

# ASSOCIATION OF BUSINESS TRIAL LAWYERS

# abtl

# REPORT

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## A CIVILITY ROUNDTABLE

### THE 2019 ABTL BOARD RETREAT



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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, 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](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 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.

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