaintiff's deposition. *Id.* at 408-09. Plaintiff's attorney had a history with defense counsel and believed that defense counsel used "intimidation tactics" during depositions. *Id.* at 409.

Hoping to capture the "intimidation tactics" Plaintiff's counsel brought his own video camera. *Id.* Defense counsel objected and told Plaintiff's counsel he had not given proper notice to use the video camera under Code of Civil Procedure 2025. *Id.* Plaintiff's counsel agreed not to tape defense counsel, unless he perceived her to be using "intimidation tactics." *Id.* On the second day of the deposition, defense counsel refused to allow plaintiff's counsel to film at all. *Id.* Both counsels then engaged in what the court called a "verbal altercation, so lacking in civility, that we decline to repeat it here." *Id.* Following the altercation, the defense counsel refused to continue with the deposition. *Id.* Both parties then filed sanctions against one another. *Id.*

Plaintiff's counsel filed a motion to terminate the Plaintiff's deposition and obtain sanctions against defense counsel. *Id.* At the hearing on the motions, the plaintiff said his motion was designed to move discovery along. *Id.* The court responded by saying, "you were wrong in the first instance and you are wrong now and what's worse, you know you are wrong." *Id.* As a result of plaintiff's counsel's actions the trial court sanctioned him $950. *Id.* at 408. Plaintiff's attorney appealed the sanctions. *Id.*

The Court of Appeals agreed with the trial court. *Id.* The Court's exasperation is evident from its first sentence: "If this case is an example, the term 'civil procedure' is an oxymoron." *Id.*

The Court said Plaintiff's counsel's belief that his opposing counsel acted improperly in past cases cannot be a basis for relief. *Id.* at 410. "Plaintiff's counsel's attempted novel use of the video camera ran afoul of the notice requirements of Code of Civil Procedure section 2025, subdivision (l)(1). He did not give the 3–day notice required by the statute." *Id.* Furthermore, there was doubt on whether CCP §2025 applies to videotaping opposing counsel instead of the witness. *Id.* The court said the sanctions were warranted and that "cases like this one clutter our courts." *Id.* Moving forward, such an order was not appealable. *Id.* at 409-10. The Court concluded: "[b]oth the legal profession and the courts would be better served if litigation arose from legitimate disputes between the litigants instead of wasteful bickering between their attorneys." *Id.* at 410.

6. *Wong v. Genser*, No. A133837, 2012 WL 6028626 (Cal. Ct. App. Nov. 30, 2012)

In dismissing an appeal as untimely filed, the appellate court also imposed sanctions in the amount of $8,500 against appellant's counsel for

prosecuting a frivolous appeal and his dishonesty and lack of remorse to the court. On November 28, 2011, appellant's counsel appealed the denial of a motion to set aside a dissolution of marriage issued some six months earlier, on May 31, 2011. The appeal was not immediately dismissed for untimeliness because the court clerk had not maintained a copy of the fax serving notice of the May 31 order to appellant, and so the court was unaware of the order. After diligent investigation, respondent's counsel filed a motion to dismiss raising the issue of timeliness for appellant and the court.

Appellant's counsel was asked by the court clerk to produce a copy of the May 31 order if they had received it. A junior lawyer for appellant's counsel told the clerk he had found a copy, but it had privileged notes written on it, so he did not send a copy of it. Appellant's counsel then filed an opposition brief without addressing the question of timeliness raised by respondent's counsel. Despite refusing to produce the fax in a phone conversation with respondent's counsel, appellant's counsel filed a supplemental brief claiming respondent's counsel had "incorrectly and disingenuously" alleged the appeal was untimely. *Id.* at 3. Respondent's counsel again emailed appellant's counsel asking for a copy of the fax, this time threatening sanctions if it was withheld, and appellant's counsel refused. Upon a later request, appellant's counsel sent a copy of the fax to the court clerk. Respondent's counsel was notified and then filed it along with a request for sanctions. In his opposition, appellant's counsel again ignored the timeliness issue and refused to acknowledged he "did anything inappropriate relative to the issue of the document in question." *Id.* at 5.

The court held it was unquestionable that appellant's appeal was frivolous as it was untimely filed. Next, the court imposed sanctions on appellant's counsel because he either knew, or should have known, that the appeal was untimely, but still persisted. Further, appellant's counsel "impliedly represented to [the court] that no such notice had been given, although by then he was well aware that it had." *Id.* at 10. The court was left to infer that appellant's counsel "was attempting to prevent [the court] from learning of the existence of the notice." *Id.* at 11. The court noted it was "especially disturbing [appellant's counsel's] steadfast refusal to acknowledge his breach of his duty to provide us with a document bearing on our jurisdiction and to express any remorse for that breach." *Id.* at 8. The court concluded with a final word on civility and how everyone "would have been spared much effort if [appellant's counsel] had accorded [respondent's counsel] the simple courtesy of providing a copy of the fax notice when he requested it." *Id.* at 14. The court further condemned appellant's counsel's uncivil attacks on opposing counsel in calling his arguments "disingenuous"

and a "smokescreen." *Id.* The court hoped appellant's counsel's "lack of professionalism and respect" was not common, as "it demeans the profession as a whole and our system of justice." *Id.*

7. *Interstate Specialty Mktg., Inc. v. ICRA Sapphire, Inc.*, 217 Cal. App. 4th 708 (2013)

The appellate court reversed an order by the trial court for sanction's on appellant's counsel in the amount of $5,076.16 and noted simple acts of civility could have avoided the situation. In filing their complaint, appellant's counsel had attached an incorrect copy of the contract between the parties, a fact that was raised by respondent's counsel soon after but not corrected. Months later, after receiving admissions the contract was not the final version, respondent's counsel filed a motion for summary judgment. It was only at this time appellant's counsel sought to amend their complaint with the correct contract version. The trial court denied the motion for summary judgment, allowed the complaint to be amended, but then initiated sanctions against appellant's counsel for their mistake. The court reversed the trial court as appellant's counsel had filed their amendment within the safe-harbor allowed by the order to show cause for sanction and the sanctions were unsupported by law.

In reversing the trial court, the court specifically commented that "[a] little civility on [respondent's counsel's] part could have resolved the problems in this case early on, saved everyone a lot of time, money, and toner, and spared us the unpleasant role of judicial scold this case has forced upon us." *Id.* at 711. Respondent's counsel should have resisted "the temptation to exploit an adversary's gaffe so as to deny him a hearing on the merits," and "picked up the telephone or written a letter and simply explained that [appellant's counsel] had the wrong document, expressed a willingness to stipulate to an amendment, and only if Interstate had persisted in doing nothing, brought some sort of motion or other proceeding to correct the mistake. That would have been the civil and professionally correct thing to do." *Id.* at 715. Instead, defendant's counsel "evidence[d] a disturbing predisposition to pick up the sword before the plowshare," a practice that should be "turn[ed] away from." *Id.*

The court also pointed out that "[t]his case illustrates what happens when we turn to sanctions too quickly." *Id.* at 710. Sanctions can "serve a purpose other than punishment. If we cannot convince attorneys to conduct themselves honorably and ethically by appealing to their character, we can sometimes bring them into line by convincing them that obeying the rules is the route of least resistance—the less expensive alternative." *Id.* However,

"[s]anctions 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. . . . We don't like to admit failure so we sanction reluctantly." *Id.*

8. *Lossing v. Superior Ct.*, 207 Cal. App. 3d 635 (1989)

The court of appeals reversed the trial court and held that a malicious prosecution action brought against defendant's counsel should be dismissed. Defendant's counsel had been unable to obtain depositions of plaintiffs and unsuccessfully filed an order to show cause re contempt for plaintiffs refusal to comply. Plaintiff's counsel then filed an action for malicious prosecution and intentional inflection of emotion distress against defendant's counsel.

After holding the malicious prosecution action could not be maintained, the appellate court noted there were numerous other malicious prosecution actions pending in their court, and made concluding comments to remind all attorneys of their professional responsibilities with respect to civility:

> "We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel. All too often today we see signs that the practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle." *Id.* at 641.

II. **Incivility Relating to Bias**

A. *Briganti v. Chow*, 42 Cal. App. 5th 504 (2019), *reh'g denied* (Dec. 11, 2019)

The appellate court dedicated a specific section of its opinion to serve as a lesson on civility within the legal profession. In the appeal from the partial denial of an anti-SLAPP motion, counsel for appellant made highly inappropriate and sexist comments regarding the trial judge in their reply brief. Counsel's opening paragraph stated that the trial judge was "an attractive, hard-working, brilliant, young, politically well-connected judge on

a fast track for the California Supreme Court or Federal Bench," but "with due respect, every so often, an attractive, hard-working, brilliant, young, politically well-connected judge can err! Let's review the errors!" *Id.* at 510-11. When questioned at oral argument about the statements, counsel noted it was intended as a compliment.

The appellate court noted that counsel's brief "reflects gender bias and disrespect for the judicial system." *Id.* at 511. The court explained that calling a woman judge attractive is both irrelevant and sexist, whether intended as a compliment or not, and would not have occurred with a male judge. This type of gender discrimination is a part of the larger issue of incivility affecting the legal profession and demeans the seriousness of judicial proceedings. The court specifically cited their responsibility to "take steps to help reduce incivility . . . by calling gendered incivility out for what it is and insisting it not be repeated." *Id.* at 511-12. While the court reminded counsel that more serious incivility would demand a report to the state bar, the court's intention was "not to punish or embarrass, but to take advantage of a teachable moment." *Id.* at 510.

B. *Martinez v. O'Hara*, 32 Cal. App. 5th 853 (2019), *reh'g denied* (Mar. 22, 2019), *review denied* (June 12, 2019)

The appellate court noted plaintiff's attorney had committed misconduct in manifesting gender bias in reference to the trial judge and reported counsel to the state bar. In filing his notice of appeal, plaintiff's counsel referred to the female judge's ruling as a "disgraceful order," "succubustic," and "resulting [in] validation of the defendant's pseudohermaphroditic misconduct." *Id.* at 857. The court noted that "succubus" is defined in the dictionary as "1: a demon assuming female form to have sexual intercourse with men in their sleep—compare incubus 2: demon, fiend 3: strumpet, whore." *Id.* The court stated that plaintiff's counsel referring to a female judicial officer in such a way "constitutes a demonstration 'by words or conduct, bias, prejudice, or harassment based upon ... gender' (Cal. Code Jud. Ethics, canon 3B(6)) and thus qualifies as reportable misconduct." *Id.* at 858. The court further noted that many of the other words and phrases in the notice have no place in a court filing. In addition to reporting counsel's conduct to the state bar, the court chose to publish only the portion of the opinion admonishing counsel "to make the point that gender bias by an attorney appearing before us will not be tolerated, period." *Id.* at 855.

C. *Martinez v. Dep't of Transportation*, 238 Cal. App. 4th 559 (2015)

The appellate court reversed the judgment of the trial court due to prejudicial attorney misconduct on the part of defendant's attorney and also referred the opinion to the California state bar. Plaintiff had been injured in a motorcycle accident and sued the California Department of Transportation (Caltrans) for use of a dangerous road barrier. In the course of a successful defense, defendant's attorney committed "egregious attorney misconduct." *Id.* at 561. Defendant's counsel made inappropriate statements alluding to the dire financial situation of Caltrans, repeatedly violated the trial court's in limine orders even after sustained objections, and "gratuitously besmirching the character of plaintiff." *Id.*

The lower court had barred any references to plaintiff's dismissal from a previous job and references to the ministerial motorcycle group "Set Free Soldiers," of which plaintiff was an ordained minister. During multiple cross-examinations, defendant's counsel repeatedly referenced plaintiff's job dismissal in violation of court order "to insinuate [plaintiff] was lazy and irresponsible . . . [and] was using the accident to scam the legal system for money." *Id.* at 567. Further, at trial, defendant's counsel attempted to show the jury the skull and WW2 helmet symbol of the "Set Free Soldiers" during a cross-examination, but the judge put it under consideration. In response, defendant's counsel asked, "At the time of the accident, the motorcycle that your husband was riding had a skull picture on it wearing a Nazi helmet; right?" *Id.* at 565. At closing arguments, plaintiff's counsel attempted to correct the Nazi reference, but that allowed defendant's counsel to double down and use "the word "Nazi" six times in rapid succession . . . not just referring to an article of clothing but to [plaintiff] himself." *Id.*

The court stated that "[t]he law, like boxing, prohibits hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion or sympathy of the jury." *Id.* at 566. The court explained that rule "prohibit[s] irrelevant ad hominem attacks" and "a defense attorney commits misconduct in attempting to besmirch a plaintiff's character," even if the personal attack is "by insinuation." *Id.* The court found defendant's counsel particularly egregious as the Nazi reference was irrelevant and because "she admitted she wanted to besmirch [plaintiff's] character because some positive evidence had come in (his church work) which tended to put him in a good light and—though she did not say this explicitly—counteract the easily exploitable image of plaintiff as a stereotypical low-life biker." *Id.* at 568.

III. **Incivility Directed at the Judiciary**

A. *In re Mahoney*, 65 Cal. App. 5th 376 (2021)

Attorney Mahoney filed a petition on behalf of his client for rehearing, in which he impugned the integrity of both the trial court and the Court of Appeal, rather than focusing on the law. *Id.* at 377. The Court of Appeal issued an order to show cause why he should not be held in contempt for that filing, which included statements such as:

> "• 'Our society has been going down the tubes for a long time, but when you see it in so black and white as in the opinion in this case, it makes you wonder whether or not we have a fair and/or equitable legal system or whether the system is mirrored by [sic] ignored by the actions of people like Tom Girardi.' (Pet. at p. 6.)
> "• Insinuation that respondent Consolidated Contracting Services, Inc. (Consolidated) may have prevailed because it had contracts with a third party 'who ... wields a lot of legal and political clout in Orange County.' (Pet. at p. 6.)
>
> "• '... [B]ecause of a judicial slight [sic] of hand with no factual basis, this court has altered the landscape and created a windfall for Consolidated.' (Pet. at p. 8.)
>
> "• Suggestion that this court did not 'follow the law.' (Pet. at p. 11.)
>
> "• Assertion that the court 'ignores the facts' in its opinion. (Pet. at p. 8.)
>
> "• Conclusion that this court 'indiscriminately screw[ed]' Salsbury. (Pet. at p. 11.)"

Id. at 378-79.

Instead of expressing contrition, Mahoney "doubled down", asserting that he had merely "'mentioned the obvious things that go on in Orange County which has a lot to do with The Irvine Company, plain and simple." *Id.* at 379. The Court of Appeal viewed this statement as a further impugning of the integrity of the court. *Id.* The Court further noted that Mahoney also did not recant at the OSC hearing, even though they tried to nudge him towards a more temperate position. *Id.* at 380. "…[W]e are confronted with a member of the bar who, after 52 years of practice, believes this is legitimate argument." *Id.*

"We have elsewhere lamented the fact modern law practice 'rife with cynicism, awash in incivility.' [citation] This kind of over-the-top, anything-goes, devil-take-the-hindmost rhetoric has to stop." *Id.* Contrasting the proper way to advocate, the court denounced Mahoney's method. "'The judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity and it is his bounden duty to protect the integrity of his court.' [citations]. 'However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides.'" *Id.* (citing *In Re Ciraolo* (1969) 70 Cal.2d 389, 394-95).

After discussing the long history of civility in the courts, the Court concluded:

> "We publish this decision as a cautionary tale. The timbre of our time has become unfortunately aggressive and disrespectful. Language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse. This isn't who we are.
>
> We are professionals. Like the clergy, like doctors, like scientists, we are members of a profession, and we have to conduct ourselves accordingly. Most of the profession understands this. The vast majority of lawyers know that professional speech must always be temperate and respectful and can never undermine confidence in the institution. Cases like this should instruct the few who don't.
>
> Respect for individual judges and specific decisions is a matter of personal opinion. Respect for the institution is not; it is a sine qua non."

Id. at 381.

The Court found Mahoney to be in direct contempt on two counts and fined him $2,000 total under Code of Civil Procedure §1209 and §1218, along with forwarding a copy of the judgment of contempt to the State Bar. *Id.* at 382.

B. <u>*People v. Whitus*, 209 Cal. App. 4th Supp. 1 (2012)</u>

In affirming the trial court's decision to sanction appellant $750 for failing multiple times to appear at trial readiness conferences, the appellate

court condemned appellant's oral advocacy on appeal as grossly inappropriate and referred the opinion to the California state bar to consider discipline. In the course of appellant's representation of defendant for a charge of driving under the influence, appellant did not appear at multiple trial readiness conferences despite the lower court specifically ordering his presence. The court affirmed the lower court's sanction given the unjustified absences, discretion to control the docket, and inadequate record supplied by appellant.

After deciding the merits, the court addressed appellant's oral advocacy on appeal that "[c]onsist[ed] of repeated tirades and impertinence . . . with a tone wholly condescending and accusatory . . . [that] is a serious and significant departure from acceptable appellate practice, or for that matter, practice in any court of law." *Id.* at 4. The court categorized appellant's oral argument "as a parade of insults and affronts," that "commenced with his demand that the deputy district attorney be removed from counsel table," "culminated with his rude insistence that the court 'state for the record that this is not a contempt proceeding,'" and "in between, the trial and appellate judges were repeatedly disparaged." *Id.* at 11-12. Among the inappropriate comments made by appellant to the judges, with a tone "best be described as confrontational, accusatory and disdainful," (*Id.* at 13) were:

- Describing the appellate division as "the fox [watching] the hen house." *Id.* at 12.
- "But it's common knowledge in the legal community, and you would be insulting me if you suggested otherwise, for us to believe that you judges don't talk like women in a sewing circle about us lawyers. You do. I know you do." *Id.*
- "I don't need to give you the universe of evidence in these proceedings. . . . You don't need a transcript." *Id.*
- "It must have been a while since you read the brief." *Id.*
- "I see a lot of judges that are really quick to bark at defense attorneys. We're always the fly in the ointment. I don't see judges willing to bark at prosecutors quite so readily. Maybe that's because if you upset them one too many times, they'll get one of their [minions to run against you and unseat you. As, I should add,] Michael Kennedy is now running for judge. I'm sure you've heard." *Id.*
- "OK. Well, hereinafter, I will honor your request. But before I proceed to honor your request, I'll tell you that in the 33 years that I've practiced law, I've appeared in front of many great men and women judges, including you three. And I've appeared in front of a few who are an embarrassment to our profession and [first and last name of the trial judge] is one of those people." *Id.*

- "When I came in and ultimately had a hearing, I had listened to the whole proceeding and I heard everything that [the trial court] had to say, and I addressed that in my arguments prior to his reaching his pre-printed ruling. And he said he didn't care. He was the epitome of the completely sealed and closed shut mind. You know . . . a human mind is a lot like a parachute. If it doesn't open, it will get you killed someday." *Id.* at 12-13.

The court chose to highlight appellant's inappropriate conduct because "[i]f left unaddressed, this sort of advocacy demeans the profession, lowers public respect, and conveys the impression that it is acceptable and effective." *Id.* at 4. The court observed: "The foundation of the rule of law is dependent upon lawyers treating judicial officers and each other with respect, dignity and courtesy. The need for civility and dignity is critically important, especially today, with the legal profession and the judicial branch of government under cynical attack from various quarters." *Id.* As officers of the court, professionalism and civility are "demanded of lawyers, at *all times* and at *all stages* of a case, no matter what the stakes involved." *Id.* at 13. The court concluded: "The civility requirements in no way reduce the practice of law to an antiseptic exercise. To the contrary, some of the most passionate and effective advocates for their clients also hold their adversaries, the Court, and its judicial officers in the highest regard. Passion can easily coexist with respect, dignity, and civility." *Id.* at 14.

C. *People v. Chong*, 76 Cal. App. 4th 232 (1999)

The appellate court rejected defendant's claim that the trial court committed prejudicial error by repeatedly admonishing his defense counsel in the presence of the jury. The court affirmed the trial court's decision to not continuously disrupt the trial by excusing jurors to reprimand defendant's counsel for "the many instances of unprofessional conduct in which [defendant's counsel] made disparaging comments to the court, violated court rulings, and repeatedly interrupted the court and witnesses." *Id.* at 235. In the published portion of the opinion, the court highlighted the "insolent and contemptuous conduct" (*Id.* at 243) of defendant's counsel including:

- After having objecting to a document being presented without having been received in evidence: "So in other words, you can put anything you want on the [overhead projector] and later you ask to admit it, is that the ruling?" *Id.* at 239.
- After having interrupted the court when ruling on an objection, the judge said "I don't appreciate the [facetious] remark on your part," and

defendant's counsel responded, "Well, I didn't appreciate the Court's comments on my questioning." *Id.* at 240.

- When responding to a directive not to insert gross prejudice: "Well, I think it's very difficult to — to — to work in an atmosphere where everything is considered not an issue by the Court. So I'm — I'm really trying to stick to the issues, if I could. Only I'm just trying — having trouble seeing what they are." *Id.* at 241.
- "Does the Court think that that's funny? . . . Does the Court think that's funny? I saw you laugh." *Id.* at 242.
- "You show respect for me as well. I've shown unbelievable respect for this Court in the fashion of [the] most unfair trial I've ever experienced in 22 years of practicing law. This place is unbelievable. I've never seen anything like it." *Id.* at 245.

The court noted that the "legal system, indeed the social compact of a civilized society, is predicated upon respect for, and adherence to, the rule of law," and "ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live." *Id.* at 243 (internal citation omitted). Thus, attorneys have "a paramount obligation to the due and orderly administration of justice," and "must not willfully disobey a court's order and must maintain a respectful attitude toward the court." *Id.* (internal citation omitted). The court upheld the trial court's actions as appropriate because: "By mocking the court's authority, an attorney in effect sends a message to the jurors that they, too, may disregard the court's directives and ignore its authority. This type of attorney misconduct must be dealt with in the jury's presence in order to dispel any misperception regarding the credence that jurors must give the court's instructions. Furthermore, when an attorney engages in repetitious misconduct, it is too disruptive to the proceedings to repeatedly excuse the jury to admonish counsel." *Id.* at 244. The court concluded "[i]n our collective 97 years in the legal profession, we have seldom seen such unprofessional, offensive and contemptuous conduct by an attorney in a court of law." *Id.* at 245.

Appendix 4: Selected Civility Resources

Name	Publications / Programs	Biography/ Links to Biography	Contact Information
Allison Buchanan	https://www.yumpu.com/en/document/view/19037735/attorney-civility-powerpoint-ethics	https://www.hogefenton.com/our-people/alison-p-buchanan/	alison.buchanan@hogefenton.com 408-947-2415
Amee Mikacich	https://portal.sfbar.org/SFBAR/Events/Event_Display.aspx?EventKey=G194111C&WebsiteKey=7ff45d51-7883-4a28-ab2a-c56a3eb4a5e0	https://www.hinshawlaw.com/professionals-Amee-Mikacich.html	AMikacich@hinshawlaw.com 415-743-3705
Ellen Pansky	https://www.yumpu.com/en/document/view/19037735/attorney-civility-powerpoint-ethics	https://panskymarkle.com/ellen-pansky/	epansky@panskymarkle.com 213-626-7300;
Eric Galton	Summer 2021 Professional Skills Series | Pepperdine Caruso School of Law	https://law.pepperdine.edu/straus/training-and-conferences/professional-skills-program/malibu/	eric@lakesidemediation.com 512-477-9300
Erin Joyce	https://erinjoycelaw.com/2020/10/practice-tips-tales-of-civility-in-the-time-of-pandemic/	https://erinjoycelaw.com/2020/10/practice-tips-tales-of-civility-in-the-time-of-pandemic/	erin@erinjoycelaw.com 626-314-9050
Jean Cha	Civility Matters Panelist, CA American Board of Trial Advocates (CAL-ABOTA), December 2020	https://chalawethics.com/about/jean-cha-c-v/	jean@chalawethics.com 714-242-8588
Jill Fannin (Judge)	https://www.youtube.com/watch?v=wUWbCZj4WHk	https://trellis.law/judge/jill.c.fannin https://cccba.org/for-attorneys/mcle-overview/mcle-self-study/	925-608-1121

Joanna Storey	http://content.sfbar.org/source/BASF_Pages/PDF/G181604materials.pdf "Civility and Communication in a Hybrid World," Bar Association of San Francisco, September 15, 2021 "What Not to Do – Ethics Lessons Learned from Fictional Attorneys," Bar Association of San Francisco (Virtual), May 11, 2021 "How to Ethically Mitigate Risk in Remote Meetings and Depositions," West LegalEdcenter Webinar, January 12, 2021 "Legal Ethics in a Remote World," Bar Association of San Francisco (Virtual), October 14, 2020 "Practical Tips for Solving Ethical Dilemmas in Mediation," Bar Association of San Francisco (Virtual), June 12, 2019 "How to Use Ethics as a Sword and Shield," Bar Association of San Francisco, January 24, 2018 "Who Knew the Courts Adopted Commonsense Professional Guidelines," San Francisco Attorney Magazine, November 27, 2017 "Ethics of Practicing Law in a Digital World," Bar Association of San Francisco, January 9, 2017	https://www.hinshawlaw.com/professionals-joanna-storey.html	jstorey@hinshawlaw.com 415-362-6000
Katie Lachter	https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/essential_qualities_instructors_workbook_final.pdf	https://www.proskauer.com/professionals/katie-lachter	klachter@proskauer.com 212-969-3618
Kendra Basner	"12 Steps to a Healthier Law Practice in 2020: Step 11 – Actions Speak Louder Than Words," California Attorney Ethics Counsel Blog, November, 2020 "12 Steps to a Healthier Law Practice in 2020: Step 2 – Treat Others The Way You Want to be Treated," California Attorney Ethics Counsel	https://oriellyroche.com/attorney/kendra-l-basner/	kendra@oreillyroche.com 415-952-3004

	Blog, February 18, 2020 "Actions Speak Louder Than Words: The Legal Ethics of Equality," The Recorder, February 5, 2016; "Can Zealous Advocacy Go Too Far," The Recorder, January 19, 2016. Presentations: "Charting an Ethical Course Through Perilous Waters," Pacific Admiralty Seminar, San Francisco, California, October 10, 2019; "Cutting Edge Conflicts: Recent Developments in Perilous Times," American Bar Association (ABA) National Legal Malpractice Conference, San Diego, California, September 13, 2019; "The Lessons of History: Are Civility and Professionalism Ethically Compelled?," West LegalEd Center live webcast, June 2008; "A Perspective: The Origins and Future of the Legal Profession," Sherwin Memel Memorial Presentation: Civility and Professionalism in Practice, California Society for Healthcare Attorneys, April 2008.		
Larry Cook	https://www.youtube.com/watch?v=wUWbCZj4WHk	https://www.cmslaw.com/attorneys/larry-e-cook/	cook@cmslaw.com
Mark LeHocky	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	mark@marklehocky@.com 510-693-6443
Merri Baldwin	N/A	https://www.rjo.com/attorneys/merri-a-baldwin/	mbaldwin@rjo.com 415-956-2828
Niall McCarthy	https://portal.sfbar.org/SFBAR/Events/Event_Display.aspx?EventKey=G194111C&WebsiteKey=7ff45d51-7883-	https://www.cpmlegal.com/professionals-niall-mccarthy-	nmccarthy@cpmlegal.com

	4a28-ab2a-c56a3eb4a5e0	whistleblower-attorney	650-697-6000
Nicole Mills	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	nicolemills@empower-mediation.com 925-351-3171
Philip M. Andersen	https://www.youtube.com/watch?v=wUWbCZj4WHk	https://www.linkedin.com/in/philipandersen	Philip.Andersen.nx3z@statefarm.com
Rick Darwin (Judge)	https://portal.sfbar.org/SFBAR/Events/Event_Display.aspx?EventKey=G194111C&WebsiteKey=7ff45d51-7883-4a28-ab2a-c56a3eb4a5e0	https://trellis.law/judge/richard.c.darwin	415-551-0309
Robin Pearson	https://www.youtube.com/watch?v=wUWbCZj4WHk	https://www.ropers.com/our-team/robin-m-pearson	robin.pearson@ropers.com
Scott Garner	https://www.ocbar.org/All-News/News-View/ArticleId/1720/March-2016-Civility-Among-Lawyers-Nice-Guys-Don-t-Have-to-Finish-Last	https://www.umbergzipser.com/profiles/scott-b-garner/	sgarner@umbergzipser.com 949-672-0052
Steven K, Austin (Judge)	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	925-608-1133
Tracy L. Allen	Summer 2021 Professional Skills Series | Pepperdine Caruso School of Law	https://law.pepperdine.edu/straus/training-and-conferences/professional-skills-program/malibu/	tallen@mediate.com; tracy.allen@pepperdine.edu 248-882-4878;
Trisha Rich	Oh No! Attorney Incivility and its Repercussions, ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS / MAY 27, 2021	https://www.hklaw.com/en/professionals/r/rich-trisha-m	trisha.rich@hklaw.com 312-578-6514 212-513-3545
Wendy Chang (Judge)	"CIVILITY AND THE ELIMINATION OF UNPROFESSIONAL CONDUCT TOWARDS WOMEN" (April 2017);	https://trellis.law/judge/wendy.w.y.chang	661-483-5715

	https://www.yumpu.com/en/document/view/19037735/attorney-civility-powerpoint-ethics		
Wendy McGuire Coats (Judge)	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	925-608-1117
American Board of Trial Advocates - Civility Matters Program (magazine)	http://www.cal-abota.org/pdf/ABOTA_CivilityMatters_Toolkit_1003111.pdf	American Board of Trial Advocates - Civility Matters Program (magazine)	CivilityMatters@abota.org (800) 779-5879
Amir Erez	https://www1.warrington.ufl.edu/departments/mgt/docs/cv_AmirErez.pdf	https://warrington.ufl.edu/directory/person/5084/	amir.erez@warrington.ufl.edu (352) 273-0339
Anna Maravelas	https://www.amazon.com/Creating-Drama-Free-Workplace-Insiders-Incivility/dp/B081S98SPZ/ref=cm_cr_arp_d_product_top?ie=UTF8	http://thera-rising.com/about/	anna@therarising.com
Annette B. Roter	https://www.amazon.com/Dark-Side-Workplace-Managing-Incivility/dp/113855930X	https://www.linkedin.com/in/annette-b-roter-phd-39989110	https://www.linkedin.com/in/annette-b-roter-phd-39989110?challengeId=AQGDpvVhOAafMAAAAXSyjJJasyaAZQjuAhHE9_Esy2JdwWG2fjqVGMT0ptdFX7cwUDLw-t3WXAtPANz6Den5iFKUWMd79ACi-g&submissionId=077ffc60-71e9-3616-

			d085-97b515519d24
Bob Sutton	https://www.amazon.com/Asshole-Rule-Civilized-Workplace-Surviving/dp/0446698202/ref=sr_1_1?dchild=1&keywords=No+Asshole+Rule&qid=1600709488&s=books&sr=1-1	https://www.bobsutton.net/	https://www.bobsutton.net/contact/
Catherine Mattice	https://www.amazon.com/Seeking-Civility-managers-workplace-bullying/dp/1530937728/ref=sr_1_2?crid=OVNS5QME965D&dchild=1&keywords=catherine+mattice&qid=1599933576&sprefix=catherine+mattice%2Caps%2C226&sr=8-2	https://civilitypartners.com/catherine-mattice-zundel/	Info@CivilityPartners.com; 619-268-5055
Christine Pearson	https://www.amazon.com/Cost-Bad-Behavior-Incivility-Damaging-ebook/dp/B002AU7MHM/ref=sr_1_1?dchild=1&keywords=pearson+porath&qid=1600999899&s=books&sr=1-1	https://thunderbird.asu.edu/christine-pearson	christinepearson@thunderbird.asu.edu
Christine Porath	https://www.amazon.com/Mastering-Civility-Manifesto-Christine-Porath/dp/1455568988	http://www.christineporath.com/	christine.porath@gmail.com
Craig Freshley	https://www.amazon.com/Wisdom-Group-Decisions-Craig-Freshley/dp/0978865723/ref=sr_1_1?dchild=1&keywords=The+Wisdom+of+Group+Decisions&qid=1600623762&s=books&sr=1-1	https://www.craigfreshley.com/about-craig/	craig@freshley.com; 207-729-5607
David A. Grenardo	https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1562&context=facarticles	https://law.stmarytx.edu/academics/faculty/david-grenardo/	dgrenardo@stmarytx.edu; 210-431-2127
Diana Damron	https://www.amazon.com/Civility-Unleashed-Survive-Thrive-Workplace/dp/1530312426/ref=sr_1_5?dchild=1&keywords=civility+workplace&qid=1599932597&s=books&sr=1-5	https://dianadamron.com/about/	diana@dianadamron.com; 406-890-8453
Dr. Linnda Durre	https://www.amazon.com/Surviving-Toxic-Workplace-Coworkers-Environments/dp/007166467X/ref=sr_1	http://www.survivingthetoxicworkplace.com/biogra	Linnda.Durre@gmail.com;

	_10?dchild=1&keywords=arsonist+in+the+office&qid=1600285176&s=books&sr=1-10	phy.html	406-890-8453
ELI Civil Treatment Series	https://www.eliinc.com/wp-content/uploads/6-ways-civility-rule-0317.pdf	https://www.eliinc.com/civil-treatment-series/about-civil-treatment/	info@eliinc.com; 800-497-7654
Ellen Burton	https://www.amazon.com/Civility-Project-reverence-wellness-productivity/dp/057843511X/ref=tmm_pap_swatch_0?_encoding=UTF8&qid=1599932091&sr=1-2	http://www.coachellenb.com/the-civility-project.html	coachellenb@gmail.com; 847-721-4694
James E. Lukaszewski	https://www.amazon.com/Decency-Code-Leaders-Building-Integrity/dp/1260455394/ref=sr_1_6?dchild=1&keywords=workplace+incivility&qid=1600378996&s=books&sr=1-6	https://premierespeakers.com/james_lukaszewski/bio	https://premierespeakers.com/james_lukaszewski/bio
Janine Hamner Holman	https://speakerhub.com/sites/default/files/Incivility-presentation-Vistage.pdf	https://jandjcg.com/our-team	Janine@Jandjcg.com; 323-493-6431
Jayne Reardon	https://www.2civility.org/wp-content/uploads/2013/12/surveyonprofessionalism_final.pdf	https://www.2civility.org/people/jayne-reardon/	jayne.reardon@2civility.org; 312-363-6208 or 312-848-0327
Jody J. Foster	https://www.amazon.com/Schmuck-My-Office-Effectively-Difficult/dp/125007567X/ref=sr_1_9?dchild=1&keywords=No+Asshole+Rule&qid=1600204433&s=books&sr=1-9	https://www.med.upenn.edu/professionalism/foster.shtml	ppmed@upenn.edu; 215-662-7677
Judith Bowman	https://www.amazon.com/Dont-Take-Last-Donut-Etiquette/dp/1601630875/ref=sr_1_1?crid=2HOZGIKZB0CO4&dchild=1&keywords=don%27t+take+the+last+donut&qid=1600792339&sprefix=don%27t+take+the+last+donut%2Caps%2C218&sr=8-1	http://www.nationalcivilityfoundation.org/speakers-bureau	judith@nationalcivilityfoundation.org

Lewena (Lew) Bayer	https://www.amazon.com/30-Solution-Increases-Engagement-Profitability/dp/1628652675/ref=sr_1_1?dchild=1&keywords=lewena+bayer&qid=1600624639&s=books&sr=1-1	https://lewbayer.com/	support@civilityexperts.com; 204-996-4792
Michael Lee Stallard	https://www.amazon.com/Connection-Culture-Competitive-Advantage-Understanding/dp/195049652X/ref=sr_1_1?dchild=1&qid=1600533244&refinements=p_27%3AKatharine+P.+Stallard&s=books&sr=1-1&text=Katharine+P.+Stallard	https://www.michaelleestallard.com/about-employee-engagement	mstallard@epluribuspartners.com; 203-550-0360
Michael P. Leiter	https://www.amazon.com/Analyzing-Theorizing-Incivility-SpringerBriefs-Psychology/dp/9400755708/ref=sr_1_4?dchild=1&keywords=workplace+incivility&qid=1600378996&s=books&sr=1-4	https://mpleiter.com/about/	https://mpleiter.com/contact/
Peggy Parks	https://www.theparksimagegroup.com/resources/books/	https://www.theparksimagegroup.com/about/	peggy@theparksimagegroup.com; 404-266-3858
Pete Havel	https://www.amazon.com/Arsonist-Office-Fireproofing-Coworkers-Employees/dp/1948484668/ref=sr_1_1?crid=3004QSPNYUBOF&dchild=1&keywords=the+arsonist+in+the+office&qid=1600183021&s=books&sprefix=the+arsonist+in+the+office%2Caps%2C207&sr=1-1	https://petehavel.com/about/	pete@petehavel.com; 855- NO-ARSON
Robert Danisch	https://www.amazon.com/Beyond-Civility-Obligations-Citizenship-Deliberation/dp/0271087307/ref=sr_1_1?dchild=1&keywords=beyond+civility&qid=1600017948&s=books&sr=1-1#customerReviews	https://uwaterloo.ca/communication-arts/people-profiles/robert-danisch	rdanisch@uwaterloo.ca; 519-888-4567 x 38603
Sharone Bar-David	https://www.amazon.com/Trust-Your-Canary-Workplace-Incivility/dp/0994726406/ref=cm_cr_arp_d_product_top?ie=UTF8	http://www.sharonebardavid.com/about/	info@sharonebardavid.com; 416-781-8132
SHRM,	https://blog.shrm.org/blog/we-need-	https://www.shr	contact via

Society of Human Resources Management	civility-now-more-than-ever	m.org/about-shrm/Pages/default.aspx	online form; 800-283-7476
Steven Michael Selzer	https://www.amazon.com/Civility-George-Washingtons-Rules-Today/dp/1524852449/ref=sr_1_1?dchild=1&keywords=steven+michael+selzer+civility&qid=1600015889&s=books&sr=1-1	https://www.stevenselzerbooks.com/biography	selzerlaw@gmail.com
The State Bar of California	http://www.calbar.ca.gov/portals/0/documents/publicComment/2007/Civility-Guide-Prop-Long-14.pdf	http://www.calbar.ca.gov/	https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1110&context=lawreview
Thomas G. Reio, Jr.	Research areas include workplace incivility	https://case.fiu.edu/about/directory/profiles/reio-thomas.html	reiot@fiu.edu; 305-348-2093
Trevor Foulk	Research areas include "deviant workplace behaviors"	https://www.rhsmith.umd.edu/directory/trevor-foulk	tfoulk@rhsmith.umd.edu; 301-405-8796
Weber Shandwick	https://www.webershandwick.com/wp-content/uploads/2019/06/CivilityInAmerica2019SolutionsforTomorrow.pdf	https://www.webershandwick.com/	Page 18 lists contacts, such as Kate Bullinger, President, United Minds, which is WS's "employee engagement and change management consultancy": kbullinger@webershandwick.com or kate.bullinger

			@unitedminds global.com
Yasmin Anderson-Smith	https://www.amazon.com/gp/product/B005REU0KO/ref=dbs_a_def_rwt_hsch_vapi_tkin_p1_i0	http://kymsimage.com/about/	yasmin@kymsimage.com; 301-792-2276

*The Task Force wishes to thank Elizabeth Caulfield for her assistance.

MEMORANDUM

To: Justice Brian Currey, Civility Task Force

From: Larson Ishii

Date: September 10, 2021

Re: Civility Expert Research

Civility in the Workplace

American Board of Trial Advocates – Civility Matters Program

The Professionalism, Ethics, and Civility Committee of the American Board of Trial Advocates (ABOTA) created "Civility Matters," an educational program designed to promote integrity, honor and courtesy in the legal profession.[3] ABOTA created Civility Matters with the hope the educational programming would be shared at local ABOTA chapters across the country, used for other bar and professional programming, and presented in law schools nationwide.[4] The Civility Matters materials include two publications (*Why Civility and Why Now?* and *Presentation Materials*) along with accompanying DVDs, guidelines, and a toolkit.[5]

Why Civility and Why Now contains a series of articles by judges and practitioners emphasizing the importance of civility in the legal profession and how to promote it.[6] The publication also contains a series of example programs and rules of professional conduct from states and private committees.[7] The *Presentation Materials* and accompanying DVDs serve as a

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[3] *Civility Matters: Presentation Materials*, American Board of Trial Advocates, http://dev.innsofcourt.org/media/12357/civilitymattersmagazinesupplement.pdf.

[4] Civility Matters, American Board of Trial Advocates Foundation Website, https://www.abota.org/Foundation/Lawyer_Resources/Civility_Matters/Foundation/Professional_Education/Civility_Matters.aspx?hkey=7e9beb21-b2ca-41b3-a8e8-132ed045dd96.

[5] *Civility Matters Toolkit*, American Board of Trial Advocates, http://www.cal-abota.org/pdf/ABOTA_CivilityMatters_Toolkit_1003111.pdf.

[6] *Civility Matters: Why Civility and Why Now?*, American Board of Trial Advocates, http://dev.innsofcourt.org/media/12354/civilitymattersmagazine.pdf.

[7] *Id.*

kind of teaching manual for putting on the program, outlining three different example programs to be used, role play scenarios, presentation slides, written materials, and instructional audio and video resources.[8]

Yasmin Anderson-Smith, KYMS Image International

Yasmin Anderson-Smith is an image and branding consultant, trainer, and author focusing primarily on business image, civility, and personal branding.[9] Anderson-Smith is certified as an image professional by the Association of Image Consultants International (AICI) and a Personal Branding Strategist by William Arruda's Reach 360 program.[10] Anderson-Smith is a founding member and former chair of the AICI Civility Counts Project and US Affiliate of Canadian-based, Civility Experts Worldwide.[11] Anderson-Smith is a co-author of two books (*Executive Image Power* (2009) and *The Power of Civility* (2011)) and has had her work featured in other publications.[12] Her notable clientele include Bloomingdales' and Deloitte.

Anderson-Smith's work emphasizes that embracing and promoting civility creates strong personal and corporate image and branding. Civility is defined as a code of conduct emphasizing three principles—Respect, Restraint, and Responsibility—that guide behavior.[13] Brand image consists of three elements—Appearance, Behavior, and Communication—that influence how individuals and organizations are perceived.[14] Civility is the key to shaping a positive image from the inside out and is foundational for building a strong image and brand.[15] This harmonious relationship is shown through Anderson-Smith's "Image and Civility Model," which demonstrates how positive image/brand and smooth harmonious relationships are at the intersection between ethical and considerate conduct and Appearance, Behavior, and Communication.[16]

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[8] *Civility Matters: Presentation Materials*, *supra* note 1.
[9] KYMS Image International Website, http://kymsimage.com/about/.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Civility Counts, An Image Perspective* (white paper), The Civility Counts Project, Association of Image Consultants International, https://www.civilityexperts.com/wp-content/uploads/AICI_WhPaperFINAL.pdf.
[14] *Id.*
[15] *Id.*
[16] *Id.*

Going off of this model, Anderson-Smith argues image and brand consultants are well positioned to influence and promote civility in the workplace. These experts in etiquette, civility, protocol, image and brand management are well equipped to provide the training, education, and awareness for individuals and corporations to create a more positive impression and increase confidence, credibility and worth.[17]

Judith Bowman, National Civility Foundation

Judith Bowman is the founder and president of Protocol Consultants International, as well as the founder and Executive Director of the National Civility Foundation.[18] Bowman works as a consultant, author, and speaker in the field of professional presence and civility. Bowman has written two books on the subject (*Don't Take the Last Donut: New Rules of Business Etiquette* (2007) and *How to Stand Apart @ Work: Transforming Fine to Fabulous* (2014)) and authored many other publications, including a previous weekly etiquette column for the *Boston Herald*.[19]

Bowman's work focuses on teaching nuanced communication and civility practices within a professional setting. Bowman believes that very few people know how to effectively communicate today because they are no longer being taught it at home or in school.[20] Bowman's work seems to try and fill that gap in education by teaching the rules of professional etiquette and mannered conduct.[21] In business, there is nothing little about the little things and proper business etiquette is more than just manners, it forms the pillars of success.[22] Bowman preaches a system of the Four C's—Confidence, Control, Contribution, and Connection—that she pairs with meticulous advice for navigating small talk, networking, e-mails, presentations, dining, meetings, and a variety of other business settings.[23] Bowman asserts these types of practiced respectful behaviors resonate in powerful ways to make

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[17] *Id.*
[18] National Civility Foundation Speaker Bio, Judith Bowman, http://www.nationalcivilityfoundation.org/speakers-bureau.
[19] *Id.*
[20] Judith Bowman Speech, YouTube, https://www.youtube.com/watch?v=pwxuLSSAOGM.
[21] *Don't Take the Last Donut: New Rules of Business Etiquette*, (2nd ed. 2009).
[22] *Id.*
[23] *Id.*

others feel acknowledged and valued to advance critical interpersonal relationships and positively influence the bottom line.[24]

Ellen Burton, E.J. Burton & Associates

Ellen Burton is a personal and professional coach, business lecturer, and motivational speaker. Burton's work focuses on civility in the workplace, diversity, equity, and inclusion matters, inclusive leadership, and efficient business communications and strategy.[25] Burton is the author of the book, *The Civility Project: How to build a culture of reverence to improve wellness, productivity and profit* (2018).[26] Burton's notable clients include the University of Chicago, the City of New York, Northwestern University, and the University of Michigan.[27]

Burton builds on existing research and her own experiences talking to workers to catalog both the costs of incivility and push for different solutions.[28] Burton views civility as showing courtesy in behavior and speech that reflects respect toward the humanity of others.[29] To increase civility, work must be done on a personal as well as organizational level.[30] In the corporate world, Burton highlights wellness, productivity, and profit as the main issues for executive leadership to confront.[31] Workers facing incivility often are psychologically unwell, which leads to being less productive, which in turn leads to a loss of profits. Burton recommends organizations create clear standards and expectations for civil behavior to educate employees and not simply assume people know how to work together.[32] Next, Burton advises training all employees from executives down on civility and business etiquette, tying benefits and rewards to civil behavior, and creating an culture of reinforcement where individuals hold one another accountable.[33] Burton notes that promoting civility will decrease sick days, increase

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[24] Bowman Speaker Bio, *supra* note 16.
[25] Ellen Burton Website, http://www.coachellenb.com/about-us.html.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Workplace Civility with Ellen Burton, Career Tipper Podcast, https://www.youtube.com/watch?v=WehTO2CxlT4.
[31] *Id.*
[32] *Id.*
[33] *Id.*

employee engagement, improve productivity and translate into better customer service, a stronger brand, and increased revenue.[34]

Robert Danisch, University of Waterloo

Robert Danisch is a Professor of Communications Studies at the University of Waterloo.[35] Danisch's research interests concern rhetorical theory and public communication within democratic societies, including extensive work on the relationship between American pragmatism and rhetoric.[36] Danisch's written scholarship include numerous articles, and four books ranging from academic to practical (*Beyond Civility: The Competing Obligations of Citizenship* (2020), *What Effect Have I Had? 100 Communication Practices to be a Better Partner, Teammate, Writer, Speaker, and Leader* (2018), *Building a Social Democracy: The Promise of Rhetorical Pragmatism* (2015), and *Pragmatism, Democracy, and the Necessity of Rhetoric* (2007)).[37]

Much of Danisch's work explores analytical theory and frameworks behind communication and those effects on democratic institutions.[38] Danisch posits that civility is a form of communicative agency where power stems from a person's ability to use language to form relationships, an essential function of stable democratic societies.[39] While civility can form an important framework for communication, Danisch also argues that it's equally important to know when to put aside civility, or to champion uncivil protests and revolution, in order to provide an adequate check on institutions of power.[40] In balancing civil and uncivil forms of communication, civility still provides the best chance of creating durable democratic systems open to political change as it grounds itself in the importance of human relationships.[41]

On a practical level, Danisch tries to re-educate individuals about what it means to communicate. Danisch rejects the transmission model of communication in which effective communicators are those that are best able to take an idea from their mind and send it to another person with the least

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[34] The Civility Project Website, https://thecivilityproject.biz/the-project.
[35] Robert Danisch Faculty Page, https://uwaterloo.ca/communication-arts/people-profiles/robert-danisch.
[36] *Id.*
[37] *Id.*
[38] *Beyond Civility: The Competing Obligations of Citizenship*, (2020)
[39] *Id.*
[40] *Id.*
[41] *Id.*

distortion.[42] Instead of asking "did you get it?", Danisch implores people to ask "what effect did I have?"[43] Danisch emphasizes that focusing on context—that different situations call for different communication processes—and audience—trying to get another person to believe or act in a certain way—are crucial skills to practicing this type of effective communication.[44] Danisch gives 100 practices and tips to become better at achieving your desired effect, rather than just your message, and to become better at communication as a partner, teammate, writer, speaker, and leader.[45]

Sharone Bar-David, Bar-David Consulting

Sharone Bar-David is the president of Bar-David Consulting, a boutique firm that specializes in assisting organizations in creating civil work environments through training, civility tools, coaching, and consulting.[46] Along with workplace incivility, Bar-David specializes in dealing with abrasive leadership and has been accredited as a Boss Whisperer through the Boss Whisperer Institute.[47] Bar-David has worked with over 41,000 people in trainings, consulting, coaching, and speaking events, and has been authored numerous articles and one book (*Trust Your Canary: Every Leader's Guide to Taming Workplace Incivility* (2015)).[48]

Bar-David defines incivility as seemingly insignificant behaviors that are rude, disrespectful, discourteous, or insensitive, where the intent to harm is ambiguous or unclear.[49] Bar-David analogizes incivility in the workplace to a disease that can progress from being a persistent allergy to a chronic infection or acute disease if left unaddressed.[50] Further, incivility can costs companies by making workers less focused and productive, less trusting and collaborative, less healthy and engaged, and more likely to quit.[51] Bar-David

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[42] *What Effect Have I Had?: 100 Communication Practices to Help You be a Better Partner, Teammate, Writer, Speaker, and Leader*, (2018).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Bar-David Consulting Website, http://www.sharonebardavid.com/about/.
[47] *Id.*
[48] *Id.*
[49] *Trust Your Canary: Every Leader's Guide to Taming Workplace Incivility*, (2015).
[50] *Id.*
[51] *Id.*

recommends a multi-pronged approach for tackling workplace incivility: (i) mend broken windows and act quickly and decisively on small acts of rudeness to show commitment to civility; (ii) model civil behavior; (iii) encourage staff to shift from bystanders to upstanders; (iv) identify and address any underlying beliefs that promote incivility as normal; (v) train and build a shared language and competence; and (vi) implement meaningful consequences for incivility to keep others accountable.[52]

Bar-David consulting offers a number of resources, programs, and toolkits for companies including "Team Civility Booster" and "Respect on-the-Go." The Team Civility Booster covers five modules and provides video lessons demonstrating incivility and strategies for boosting civility, planning and implementation guides for facilitated discussions, and resources and guides for sustaining the change.[53] The Respect on-the-Go toolkit provides planning and coaching tools as well as hundreds of tips, phrases, and strategies on easy to access cards for HR, managers, and executives.[54]

Lewena Bayer, Civility Experts Inc.

Lewena Bayer is the CEO of Civility Experts Inc., an international civility training group with 501 affiliates in 48 countries.[55] Bayer is also the Chair of the International Civility Trainers' Consortium, President of The Center for Organizational Cultural Competence, and Founder of the In Good Company Etiquette Academy Franchise Group.[56] Bayer is one of only 26 Master Civility Trainers in the world and has received or been nominated for a number of awards and recognitions; Bayer describes herself as "the leading expert on civility at work."[57] In addition to being a seasoned speaker, Bayer is an 18-time author of numerous works about civility.[58]

Civility Experts defines civility as: a conscious awareness of the impact of one's thoughts, actions, words and intentions on others; combined with, a continuous acknowledgement of one's responsibility to ease the experience of

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[52] *Why Civility Should Matter to You*, Globe and Mail's Leadership Lab, (Jan. 26, 2016), https://www.sharonebardavid.com/wp-content/uploads/2011/12/Globe-and-Mail-Why-Civility-Should-Matter-to-You-Jan-2016.pdf.
[53] Bar-David Consulting website, *supra* note 44.
[54] *Id.*
[55] Lew Bayer Website, https://lewbayer.com/.
[56] *Id.*
[57] *Id.*
[58] *Id.*

others (*e.g.*, through restraint, kindness, non-judgment, respect, and courtesy); and, a consistent effort to adopt and exhibit civil behavior as a non-negotiable point of one's character.[59] Civility Experts provides a host of materials, trainings, consultations, and assessments to help businesses imagine and plan a civil workplace, identify and change organization structure and culture leading to uncivil behavior, and build competency in core areas—continuous learning, social intelligence, systems thinking, and cultural competence—leading to a better workplace.[60] Civility Experts also offers a number of certification courses for individuals to become coaches and civility trainers.[61]

Diana Damron

Diana Damron is a speaker, author, and coach who's work focuses on transforming toxic business environments to trusting civil workplaces.[62] Damron's background is primarily in news and media as a former radio and television anchor.[63] Damron is the author or two books on civility (*Civility Unleashed: Using Civility to Survive and Thrive in the Workplace* (2016) and *The Civility Workout: Your Personal Guide to Unleashing Civility in the Workplace* (2017)).[64]

Damron defines civility as the consistent implementation of respect.[65] Damron focuses on the word consistent as civility is a daily exercise that needs to be practiced even when doing so steps on other's toes.[66] To promote trust and civility, Damron utilizes the 3 C's: Civility, Communication, and Character.[67] Damron believes that our civility needs to undergird our communication with one another to form connections that promote respect and both protect and nurture others.[68] Further, Damron breaks down Civility into 5 action steps in which one: Chooses intentionally to be civil;

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[59] Civility Experts, Inc. Website, https://www.civilityexperts.com/.
[60] *Id.*
[61] *Id.*
[62] Diana Damron Website, https://dianadamron.com/about/.
[63] *Id.*
[64] *Id.*
[65] The Force of Civility, Ted Talk, https://www.youtube.com/watch?v=paAfcZMpFAc.
[66] *Id.*
[67] Diana Damron Website, *supra* note 60.
[68] The Force of Civility, *supra* note 63.

Identifies their own strengths and weaknesses; understands their Values; Invites change into their lives and others to join; and Let's go of negativity.[69]

Dr. Linnda Durre, Psychotherapist

Linnda Durre is a psychotherapist, consultant, author, speaker, and former columnist and TV/radio host.[70] Durre has written many different works including one book (*Surviving the Toxic Workplace: Protect Yourself Against Coworkers, Bosses, and Work Environments That Poison Your Day* (2010)).[71]

In her book, Durre discusses many of the prevalent types of toxic coworkers, bosses, and situations prevalent in workplaces today. While Durre describes common toxic scenarios, the book then recommends specific solutions that one may take to resolve the toxicity, as well as alternatives (*e.g.*, a lawsuit or going to HR) if direct action proves ineffective.[72] Durre advocates for the sandwich method to address incivility by (i) first giving a positive compliment, (ii) then using "and" (not "but") to give feedback regarding the problem you are facing, and finally (iii) again using "and" to present a positive solution to move forward.[73]

Stephen M. Paskoff, ELI – Civility Treatment Series

Stephen Paskoff is the founder, president, and CEO of ELI, a training company that helps organizations solve bad behavior in the workplace.[74] Paskoff is a former EEOC trial attorney, partner at a labor and employment law firm, and founder and co-chair of the ABA's compliance training and communication subcommittee.[75] Paskoff has numerous media appearances and has written two books on civility (*CIVILITY Rules! A New Business Approach to Boosting Results and Cutting Risks* (2016) and *Teaching Big Shots to Behave (and Other Human Resources Challenges)* (2004)).[76] ELI

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[69] Diana Damron website, *supra* note 60.
[70] Surviving the Toxic Workplace Website, http://www.survivingthetoxicworkplace.com/biography.html.
[71] *Id.*
[72] *Surviving the Toxic Workplace: Protect Yourself Against Coworkers, Bosses, and Work Environments That Poison Your Day*, (2010).
[73] Surviving a toxic workplace, News Interview, https://www.youtube.com/watch?v=c_BoRDIbFCw.
[74] ELI company website, https://www.eliinc.com/about-eli/meet-the-team/stephen-m-paskoff/.
[75] *Id.*
[76] *Id.*

provides an award-winning training program on civil treatment in the workplace for managers and employees. Notable ELI clients include Coca-Cola, Verizon, Mastercard, Cox, Capital One, and the Department of Justice.[77]

As a former attorney, Paskoff's work has a greater legal bent, attempting to reshape companies' perspectives on workplace behavior from one centered on legal compliance to one based on civility and respect.[78] Paskoff believes that this narrow, legal-focused approach pushes other concerns to the side, is harmful to business performance, makes it harder to build respectful cultures, and breeds cynicism and narrowness.[79] Paskoff gives six solutions for companies to consider when transforming their business: 1) legal compliance is mandatory for a business, but does not go far enough in eliminating workplace incivility; 2) civility may be a "soft skill" but it has "hard" results and costs for an organization depending on the continuum of uncivil behavior (*e.g,*. illegal to rude conduct) allowed to fester; 3) unite other behavioral and compliance trainings (*e.g.*, sexual harassment) under the umbrella of civility to avoid regulatory fatigue; 4) keep it simple to make it stick for employees; 5) welcome all concerns and feedback from employees to build trust and diagnose issues; 6) senior leaders should initiate and model the change to civility for the rest of the company.[80]

Amir Erez, University of Florida

Amir Erez is a Professor at the University of Florida's Warrington College of Business Management.[81] Erez's research focuses on how positive moods and positive personality, influence individuals thought processes, motivation, and work behaviors.[82] Erez also investigates how negative work behaviors such as rudeness and disrespect affect individuals performance and cognition.[83] Erez has a large number of journal articles and studies regarding the effects of civility and incivility.

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[77] *Id.*
[78] *6 ways to make Civility Rule!*, ELI, https://www.eliinc.com/wp-content/uploads/6-ways-civility-rule-0317.pdf.
[79] *Id.*
[80] *Id.*
[81] Amir Erez Faculty Page, https://warrington.ufl.edu/directory/person/5084/.
[82] *Id.*
[83] *Id.*

In his research, Erez has found that rude behavior and incivility can have a negative effect on the mental capacities of individuals.[84] Erez and a team found that incivility drains the working memories of individuals—the area of the cognitive system where planning, analyses, and management of goals occur—and adversely affects team performance.[85] Erez notes that people can't think correctly when confronted with rudeness, and that incivility can spread easily from person to person.[86] Erez has also studied the effects of civil behavior in the work place and found that it can have both positive and negative effects.[87] In two studies, team members that had civil team communication tended to perform better, but for surgery teams undergoing progressively complex tasks, civil team communication eventually flipped to a negative.[88] Thus, Erez has found that the type of effect civility will have often depends on the broader environmental demands of the team.[89]

Jody J. Foster, University of Pennsylvania

Jody Foster, MD, MBA, is a Clinical Associate Professor of Psychiatry in the Perelman School of Medicine at the University of Pennsylvania, chairs the Department of Psychiatry at Pennsylvania Hospital, and leads the Professionalism Program at Penn Medicine as the Executive Clinical Director.[90] Foster's clinical practice includes general psychiatry, with a special emphasis on treating acute inpatients, psychopharmacology, and also

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[84] Riskin, A., Bamberger, P., Erez, A. and Zeiger, A. (2020), *Discrete Incivility Events and Team Performance: A Cognitive Perspective on a Pervasive Human Resource (HR) Issue*, Buckley, M.R., Wheeler, A.R., Baur, J.E. and Halbesleben, J.R.B. (Ed.) Research in Personnel and Human Resources Management (Research in Personnel and Human Resources Management, Vol. 38), Emerald Publishing Limited, Bingley, pp. 223-258. https://doi.org/10.1108/S0742-730120200000038008

[85] *Id.*

[86] *The Sunshine Economy: Civility and Commerce*, WLRN, Oct. 27, 2020, https://www.wlrn.org/podcast/the-sunshine-economy/2020-10-27/the-sunshine-economy-civility-and-commerce.

[87] Liu, Y., Vashdi, D. R., Cross, T., Bamberger, P., & Erez, A. (2020), *Exploring the puzzle of civility: Whether and when team civil communication influences team members' role performance*, Human Relations, 73(2), 215-241. https://doi.org/10.1177/0018726719830164

[88] *Id.*

[89] *Id.*

[90] Jody Foster Faculty Page, https://www.med.upenn.edu/professionalism/foster.shtml.

provides consulting support and evaluation services to executives.[91] Foster has authored the book, *The Schmuck in My Office: How to Deal Effectively with Difficult People at Work* (2017).[92]

Foster approaches civility in the workplace from her psychiatric background. Foster finds that early and direct confrontation of uncivil behaviors is the best solution for stopping incivility in the workplace.[93] However, frequently people avoid unpleasant situations, including difficult people and disruptive workplace behavior.[94] Further, many employees don't understand why colleagues act uncivilly. Foster's book seeks to educate individuals to identify and understand numerous disruptive behaviors and archetypes within the workplace (*e.g.*, the narcissist, the robot, the controlling perfectionist, the chaos bringer).[95] Through greater clarity of the individual and their uncivil behavior, Foster argues one is then able to empathize with the individual and try and rectify the situation.[96]

Trevor Foulk, University of Maryland

Trevor Foulk is an Assistant Professor of Management & Organization at the Robert H. Smith School of Business at the University of Maryland.[97] Foulk's research interests center around deviant workplace behaviors, workplace power dynamics, social perception, and interpersonal influence behaviors.[98] Foulk has published numerous articles in both scholarly journals and popular news outlets.[99]

Foulk's research on the effects of incivility in the workplace has been diverse and covered multiple areas. Foulk defines rude work behavior as low-intensity deviant behavior with ambiguous intent to harm.[100] This incivility

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[91] *Id.*
[92] *Id.*
[93] *The Schmuck in My Office: How to Deal Effectively with Difficult People at Work*, (2017)
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] Trevor Foulk Faculty Page, https://www.rhsmith.umd.edu/directory/trevor-foulk.
[98] *Id.*
[99] *Id.*
[100] *Why rudeness at work can be harmful and contagious*, Silicon Republic, Feb. 6, 2020, https://www.siliconrepublic.com/careers/rudeness-work-trevor-foulk.

can lead to adverse effects including decreased performance, decreased creativity, and increased turnover intentions.[101] Further rudeness in the workplace is contagious and can spread from person-to-person through (i) the process of social learning of uncivil workplace norms and (ii) through non-conscious agitation.[102] In non-conscious agitation, rudeness stimulates a part of the brain responsible for processing rudeness, making it more likely for a person to notice rude cues and interpret ambiguous interactions as rude.[103]

Foulk's research on rudeness has also extended to leaders in power, finding those who were reminded of their power were more likely to treat others inappropriately.[104] Further, those in power were also more likely to perceive interactions from others as uncivil.[105] This focus on rudeness took its toll on leaders outside of the office as the leaders reported greater negative feelings and reduced well-being later at home.[106]

Craig Freshley, Good Group Decisions

Craig Freshley is a professional meeting facilitator, speaker, trainer, consultant, and president of Good Group Decisions.[107] Freshley focuses his professional work on improving how corporate teams collaborate and get things done. Freshley won the 2019 American Civic Collaboration Award for creating and facilitating make shift coffee houses in an effort to bring civility and understandings to political life.[108] Freshley has written hundreds of tips and insights for improving group skills including one book (*The Wisdom of Group Decisions* (2010)).[109]

Freshley provides facilitation and trainings for companies looking to improve group collaboration while handling conflict, running meetings, and

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[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Feeling Powerful at Work Makes Us Feel Worse When We Get Home*, Harvard Business Review, June 13, 2017, https://hbr.org/2017/06/feeling-powerful-at-work-makes-us-feel-worse-when-we-get-home?elqTrackId=f1a4c64d43d04a3b9478ee828ab8a6aa&elq=a6aa296715844dfaad976d0b53d9efab&elqaid=14504&elqat=1&elqCampaignId=6105.
[105] *Id.*
[106] *Id.*
[107] Good Group Decisions Website, https://craigfreshley.com/about-craig/.
[108] *Id.*
[109] *Id.*

disagreeing.[110] Much of Freshley's published work is condensed into one-page pieces of advice on over one hundred different topics (*e.g.*, email, agenda setting access, crediting the group, private criticism, etc.).[111] These tips start with a principled understanding of the issue, and how it can go wrong, then offers practical tips to better communicate with others.[112]

David A. Grenardo, St. Mary's School of Law

David Grenardo is a Professor of Law at St. Mary's University School of Law teaching professional responsibility, contracts, sports law, business associations, and civil procedure.[113] Grenardo has presented on professionalism and ethics multiple times locally, statewide and nationally, including at the American Bar Association's Annual Meeting and the ABA's Annual National Conference on Professional Responsibility.[114] Grenardo has written multiple articles on the topic of civility in the legal profession.

Much of Grenardo's civility scholarship has revolved around fixing incivility in the legal profession by advocating for mandatory civility rules. In his work Grenardo examines the various definitions of civility before noting that civility includes treating opposing counsel, the parties, the courts, and everyone an attorney encounters, with respect, courtesy, and dignity.[115] For attorneys especially, civility is also linked to professionalism and ethics.[116] Grenardo highlights the high costs of incivility within the legal profession as increased costs for the client, potentially losing a case, greater stress for the attorneys, negative public perceptions of the legal profession, waste of public and judicial resources, and ostracization within the legal community.[117] In spite of these costs, most jurisdictions have only adopted voluntary civility

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[110] *Id.*
[111] *The Wisdom of Group Decisions*, (2010).
[112] *Id.*
[113] David Grenardo Faculty Page, https://law.stmarytx.edu/academics/faculty/david-grenardo/.
[114] *Id.*
[115] *Making Civility Mandatory*, Cardozo Pub. Law, Policy, & Ethics J., Vol. 11, 239 (2013), https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1044&context=facarticles.
[116] *Id.*
[117] *The High Costs of Incivility*, 43 Student Law. 24 (2015), https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1561&context=facarticles.

oaths and civility guidelines for attorneys.[118] Grenardo finds these voluntary acts fall short of stopping incivility as there are no repercussions for uncivil violations.[119]

In response, Grenardo argues for making civility mandatory. For Grenardo, if civility is considered mandatory, then any time an attorney fails to act with civility, they would be sanctioned or penalized; though sanctions and penalties need not only be monetary, but could also include treatment or rehabilitation to fix the root of the problem.[120] To help enforce civility, Grenardo offers ten model rules and comments for mandatory attorney civility.[121] Grenardo also takes on objections to the idea of mandatory civility. He rejects the idea that because incivility cases are subjective they are cannot be ruled on given the legal profession already regulates similarly opaque professional conduct.[122] Next, Grenardo asserts that zealous advocacy does not require incivility, finds that civility requirements do not chill free speech, and will lower the costs of enforcement in the long run.[123] Finally, Grenardo advocates that solving incivility will require greater education in law schools and requiring professionalism/civility courses for lawyers.[124]

Janine Hammer Holman, J&J Consulting Group

Janine Holman is the founding principal and CEO of J&J Consulting Group. Holman uses scientifically validated strategies and tools to build high performance teams, enhance organizational development, and develop organizations and leaders with whom everyone wants to work.[125] Holman spent 10 years studying brain science and developed curriculum to help great organizations create thriving workplaces with engaged, emotionally

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[118] *Making Civility Mandatory*, *supra* note 113.
[119] *Id.*
[120] *Id.*
[121] *Enforcing Civility: Holding Attorneys to a Higher Standard of Conduct,* National Conference on Professional Responsibility (2013), https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1002&context=faccle.
[122] *Id.*
[123] *Id.*
[124] *Making Civility Mandatory*, *supra* note 113.
[125] J&J Consulting Group Website, https://jandjcg.com/our-team.

intelligent, high-performing teams, led by dynamic, innovative and compassionate leaders.[126]

Holman defines incivility in the workplace broadly as rude and disrespectful behavior that violates organizational norms and has an ambiguous intent to harm.[127] Holman combats this incivility through a unique approach that utilizes "brain science," emotional intelligence, and partnerships.[128] Holman defines "brain science" as the study of how the human brain works, and emphasizes that the trainings and approaches she takes are scientifically-based in how the brain responds to incivility.[129] Further, Holman emphasizes partnership as an active choice among individuals when working together and the importance of managing and understanding the emotions of oneself and others.[130] For organizations, Holman identifies 10 ways to increase civility: 1) focus on organization culture, 2) enroll leaders on the importance of action, 3) create a policy of large and small changes, 4) manage yourself, 5) use emotional intelligence, 6) screen out incivility in hiring, 7) teach and train others on civility best practices, 8) learn how to deal with conflict, 9) be intolerant of bad behavior, and 10) reward good behavior.[131]

Pete Havel, The Cloture Group

Pete Havel is a keynote speaker, trainer, and consultant on workplace culture and organizational leadership.[132] Havel is the president of The Cloture Group which provides speaking, training, and consulting to help transform toxic workplaces.[133] Pete has written tips and advice for dealing with toxic workplaces as well as a book on the matter (*The Arsonist in the Office: Fireproofing Your Life Against Toxic Coworkers, Bosses, Employees, and Cultures* (2019)).[134]

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[126] *Id.*
[127] *The Incivility Epidemic*, Sept. 11, 2020, https://jandjcg.com/blogs-%26-articles/f/the-incivility-epidemic.
[128] J&J Consulting Group Website, *supra* note 123.
[129] *Id.*
[130] *Id.*
[131] The Brutal Costs of Incivility on the Bottom Line, https://speakerhub.com/sites/default/files/Incivility-presentation-Vistage.pdf.
[132] Pete Havel Website, https://petehavel.com/about/.
[133] *Id.*
[134] *Id.*

Havel defines a toxic workplace as one wherein drama, chaos, and dysfunction trump common sense, ethical standards, and reason.[135] While toxic employees may pervade every organization, Havel notes it is management that is responsible for workplace culture and dealing with toxic environments.[136] In working to detoxify workplaces, Havel trains leadership and mangers to have the mindset, the understanding, and the tools to identify the problem areas, re-establish the organization's core values, and then identify and implement solutions.[137]

Michael P. Leiter, Deakin University

Michael P. Leiter is Professor of Organizational Psychology at Deakin University, Melbourne, Australia.[138] He previously held the Canada Research Chair in Occupational Health at Acadia University.[139] Leiter's work focuses on job burnout, work engagement, and workplace civility, with recent initiatives surrounding improving the quality of work life through enhancing the level of civility and respect among colleagues.[140] Leiter is widely published and has authored a number of articles and books (including *Analyzing and Theorizing the Dynamics of the Workplace Incivility Crisis* (2013)).

Leiter approaches incivility at work from a psychological background, incorporating academic theory to build a model of how and why incivility exists. In analyzing civility at work, Leiter uses a risk management model to explain the negative effects of incivility.[141] Under this model, incivility creates greater risks by ostracizing colleagues from the group, whereas civility brings safety.[142] Leiter's model's application to workplace civility builds on five propositions: 1) people want to belong in social groups; 2) people notice their own status in social groups; 3) workplace climates are self-perpetuating; 4) improving civility benefits from feeling psychologically safe;

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[135] *The Arsonist in the Office: Fireproofing Your Life Against Toxic Coworkers, Bosses, Employees, and Cultures* (2019).
[136] *Id.*
[137] Pete Havel Wesite, *supra* note 130.
[138] Michael Leiter Website, https://mpleiter.com/about/.
[139] *Id.*
[140] *Id.*
[141] *Analyzing and Theorizing the Dynamics of the Workplace Incivility Crisis*, (2013).
[142] *Id.*

5) improving civility is a reflective process.[143] The reflective process to improve civility requires clear and shared values, active and meaningful reflection and conversations, action and practicing civility, and full integration into day-to-day work life.[144] Through these processes, Leiter finds that the level of civility and respect in a workplace can improve, and there is a close link of improved collegiality with greater engagement with work (leading to less burnout).[145] However, any improvement requires groups to make a serious commitment to change, to dedicate time to a changes process, and to focus their attention on bringing that change about.

James Lukaszewski

James Lukaszewski identifies as "America's Crisis Guru" and the go-to person for senior executives when there is trouble in the room or on the horizon.[146] Lukaszewski is retained by senior management to directly intervene and manage the resolution of corporate problems and bad news while also providing personal coaching and executive recovery advice for executives in trouble or facing career-defining problems and succession or departure issues.[147] Lukaszewski has authored hundreds of articles and 13 books (including *The Decency Code: The Leader's Path to Building Integrity and Trust* (2020) (co-authored with Steve Harrison)).[148]

Lukaszewski's book emphasizes the importance of little acts of decency as the way to promote civility within the workplace. Lukaszewski defines business decencies as a thoughtful, meaningful gesture offered that in ways small and large can enhance a corporate culture; decencies are how we humanely treat each other.[149] Institutionalized corporate decencies are self-propagating and create a barrier to misconduct by building an ethical, compliant, and productive culture through pathways of accountability, civility, compassion, empathy, honesty, humility, and principle.[150] Lukaszewski believes that

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[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] Jim Lukaszewski Website, https://www.e911.com/.
[147] *Id.*
[148] *Id.*
[149] *The Decency Code: The Leader's Path to Building Integrity and Trust*, (2020).
[150] *Id.*

seeing and experiencing little decencies adds impact to principle and creates change that can be felt and observed by everyone.[151]

Anna Maravelas, Thera Rising International

Anna Maravelas is the founder and president of Thera Rising International.[152] Maravelas is a Psychologist Emeritus with additional training in system thinking and process mapping.[153] Her work focuses now on transforming negative cultures into climates of respect, fiscal responsibility and pride.[154] Maravelas is the author of *Creating a Drama-Free Workplace: The Insider's Guide to Managing Conflict, Incivility and Mistrust* (2020). Notable clients include Wells Fargo, Target, Honeywell, General Mills, 3M, Lockheed Martin, and Best Buy.[155]

Thera Rising provides both seminars and trainings, workplace consulting, and facilitator and trainer certifications.[156] When working with companies, Thera Rising employs a three-step team building process: 1) a seminar training on drama-free work; 2) applying new principles to behaviors within the team and creating a code of conduct; 3) working to resolve private conflicts between pairs.[157] Maravelas' seminars and trainings emphasize three broad areas to increase civility: 1) positive energy is necessary to protect health, create connection, and lower stress levels; 2) insights into the causes and cures of workplace hostility by building alliances, being hard on the problem (soft on the person), and identifying the root of conflicts and when people are most vulnerable; 3) specific strategies to transform confrontations to shared searches for solutions, use reciprocity favorable, avoid adversarial factions, change blame-based conversations, and open up dialogue with a 96% chance of a positive outcome.[158]

Catherine Mattice, Civility Partners

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[151] *Id.*
[152] Thera Rising International Website, http://thera-rising.com/about/.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Creating a Drama-Free Workplace: The Insider's Guide to Managing Conflict, Incivility & Mistrust*, (2020).

Catherine Mattice is the founder and CEO of Civility Partners and provides consultant, speaker, and trainer services on transforming workplace culture and preventing workplace bullying.[159] Mattice is active in the International Association for Workplace Bullying & Harassment (IAWBH) and one of the four founding members of the National Workplace Bullying Coalition, a nonprofit organization focused on ending workplace bullying.[160] Mattice has written multiple articles and three books on stopping workplace bullying (*BACK OFF! Your Kick-Ass Guide to Ending Bullying at Work* (2012), *Seeking Civility: How leaders, managers and HR can create a workplace free of bullying and abusive conduct* (2016), and *Stand Up, Speak Out Against Workplace Bullying: Your Guide to Survival and Victory Through 23 Real Life Testimonies* (2018)).[161]

Mattice's work focuses on incivility in the workplace through the lens of bullying. Mattice defines workplace bullying as unwanted and recurring negative and abusive acts aimed at one or more individual.[162] Bullying often involves perceived power imbalances and inability to engage in self-defense, resulting in psychological harm to the victim and monetary losses to the organization.[163] As most instances of bullying are not covered by law or most corporate policies, it is often a reflection of the organizational culture and how employees communicate and interact with one another.[164] Mattice offers seven steps to create a bully-free workplace: 1) strategically use internal communication to create a culture of support, fairness, and listening; 2) obtaining and maintaining organizational commitment at every level; 3) periodically auditing internal communication processes for inappropriate behavior; 4) implement an anti-bullying policy; 5) conduct repeated management and employee trainings; 6) take grievances seriously and investigate them immediately; and 7) use a 360-degree review process where every person reviews everyone they have worked with.[165] Eliminating

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[159] Civility Partners Website, https://civilitypartners.com/catherine-mattice-zundel/.
[160] *Id.*
[161] *Id.*
[162] *7 Steps to a Bully-Free Workplace: Deliver a culture of civility to your organization & sustain the positive change*, HR Times, Vol. 3 Issue 4, https://assets.nu.edu/assets/resources/degreeResources/7_Steps_HRTimes_Cover.pdf.
[163] *Id.*
[164] *Id.*
[165] *Id.*

bullying from the workplace motivates staff, increases the quality and quantity of work, reduces stress, and improves the health of employees and the organization.[166]

Peggy Parks, The Parks Image Group

Peggy Parks is a speaker, trainer, and consultant focusing on business etiquette and corporate civility.[167] Parks is certified as an image and etiquette trainer, a branding strategist, and reach assessment analyst.[168] Parks has written numerous articles and some book chapters on business etiquette and civility.[169] Notable clients include AT&T, eTrade, Intel, and UPS.[170]

Parks provides customized workplace civility trainings and workshops for companies to address individual needs. To aid in solving the complex aspects of uncivil behaviors, Parks has created a civility solution model.[171] The 4C's Model for Civil Communication emphasizes communication must be clear, correct, calm, and conscious.[172] Parks supplements training on this communication model with self-assessments relating to communication habits and lessons on why civility matters and how it can improve business through increased respect, retention, morale, and profits.[173]

Christine Pearson, Arizona State University

Christine Pearson is a Professor of Global Leadership at Arizona State University's Thunderbird School of Global.[174] Pearson is an expert on curtailing and containing dysfunctional behavior at work, from dramatic organizational crises, to the corrosive impact of problems stemming from low-intensity incivility and aggression.[175] Pearson also serves as a consultant and executive-development adviser, with notable clients including PepsiCo,

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[166] *Id.*
[167] The Parks Image Group Website, https://www.theparksimagegroup.com/about/.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] Christine Pearson Faculty Page, https://thunderbird.asu.edu/christine-pearson.
[175] *Id.*

Dow Chemical, NASA, Clorox, Transamerica, Cisco Systems, Kraft Foods, AT&T, Mobil, and Chevron.[176] Pearson has authored numerous articles and six books relating to crisis leadership and bad behavior at work (including *The Cost of Bad Behavior: How Incivility Is Damaging Your Business and What to Do About It* (2009) (co-authored with Christine Porath).[177]

Pearson defines civility in the context of the workplace as behavior that helps to preserve the norms for mutual respect at work; it comprises behaviors that are fundamental to positively connecting with another, building relationships and empathizing.[178] In contrast, incivility in the workplace entails the violation of those norms such that cooperation and motivation are broadly hindered.[179] Further, Pearson diagnoses the various ways incivility can creep into an organization. Incivility may be confined into non-escalating exchange between two individuals.[180] However, incivility may also escalate and with each action promoting a more uncivil response creating a spiral.[181] Additionally, incivility can cascade outside of just the participants through direct and indirect displacement (when incivility with one person is taken out on another), word-of-mouth, and direct observation.[182] Much of Pearson's studies have been analyzing and accounting for the costs this incivility can have in the workplace (see Christine Porath below).

To combat incivility, Pearson recommends a series of corrective and protective actions. First, Pearson notes a company must set clear and expectations regarding their standards for interpersonal communication and not simply rely on the assumption everyone knows what civility means; once set, leaders must exemplify such values.[183] Next, companies can reduce incivility by screening for it during hiring, and then by training employees on civil behavior throughout their tenure.[184] Finally, companies should both

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[176] *Id.*
[177] *Id.*
[178] *Assessing and Attacking Workplace Incivility*, Organizational Dynamics, (2000), https://www.researchgate.net/profile/Christine-Porath/publication/228079608_Assessing_an_attacking_workplace_incivility/links/5663616108ae192bbf8ef07a/Assessing-an-attacking-workplace-incivility.pdf.
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*

welcome and encourage feedback on uncivil behavior in the workplace and take corrective action on the issues raised.[185]

Christine Porath, Georgetown University

Christine Porath is an Associate Professor at Georgetown University's McDonough School of Business and also serves as a speaker and consultant. Porath's scholarship focuses on civility and is featured in numerous articles and the subject of two books: *Mastering Civility: A Manifesto for the Workplace* (2016) and *The Cost of Bad Behavior – How Incivility Damages Your Business and What You Can Do About It* (2009, co-authored with C.M. Pearson).[186] Notable among Porath's speaking and consulting clients are Google, United Nations, Pixar, Ford, AT&T, Expedia, the World Bank, Marriott, the Department of Justice, and Verizon.[187]

From over 20 years of research and polling workers, Porath has found that incivility is rampant in the workplace (98% of workers had experienced uncivil behavior).[188] Moreover, incivility was on the rise; in 2011, half of respondents stated they were treated badly at least once a week (up from a quarter in 1998).[189] Given the inescapable reality that every workplace deals with incivility in some manner, Porath's work seeks to do two things: (i) quantify and show the costs of incivility, and (ii) devise strategies and recommendations for how to fix it.

Porath defines incivility as disrespect or rudeness; this definition includes a multitude of behaviors that may vary in meaning for different people (what is rude to one person may not be to another).[190] In the workplace, incivility leads to tangible costs. Workers on the receiving end of incivility intentionally decrease effort (48%), quality (38%), and time spent (47%) at work; lose time worrying (80%) or avoiding the offender (63%); experience a decline in performance (66%) or commitment to the organization (78%); take

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[185] *Id.*
[186] Christine Porath Faculty Page, https://gufaculty360.georgetown.edu/s/contact/00336000014ReyuAAC/christine-porath.
[187] Christine Porath Website, http://www.christineporath.com/.
[188] *An Antidote to Incivility*, Harvard Business Review, April 2016, https://hbr.org/2016/04/an-antidote-to-incivility.
[189] *Id.*
[190] *Why being respectful to your coworkers is good for business*, Ted Talk, Oct. 24, 2018, https://www.youtube.com/watch?v=YY1ERM-NIBY.

frustration out on customers (25%); and quit (12%).[191] Further, individuals who experience incivility are less creative, perform worse, and are less likely to help out teammates or collaborate.[192] The effects of incivility also extend to those simply observing incivility, with customers found to be less likely to purchase from a company after witnessing uncivil conduct.[193] Overall, incivility is expensive and costly for a company.

Porath finds the usual responses to incivility—retaliation, direct discussion, avoidance—often fall short.[194] While these approaches can help in certain situations, confrontation usually makes the dynamic worse and avoidance is not sustainable.[195] Instead, companies should take a holistic approach where the best remedy for incivility is to improve the well-being of the office (rather than one offender) as a whole.[196] On a personal level, individuals who are thriving are less affected by the negative consequences of incivility. Thriving takes a two-pronged approach: (i) thriving cognitively, focused around growth, momentum, mentorship, and continued learning both at and outside of work, and (ii) thriving affectively, which is centered around feeling healthy, well rested, and experiencing passion and excitement at work and outside of it.[197] On an organizational level, company leadership should model good behavior, ask for feedback (including post-departure interviews), pay attention to progress, include civility as a factor in hiring, teach and train employees on what it means to be civil, create group norms and expectations, reward good behavior, and punish bad behavior.[198] Greater civility in a company benefits not only the people, but also the bottom line.[199]

Thomas G. Reio, Jr., Florida International University

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[191] *The Price of Incivility*, Harvard Business Review, January-February 2013, https://hbr.org/2013/01/the-price-of-incivility.
[192] *Id.*
[193] *Id.*
[194] *An Antidote to Incivility*, *supra* note 186.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*; *The hidden toll of workplace incivility*, McKinsey Quarterly, Dec. 14, 2016, https://www.mckinsey.com/business-functions/organization/our-insights/the-hidden-toll-of-workplace-incivility#.
[199] *Why being respectful to your coworkers is good for business*, *supra* note 5; Christine Porath Website, *supra* note 185.

Thomas G. Reio, Jr. is a Professor of Adult Education and Human Resource Development at Florida International University.[200] Reio's research concerns taking a sociocultural view of curiosity and risk-taking motivation and their links to learning and development across the lifespan, socialization practices (*e.g.*, mentoring), and workplace incivility.[201] Reio has published numerous academic articles and was awarded multiple awards for work on workplace incivility and conflict management.[202]

Much of Reio's work builds off of what management strategies companies can take after acknowledging that incivility in the workplace is prevalent and harmful. In a study on the effects of supervisor and coworker incivility, Reio confirmed that incivility had a strong, direct negative effect on job satisfaction and employees' emotions.[203] However, Reio found that emotion management—the process to modify one's emotions to fit the appropriate responses for environmental and organizational demands (*e.g.*, suppressing negative emotions or faking positive emotions)—lessened the negative effects of incivility on job satisfaction.[204] Thus, organizations should not only be aware of the ill effects of incivility, but also develop positive emotional management strategies and educate employees.

Reio has also studied the effects of different styles of conflict management in dealing with workplace incivility. Reio found that dominant conflict management style—low levels of concern for others and high focus on yourself—was negatively associated with organizational commitment and retention.[205] However, Reio found that integrative conflict management style—high levels of concern for yourself and others that creatively uses information to achieve mutually-satisfactory results—had positive relations

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[200] Thomas Reio Jr. Faculty Page, https://case.fiu.edu/about/directory/profiles/reio-thomas.html.
[201] *Id.*
[202] *Id.*
[203] Opengart, Rose,et al., *Workplace Incivility and Job Satisfaction: Mediating Role of Emotion Management*, IJAVET vol.10, no.2 2019. http://doi.org/10.4018/IJAVET.2019040101.
[204] *Id.*
[205] Reio, Jr., Thomas G. and Jeannie Trudel, *Workplace Incivility and Conflict Management Styles: Predicting Job Performance, Organizational Commitment, and Turnover Intent*, Adult Education and Vocational Training in the Digital Age, edited by Viktor Wang, IGI Global, 2017, pp. 217-240. http://doi:10.4018/978-1-5225-0929-5.ch013.

to job performance, organizational commitment, and turnover.[206] Thus, Reio encourages companies to seek to use more integrative conflict management styles when dealing with workplace incivility.

Jayne Reardon, Illinois Supreme Court Commission on Professionalism

Jayne Reardon is the Executive Director of the Illinois Supreme Court Commission on Professionalism.[207] Reardon oversees programs and initiatives to increase the civility and professionalism of attorneys and judges, create inclusiveness in the profession, and promote increased service to the public.[208] Reardon has written articles and given various presentations on civility and professionalism within the legal enterprise.[209]

Reardon has defined civility within the legal profession to be a code of decency in conduct and behavior that is a condition of lawyer licensing.[210] Reardon finds that despite attorney's professional obligations to civility, it is rampant in the legal community with the vast majority of Illinois lawyers having experienced unprofessional behavior by other lawyers, whether blatant rudeness in comments or interactions, to more strategic incivility in opposing counsel employing uncivil behaviors in an attempt to gain an upper hand in litigation.[211] However, the research clearly shows the benefits to civility: (1) civil lawyers are more effective and achieve better outcomes; (2) civil lawyers build better reputations; (3) civil lawyers have greater job satisfaction; and (4) civil lawyers have less chances of discipline.[212]

To promote civility among lawyers, Reardon proposes bringing lawyers together for training and mentoring. To that end, the Commission on Professionalism has created a lawyer-to-lawyer mentoring program for new lawyers using a guided curriculum on how attorneys can build careers based

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[206] *Id.*
[207] Illinois Supreme Court Commission on Professionalism Website, https://www.2civility.org/about/our-team/jayne-reardon/.
[208] *Id.*
[209] *Id.*
[210] Civility as the Core of Professionalism, American Bar Association, Sept. 18 2014, https://www.americanbar.org/groups/business_law/publications/blt/2014/09/02_reardon/.
[211] *Id.*
[212] *Id.*

on integrity and professionalism.[213] Further, the Commission has created CLE programs on civility, expert interviews and tips, and a host of other resources to train and educate attorneys and the entire legal profession on civil behavior.[214]

Bob Sutton, Stanford University

Bob Sutton is a Professor of Management Science and Engineering and Professor of Organizational Behavior at Stanford University.[215] Sutton co-founded the Stanford Technology Ventures Program and the Hasso Plattner Institute of Design.[216] Sutton studies organizational change, leadership, innovation, and workplace dynamics and has received numerous honors and recognitions as a leader in management.[217] Sutton is widely published in academic journals and has authored seven books (including *The No Asshole Rule* (2010) and *The Asshole Survival Guide* (2017)).[218]

Sutton has been influential in popularizing both the costs and negative effects of incivility in the workplace, but also in working to create different solutions for transforming organizational culture. Sutton defines the workplace jerk as someone that makes others feel oppressed, humiliated, de-energized, belittled, or worse about themselves after interacting with them.[219] Sutton then quantifies the total costs of jerks for a company by looking at the damage to victims and witnesses (*e.g.*, distraction, loss of motivation, stress), damage to the jerks (*e.g.*, retaliation from victims, humiliation, unable to work with others), consequences for management (*e.g.*, time lost dealing with jerks and their fallout), legal and HR costs, and negative organizational effects (*e.g.*, reduced creativity, impaired cooperation, less effort).[220] In response, Sutton advocates for the no-jerks rule and five practices for companies to utilize when following it: 1) make the rule public by what you say and do for accountability; 2) employ the rule in hiring and firing

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[213] Illinois Supreme Court Commission on Professionalism Website, *supra* note 205.
[214] *Id.*
[215] Bob Sutton Website, https://www.bobsutton.net/about-bob/.
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Building the civilized workplace*, McKinsey Quarterly, May 1, 2007, https://www.mckinsey.com/business-functions/organization/our-insights/building-the-civilized-workplace.
[220] *Id.*

decisions; 3) teach people how to constructively disagree and argue; 4) apply the rule to customers and clients; and 5) manage the little moments as ways to repeatedly practice the rule.[221]

After writing extensively on how organization's may utilize the no-jerks rule to transform company culture, Sutton has also researched its application specifically to senior management. People in positions of power are more likely to act uncivil in their behavior whether it is because they are overworked, insecure, distanced, or drunk on power.[222] Because of this, leaders have to be especially self-reflective and cognizant of whether they are the source of incivility in the organization.[223] Sutton proposes a five-point plan to help top executives strive to treat others with respect: 1) make sure you are not surrounded by jerks because rudeness is contagious and can spread; 2) be aware of how you wield your influence and power and practice humility and giving credit to others; 3) understand the risks of overload and addiction to technology, which often has the indirect effect of causing unintentionally uncivil conduct; 4) when you behave like a jerk, make sure to apologize correctly and personally (don't delegate); and 5) envision your actions from the future and reflect upon how you would like to behave looking back on your life.[224]

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[221] *Id.*

[222] *Memo to the CEO: Are you the source of workplace dysfunction?*, McKinsey Quarterly, Sept. 14, 2017, https://www.mckinsey.com/featured-insights/leadership/memo-to-the-ceo-are-you-the-source-of-workplace-dysfunction.

[223] *Id.*

[224] *Id.*

Appendix 5: Referral and Dispute Resolution Programs

Report On Civility Mediation Programs

TO: **Civility Task Force**

FROM: **Jeanne A. Fugate and Alan M. Mansfield**

DATE: **July 29, 2021**

RE: **Referrals and Dispute Resolution Subgroup Final Report**

The Civility Task Force is exploring potential programs, procedures, and rule changes to increase civility in the legal profession in the State of California. Our subgroup was tasked with investigating examples of attorney referral programs utilized by other State Bars as well as to explore examples outside the context of the legal profession, such as conflict resolution programs adopted by public and private entities. We looked specifically for programs addressing *incivility* in the legal profession and/or the workforce, as opposed to programs that deal with ethical violations or address claims of illegal conduct in the workforce (discrimination, harassment, etc.).

Below we briefly summarize the programs that we have located. Each of the programs discussed below share common characteristics: They are confidential and voluntary, and are not part of any formal disciplinary body. The sessions are mediated by a neutral third party—usually a volunteer but in one example below a professional and paid mediator. There tend to be civility rules (or workplace conduct rules) against which to gauge behavior. And there tends to be a limitation in geographic scope.

Based upon our research and discussions with the Task Force, we also attached hereto as Exhibit "1" our recommendations, should there be interest in implementing a similar program in California.

I. ATTORNEY REFERRAL PROGRAMS

At least four states have adopted some form of lawyer professionalism and/or civility referral programs: (1) New Jersey, (2) Utah, (3) Colorado, and (4) Florida. Both Illinois and Michigan have engaged in a sustained effort to promote civility, but do not appear to have adopted formal referral programs.

We also saw references to similar programs in Arizona, Georgia, and North Carolina, but so far have been unable to locate detailed information about them.

A. New Jersey

In 1997, New Jersey implemented a "Professionalism Counseling Program." https://tcms.njsba.com/PersonifyEbusiness/Default.aspx?TabID=2009. According to their website, the Commission on Professionalism in the Law asked county bar associations across New Jersey to take the lead through the establishment of Professionalism Committees that would have the ability to identify and counsel lawyers whose conduct falls short of accepted levels of professional behavior or competence.

The Professionalism Counseling Program addresses conduct by lawyers that does not rise to the level of a violation of the ethics rules (the Rules of Professional Conduct). Thus, it does not handle any matter that is within the jurisdiction of a District Ethics Committee. For instance, the program deals with such things as harassing conduct, abusive litigation tactics, incivility, inappropriate courtroom conduct, and repeated lack of respect for colleagues, judges, and court staff. The program is educational in nature. No discipline or sanctions are imposed, and all matters are confidential. The only records kept are those relating to the type of complaint addressed.

The program is operated through local Professionalism Committees appointed by county bar associations. The precise composition, structure and operation of a committee is left to the bar association to establish, and different approaches have been taken. Some committees operate under formal operational rules; others deal with complaints on a more ad hoc basis. Another committee has established a mediation program to deal with disputes between lawyers. The commission encourages such experimentation and leaves it to bar associations to determine what type of program best fits the needs of the bench and bar of that county.

The Commission has, however, set some basic guidelines for the local Professionalism Committees to follow:

- Each committee, and a committee chair, should be appointed by the county bar president.
- Lawyer members of committees should be highly regarded and experienced members of the bar with reputations for competence, integrity and civility. Judges, both sitting and retired, are encouraged to participate and should exhibit the same qualities.

The program should offer assistance in the following circumstances:

- A lawyer requests assistance in dealing with another lawyer, or in addressing specific conduct of another lawyer
- A lawyer requests assistance in dealing with a professionalism issue
- A judge requests assistance in dealing with a lawyer, or in addressing specific conduct of a lawyer
- The Appellate Division encounters unprofessional behavior and refers an opinion to the Commission, for referral to the appropriate county bar committee.
- The program shall not handle complaints from clients, or members of the public.

Generally, complaints are directed to the chair of the Professionalism Committee. The evaluation of complaints is done pursuant to committee rules and guidelines. Most committees will ask a member to look into a complaint by talking with the lawyers involved. If further action is deemed necessary, committee members will be assigned to counsel the lawyer in question, or the lawyer will be asked to appear before the committee. If a lawyer is reluctant to cooperate, the assignment judge (pursuant to Court Directive #1-97) may be asked to intercede and assist in ensuring the lawyer's cooperation.

Currently, almost all of New Jersey's twenty-one county bar associations have adopted some form of professionalism counseling. Committees may also refer lawyers to other programs, if the circumstances so warrant. For instance, such referrals have been made in cases where substance abuse problems have been uncovered.

B. Utah

Utah has adopted a "Program of Professionalism," pursuant to the Utah Supreme Court Standing Order No. 7 (amended June 12, 2012). The program is administered pursuant to Rule 14.303 of the Utah Supreme Court Rules of Professional Practice, a copy of which is included in our Appendix.

The program consists of seven members in staggered 3-year terms, appointed by the Supreme Court, to server on a "Professionalism and Civility Counseling Board." The purpose of the Board is to "(1) counsel members of the Bar, in response to complaints by other lawyers, referral from judges or referrals from counsel in the Office of Professional Conduct, (2) provide counseling to members of the Bar who request advice on their own obligations under the Standards, (3) provide CLE on the Standards and (4) publish advice and information relating to the work of the Board." One member of the Board has small firm or solo practitioner experience, and one has transactional experience. The Board does not consider complaints from clients or the public.

The Board addresses most matters in panels of three, based on written complaints or referrals (which are not to be anonymous in terms of the person making the referral). If they find the matter warrants a response, is submitted in good faith and not for purposes of harassment or to attain a strategic advantage, they are to let the complainant know that a complaint or referral has been received, and gives them a description of how the Board intends to address the issue. The contents of any complaint or response is to remain confidential, and Board members are free to investigate such claims. They may, but are not required to, inform the lawyer of the relevant factual assertions and provide them a copy of the complaint prior to issuing an advisory or taking any other action.

Resolution may be a written advisory to the attorney, or a face-to-face meeting with the lawyers or through counsel. The Board may also advise relevant supervisors, employers, agencies or judges of the disposition if it is a written advisory, and may also publish the advisory for the benefit of the Bar and the public, while keeping the names of the persons involved confidential.

The Board reports annually to the Utah Supreme Court concerning its operations, the standards it has interpreted, the advice it has given, any trends it believes are important for the Court to know and suggestions as needed to modify the standards. These results are also to be published in the Utah Bar Journal and on a website, in a database of advisories for reference for the benefit of practicing lawyers.

C. Colorado

Colorado has implemented a "Peer Professionalism Assistance Group." https://www.cobar.org/For-Members/Professionalism-Resources/Peer-Professionalism-Assistance-Group

According to the PPA's website, the PPA provides free confidential coaching to individual attorneys, informal mediation assistance to attorneys and education to groups of attorneys. The PPA is confidential and any communications are not shared with any regulatory agency, court, or professional association.

The PPA, which apparently is staffed by volunteer attorneys, (1) provides one-on-one confidential advice to individual attorneys on how to handle an unprofessional situation; (2) communicates with opposing counsel upon request of the calling attorney to discuss and help resolve professionalism issues; (3) meets jointly with and provides informal mediation services to both/all attorneys experiencing professionalism issues (either upon request of the attorney(s) or when ordered by the court); and (4) receives referrals from judges and magistrates to eliminate unprofessional behavior in courtrooms; and (5) provides Continuing Legal Education seminars.

D. Florida

Florida has taken a variety of approaches to address civility issues, mostly on a local Bar level, although it also has enforced formal civility complaints through the State Bar and published decisions. As one example, the Palm Beach County Bar Association has created a "Professionalism Panel," to meet with attorneys who have conducted themselves in a manner inconsistent with The Florida Bar Professionalism Expectations or the Palm Beach County Bar Association Standards of Professional Courtesy and Civility. The purpose of the Panel is to discuss their conduct and counsel them to avoid such conduct in the future. The Panel has no authority to discipline attorneys or to compel an attorney to appear before it. The Bar

provides an online form that can be submitted to the Panel, a copy of which is included in our Appendix.

E. Illinois

The Illinois Supreme Court has created a formal Commission on civility and professionalism, which has created a website devoted to lawyer civility issues and is an excellent clearinghouse of information our committee should review for ideas and resources: https://www.2civility.org/civility/. We confirmed via email with Executive Director Jayne R. Reardon that it does not utilize any form of referral program. According to Ms. Reardon, "The Commission on Professionalism is charged with promoting professionalism above the floor required by the Rules of Professional Conduct. . . . We do not have any involvement in referral for dispute resolution."

F. Michigan

Michigan has similarly created a clearinghouse of information on civility, based on an October 2018 summit on civility by bench and bar leaders throughout Michigan that resulted in the creation of a clearinghouse for civility information and a presentation to the State Supreme Court of Michigan in October 2019 of "Professionalism Principles for Lawyers and Judges." https://www.michbar.org/file/professional/pdfs/Professionalism-Letter.pdf

Michigan considers the Principles to be "aspirational," and address no possible enforcement or disciplinary process. There is not a formal referral program within these principles. We found interesting, however, the below, which the Michigan State Bar identified as "The Top Ten Most Shared Recommendations" to encourage civility:

- Encourage bar associations, lawyer organizations, and judicial groups to conduct similar summits.
- Consider the adoption of Michigan specific civility guidelines for lawyers and judges and use them more deliberately.
- Review The Lawyer's Oath more frequently and include it in a State Bar curated clearinghouse and professionalism tool kit.
- Focus on personal relationship building, inclusion, and more thoughtful communication, especially when using technology.

- Focus on lawyer wellness.
- Recognize lawyers and judges practicing civility and professionalism through awards, social media, and other methods designed to celebrate those who exemplify good practice.
- Create more court ombudsman programs to invite communications regarding judges and lawyers who may be struggling with civility in the courtroom.
- Send the message through mentorship and similar efforts that uncivil conduct unfavorably affects time management, economics of law practice, and personal credibility.
- Encourage the public and the business community to look for attorneys with civility and professionalism qualities.
- Involve the public in this conversation and invite community organizations to have public speakers on the subject.

Above we summarize the programs in place in New Jersey, Utah, Colorado, and Florida, as well as describe programs to promote civility in Illinois and Michigan. Please let us know if further research would be helpful as to these or other attorney referral programs.

II. PRIVATE/PUBLIC ORGANIZATION EXAMPLES

We also investigated dispute resolution mechanisms in the public and private sector. As an initial note, we have not been able to identify any private sector program, despite wide inquiries in that regard. It is the authors' suspicion that private sector programs are often more focused on discipline and risk mitigation (and most HR functions would operate confidentially) and thus we have not yet identified any private sector programs that could be interest to the Task Force.

However, we were able to identify several public sector organizations that have implemented, or are in the process of implementing, dispute resolution programs. We have spoken with representatives of the County of Los Angeles, the City of San Francisco, and the City of Los Angeles, who have shared their programs and/or aspirations. Of them, the County of Los Angeles program has been in place the longest and may provide the most guidance.

A. County of Los Angeles

We interviewed two representatives from LA County's Department of Human Resources: William Gomez, Senior Manager for Civil Service Advocacy Division; and Diane Woo, Deputy Compliance Officer, Dispute Resolution Mediation. Ms. Woo is considered to be a subject matter expert as she has been involved in the County's program for the past 15 years.

The program was created to deal with miscommunications between supervisors and line staff, escalation of workplace tensions, etc. The program is voluntary for its participants, and is entirely confidential. According to a Resource Guide, the process is initiated by a supervisor contacting the DRM section for consultation. The supervisor then meets with a professional facilitator (who is paid by the County, at $100 per hour). The professional facilitator then drafts a plan of action and holds a confidential meeting with the employees who are the subject of the referral.

Ms. Woo reported that she believed the most important attributes of their program (and of any similar program) are: (1) that it be voluntary, with willing participants, (2) that is be entirely confidential, (3) that it not be tied to discipline, and (4) to obtain participants' views on what worked and what didn't to continually improve the program.

Materials in Appendix include the DCO Resource Guide, and Program Flyer.

B. City of San Francisco

We spoke with Jacqueline Joseph-Veal, who goes by "jjv," the Diversity, Equity, and Inclusion Director of the City of San Francisco to learn about their program. The San Francisco program has just launched as a pilot project for four departments. Like the Los Angeles County program, the program is entirely voluntary and confidential. Also similar to LA County, the program starts with a referral, followed by a pre-meeting with the participants, and a formal mediation session, subject to a confidentiality agreement.

Unlike Los Angeles County with pays professional mediators to lead session, the "facilitators" in San Francisco are volunteers from the City. The City received 243 applications from employees, narrowed to the top 70 based on highest scores and manager approval, and eventually chose 50 employees with the top scores to be the mediators.

jjv reports that employees are very excited about the program – they have adopted a slogan, "be part of the solution," that has gained a lot of traction. It is still early in the program, and jjv offered to speak again after the program ahs been in place for longer to give more feedback. She agreed, however, the important attributes are: (1) voluntariness, (2) confidentiality, and (3) that the "facilitator" be outside the supervisory chain of the participants. It is also not a disciplinary program.

Materials in the Appendix include a Powerpoint summary of the Program and an exemplar Confidentiality Agreement

C. City of Los Angeles

We spoke with Malaika C. Billups, Chief Diversity, Equity & Inclusion Officer of the City of Los Angeles. The City is in the process of creating its own dispute resolution program. It is looking at both the LA County and San Francisco programs described above. Ms. Billups had several observations: (1) there needs to be an agreed upon set of rules/conduct to measure the participants' conduct against, (2) the program needs to be voluntary, confidential and separate from discipline.

III. CONCLUSION

Upon the request of the Task Force, attached hereto as Exhibit 1 are our recommendations, should there be interest in pursuing dispute resolution program in California.

Exhibit 1

Key Attributes of Peer Review Counseling Program

1. Program would be overseen and coordinated by local bar associations in contrast to state-wide organization such as California State Bar.

2. Program would be staffed by volunteers with experience in mediation, similar to voluntary mediation programs operated by local Bar associations. If there could be a source of funding, it would be ideal to pay mediators a nominal hourly or daily fee, but question as to who would provide the source of that funding.

3. Referrals to program would be by other attorneys and local state and federal court judges, not clients, and participation in any referral to the Program would be voluntary

4. Format of Program would be more in form of mediation than a formal proceeding, with results not being formally transcribed or reported. Results of the mediation would be confidential.

(a) Question how to provide participants the results from participation in the program (i.e., would there be a written letter or report generated from the mediation, or entirely oral summary), and if the matter has been referred to the Program by a judge, would the results of that mediation be provided to the judge either orally or in writing.

(b) Results would not be reported to State Bar of California or other relevant jurisdiction

5. Program would be promoted in monthly bar and bench journals, bar organizations, and possibly through a centralized website containing updated information on civility programs, such as maintained in Illinois and/or Michigan

6. Program would develop a template for local bar associations to use for referrals and general rules to follow in process, which would be modified by local bar as appropriate to match/fit local needs. A template is attached as Ex. 1-A

EXHIBIT 1-A

REQUEST FOR REFERRAL TO
PEER REVIEW COUNSELING PROGRAM

Important: Please read the instructions on the next page.

A. Your Information:

Name: _____

Address: _____

E-mail address: _____

Telephone no.: _____

B. Lawyer or Staff Person Complained About:

Name of lawyer: _____

Name of staff person: _____

Firm name: _____

Address: _____

C. Nature of Conduct Complained of (*check all that apply*):

_ Dishonesty, lack of candor

_ Unfair or dilatory tactics

_ Disruptive in court or other oceeding

_ Disorganized/unprepared

___ Rude, discourteous, disrespectful, uncivil

___ Bullying, badgering, abusive, insulting

___ Profanity, obscene gestures, facial expressions

___ Lack of decorum

___ Other

Did the conduct occur in connection with litigation? ___Yes ____No.

If yes:

Case caption: _____

Court:_____

Case No. _____

D. Specific Conduct. The specific conduct complained of is described on the attached sheet(s).

E. **Declaration, Request, and Signature.** By signing below, I declare that I believe in good faith that the information that I am providing is true and complete, and I request that this matter be referred to the Peer Review Counseling Program.

_____

Date: _____ Name: _____

INSTRUCTIONS FOR REFERRAL FORM

Purpose: The Peer Review Counseling Program was established pursuant to a Civility outreach program established by the State Bar of California. Its purpose is to meet with attorneys who have conducted themselves in a manner inconsistent with Standards of Professional Courtesy and Civility to discuss their conduct and counsel them to avoid such conduct in the future.

The Panel has no authority to discipline attorneys or to compel an attorney to appear before it. Likewise, neither the mediator overseeing the referral or the County Bar Association can intervene on your behalf in a civil or criminal case or give you legal advice.

Completion of Form: Please submit no more than **ten pages,** including the referral form and attachments**.** Do not include this instruction page. You may indicate that additional evidence or exhibits are available upon request. Please type or print legibly, using only black typeface or ink.

Conduct in Question: Describe in detail the conduct about which you are complaining, supplying dates where possible. Please be aware that simply alleging conclusions unsupported by facts may result in the rejection of your request or a delay in its disposition.

Signature: You must sign the form where indicated. Unsigned forms will be returned for signature.

Submission of Form: Please e-mail your completed form and accompanying pages to _____, Executive Director of the County Bar Association Peer Review Counseling Program, at _____

Thank you for your interest in promoting the professionalism of attorneys in this County.

Appendix 6: Bias-Driven Incivility

BIAS AND INCIVILITY

By Esther K. Ro, Bradley S. Pauley, Mike H. Madokoro, Marisa Hernandez-Stern[i]

I. Bias-driven incivility in the legal profession

Notwithstanding efforts to minimize the effects of implicit bias in the legal profession, diverse attorneys continue to face "bias-driven incivility," a distinct form of incivility resulting from expressions of explicit and implicit biases.[225] In this section, we define and provide examples of bias-driven incivility; explain the negative effects of bias-driven incivility on attorneys who are directly impacted and on the legal profession; and make recommendations for intervention through MCLE programming.

II. What is bias-driven incivility?

Bias-driven incivility is uncivil conduct resulting from expressions of implicit and explicit biases,[226] including the unconscious expression of an

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[225] Although this section primarily focuses on the experiences of attorneys, we recognize that other legal professionals face bias-driven incivility. An attorney's duty of civility extends beyond their treatment of other attorneys and encompasses an attorney's treatment of all members of the legal profession, including but not limited to legal staff, judicial officers, and court staff. Additionally, attorneys should be mindful of their civility obligation to clients and the public. (California Attorney Guidelines of Civility and Professionalism, p. 3, https://www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf.) When clients or the public witness or are subjected to incivility, it "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." (Gernardo, *A Lesson in Civility* (2019) 32 Georgetown J. L. Ethics 135, 146; see Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 237 [incivility undermines public confidence in the legal profession].)

[226] "Bias" is generally defined as a prejudice in favor of or against one person or group compared with another, usually in a way considered to be unfair. California State Bar Rule 2.72(B)(2) states a non-exhaustive list of

internal bias or a covert manifestation of a discriminatory preference.[227] When biases are openly expressed through words or conduct, the persons against whom the biases operate may experience the behavior as uncivil conduct. Bias-driven incivility may occur between opposing counsel or colleagues at a firm, at work, or at social functions. A correlation exists between bias-driven incivility and power dynamics, with people in positions of authority more likely to engage in bias-driven incivility, though some forms of bias-driven incivility are more common between peers.[228] Attorneys

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biases experienced because of one's "sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation . . . ." More generally, biases are rooted in prejudices and stereotypes caused by racism, sexism, homophobia, ableism, and ageism, among other causes.

Implicit biases are unconsciously held attitudes and stereotypes about someone. Explicit biases are consciously held attitudes and stereotypes about someone.

The American Bar Association has issued reports comprehensively detailing and documenting the biases and obstacles experienced by women attorneys, attorneys of color, LGBTQ+ attorneys, and attorneys with disabilities, including You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession (2018), prepared jointly with the Minority Corporate Counsel Association; Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color (2020); and Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers who Identify as LGBTQ+ (2020).

[227] Cortina et al., *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact* (2013) 39 J. Mgmt. 1579, 1580-1581. Workplace incivility is generally defined by the academic literature as "low-intensity deviant behavior with ambiguous intent to harm the target, in violations of norms of workplace mutual respect. Uncivil behaviors are characteristically rude and discourteous, displaying a lack of regard for others." (Andersson & Pearson, *Tit for Tat? The Spiraling Effect of Incivility in the Workplace* (1999) 24 Acad. Mgmt. Rev. 452, 457.)

[228] Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 255–256; Kim et al., *Microaggression Theory: Influences and Implications, The 360-Degree Experience of Workplace Microaggressions: Who Commits Them? How Do Individuals Respond? What*

may unintentionally engage in uncivil behavior because their conduct arises from an implicit bias or from a lack of awareness that their conduct is offensive. Regardless of the intentions of the attorney behaving this way, the persons against whom biases or ignorance operate continue to experience bias-driven incivility.

Common acts of incivility, such as interrupting one's opposing counsel during an oral argument or a negotiation, may constitute bias-driven incivility in certain circumstances. For example, if the attorney being interrupted is a young, Latinx woman, the attorney interrupting may be motivated by a combination of biases held against women, people of color, and young attorneys.[229] Importantly, recognizing these incidents as bias-driven incivility validates, rather than minimizes,[230] the experiences of diverse attorneys and helps to explain why they face greater exposure to incivility in legal practice.

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are the Consequences? in Microaggression Theory: Influences and Implications (Torino et al. edits., 2019) pp. 164-166.

[229] Applying an intersectionality framework to our understanding of bias-driven incivility recognizes that each person is comprised of overlapping identities. Legal scholar Kimberle Crenshaw coined the term "intersectionality" to explain that people may be subjected to unique forms of discrimination based on others' biases towards their overlapping identities, as opposed to a single-axis framework that silos one's various identities and assumes, for example, that all Black people experience racism in the same way or that all women experience sexism in the same way. (See *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* (1989) 1989 Univ. Chi. Legal Forum 139.)

[230] For example, telling a woman attorney that she is imagining being interrupted more frequently or that "everybody gets interrupted sometimes" are examples of minimizing her experience. Notably, one study documents that female Justices of the Supreme Court are interrupted three times as often as their male colleagues. (Gender Equality is Part of the Civility Issue, https://abtl.org/report/la/articles/ABTL_LA_Summer19_EdmonJessner_Reprint.pdf; see generally The Universal Phenomenon of Men Interrupting Women https://www.nytimes.com/2017/06/14/business/women-sexism-work-huffington-kamala-harris.html.)

Bias-driven incivility can occur through microaggressions. Microaggressions are "the everyday verbal, nonverbal, and environmental slights, snubs, or insults, whether intentional or unintentional, which communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership."[231] Microaggressions "communicate bias and can be delivered implicitly or explicitly."[232] Being mistaken for a nonlawyer is a common example of a microaggression in the legal profession and is often based on biases about what an attorney should look like.[233] One study, conducted by the American Bar Association, found that women of color are mistaken for law firm, court, or janitorial staff at a rate 50 percentage points higher than White men; White women reported rates 44 percentage points higher, and Black men reported rates 23 percentage points higher.[234] The higher rates at which attorneys of color experience this kind of incivility demonstrates the effect of implicit and explicit biases on the experiences of attorneys with intersectional identities. Further, an attorney's choice to wear religious garb (e.g., a Sikh turban or a hijab) or to present in gender nonconforming ways may also

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231 https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2019/july-august/unconscious-bias-implicit-bias-microaggressions-what-can-we-do-about-them/.

232 Torino et al., *Everything You Wanted to Know About Microaggressions but Didn't Get a Chance to Ask* in Microaggression Theory: Influences and Implications (2019) p. 3.

233 This kind of bias-driven incivility can be expressed, for example, by asking a woman lawyer to perform administrative tasks, mistaking a Black woman lawyer at the deposition as the court reporter, or assuming a Latinx male lawyer is the defendant in the case. (See https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer; https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf; Cooper, *The Appearance of Professionalism* (2019) 71 Fla. L.Rev. 1, 31.)

234 https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf.

increase the chances of being misidentified as a nonlawyer.[235] This kind of bias-driven incivility can be harmful to an attorney's ability to make interpersonal connections, which can affect their professional progression, as well as their sense of belonging in the legal profession.[236]

Attorneys subjected to bias-driven incivility often experience incivility in the form of professional discrediting, including having their competence challenged, being addressed unprofessionally (for example, using pet names), and being critiqued on their physical appearance and attire.[237] Bias-motivated conduct may be overtly uncivil.[238] Attorneys also report experiencing incidents based on their identities, which may not be overtly uncivil, but have the effect of excluding, "othering," or otherwise relying on stereotypes associated with that attorney's identity.[239] Professional exclusion from advancement or social events also can be bias-driven incivility.[240]

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[235] Cooper, *The Appearance of Professionalism* (2019) 71 Fla. L.Rev. 1, 9–14.

[236] https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer.

[237] Gender Equality is part of the civility issue, https://abtl.org/report/la/articles/ABTL_LA_Summer19_EdmonJessner_Reprint.pdf; https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer.

[238] Using phrases like "that's so gay," making fun of an attorney's disability, and commenting on the physical appearance of a woman attorney are examples of overtly uncivil conduct. See https://www.360advocacy.com/wpcontent/uploads/2015/10/ChangChopraArticle-1.pdf.

[239] For example, continually confusing two attorneys with similar backgrounds, commenting to a Muslim colleague that "he is no fun" because he abstains from drinking for religious reasons, or serving pork as the main dish at a firm event without consideration of the dietary restrictions of Jewish, Muslim, or Buddhist attorneys are incidents that may exclude or "other." Joking to an Asian American colleague that she should work on a case involving accounting fraud because "all Asians are good at math" is an example of implicating a stereotype associated with Asian Americans.. (See Cooper, *The Appearance of Professionalism* (2019) 71 Fla. L.Rev. 1, 31;

III. Effects of bias-driven incivility on impacted attorneys and the legal profession

Bias-driven incivility has profound effects on individual attorneys as well as on the legal profession. Bias-driven incivility negatively impacts the well-being and career trajectories of diverse attorneys. Additionally, individual experiences of bias-driven incivility, when considered collectively, have negative repercussions on the overall environment of legal workplaces.

Bias-driven incivility is uniquely harmful for attorneys who experience it. Because the legal profession remains one of the least diverse professions in the nation,[241] diverse attorneys typically experience bias-driven incivility in

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Gender Equality is part of the civility issue, https://abtl.org/report/la/articles/ABTL_LA_Summer19_EdmonJessner_Reprint.pdf; https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2015/micro-aggressions-boardroom-courtroom-presidential-campaign-trail/; E. Chung, S. Dong, J. Hu, C. Kown, G. Liu, A Portrait of Asian Americans in the Law, pp. 29, 31, https://www.apaportraitproject.org/ [" 'Asians work hard and do not say no to their superiors. With that, somehow I was the only one staying back to cover the team assignments...' "].)

[240] For example, excluding women attorneys from attending a basketball game because of a perception that they would not be interested, or failing to promote a Black woman associate to partnership because she is being held to a higher standard of performance and being over penalized for past mistakes are examples of exclusion motivated by biases. (Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 246–247; Gender Equality is part of the civility issue, pp. 1–2, https://abtl.org/report/la/articles/ABTL_LA_Summer19_EdmonJessner_Reprint.pdf; https://www.nytimes.com/2018/09/06/us/lawyers-bias-racial-gender.html.)

[241] https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/ (providing statistics); https://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf (explaining California state's attorney population does not reflect its diversity). For example, in 2013, 20.2% of partners nationally were women; 2.3 % were women of color nationally and in many cities, women of color made up only 1% of partners. (IILP Review 2014: The State of Diversity and Inclusion in the Legal Profession, p. 14,

predominantly White, male, cisgender, non-disabled spaces. Against this backdrop, attorneys who are subjected to bias-driven incivility often expend emotional and mental labor to determine what role their identity played in their mistreatment, to process their mistreatment, and to protect themselves accordingly.[242] Protecting oneself from bias-driven incivility may result in additional identity performances by the affected diverse attorney that can further impact his or her psychological well-being.[243] Moreover, when acts of bias-driven incivility occur, the onus typically falls on the diverse attorney to speak up or to explain why the conduct was problematic.[244] This burden adds to the already higher emotional and mental labor shouldered by diverse attorneys.

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https://theiilp.wildapricot.org/Resources/Documents/IILP_2014_Final.pdf.) Additionally, Latinas, who constitute 7% of the total U.S. population, make up 2% of associates, 0.4% percent of equity partners, and only 0.6% of general counsels at Fortune 500 companies. (Los Puentes y Las Barreras: Latinas in the Legal Profession, The Federal Lawyer (2017) p. 37, https://www.fedbar.org/wp-content/uploads/2017/01/Latinas-pdf-1.pdf.) LGBTQI+ attorneys represented only 2% of all equity partners and less than 1% were persons with disabilities. (2019 NAWL Survey Report, p. 5.)

[242] Torino et al., *Everything You Wanted to Know About Microaggressions but Didn't Get a Chance to Ask* in Microaggression Theory: Influences and Implications (2019) p. 5 (explaining that microaggressions are more stressful than everyday incivilities because "[w]hen individuals of historically marginalized groups . . . are aware of historical or systemic discrimination or have experienced microaggressions in the past, they may be more conscious of how their identity impact interpersonal dynamics").

[243] See generally Carbado & Gulati, Acting White? Rethinking Race in "Post-Racial" America (2015) (discussing the costs and burdens of identity performances including the work performed to negate stereotypes); Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 256–257.

[244] Evans & Moore, *Impossible Burdens: White Institutions, Emotional Labor, and Micro-Resistance* (2015) 62 Soc. Probs. 439, 441 (explaining "how participation in white institutional spaces requires particular forms of emotional labor and management of emotions from people of color, resulting from the stark contradiction between their racialized experiences in these institutions, on the one hand, and the dominant discourse that minimizes and delegitimizes their experiences on the other hand").

Studies have shown that incivility can result in adverse psychological effects such as stress, anxiety, depression, burnout, or a loss in self-esteem.[245] Additionally, experiencing incivility can negatively impact job performance, satisfaction, and commitment, and it can lead to leaving the job.[246] Women attorneys and attorneys of color often report having to work harder in order to overcome biases and stereotypes and receive the same recognition or respect as their colleagues.[247] They also report being penalized more harshly for mistakes.[248] As a result, bias-motivated incivility discourages diverse attorneys from actively participating or joining the community and reduces the inclusiveness of the legal profession.[249]

From an organizational perspective, workplace incivility "can negatively affect organizational performance because employees may reduce work efforts, be less likely to work collaboratively, avoid extra-role behaviors or simply exit the organization. When it affects women and employees of color specifically, workplace incivility can place them on the margins of everyday

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245 Cortina et al., *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact* (2013) 39 J. Mgmt. 1579; Estes & Wang, *Workplace incivility: Impacts on individual and organizational performance* (2008) 7 Hum. Res. Dev. R. 218.

246 Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 256-257; Cortina et al., *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact* (2013) 39 J. Mgmt. 1579; Estes & Wang, *Workplace incivility: Impacts on individual and organizational performance* (2008) 7 Hum. Res. Dev. R. 218; Pearson et al., *Assessing and attacking workplace incivility* (2000) 29 Organizational Dynamics 123; Hershcovis & Barling, 2010.

247 https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf.

248 https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer; https://www.nytimes.com/2018/09/06/us/lawyers-bias-racial-gender.html.

249 https://hbr.org/2013/01/the-price-of-incivility?registration=success.

work life, further disadvantaging historically marginalized groups."[250] On the other hand, studies have shown that increased diversity and inclusion boost law firm and corporate profitability.[251] Thus, for law firms and corporations, to the extent bias-driven incivility causes diverse attorneys to seek other employment or reduce their productivity, failing to address bias-driven incivility can adversely affect their bottom line. Studies also demonstrate that workplaces that encourage open discussion about problems, foster social connections, and practice empathy are more productive.[252] Accordingly, an organization's productivity objectives are aligned with efforts to minimize bias-driven incivility and to foster a more inclusive environment, including open and honest conversations about bias-driven incivility.

For the profession generally, bias-driven incivility impedes the goal of increasing diversity and inclusivity. It negatively impacts the entry, retention, and promotion of those impacted by biases and stereotypes in the workplace, which in turn affects the number of diverse attorneys remaining in the law or rising to supervisory and leadership levels within law firms, government agencies, in-house legal departments, and other C-Suite positions.[253] Thus, addressing bias-driven incivility helps legal employers who aim to promote diversity and inclusion as a core value of their organizations.

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[250] Smith et al., *Gender, Race, and Experiences of Workplace Incivility in Public Organizations* (2020) R. Pub. Pers. Admin. (citations omitted) <https://journals.sagepub.com/doi/10.1177/0734371X20927760>.

[251] https://www.abajournal.com/columns/article/demographics-as-destiny-making-the-case-for-law-firm-diversity-and-inclusion; https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2014/diversity-inclusion-profit-drivers/.

[252] https://hbr.org/2015/12/proof-that-positive-work-cultures-are-more-productive.

[253] For example, one study found that 52% of lawyers of color leave their law firms by the third year and 85% leave by the fifth year. (IILP Review 2014: The State of Diversity and Inclusion in the Legal Profession, p. 66, https://theiilp.wildapricot.org/Resources/Documents/IILP_2014_Final.pdf; see https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf, p. 13 [70% of female lawyers of color report leaving or considering leaving the legal profession].) Many diverse attorneys attribute retention issues to the

IV. Interventions through MCLE programming

Education about bias-driven incivility through MCLE programming can be an effective way to reduce incidents of bias-driven incivility and to address it when it does happen. Although existing MCLE requirements include Recognition and Elimination of Bias,[254] programming typically focuses on increasing awareness of one's own implicit biases and how to minimize the impact of implicit biases on decision making, for example, hiring and promoting attorneys. While related, bias-driven incivility is a distinct problem that requires a distinct form of education.

Programming should seek to educate attorneys about what bias-driven incivility is and its adverse impacts on diverse attorneys and on the legal profession. One way to do this is to elevate the narratives of diverse attorneys who have experienced bias-driven incivility, including the repercussions such conduct has had on their careers and on their sense of belonging in the legal profession. Further, all attorneys should be encouraged to become more

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effects of bias-driven incivility, including biased performance reviews, unequal distribution of work assignments, lack of mentorship opportunities, and work/life balance issues. (See IILP Review 2014, at p. 67; https://scholarship.richmond.edu/cgi/viewcontent.cgi?article =2507&context=law-faculty-publications, pp. 193–194.) Indeed, an ABA study found that women reported microaggression and negative stereotypes contributed to their desire to leave the legal profession. (https://www.americanbar.org/content/dam/aba/administrative/women/ leftoutleftbehind-int-f-web-061020-003.pdf, pp. 4–9, 12–13; see also Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 256–257 [study finds increased experience of incivility leads to attorneys leaving the legal profession].)

[254] The State Bar currently requires at least one hour of MCLE devoted to Recognition and Elimination of Bias in the Legal Profession and Society ("elimination of bias"). As of January 1, 2022, all licensed attorneys must complete "at least two hours dealing with the recognition and elimination of bias in the legal profession and society . . . ." (State Bar rule 2.72(B)(2)(a)(ii).) "Of those two hours, at least one hour must focus on implicit bias and the promotion of bias-reducing strategies to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or other characteristics undermine confidence in the legal system . . . ." (*Ibid.*).

knowledgeable about the problem through self-education. Self-education is an important tool because it helps to relieve the burden shouldered by diverse attorneys of having to explain why bias-driven incivility is harmful, which may place them in a sensitive or difficult position.

Once a foundational understanding has been achieved, programming should focus on training so that each attorney feels equipped to address bias-driven incivility when it happens. Programming can be tailored to focus on the various perspectives involved in any incident: the attorney directly impacted by bias-driven incivility, the attorney who engaged in bias-driven incivility, and bystanders. These conversations can be difficult for a multitude of reasons, including a power imbalance between the attorneys involved and a concern about professional repercussions. Providing attorneys with the tools and language to productively communicate about bias-driven incivility will encourage all members of the legal profession to engage in meaningful and impactful conversations to further promote civility in the practice of law.

Appendix 7: Sample Judicial Education Program on Promoting Civility

HOW TO PROMOTE CIVILITY IN YOUR CASES BOTH IN AND OUT OF THE COURTROOM

HON. [NAME], [COUNTY] SUPERIOR COURT

HON. [NAME], [COUNTY] SUPERIOR COURT

A Judicial Education Presentation by the California Civility Task Force

"It is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law."

People v. Chong (1999) 76 Cal.App.4th 232, 243

In Re S.C. (2006) 138 Cal.App.4th 396, 412

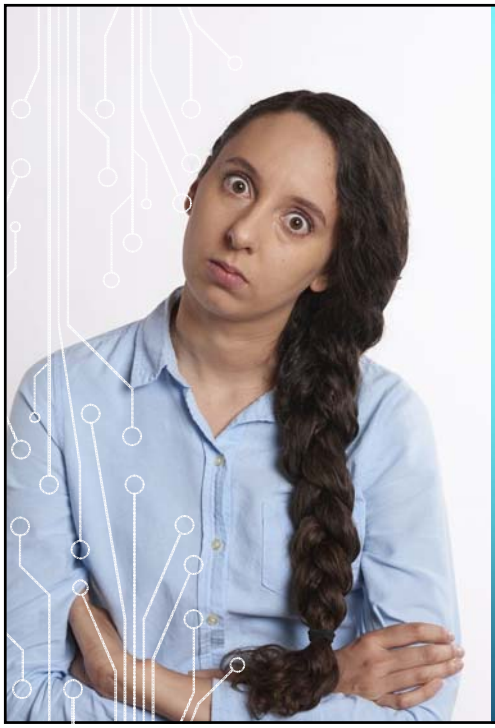
"In situations involving the misconduct of lawyers in court or settlement conferences, the judge's obligation to take action may be difficult and embarrassing to the offending lawyer. The consequences of not acting, however, could result in the appearance of tacit approval of the conduct, creating an invitation for further like conduct."

Rothman, Fybel, MacLaren and Jacobson, California Judicial Conduct Handbook (California Judges Association, 2017) at §2.11, pg. 75

"'The judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity and it is his bounden duty to protect the integrity of his court.' [citations]. 'However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides.'"

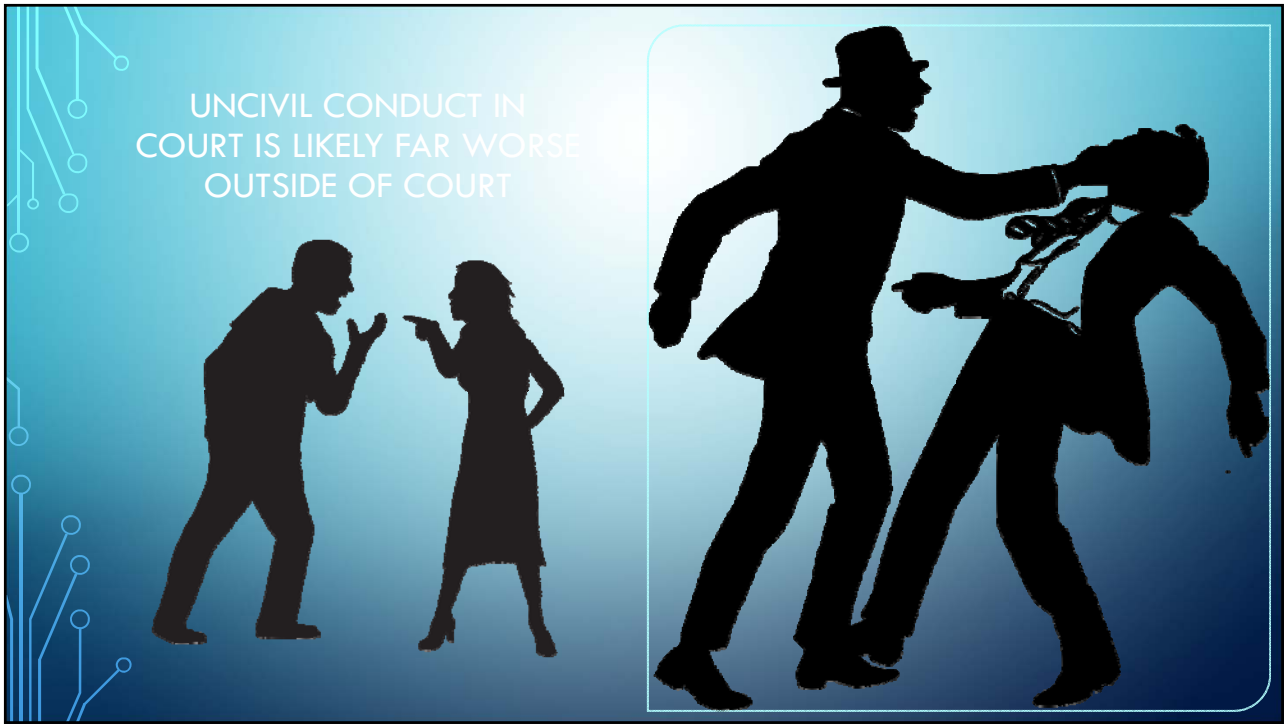
In re Paul M. Mahoney (2021) 65 Cal. App. 5th 376 at *5

(citing In Re Ciraolo (1969) 70 Cal.2d 389, 394-95.)

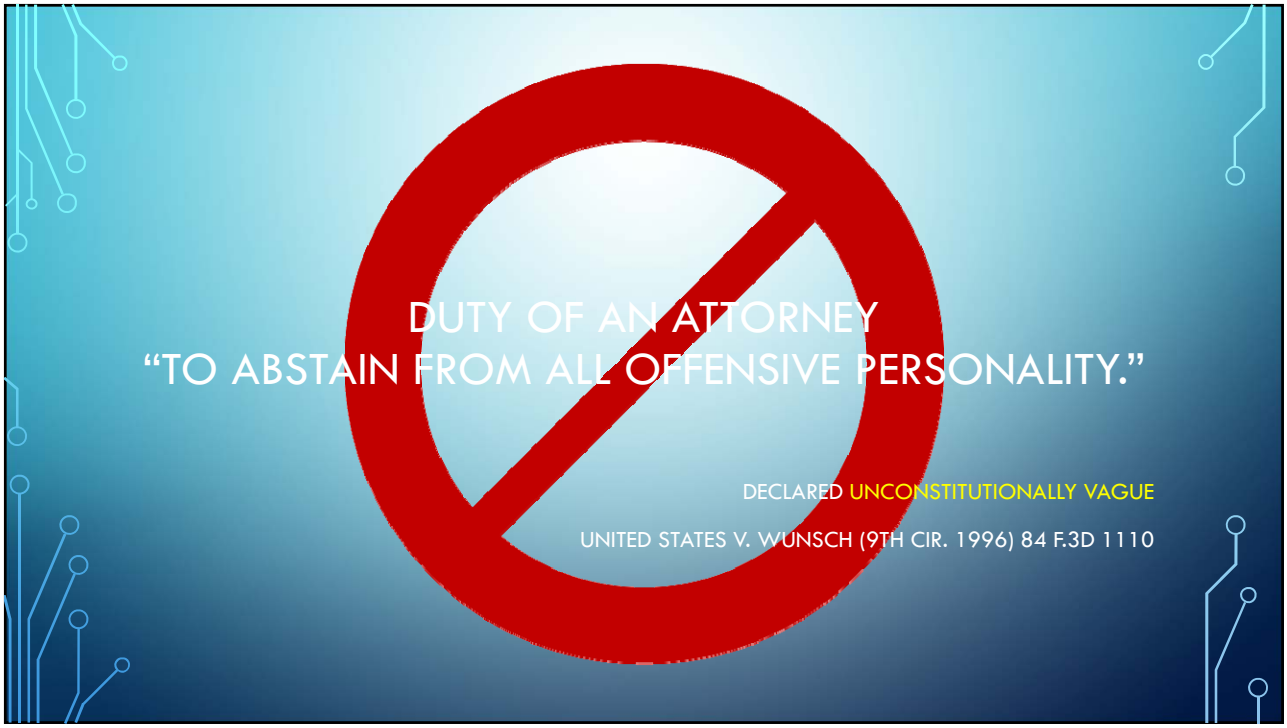


PROBLEM AREAS FOR INCIVILITY

- Discovery disputes
- Abusive and uncivil communication outside court
- Lack of professional courtesies resulting in acrimonious and unnecessary motion practice
- Conducting meaningful meet and confers as required by law
- Counsel working together to prepare trial documents
- Improper use of sanctions requests to intimidate and bully


UNCIVIL CONDUCT IN
COURT IS LIKELY FAR WORSE
OUTSIDE OF COURT

LEGAL BASIS FOR REQUIRING CIVILITY


DUTY OF AN ATTORNEY
"TO ABSTAIN FROM ALL OFFENSIVE PERSONALITY."
DECLARED UNCONSTITUTIONALLY VAGUE
UNITED STATES V. WUNSCH (9TH CIR. 1996) 84 F.3D 1110

BIAS IN THE COURTROOM

CA CODE OF JUDICIAL ETHICS CANON 3

- A judge shall perform judicial duties without bias or prejudice. Canon 3B(5)
- A judge shall require lawyers in proceedings before the judge to refrain from (a) manifesting by words or conduct, bias, prejudice or harassment. Canon 3B(6)

CA RULES OF PROF. CONDUCT RULE 8.4.1(A)

In representing a client…a lawyer shall not (1) unlawfully harass or unlawfully discriminate against persons on the basis of any protected characteristic; or (2) unlawfully retaliate against persons.

"DON'T RAISE YOUR VOICE AT ME. IT'S NOT BECOMING OF A WOMAN..."

"A sexist remark is not just a professional discourtesy, although that in itself is regrettable and all too common. The bigger issue is that comments like Bertling's reflect and reinforce the male-dominated attitude of our profession. A recent ABA report found that 'inappropriate or stereotypical comments' towards women attorneys are among the more overt signifiers of the discrimination, both stated and implicit, that contributes to their underrepresentation in the legal field. When an attorney makes these kinds of comments, 'it reflects not only on the attorney's lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice.' …. [T]he court finds that Bertling's conduct was in bad faith…the remark was emblematic of an unacceptably disrespectful attitude towards Plaintiffs' counsel."

Hon. Paul Grewal (ret.), ordering donation to Women Lawyers Assoc. of Los Angeles Foundation

Claypole v. County of Monterey (Jan. 12, 2016), 2016 WL 145557

TWITTER POSTS IN ANOTHER LAW FIRM'S NAME ETHICS VIOLATION?

- "Dennis Block & Associates is helping to #MAGA by evicting one latino at a time!"
- My associate Nasti Hasti really needs to start wearing longer skirts to court. Or underwear. Or [omitted]"
- "A client called to complain that our Manisha Bajaj was 'dressing like a prostitute'. I told him wait until he sees 'Nasti Hasti' Rahsepar!'").

JUDGE'S ETHICAL RESPONSIBILITIES

"Judicial ethics require a judge to 'be patient, dignified, and courteous to litigants ... [and] ... lawyers ... and ... require similar conduct of lawyers ... under the judge's direction and control." (Cal. Code Jud. Ethics, canon 3(B)(4).)"

Haluck v. Ricoh Electronics, Inc. (2007) 151 Cal. App. 4th 994

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

CRC Rule 9.7 (fka Rule 9.4)

Attorney Oath of Office (eff. May 23, 2014)

Loyola Law School Swearing In Ceremony, 12/2/2019
https://www.lls.edu/thellsdifference/facesoflls/swearinginfall2019/swearinginfall2019.html

Applies only to those taking the attorney oath after its adoption in 2014

CODE OF CIVIL PROCEDURE 583.130

"It is the policy of the state…that all parties shall cooperate in bringing the action to trial or other disposition"

FAMILY CODE 271(A)

"…the 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. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction."

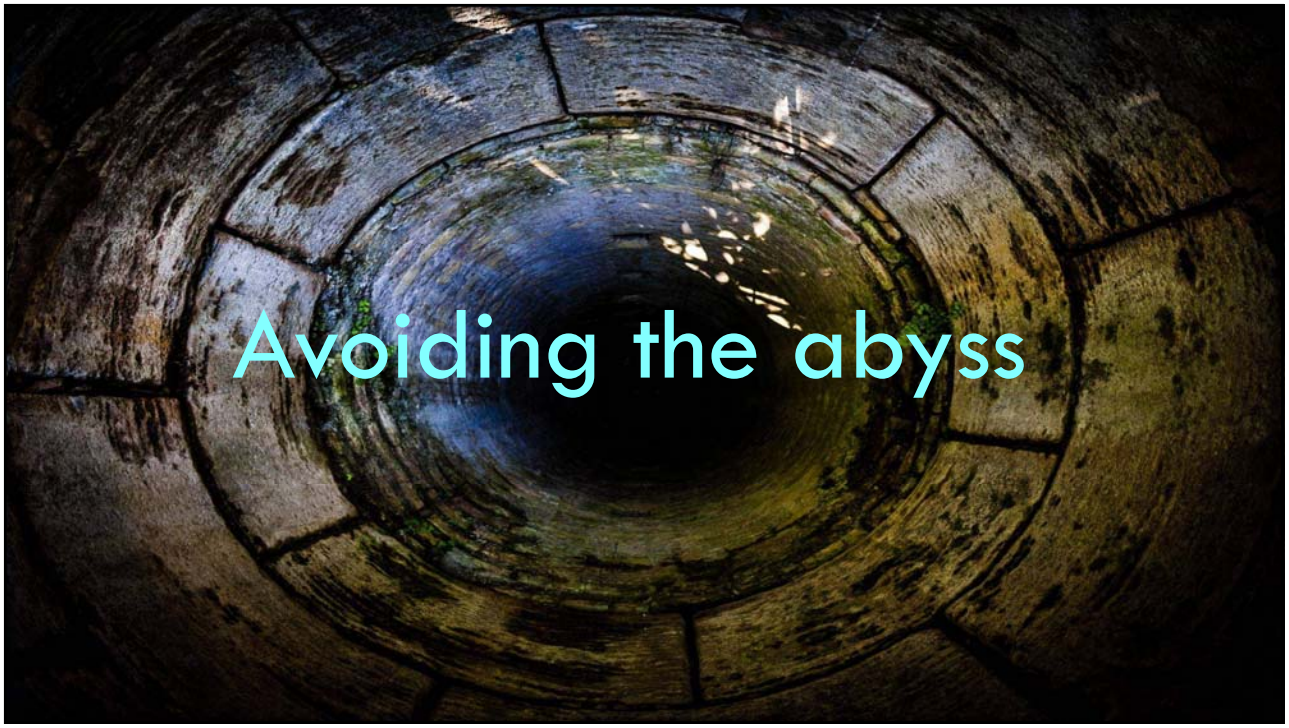
BUSINESS & PROFESSIONS CODE 6068

It is the duty of an attorney to do all of the following:…

(b) To maintain the respect due to the courts of justice and judicial officers…

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged…

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.


Avoiding the abyss

LOCAL GUIDELINES

- LASC Civility Guidelines, Appendix 3.A of Local Rules
  - "…Counsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility. Section (I)(2)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

CHAPTER THREE
CIVIL DIVISION

APPENDIX 3.A

GUIDELINES FOR CIVILITY IN LITIGATION

(a) CONTINUANCES AND EXTENSIONS OF TIME.

(1) First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery or motions, should ordinarily be granted as a matter of courtesy unless time is of the essence. A first extension should be allowed even if the counsel requesting it has previously refused to grant an extension.

(2) After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.

(3) A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough".

(4) A lawyer should not seek extensions or continuances for the purpose of harassment or prolonging litigation.

(5) A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions such as preserving rights that an extension might jeopardize or seeking reciprocal scheduling concessions. A lawyer should not, by granting extensions, seek to preclude an opponent's substantive rights, such as his or her right to move against a complaint.

(b) SERVICE OF PAPERS.

(1) The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

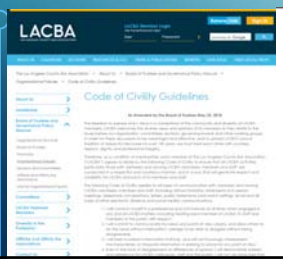
(2) Papers should not be served sufficiently close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or, where permitted by law, to respond to the papers.

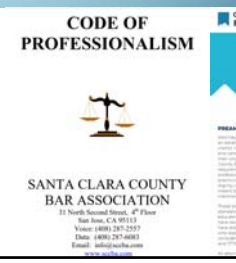
(3) Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.

(4) Service should be made personally or by facsimile transmission when it is likely that service by mail, even when allowed, will prejudice the opposing party.

PROFESSIONAL ASSOCIATION GUIDELINES

http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Attorney-Civility-and-Professionalism





HYPOTHETICAL

- Fee dispute between attorney acting as SRL and contractor total payment to date $92,651
- Contractor is unlicensed
- Attorney SRL files suit, and prevails
- Attorney files attorney fee motion seeking $271,530 in fees
- Court permits briefing with 10 pages of text filing. Attorney SRL files:
  - 11 pages of text, plus 400 pages of supplemental papers
  - Increases fee request
  - Accuses defense counsel of witness tampering, making frivolous comments, and improper tactics "typical" of those employed by defense counsels

How would you rule on fee motion?

REDUCTION OF FEE AWARDS TO UNCIVIL COUNSEL

"Attorney skill is a traditional touchstone for deciding whether to adjust the lodestar… Civility is an aspect of skill. Excellent lawyers deserve higher fees and excellent lawyers are civil…. It is a salutary incentive for counsel in fee-shifting cases to know their own low blows may return to hit them in the pocketbook."

- Counsel lacked objectivity and appropriate scale of litigation
- $300k request reduced to $90K
- *Karton v. Ari Design & Const., Inc.* (2021) 61 Cal. App. 5th 734, 747

HYPOTHETICAL

- Attorney serves defendant and 36 days later (on a Friday), warns defendant that she had until following day to respond or he would file default
- Defaulted the following Monday
- Defendant motion to set aside default denied
- Default judgment entered 1 year later, for $1 million. Defendant appeals.

Was the trial court correct in denying motion to set aside?

REVERSAL OF THE ORDER OBTAINED THROUGH UNCIVIL CONDUCT

The mantra "this is a business" has been repeated so much in the legal field that counsel have "lost sight that the practice of law is *not* a business. It is a profession and those who practice it carry a concomitantly greater responsibility than businesspeople."

"'[L]awyers who know how to think but have not learned how to behave are a menace and a liability ... to the administration of justice.... [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.'"

- Stealth default vacated, unreasonable deadline, set up defendant for failure

LaSalle v. Vogel (2019) 36 Cal.App.5th 127, 134, 141

(*quoting* [CJ] Burger, *Address to the American Law Institute, 1971)*

HYPOTHETICAL

- Male plaintiff's counsel believes female defense counsel uses intimidation tactics during depositions
- Brings his own video camera to deposition to tape opposing counsel, without giving notice
- When on second day defense counsel refused to permit taping, a verbal altercation ensued
- Defense counsel terminates the deposition
- Cross motions for sanctions are filed

How do you rule?

DISCOVERY SANCTIONS

"If this case is an example, the term 'civil procedure' is an oxymoron."

"Both the legal profession and the courts would be better served if litigation arose from legitimate disputes between the litigants instead of wasteful bickering between their attorneys."

- Plaintiff counsel sanctioned $950

Green v. GTE California, Inc. (1994) 29 Cal.App.4th 407, 408, 410

HYPOTHETICAL

- Defense attorney obtains order compelling Plaintiffs to attend deposition.
- Subsequently attempts to enforce order with OSC re Contempt against Plaintiffs
- Plaintiffs file separate suit for malicious prosecution, NIED, and IIED against defense attorney.

On defense attorney's demurrer, how to do you rule?

DISCOVERY SANCTIONS IN PRIMARY LITIGATION IS PROPER REMEDY, NOT MALICIOUS PROSECUTION

"It seems clear that this litigation arose from a fit of pique between counsel in the underlying action. Frivolous litigation, or that brought for purposes of harassment, has no place in our overburdened court system. The taxpayers who bear the cost of providing our judicial system should not have to shoulder the burden of providing a forum for frivolous or absurd litigation."

- Affirms order sustaining demurrer to IIED and NIED without leave
- Finds demurrer to malicious prosecution should also have been sustained

Lossing v. Superior Court (1989) 207 Cal.App.3d 635

NON-DISCOVERY MONETARY SANCTIONS

- Code of Civil Procedure 177.5
  - A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars ($1,500), notwithstanding any other provision of law, payable to the court, for any violation of a lawful court order by a person, done without good cause or substantial justification.
- Code of Civil Procedure 128.5/128.7
  - 128.5: reasonable expenses, including attorney's fees due to actions or tactics in bad faith, frivolous or solely intended to cause unnecessary delay
  - 128.7: pleading certification
  - Beware tactical weaponization of these motions
    - These are reportable sanctions if over $1000

HYPOTHETICAL

- New attorney with little family law experience files unnecessary motions and excessive evidence that does not prove claims, without meeting and conferring, and engages in hostile and rude communications with opposing counsel.
- New attorney tells judge he was taught to litigate "with unbridled aggression."
- Sanctions motion pursuant to Family Law Code 271 filed.

How do you rule?

FAMILY CODE 271 SANCTIONS AGAINST NEW ATTORNEY "TAUGHT" TO LITIGATE WITH "UNBRIDLED AGGRESSION"

"all counsel, regardless of practice, regardless of age—that zealous advocacy does not equate with 'attack dog' or 'scorched earth'; nor does it mean lack of civility."

- $100,000 sanctions imposed
- $304,387 awarded for opposing attorney fees

Marriage of Davenport (2011) 194 Cal.App.4th 1507, 1537

HYPOTHETICAL

- Defendants appeal default judgment, arguing evidence did not support the judgment granted
- On appeal, Plaintiff's counsel requested extension stating he needed more time to research under penalty of perjury
- Plaintiff's counsel subsequently files verbatim duplicate brief of one previously filed with court, referencing facts not in the current case (i.e. he copied it from another case)

WOULD YOU TAKE ACTION, AND IF SO, WHAT?

SANCTIONS FOR DISHONESTY OF COUNSEL

"it is critical to both the bench and the bar that we be able to rely on the honesty of counsel. The term "officer of the court," with all the assumptions of honor and integrity that append to it, must not be allowed to lose its significance. While some might find these to be only "little" lies, we feel the distinction between little lies and big ones is difficult to delineate and dangerous to draw. The corrosive effect of little lies differs from the corrosive effect of big lies only in the time it takes for the damage to become irreversible."

- Default overturned, not enough evidence, court is gatekeeper for appropriate claims
- $10,000 sanction imposed

Kim v. Westmoore Partners, Inc. (2011) 201 Cal.App.4th 267

REFERRAL TO STATE BAR

"I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit."

- Fee dispute between prior counsel and successor counsel
- $6000 monetary sanctions for a frivolous appeal
- Referral to State Bar of CA

DeRose v. Huerlin (2002) 100 Cal. App. 5th 158

HYPOTHETICAL

- Counsel files documents with the following statements:
  - Insinuation that party may have prevailed because it had contracts with a third party "who ... wields a lot of legal and political clout in [County]"
  - "... [B]ecause of a judicial slight [sic] of hand with no factual basis, this court has altered the landscape and created a windfall for [Party A]."
  - "court did not 'follow the law,'" "ignores the facts," "indiscriminately screw[ed]" [Party B]
- Legitimate advocacy? Or improper conduct?

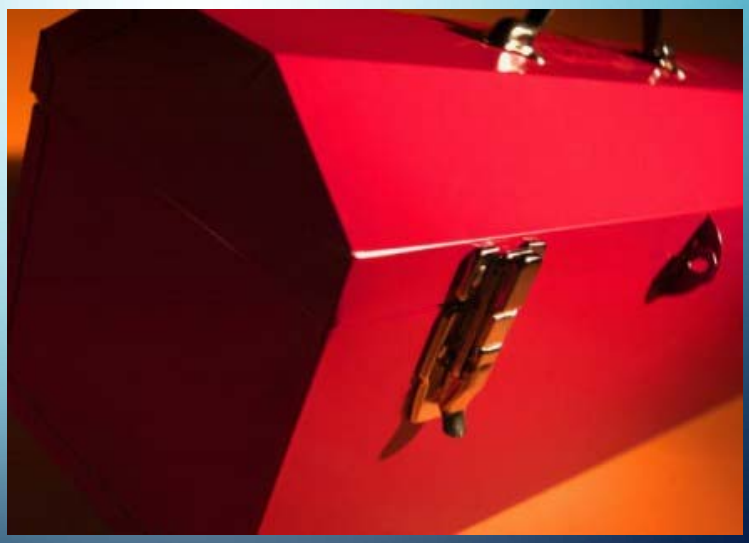
IN RE PAUL M. MAHONEY
(2021) 65 CAL. APP. 5TH 376

"Respect for individual judges and specific decisions is a matter of personal opinion. Respect for the institution is not; it is a sine qua non."

- Found to be in direct contempt on two counts
- fined $2,000 Code of Civil Procedure §1209 and §1218
- forwarding copy of the judgment of contempt to the State Bar

CONTEMPT
CAUTION!
• Code of Civil Procedure 178 - Punishment
• Code of Civil Procedure 128 – Powers
• Code of Civil Procedure Sections 1209 -1222 – Of Contempts
• *In re Paul M. Mahoney* (2021) 65 Cal. App. 5th 376

"SOFT" TOOLS FOR YOUR TOOLKIT



COURTROOM STANDING ORDERS/GUIDELINES

"I. **EXPECTATIONS OF CIVILITY**

The Court will consistently provide all parties with a reasonable opportunity to be heard prior to any rulings being made. Interruptions when someone else has been recognized to speak will not be tolerated. Personal attacks and raised voices shall also be prohibited. Counsel are reminded of California Rules of Court, Rule 9.7, which includes the following language: "[T]he oath to be taken by every person on admission to practice law is to conclude with the following: 'As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.'" Litigants should review and be familiar with the Los Angeles Superior Court's Guidelines for Civility in Litigation, Appendix 3.A to the LASC Local Rules, which establish the minimum standard of courtesy and civility expected of attorneys who appear in this court." Hon. Stuart M. Rice, Los Angeles Sup. Crt.

OTHER TOOLS

- The bench officer sets the tone for civility - model civil behavior
- Informal discovery conferences
- Order meet and confers and enforce the requirement
- Appoint a Discovery Referee
- Sanctioning both sides
- Notice and inform
- Admonish
- Require appearance of firm managing lawyers when subordinates repeatedly fail to comply with ethics and civility standards

AVOID EMBROILMENT WITH THE HIGH CONFLICT PERSONALITY (HCP)

- Educate yourself on HCP
- Set boundaries: time, issues
- Avoid blame, criticism
- Seek kernel of truth
- Maintain professional distance
- Listen
- Control expectations
- Don't argue
- Be respectful
- Know yourself and your triggers
- Remain cautious and stay calm
- Create a flexible plan for managing
- Maintain procedural formalities
- Avoid deviating from rules
- Look for small agreements
- Take a break

ANY QUESTIONS?

- [insert contact info]
- [insert contact info]

Appendix 8: Proposed Civility Revisions to the California Rules of Professional Conduct

PROPOSED CHANGES TO RULES OF PROFESSIONAL CONDUCT

Rule 1.0.1 Terminology

Add the following definition:

(*) "Incivility" means discourteous, abusive, harassing, or other significantly unprofessional conduct.

Rule 1.2 Scope of Representation and Allocation of Authority

(a) Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. **A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process.**[255]

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255 Numerous other states have similar language in their equivalent version of California's Rule 1.2. See, e.g., *Massachusetts* ("A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process."); *Michigan* ("A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the

(b) A lawyer may limit the scope of the representation if the limitation is reasonable* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.*

Rule 1.3 Diligence

(a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.

(b) For purposes of this rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

Comment

[1] This rule addresses only a lawyer's responsibility for his or her own professional diligence. See rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See rule 1.1 with respect to a lawyer's duty to perform legal services with competence.

[3] A lawyer's duty to act with reasonable diligence does not eliminate a lawyer's other professional obligations and lawyers

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rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics."); *New York* ("A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process."); *Ohio* ("A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process.").

should strive to treat all persons involved in the legal process with courtesy and respect.[256]

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256 Numerous other states have similar language in their equivalent version of California's Rule 1.3. See, e.g., *Alaska* ("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."); *Arizona* ("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."); *Colorado* ("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."); *Delaware* ("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."); *District of Columbia* ("The duty of a lawyer to represent the client with zeal does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm. Thus, the lawyer's duty to pursue a client's lawful objectives zealously does not prevent the lawyer from acceding to reasonable requests of opposing counsel that do not prejudice the client's rights, being punctual in fulfilling all professional commitments, avoiding offensive tactics, or treating all persons involved in the legal process with courtesy and consideration."); *Florida* ("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."); *Hawaii* ("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."); *Illinois* ("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."); *Massachusetts* ("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."); *Minnesota* ("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."); *New Mexico* ("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

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not:

(1) knowingly* make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;

(2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly* misquote to a tribunal* the language of a book, statute, decision or other authority; or

(3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.

(b) A lawyer who represents a client in a proceeding before a tribunal* and who knows* that a person* intends to engage, is engaging or has

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respect."); *New York* ("Notwithstanding the foregoing, the lawyer should not use offensive tactics or fail to treat all persons involved in the legal process with courtesy and respect."); *South Carolina* ("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."); *Utah* ("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."); *Washington* ("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."); *Wyoming* ("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."); *ABA Model Rules* ("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.").

engaged in criminal or fraudulent* conduct related to the proceeding shall take reasonable* remedial measures to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.

(d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal* of all material facts known* to the lawyer that will enable the tribunal* to make an informed decision, whether or not the facts are adverse to the position of the client.

(e) In appearing as a lawyer before a tribunal,* a lawyer shall not:

(1) engage in a pattern of incivility;

(2) intentionally or habitually violate any established rule of procedure or of evidence; or

(3) engage in conduct intended to disrupt the tribunal.* [257]

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other

257 At least one other state has similar language in its equivalent version of California's Rule 3.3. See, e.g., *New York* ("In appearing as a lawyer before a tribunal, a lawyer shall not: (1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply; (2) engage in undignified or discourteous conduct; (3) intentionally or habitually violate any established rule of procedure or of evidence; or (4) engage in conduct intended to disrupt the tribunal.").

material having potential evidentiary value. A lawyer shall not counsel or assist another person* to do any such act;

(b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;

(c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably* incurred by a witness in attending or testifying;

(2) reasonable* compensation to a witness for loss of time in attending or testifying; or

(3) a reasonable* fee for the professional services of an expert witness;

(e) advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein;

(f) A lawyer shall not ask any question intended to degrade a witness or other person except where the lawyer reasonably* believes that the question will lead to relevant and admissible evidence;[258]

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258 Numerous other states have similar language in their equivalent version of California's Rule 3.4. See, e.g., *Texas* ("A lawyer shall not … ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or (5) engage in conduct intended to disrupt the proceedings."); *Virginia* ("A lawyer shall not … assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another."). See, also, *Delaware*, in its Notes to Decision for Rule 3.4, citing to a particular case where a lawyer's behavior

(g) knowingly* disobey an obligation under the rules of a tribunal* except for an open refusal based on an assertion that no valid obligation exists; or

(h) in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

Rule 3.5 Contact with Judges, Officials, Employees, and Jurors

(a) Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or standards governing employees of a tribunal,* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.* This rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.

(b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a rule or ruling of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:

(1) in open court;

(2) with the consent of all other counsel and any unrepresented parties in the matter;

(3) in the presence of all other counsel and any unrepresented parties in the matter;

(4) in writing* with a copy thereof furnished to all other counsel and any unrepresented parties in the matter; or

(5) in ex parte matters.

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was uncivil ("New trial was granted where defense counsel's comments to jury included an unjustified attack on the integrity of opposing counsel.").

(c) A lawyer shall not engage in a pattern of incivility that is degrading to a tribunal.* [259]

(d) As used in this rule, "judge" and "judicial officer" shall also include: (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

(e) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.

(f) During trial, a lawyer connected with the case shall not communicate directly or indirectly with any juror.

(g) During trial, a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows* is a juror in the case.

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259 Numerous other states have similar language in their equivalent version of California's Rule 3.5. See, e.g., *Alaska* ("A lawyer shall not ... engage in conduct intended to disrupt a tribunal."); *Delaware* ("A lawyer shall not ... engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal."); *Hawaii* ("A lawyer shall not harass a judge, juror, prospective juror, discharged juror, or other decision maker or embarrass such person in such capacity."); *Kansas* ("A lawyer shall not ... engage in undignified or discourteous conduct degrading to a tribunal."); *Michigan* ("A lawyer shall not ... engage in undignified or discourteous conduct toward the tribunal."); *Ohio* ("a lawyer shall not ... engage in undignified or discourteous conduct that is degrading to a tribunal."); *South Carolina* ("A lawyer shall not ... engage in conduct intended to disrupt a tribunal;"); *ABA Model Rules* ("A lawyer shall not ... engage in conduct intended to disrupt a tribunal.").

(h) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known* to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(i) A lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.

(j) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.

(k) A lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

(l) This rule does not prohibit a lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.

(m) For purposes of this rule, "juror" means any empaneled, discharged, or excused juror.

Comment

[1] An applicable code of judicial ethics or code of judicial conduct under this rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 United States Code section 7353 (Gifts to Federal employees). The statutes applicable to

adjudicatory proceedings of state agencies generally are contained in the Administrative Procedure Act (Gov. Code, § 11340 et seq.; see Gov. Code, § 11370 [listing statutes with the act].) State and local agencies also may adopt their own regulations and rules governing communications with members or employees of a tribunal.*

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure section 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. In the event that any judicial officer is impatient, undignified, or discourteous, the lawyer may continue to advocate on behalf of the client and stand firm in the position of the client, but this shall not provide justification for the lawyer engaging in any violations of this rule.[260]

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260 Numerous other states have similar language in their equivalent version of California's Rule 3.5. See, e.g., *Alaska* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Colorado* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is

no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Delaware* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *District of Columbia* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Florida* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge’s default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Hawaii* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Illinois* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge’s default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Massachusetts* (“The advocate’s function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge’s default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Michigan* (“The lawyer may not engage in improper conduct during the communication.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from undignified or discourteous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Minnesota* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can prevent the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *New Mexico* (“Refraining from abusive or obstreperous conduct is a corollary of the advocates right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *New York* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge’s misbehavior is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *South Carolina* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); Utah (“Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); Virginia (“Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer must stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Washington* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. … An advocate can present the cause, protect the record for

[5] The duty to refrain from incivility applies to any proceeding of a tribunal,* including a deposition.[261]

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate these rules or the State Bar Act, knowingly* assist, solicit, or induce another to do so, or do so through the acts of another;

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subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Wyoming* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *ABA Model Rules* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.").

261 Numerous other states have similar language in their equivalent version of California's Rule 3.5. See, e.g., *Colorado* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *Delaware* ("The duty to refrain from disruptive, undignified or discourteous conduct applies to any proceeding of a tribunal, including a deposition."); *New Mexico* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *South Carolina* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *Utah* ("The duty to refrain from disruptive conduct applies to any proceedings of a tribunal, including a deposition."); *Washington* (""The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *Wyoming* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *ABA Model Rules* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.").

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official, or to achieve results by means that violate these rules, the State Bar Act, or other law; or

(e) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, "judge" and "judicial officer" have the same meaning as in rule 3.5(c).

Comment

[1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code sections 6101 et seq., or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See In re Kelley (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].)

[4] A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the

lawyer's conduct is otherwise in compliance with these rules and the State Bar Act.

[6] A lawyer violates paragraph (d) by repeated incivility while engaged in the practice of law or related professional activities.[262]

[7] This rule does not prohibit those activities of a particular lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

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262 Numerous other states have similar language in their equivalent version of California's Rule 8.4. See, e.g., *District of Columbia* ("A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status."); *Florida* ("Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct."); *Utah* ("The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).").