

ASSOCIATION OF BUSINESS TRIAL LAWYERS

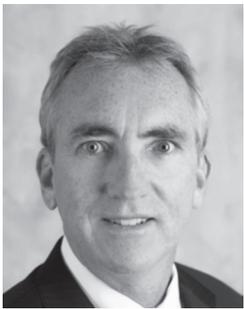
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REPORT

LOS ANGELES

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WHAT'S NEXT FOR ABTL?



Justice Brian S. Currey

In September 2021, the California Civility Task Force released its initial report, “Beyond the Oath: Recommendations for Improving Civility.” The report sets forth four concrete, realistic, achievable, and powerful proposals to improve civility in California’s legal profession, and has already stimulated renewed interest in taming incivility in the state. The Task Force is comprised of a diverse group

of more than 40 distinguished lawyers and judges, including members from each ABTL chapter. I am honored to serve as Chair. This article summarizes the report, explains ABTL’s key role in the formation of the Task Force, and suggests ways ABTL chapters can help ensure the proposals are adopted in the coming year.

The Task Force is a joint project of the California Judges Association (CJA) and the California Lawyers Association (CLA), in cooperation with the State Bar of California.

The initial Task Force report is a quick read (15 pages) with many interesting appendices. It can be accessed at the California Judges Association website: caljudges.org/civility.

The Task Force’s Four Key Proposals

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 both highlight the

connection between bias and incivility, and urge lawyers to eliminate bias-driven incivility.

2. Provide optional training to judges on the need to model civility, curtail attorney incivility inside and outside the courtroom, and explain 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 attorney admission 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.”

Civility MCLE

In furtherance of the first proposal, the Task Force is asking the State Bar Board of Trustees to mandate one hour of civility MCLE training (without increasing total MCLE hours). We are also requesting the State Bar to require at least part of each approved course be devoted to making the profession more welcoming to underrepresented groups by addressing the link between incivility and bias.

Specifically, we are asking 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. Any change in the rules would require approval by the California Supreme Court.

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.

The Task Force believes mandating civility education would spur the creation of excellent new programming on the topic by California MCLE providers, including ABTL. Our initial report includes resources to aid in the effort. For example, Appendix 3 is a list of California cases dealing with civility and a summary of key cases. Appendix 4 contains a table and memorandum identifying and describing individuals who have expertise in workplace incivility generally (i.e., not limited to the legal profession). It also includes a list of individuals who have written or spoken about incivility. MCLE providers could recruit some of these individuals to assist in developing new programming. Appendix 5 describes referral and dispute resolution techniques previously 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 California adopt such a program, the idea warrants further study and could be fodder for an MCLE program.

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. The initial report has already spurred development of programming in this area; much more is needed.

Additional Civility Training for Judges

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. If given the tools to do so, judges can significantly improve civility in the profession. Thus, the Task Force's second proposal is to increase civility training for judges.

Specifically, the Task Force asks California's Chief Justice, as head of the Judicial Council, to ask the Center for Judicial Education and Research Advisory Committee (CJER) to develop and promote educational programs specifically designed to inform judges about the need both to model civility and to require civility and professionalism both in and out of the courtroom.

One of the Task Force's co-sponsoring organizations, CJA, is another major provider of judicial education. It has embraced the Task Force's proposals, and the organization has already begun to add additional civility programming for judges. In addition, Task Force members Judge Wendy Chang and Judge Stuart Rice developed a civility training program for judges. It is in the process of being beta tested and refined. A group of Los Angeles County Superior Court civil litigation judges recently participated in the course and gave it high marks.

Changes to State Bar Disciplinary Rules

The Task Force proposal likely to generate the most attention and controversy is a request to the State Bar Board of Trustees to devise and recommend to the California Supreme Court revisions to the Rules of Professional Conduct clarifying that repeated incivility constitutes professional misconduct and that civility is consistent with zealous advocacy.

The Task Force's report contains some proposed language, but makes clear that the proposal is just a starting point for further discussion. The Task Force anticipates the State Bar rulemaking bodies will take public input, consider alternative language, and craft rule revisions that best serve the public in the profession.

The Task Force recognizes that making incivility a breach of the rules of professional conduct may be controversial in some circles, and that lawyers will have legitimate concerns that must be addressed during the rulemaking process. For example, both the First Amendment and common sense will require some clarity about what conduct is and is not prohibited. For example, in *United States v. Wunsch* (9th Cir. 1996) 84 F.3d 1110, the Ninth Circuit concluded California Business & Professions Code §6068(f)'s admonition that lawyers should abstain from "offensive personality" was void for vagueness. The court appeared to have no problem, however, with prohibiting "conduct unbecoming a member of the bar." I am confident rules can be drafted to give attorneys sufficient notice of what conduct violates the rule. The rule should not ensnare lawyers for a single misstep, nor should we permit a rule to be "weaponized" by litigation adversaries. The goal is to reduce unprofessional behavior and increase civility, not to add to unseemly conduct.

Finally, the Task Force suggests the State Bar develop a diversion program for first-time offenders to avoid disciplinary proceedings by completing a civility mentorship program. Ideally, judges could also refer uncivil attorneys to that program in lieu of monetary sanctions for incivility.

Civility Affirmation

In 2014, the California Supreme Court—at the recommendation of the State Bar Board of Trustees—adopted what is now California Rules of Court, rule 9.7. The rule requires anyone admitted to practice law after its effective date 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 Task Force's final proposal would require the rest of the profession to take the same aspirational civility pledge. A potential mechanism for doing so would be to require lawyers to acknowledge the pledge during the annual dues renewal process.

What More Can ABTL Do?

The Task Force grew out of an ABTL joint board meeting in 2019. More than 100 prominent lawyers and judges from each of California's ABTL chapters spent several hours addressing incivility and possible responses to it in a wide-ranging discussion I moderated. After the discussion, a number of participants discussed possible next steps. On behalf of the

group, I approached Alan Steinbrecher, then Chair of the State Bar Board of Trustees, to inquire about the matter. His response was to designate me as Chair of what became the Task Force.

So, ABTL has a strong stake in ensuring the success of the Task Force's proposals. All California ABTL chapters have already endorsed the Task Force's recommendations. ABTL can further those recommendations in several ways. First, chapters can develop first-rate MCLE civility programming, being careful to address bias-driven incivility. It would be useful to video record the programs so they can be made available to other lawyers. Second, ABTL chapters and their members should engage in the State Bar rulemaking process, commenting on and supporting efforts to brand incivility as professional misconduct, while ensuring any rule ultimately adopted comports with the First Amendment and is something business trial lawyers will thrive under. Third, ABTL chapters and members similarly should engage in any public comment period relating to the civility pledge. Finally, ABTL should continue its long tradition of modeling and promoting civility and professional conduct among lawyers.

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