I am pleased that my final President’s Message is appearing in this special “Civility” issue of the ABTL Report. To provide some background on the genesis of this themed issue, you likely know that the ABTL consists of five chapters across the state of California: Los Angeles, Northern California, Orange County, San Joaquin Valley, and San Diego. In addition to enjoying the company of our sister chapters at the Annual Seminar every October, the leadership of each chapter communicates throughout the year on issues that impact the practice of business litigation; this year a point of emphasis in those discussions was civility in the legal profession. One manifestation of those discussions was the “Civility” issue published by the Los Angeles chapter this summer, and reprinted here. Many thanks to the members of the Los Angeles chapter who made this issue -Continued on page 6-

Q: The theme of this issue of the ABTL Report is civility. Do you see value in hiring outside litigation counsel who display civility in their practice?

A: My first year out of law school I did employment litigation. I quickly learned that being overly aggressive was not always in my client’s best interest, and that a lot more can get accomplished when attorneys maintain a civil tone. I know that Glaukos benefits when our outside litigation counsel maintains a cooperative working relationship with opposing counsel. In fact, civility saves us money because we don’t incur legal fees on inconsequential disputes that arise between counsel. And when a Glaukos attorney has credibility with opposing counsel I’ve found it can moderate extreme views on the other side of the case, and prevent the parties from becoming entrenched in their positions. On the other hand, when I see opposing counsel acting rudely, or attempting to intimidate with boorish behavior, I certainly won’t be using those attorneys for future matters or recommending them to others.

Q. There is an increasing push for diversity in large law firms, and some corporate clients are now mandating diversity on the teams they hire. Does Glaukos seek out diversity when hiring outside litigation counsel who display civility in their practice?

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A Civility Roundtable
The 2019 ABTL Board Retreat
By Robin Meadow

At this year’s Joint Board Retreat, hosted by the Los Angeles Chapter, nearly 100 lawyers and judges devoted Saturday morning to discussing the problem of incivility—what it is, why it exists, and what to do about it. Justice Brian Currey guided the free-flowing conversation. This article summarizes some of the key points that emerged.

What Is Incivility?

The image that probably comes to mind when someone complains about incivility is overt abuse—name-calling, physical threats, ad hominem attacks in briefing, and the like. But the meeting participants focused more on the wide variety of contexts in which incivility arises.

For example, incivility can surface when a lawyer conveys disrespect of another lawyer’s area of practice—maybe a lawyer whose practice focuses on big-ticket commercial class actions acts condescendingly toward someone who handles collection cases. Another breeding ground for incivility is age difference—experienced lawyers sometimes abuse newer lawyers who are struggling with their first depositions or trials.

It wasn’t until late in the meeting that one participant said, “Any conversation about civility must talk about gender and people of color.” This kind of incivility often goes unnoticed by those who are not subjected to it, but it’s widespread. One participant described how, during a break from a panel she was on, a long line of women waited to ask her and her co-panelists how to respond to gender/color bias. Surprising to at least some at the meeting was that not even bench officers are immune. (See Edmon & Jessner, Gender Equality is Part of the Civility Issue, in this issue.)

The causes of incivility are not always obvious. Discovery disputes and rapid-fire email exchanges were consistently recognized as common settings for incivility, but they are more symptoms (or perhaps facilitators) than causes. One participant suggested that, while business clients don’t necessarily want lawyers to be uncivil, high billing rates create high client expectations, which in turn may ratchet up the lawyers’ perceived need to be “tough.” Another noted that it’s a fact of life for firms that the nature of a particular case itself...

"Continued on page 7"
MARK YOUR CALENDARS FOR 2020

January 29, 2020
Dinner Program
The Westin South Coast Plaza

March 11, 2020
Dinner Program
The Westin South Coast Plaza

May 20, 2020
21st Annual Robert E. Palmer Wine Tasting Dinner for PLC
The Westin South Coast Plaza

September 9, 2020
Dinner Program
The Westin South Coast Plaza

October 7-11, 2020
ABTL 47th Annual Seminar
Mauna Lani Resort
Big Island, Hawaii

November 4, 2020
Dinner Program
Holiday Gift Giving Opportunity
The Westin South Coast Plaza

Seven Things Judges Can Do To Promote Civility Outside the Courtroom
By Hon. Brian S. Currey and Hon. Kevin C. Brazile

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 courte-
sely—treat 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 gumns 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, “ofentimes 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...
Gender Equality is Part of the Civility Issue
By Hon. Lee Smalley Edmon and Hon. Samantha P. Jessner

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 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 Pitzer School of Law at North- western 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

Winning Through Cooperation
By Hon. Carolyn B. Kuhl

“Winning through intimidation” became a catchphrase in the 1970s after a book by that title caught on and eventually became a New 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 advice 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 motivi-

cation 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 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 Michi-
gan, 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 Dilem-

ma,” a classic game theory exercise. In Axelrod’s varia-
tion 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 inter-
mediate 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 conflict. Axelrod announced an online tournament in which participants were chal-

lenged 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, sociolo-
gists 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 pre-

vious 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 to a strategy that tends to win or settle well. As a judge who has conducted hundreds of settlement conferences, I can comfortably say that pe-
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 (1979), and best-selling author of Full Catastrophe Living: Using the Wisdom of Your Body and Mind to Face Stress, Pain, 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. When you pay attention to 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 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 is often done in an Acta, incorporate meditation practice into their work environments, believing that meditation helps employees experience better work environments...
a reality, including Sabrina H. Strong and Valerie Goos (LA Chapter Presidents), Michael Mallow and Celeste Brecht (Chair and Vice Chair of the LA Civility Committee), and Robin Meaney (Chair and Vice Chair of the ABTL Report, Los Angeles). I am particularly appreciative of Sabrina Strong’s inspired leadership in keeping this topic top-of-mind for all ABTL chapters this year. I defer to Sabrina’s excellent introductory talk to the “Civility” issue:

The diverse, distinguished authors here explore the sources of incivility, address the problems it causes, ask whether it works (spoiler: it doesn’t), place it in the context of lawyer well-being and mindfulness, provide judicial perspectives, and suggest ways to counter it with civility.

We have no illusions that this issue, or any of our other projects, will suddenly tame our profession’s worst excesses. We know that some lawyers are fundamentally uncivil—perhaps or maybe incapable of displaying—the kind of professionalism we take for granted in ABTL members. But we firmly believe that there are many other lawyers, particularly younger lawyers, who may yet be willing to examine whether they want to live their professional lives mired in toxicity. As you read this issue, we hope you will think of ways that you can help us reach them. No matter how quixotic this quest may be, we must stand up and be counted among those who wish to preserve an ethical code that makes us proud to be lawyers. Please read, think, and speak about this. The future of our profession depends on it.

I hope you enjoy the articles in this “Civility” issue as much as I did, and that they will spur each of us to re-think the meaning of civility in our own practice.

Finally, as I end my year as President of the Orange County chapter, I would like to give a few heartfelt “thank yous” for a wonderful experience leading our chapter: to my Board of Governors and Judicial Advisory Committee, who have been a pleasure to work with throughout the year; to my Executive Committee, who exhibited leadership and raised innovative ideas; and, most of all, to our Executive Director, Linda Sampson, who is the reason our chapter and our Board thrive as a board.

Our 2020 membership drive has begun—please register yourself and your litigation department now, so that you can enjoy concomitantly with our attorney and judicial members and programs next year! On that note, mark your calendar now for January 29, 2020, which will be our next dinner and CLE program at the Westin South Coast Plaza. I wish you and your loved ones a joyous holiday season.

Karla Kraft is a partner at Stradling, Tocca, Carlson & Rath.
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 say, “You shouldn’t say that.” 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—nothing is more conducive to finding the truth than cross-examination. Nothing is more helpful to a correct determination of a legal issue than informed advocates. Some felt that this kind of adversarial system of litigation fosters good personal relationships. (See Kuhl, Winning Through Cooperation, in this issue.)

And anyone interested in going on the bench needs to cultivate his or her reputation for civility. As one participant put it, those with judicial aspirations should behave every day as if their opposing counsel is going to fill out an evaluation form—because that’s exactly what will happen.

Finally, participants appeared to agree that a civil environment promotes a better working relationship and general job satisfaction. (See Buchanan, Breaking the Cycle of Incivility, Through Well-Being, and Bucigalp, Mindfulness, both in this issue.)

Being Civil

There is no lack of guidance about how to be civil. The Los Angeles Chapter has long had civility guidelines, which, along with numerous other guidelines, can be found on the ABTL website: http://www.abtl.org/la_guidelines.htm. But these are more in the nature of guiding principles than practical advice. The meeting participants focused on the latter.

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In one participant’s words, “Litigation should go back to being a contact sport.” There appeared to be universal agreement that the best way to promote civility is through personal contact and communication. For example:

- Start the case with a phone call to introduce yourself.
- When doing out-of-town depositions or hearings, invite opposing counsel to dinner—not to discuss the case or settlement, but just to spend time together.
- Pick up the phone: Conversations, rather than emails, make it harder to be uncivil.
- One judge has a strategy of ordering disputing lawyers to go share a cup of coffee without saying anything about the case.
- Invite opposing counsel to an ABTL event. (See Segal, A Civility Checklist, in this issue.)

Civility in letters and emails should be easier because they aren’t—or at least shouldn’t be—“spontaneous: Just because you are in a case (or right now) doesn’t mean what you’ve written before hitting ‘send.’” Civility in court filings should be easier still. One suggestion was to write memoranda in a way that encourages the judge to copy your language into the resulting order—a technique that will quickly weed out inexcuseable ad hominem attacks.

Going deeper, participants talked about the importance of modeling civil behavior for others, most importantly junior colleagues: In one participant of modeling civil behavior for others, most importantly junior colleagues: In one participant

The Judicial Perspective

The judicial perspective of the judges mejorar the offer of a wide range of experiences with incivility—not surprisingly, with discovery as the primary theme. The most frequent comments focused on the benefit of early, hands-on involvement by judges, principally in face-to-face informal conferences with follow-up. Last year saw the enactment of the California Code of Civil Procedure section 2016.080, which authorizes courts to hold “informal discovery conferences” to resolve issues the parties are unable to resolve by themselves. But some judges had already discovered this technique and were using it with great success. One judge essentially stopped hearing discovery motions, and instead brought the lawyers into chambers to discuss their disputes. As he put it, “Emails don’t count, letters don’t count. At the end of the day, everyone is going to get what they need for trial.”

Both judges and lawyers at the meeting stressed the highly positive impact of direct judicial participation in disputes. One judge who sometimes agrees to be available during depositions reported that, in many cases, the lawyers never call—they discuss the dispute rather than getting involved. Likewise, when someone requests an informal conference, often the dispute magically disappears and the conference is never held.

But informality doesn’t always work, and several judges spoke about the need to impose civility in some cases. This can range from simply ordering lawyers to be civil, to requiring lawyers to affirm the California Attorney Oath’s commitment to “dignity, courtesy, and integrity,” to more coercive measures (ordering the lawyers into the jury room to talk, to—of course—sanctions.

There was some discussion about whether judges should have some kind of enforceability with provisions that Family Code section 271 provides: “[T]he court may base an award of attorney’s fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys.” But judges who speak on this topic generally feel that the law gives them the leeway to provide sufficient flexibility, that sanctions should be a last resort, and that generally they’re not needed when the judge is cooperative.

One’s mental attitude matters, too. Generalizations and stereotypes—not just gender-based or racial, but professional attributes like plaintiff/defendant, big/small firm, liberal/conservative—are counterproductive. Every opposing counsel and every judge is an individual human being. There will be more civility when you think of them that way.

Overachievers

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. Read and re-read your communications to opposing counsel before you send them to eliminate those shots across the bow, the passive-aggressive verbage, 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 to 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 greatest of barriers. Tell your 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/her to put it in a letter. The formality of letters carries with it a certain expectation of civility that often passes 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 developments. 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 lawyer 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 young lawyers a healthy sense of self-deprecation, which will help them—as it helps you—shrink off perceived slights or rudeness from others.

- Allen Lanstra is a partner at Skadden, Arps, Slate, Meagher & Flom LLP.

Gender Equality: Continued from page 4

- trivialize gender discrimination.

Other common examples reported by women lawyers include being professionally discredited. The misbehavior included being addressed unprofessionally (such as with terms of “endearment”), being criticized 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 sexual- ly 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 civility. 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

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...

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.


Judges can and should tailor their approach to individu-
al cases. For example, if a party brings to the judge’s atten-
tion that one or more lawyers disrupts depositions by mak-
ing uncivil remarks or lengthy, intertempore speaking objec-
tions, 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 commit-
ted to reducing incivility will give these calls priority, even
briefly reserving a trial to take the call. (Most judges have
found that merely being available to take a call usually
causes lawyers to act more reasonably and work through
their problems rather than call the judge.) Or the judge
might order the next several depositions to be taken in her
jury room, and make herself available to monitor the situa-
tion. Or require an additional camera in the deposition room
that captures lawyer misconduct if the complaint is unpro-
fessional conduct like making faces or placing feet on the
particular issue.

If the problem is that lawyers need the judge to make a decision so they can move on. And, as one participant put it, sometimes the lawyers need a judge to “save us from our worst impulses.” (See Currey & Brazile, What Judges Can Do, in this issue.)

Meeting participants recognized the reality that they
were preaching to the choir—organizations like the ABTL tend to attract lawyers and judges for whom civility is a pri-
ority and the norm. But the hope is that by spending time
together probing what civility really means and how we can improve our efforts to achieve it, the participants
are meeting with a better appreciation of the value of being civil and of inspiring civility in others.

Robin Meadow is a partner at Greines, Martin, Stein & Richland LLP and is co-editor of the Los Angeles ABTL Re-

-Judicial Influence: Continued from page 5-

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 with 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 Mfg., Inc. v. ICRA Sapphire, Inc. (2013) 217 Cal.App.4th 708, 710.) And imposing sanctions against a lawyer seems a poor first re-

-civilty Roundtable: Continued from page 8-

get personally involved.

But rules do help. One federal judge noted that the amendment to rule 37 of the Federal Rules of Civil Proce-
dure to cover spoliation issues very significantly reduced motion practice in that area.

Other judges spoke of positive reinforcement tech-
niques, particularly complimenting lawyers for good behav-
ior—on the record, so that clients can see it.

There was also a recognition that there are some contro-
versies that all the goodwill in the world can’t resolve—the
party needs the judge to make a decision so they can move on. And, as one participant put it, sometimes the lawyers need a judge to “save us from our worst impulses.” (See Currey & Brazile, What Judges Can Do, in this issue.)

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-Judicial Influence: Continued from page 5-

chances of getting what they ask for during litigation and set岛屿 negotiations.” (S. Feldman Hausner, Psychology


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 fo-
menting needless discovery disputes and other unnessary
motions. It erodes the judicial process and the public’s per-
ception of it. And let’s face it: Dealing with lawyer incivi-

ity can be unpleasant. We believe that justice requires that we sanction reluctantly.

And yet, sanctions serve their purpose when other meth-
ods 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.” (Id.) And sanctions provide a
way for clients to recover some of the added costs incivility
cause can.

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 cour-
tesy and professionalism. For example, they participate in bar association civil 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 Califor-

nia Court of Appeal, Second Appellate District, Division

Four.

• Hon. Kevin C. Brazile is Presiding Judge of the Los Angeles County Superior Court.

Teaching Civility: Continued from page 3-

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.
You’ve all done it jam them (which is not civil). Treating
Scheduling as a game is petty.

• Set your own tone. As competitive, type-A, proud

-Continued on page 13-

counsel and parties of every imaginable misdeed. At

barriers. But the hope is that by spending time
together probing what civility really means and how we can improve our efforts to achieve it, the participants
are meeting with a better appreciation of the value of being civil and of inspiring civility in others.

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chances of getting what they ask for during litigation and set岛屿 negotiations.” (S. Feldman Hausner, Psychology


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 fo-
menting needless discovery disputes and other unnessary
motions. It erodes the judicial process and the public’s per-
ception of it. And let’s face it: Dealing with lawyer incivi-

ity can be unpleasant. We believe that justice requires that we sanction reluctantly.

And yet, sanctions serve their purpose when other meth-
ods 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.” (Id.) And sanctions provide a
way for clients to recover some of the added costs incivility
cause can.

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 cour-
tesy and professionalism. For example, they participate in bar association civil 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 Califor-

nia Court of Appeal, Second Appellate District, Division

Four.

• Hon. Kevin C. Brazile is Presiding Judge of the Los Angeles County Superior Court.

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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.
You’ve all done it jam them (which is not civil). Treating
Scheduling as a game is petty.

• Set your own tone. As competitive, type-A, proud

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Judges have unique abilities to help stem the tide by modeling good behavior, inspiring collegiality 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 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 contributing to the preservation of limited judicial resources. Therefore, the Court expects and requires the highest degree of professionalism from all those involved in the courtroom process, including knowledge of and strict compliance with, the Code of Civil Procedure, the California Rules of Court, the Los Angeles County Court Rules, and the California Attorney Guidelines of Civility and Professionalism. The Court intends to treat everyone with respect and courtesy, and expects all those involved . . . to do the same. UnCivil or unprofessional behavior will not be tolerated.

The judge may repeat these exhortations at initial status conferences and hearings, using a shorthand version: “I intend to treat lawyers who appear before me with respect. In return, I expect lawyers to treat the Court and each other with respect and professionalism.”

4. Facilitate civility.

Incivility can be reduced through positive interactions among lawyers. It is harder (but admittedly not impossible) for lawyers to be nasty to someone they judge to be well-intentioned. 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 how important it is that counsel work cooperatively, treat each other courteously and respectfully, and collaborate.

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 Judgments, § 2d ed. 2007) § 2.46, p. 93.) “Maintaining decorum and dignity, and being courteous and patient, sets the gold standard in the courtroom status conference . . . 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 demonstrate courtesy and civility outside the courtroom. For example, judges 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 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 scope of discovery, or produce a production schedule, or anything else that is useful and relevant? Or do they simply make personal attacks on 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. Eunanimity 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/five-ways.deal-with-rudenss.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