

SEVEN THINGS JUDGES CAN DO TO PROMOTE CIVILITY OUTSIDE THE COURTROOM



Justice
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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.

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 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 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/newstys0501.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*, available at <https://www.lacourt.org/courtrules/CurrentRulesAppendixPDF/Chap3Appendix3A.PDF>.) “Counsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility.” (*Id.*, § (1)(2).)

i. Enlist help from colleagues. Have a plan. If need be, bring serious episodes to the court’s attention.

j. Join and support bar organizations that promote civility.

6. Be a problem solver.

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

The judge might offer to be available by telephone so that deposition exchanges can be read back by the reporter, or other issues can be resolved in real time. Judges committed to reducing incivility will give these calls priority, even 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.

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