

# abtl REPORT

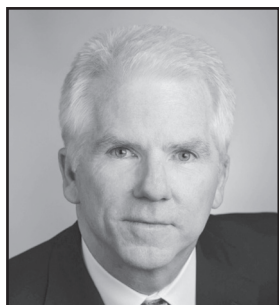
NORTHERN CALIFORNIA

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## Letter from the President

The Northern California Chapter of ABTL has been a leader in promoting civility guidelines in our profession. As Judge Brian Walsh's article describes, Northern California lawyers were leaders in developing an early civility code in Santa Clara County. That's why, when we learned that our colleagues in the Los Angeles chapter were devoting an entire issue of their ABTL Report to "Civility," we immediately asked whether they would be willing to let us share their excellent work with our readership. They of course responded with an enthusiastic "yes!" This issue of the Northern



Daniel Bergeson

Continued on page 2

### Also in This Issue

Bree Buchanan	<i>Breaking the Cycle...</i>	p. 4
Justice Samantha P. Jessner	<i>Gender Equality is</i>	p. 7
Justice Lee Smalley Edmon	<i>Part of the Civility Issue</i>	
Suzanne H. Segal	<i>Civility Checklist</i>	p. 10
T. John Fitzgibbons	<i>Incivility as a Problem of</i>	p. 13
	<i>Law Firm Risk Management</i>	
Judge Kevin C. Brazile	<i>Seven Things Judges Can</i>	p. 16
Justice Brian S. Currey	<i>Do...</i>	
Allen Lanstra	<i>Teaching Civility</i>	p. 22
Judge Paul A. Bacigalupo	<i>Strengthening Resilience</i>	p. 24
	<i>Through Mindfulness</i>	
Judge Carolyn B. Kubl	<i>Winning Through</i>	p. 26
	<i>Cooperation</i>	

## Civility Then, Now, and Forever

### Orangutans and Slime-ball Lawyering

It seems so obvious now that implementation of Civility Codes, and an emphasis on Professionalism, are good and necessary efforts. But, 27 years ago, when I was President of the Santa Clara County Bar Association, it was not nearly so clear.



Hon. Brian C. Walsh

In 1992 the legal profession was under attack. The public's respect for lawyers was sinking, prompted in part by the continuing negative reaction to unsavory acts of the lawyers involved in the Watergate scandal and by the Vice President of the United States issuing regular public insults of the profession. An ABA survey discovered that public regard for lawyers was at an all-time low. Lawyer jokes, tinged with no small amount of vindictiveness, were on the rise.

Hollywood weighed-in with an unflattering depiction of the lawyer in the first Jurassic Park movie, prompting theater crowds to erupt in cheers when the lawyer was snatched away, writhing in the jaws of the tyrannosaurus rex. The press piled on, including a timely article in Newsweek on "Slime-ball Lawyering."

As that magazine pointed out, most disciplinary codes focus on "minimum standards a lawyer needs to follow to avoid reprimand." But, "most slime-ball lawyering, though unpleasant, is legal and ethical.

Continued on page 2

*Continued from page 1*

## *Letter from the President*

California ABTL Report reprints the vast majority of their Summer 2019 issue, along with Judge Walsh's article and this brief letter. We thank them for letting us share this important work with you. Because our members been at the forefront of drafting the Civility Guidelines and Standing Orders found in our courts here in Northern California (including our own ABTL Civility Guidelines, available at [www.ABTL.org](http://www.ABTL.org)), we have included at the end of this issue a partial list of California Civility Guidelines.

In addition, since this is my last President's message, I would like to take this opportunity to thank you for making 2019 such a great year. And what a year it was! Our membership is close to an all-time high; our dinner programs have been superb with record attendance; we have launched a brand new ABTL website that is mobile friendly, completely searchable and much more functional; our new Community Outreach events have been a success; and our ABTL Reports have been excellent – as usual. Thank you for your tremendous support of ABTL this year.

We have an outstanding group of officers in place for 2020. Our new President will be Bruce Ericson (Pillsbury Winthrop Shaw Pittman LLP); Rachel S. Brass (Gibson, Dunn & Crutcher LLP) will be our Vice-President; Molly Moriarty Lane (Morgan, Lewis & Bockius LLP) will be our Treasurer, and Walt Brown (Orrick, Herrington & Sutcliffe, LLP) will serve as our Secretary. The 2020 dinner programs have been set. The San Francisco programs will remain at the Hyatt Regency Embarcadero, and we return to the Four Seasons East Palo Alto for our Silicon Valley program. The 2020 dinner program dates are February 4, 2020; March 3, 2020; April 7, 2020; June 3, 2020 (Silicon Valley); September 15, 2020; and December 8, 2020.

In addition, the 2020 Annual Seminar will be in Hawaii at the Mauna Lani, Hawaii on October 7-11, 2020.

Finally, thank you so much for allowing me to be your President this year and to be given the opportunity to work with such an outstanding group of board members, judges and lawyers. It truly has been an honor and a privilege.

I hope you have a safe and happy holiday season.

Daniel J. Bergeson

*Continued from page 1*

## *Civility Then, Now, and Forever*

And it often works, for many adversaries eventually capitulate in the face of unremitting hardball. The race to the gutter may be inevitable."

In 1992, our county bar decided that it was not "inevitable" and that we could guard against the loss of civility by adopting and keeping alive a Code of Professionalism. We wanted to avoid platitudes. We wanted practical guidelines for real lawyering. We organized a committee of experienced trial lawyers and judges to reach out to respected practitioners around the county to ask them how they implemented civility in their professional lives: "Explain to us the specifics of how did you did it." "What do you tell young lawyers in your firm to do when faced with difficult circumstances?" Their insightful answers became our Code.

Some lawyers complained about the notion of a civility code: "It's like trying to teach orangutans to eat with a knife and a fork." But, in 1992 the Santa Clara County Bar Association adopted the Code as the "recognized standard of professionalism by lawyers practicing in Santa Clara County."

The Santa Clara Superior Court quickly "ORDERED that the Code of Professionalism . . . serve as a guide to Judges of the Santa Clara Superior Court in the exercise of their individual discretion when adjudicating disputes among attorneys." The Federal Court for the Northern District adopted a similar order. And, in 2007, the State Bar of California adopted "Civility Guidelines" modeled on the Santa Clara Code of Professionalism.

More recently, Chief Justice Tani Cantil-Sakauye fostered the expansion of the mandatory attorney's oath to include: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity." (CRC, Rule 9.7) And, guiding such conduct, codes of civility and professionalism have proliferated throughout California. (A partial list we have compiled for this Report is on p. 28)

### **It's Not Me, It's Them**

In devoting this edition of the ABTL Report to Civility, we know we are preaching to the choir. Trial lawyers in our area who handle the large civil cases

*Continued on page 3*

## *Civility Then, Now, and Forever*

are routinely models of professionalism. But, simply being civil is not enough. We owe it to our professions and the people we serve to do what we can to preserve and promote civility: as lawyers, as judges, and as legal organizations. We are all in this together and within us are the solutions.

### **What Can We Do?**

Below are lists of civility action items gleaned from a quarter century of experience in Santa Clara County, from the presenters at the ABTL Annual Seminar in October, 2019, and from the contributors to the articles in this Report.

#### **What can attorneys do to promote civility?**

- Tell clients at the outset this is how you practice.
- Start the case with a phone call to introduce yourself.
- Maintain personal contact with opposing counsel regularly throughout the case.
- Show respect for the opposing side.
- Stay calm and avoid rudeness.
- Address incivility when you encounter it.
- Model civility for younger lawyers and give them the confidence to display it.

#### **What can judges do to promote civility?**

- Persuade your court to issue a standing order adopting a Professionalism Code.
- Post a copy of the Code in your chambers and outside the courtroom.
- Be open to informal discovery conferences on short notice.
- Emphasize expectations for professional conduct.
- Address your commitment to civility in case management and pretrial conferences.
- Discuss civility concepts with jurors before trial.
- Address attorneys who violate the Code.

- Model civility while on the bench – what you give is what you get.

- Treat attorneys, jurors, witnesses, parties and court staff with civility and respect.

#### **What can ABTL Chapters do to promote civility?**

- Work with lawyers and judges to implement the actions listed above.
- Adopt, distribute and urge members to commit to a Code of Professionalism.
- Create an annual civility award.
- Develop civility MCLE's for presentations to law schools, law firms, and bar associations.
- Educate clients and the public that “attack dog” attorneys can provoke unnecessary litigation and run up costs.

#### **It Is Not Red Versus Blue--Civility Can Unite Us**

We can take these actions to encourage greater civility with the confidence that civility should not be a divisive issue. It has support as broad-based as President John F. Kennedy, Justice Sandra Day O'Connor, and President George W. Bush:

“Civility is not a sign of weakness.” [Kennedy]

“[C]ivility is hard to codify or legislate. . . . It's possible to disagree without being disagreeable.” [O'Connor]

“Civility . . . is the determined choice of trust over cynicism, of community over chaos.” [Bush]

*Hon. Brian C. Walsh is a Judge of the Superior Court of Santa Clara County, assigned to Complex Civil Litigation. He is a member of the Board of Governors of the ABTL Northern California Chapter and a Co-Editor of the ABTL Report.*



BREE BUCHANAN

## *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 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.

*Continued on page 5*



## *Breaking Cycle of Incivility Through Well-Being*

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/](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](http://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 to reduce stress, celebrate success, mourn losses, and often, simply end (or get through)

## *Breaking Cycle of Incivility Through Well-Being*

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/](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

## *Breaking Cycle of Incivility Through Well-Being*

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.*



JUSTICE SAMANTHA P. JESSNER  
JUSTICE LEE SMALLEY EDMON

## *Gender Equality is Part of the Civility Issue*



Justice Samantha P. Jessner



Justice Lee Smalley Edmon

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**

*Continued on page 8*

## *Gender Equality is Part of the Civility Issue*

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 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.*





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## *A Civility Checklist*



Judge Suzanne H. Segal

**C**hecklists 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

*Continued on page 11*

## *A Civility Checklist*

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, 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

## *A Civility Checklist*

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 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.*





T. JOHN FITZGIBBONS

## *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 plaintiff's 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

*Continued on page 14*

## *Incivility as a Problem of Law Firm Risk Management*

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

## *Incivility as a Problem of Law Firm Risk Management*

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.

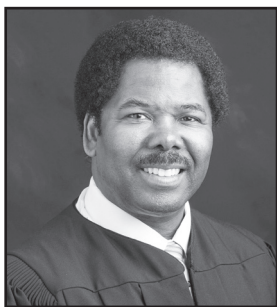
But even when lawyers reserve their bad conduct only for their adversaries, scorched-earth tactics can backfire because clients later balk at the cost. That can lead to a malpractice case that is a fee dispute in disguise: The client’s true complaint is that he or she paid a lot but received little of 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:

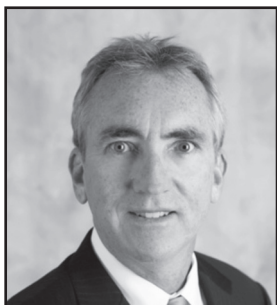
- Incivility increases the likelihood that a

PRESIDING JUDGE KEVIN C. BRAZILE  
JUSTICE BRIAN S. CURREY

## *Seven Things Judges Can Do to Promote Civility Outside the Courtroom*



Presiding Judge Kevin C. Brazile



Justice Brian S. Currey

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

*Continued on page 17*



## *Seven Things Judges Can Do to Promote Civility Outside the Courtroom*

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.

## *Seven Things Judges Can Do to Promote Civility Outside the Courtroom*

- **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.”

## *Seven Things Judges Can Do to Promote Civility Outside the Courtroom*

### **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.**

## *Seven Things Judges Can Do to Promote Civility Outside the Courtroom*

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/newstys/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](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. Ct. 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



Continued from page 20

## *Seven Things Judges Can Do to Promote Civility Outside the Courtroom*

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.*



Continued from page 15

## *Incivility as a Problem of Law Firm Risk Management*

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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ALLEN LANSTRA

## Teaching Civility

As the type of attorney who is reading a volume of the ABTL Report on civility, you are probably not experiencing an awakening about



Allen Lanstra

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

*Continued on page 23*

## Teaching Civility

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 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.

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JUDGE PAUL A. BACIGALUPO

## *Strengthening Resilience Through Mindfulness*

**H**ow 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.



Judge Paul A. Bacigalupo

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

*Continued on page 21*



## *Strengthening Resilience Through Mindfulness*

quickly from negative ones; Mental—heightening focus and improving mindset through mindfulness, meditation and yoga.

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.*



JUDGE CAROLYN B. KUHL

## *Winning Through Cooperation*

“**W**inning through intimidation”

became a catchphrase in the 1970s after a book by that title caught on and eventually became a New



Judge Carolyn B. Kuhl

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 *regardless of the underlying merits*.

*Continued on page 19*

## *Winning Through Cooperation*

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 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.*



**California Professionalism  
and Civility Guidelines and Codes  
(a partial list)**

- California State Bar Attorney Guidelines of Civility and Professionalism
- Association of Business Trial Lawyers, Los Angeles Chapter, Professionalism and Civility Guidelines
- ABTL, San Diego and Northern California Chapters, Professionalism and Civility Guidelines
- Los Angeles County Bar Association Code of Civility Guidelines
- Santa Clara County Bar Association: Code of Professionalism
- Contra Costa County Standards of Professional Courtesy
- Marin County Bar Association Code of Civility
- Orange County Bar Association Standards for Professionalism and Civility Among Attorneys
- Riverside County Bar Association Guidelines of Professional Courtesy and Civility
- Sacramento County Bar Association Standard of Professional Conduct
- San Bernardino County Bar Association Civility Code
- San Diego County Bar Association Attorney Code of Conduct
- Santa Cruz County Bar Association Civility Code
- Ventura County Bar Association Guidelines on Professional Conduct and Civility
- ABOTA Principles of Civility, Integrity, and Professionalism
- Superior Court of California County of Los Angeles Guidelines for Civility in Litigation
- U.S. District Court Central District of California Civility and Professionalism Guidelines
- U.S. District Court Northern District of California Guidelines for Professional Conduct
- U.S. District Court Southern District of California Civil Rule 83.4 Professionalism

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