

INCIVILITY AS A PROBLEM OF LAW FIRM RISK MANAGEMENT



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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 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 “succubistic.” 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 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.

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