the abtl REPORT

Why do some very smart people say very dumb things in court?

By Hon. John S. Meyer

Before I entered the legal profession, I shared the general perception of what a lawyer was and was not. A lawyer was smooth and polished and spoke and acted with class. I pictured Gregory Peck and Paul Newman playing lawyer roles in To Kill a Mockingbird and The Young Philadelphians. Lawyers looked sharp and were persuasively articulate. They simply did not say or do dumb and tasteless things, and certainly never in court. Over my years as a trial judge in San Diego, I have encountered many attorneys who perfectly fit that general perception. Unfortunately, I have also seen enough in the courtroom to realize that some smart lawyers end up doing and saying some very dumb things in court.

Behavior matters

Despite the all-to-common lawyer bashing and attorney jokes, I believe that society in general and jurors in particular still feel that members of the legal profession hold a significantly high standing in society. I believe that most prospective jurors perceive that the men and women who are conducting the voir dire process are smarter, wealthier, better educated, more articulate, better dressed, and classier than most members of the jury pool. Lawyers are expected to be masters of the English language, organized and convincing. They can analyze complicated facts and do not waste time. At the commencement of trial, the jury does not anticipate that a layer will do or say anything foolish or tasteless. They are in a court of law, many for the first time. This is not a T.V. program, it's the real thing. In general, they expect good taste and professionalism in appearance, speech, and manner from attorneys. They don't anticipate that their time will be wasted.

The reality is that jurors are sometimes very disappointed by how attorneys actually act in court. If those jurors are sitting in judgment on your case, the negative impact on your client's chances of success may be significant. Some lawyers, it appears, seem compelled to personify the antithesis of the smooth professional whom most jurors expect to encounter. Through the course of a trial, these lawyers will say and do silly, inappropriate, and sometimes even offensive, things. Even engaging in such conduct only once or twice during a trial can have a significant impact on the jury.

Some things these lawyers do are obviously tasteless. Some are subtle, but no less annoying. All can be counter-productive. As just one example, after jurors are told not to eat food or drink soft drinks during trial, I have watched their expressions of amazement when they see a can of Diet Coke (or worse, an entire Big Gulp cup) in plain view on counsel's table when

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PAUL REYNOLDS

PRESIDENT'S LETTER:

ABTL San Diego, 2023

By Paul Reynolds

It is my pleasure, in my first President's Letter, to present to you our latest edition of the ABTL Report. There is, we hope, something to interest most anyone in this issue. Judge John Meyer's "Why Do Very Smart People Say Very Dumb Things in Court?" and Katherine Fine's (in collaboration with Judges Allison Goddard, Carolyn Caietti, and Robert Longstreth) "Winning Manners for Virtual Court Rooms: A Remote Appearance Etiquette Guide" comprise something of a mini-theme of the issue, reminding us of the importance of being conscious of what we do and say—and how we appear—in court, whether it be in person or virtually. I'm sure most would agree that these are concerns that went somewhat by the wayside too often during the pandemic, and now that we are out on the other side it is valuable to take a minute to remind ourselves of their importance.

We also have, from Erin Lupfer, a synopsis of our recent dinner event with new Chief Justice of California, Patricia Guerrero, which occurred at the U.S. Grant Hotel on February 21. The event, by all accounts, was a smashing success, both in terms of the turn-out and the quality of the speaker and her presentation. Our next event, set for May 23, will have Daralyn Durie of Morrison & Foerster discussing her $178 million victory in a patent litigation matter—the largest verdict in the state last year. We are in the process of programming a third dinner for the fall, and are endeavoring to make it of similar quality and interest as the first two events. There is no question that high-quality dinner events drive attendance, engagement, and membership, and so they are a point of particular emphasis this year.

Finally, we have an article by Alan Mansfield regarding the ABTL's efforts—particularly via the San Diego Chapter and it's leadership, including Past Presidents Mansfield, Michelle Burton, and Randy Grossman and Judge Katherine Bacal—that led directly to three proposals regarding civility that are currently pending before the State Bar. (Judge Bacal, separately, also provides a great piece, "A Day in the Life….What is it REALLY like to be a judge?," that should not be missed.)

All of us in leadership this year are looking forward to a successful year for the Chapter and look forward to seeing you soon at one of our events.

Paul Reynolds

Paul Reynolds, President of ABTL San Diego Chapter and partner at Shustak Reynolds & Partners, P.C.

Why do some very smart people say very dumb things in court? | *Continued from cover*

trial resumes after lunch. And don't think the lawyer loudly swigging water from a plastic water bottle during trial goes unnoticed.

Other lawyers behave as if they are unaware that their actions can alienate their clients from the jury. Lawyers generally strive to present their client to the jury as "one of them"—a nice human being with an unassuming first name such as Joe or Mary. Yet during trial these same lawyers will repeatedly refer to Joe or Mary only as "my client." Although this is subtle, such a reference unnecessarily presents a rather impersonal lawyer-client business relationship to the jury—a relationship which tends to dehumanize the persona of Joe or Mary. On the other extreme, counsel sometimes forget their manners and fail to address their clients and witnesses with due respect. In one recent trial an attorney began direct examination of their client by exclaiming, "Hi, Susie!" Remember, in the courtroom, stick with Mr., Mrs., and Ms., and stay away from first names if at all possible.

Another obvious lawyer indiscretion is the gratuitous use of profanity. Notwithstanding the permissiveness of contemporary language, jurors simply do not expect lawyers to speak to them as they speak to their buddies over a beer. While some jurors may hope their trial has the excitement of a TV legal drama, they don't expect the attorneys to act with a reality-TV show atmosphere. Jurors are disappointed or surprised to hear lawyers using words like "hell" and "damn" during closing argument. While lawyers apparently think such words will emphasize a point, jurors typically consider such language to be wholly inappropriate in the formal setting of a courtroom.

Obviously, lawyers who lose control during trial can end up using even more damaging language. I've heard attorneys use the phrases "lying SOB," "piss-poor," and "pissed off" during trial. A lawyer once told the opposing attorney to "shut up" during a hearing. And, of course, some jurors will take outright umbrage at the use of "Jesus" or "God" as an expletive during trial. I will never forget another blatant indiscretion which occurred when a fledgling attorney fumbled with the water pitcher and spilled it, muttering "Aw, shit" loud enough for all in the courtroom, including the court reporter, to hear. I doubt that transcript is something this attorney proudly displays on the wall of his office.

Profane language is, of course, not the exclusive province of lawyers. From their first day of practice, lawyers are advised that thorough preparation wins cases. I have observed lawyers come to trial loaded with boxes and piles of paper - monuments to their preparation and diligence. They have ready their in limine motions, transparencies, exhibit binders, and written scripts for direct examination. But with all this preparation, they sometimes completely neglect to prepare their client for appropriate decorum and appearance in the courtroom. I have heard both plaintiffs and defendants who are represented by attorneys use such words as "hell," "damn," "asshole," and the like during their testimony. Such a lack of preparation is inexcusable, given that whether the jury "likes" your client can often make or break your case, and their demeanor will inevitably impact the jurors' impressions of your client.

Words matter

The law is a "learned profession" and counsel should make every effort to communicate in proper English. Sometimes this isn't the case. For example, the use of the term "you guys" seems to have proliferated into every aspect of human conversation. I believe that a jury panel and members of a sitting jury deserve to be referred to with a bit more exalted expression. I began to admonish attorneys at the beginning of a trial not to use that expression when conducting voir dire or arguing to the jury. Typically, though not always, my request falls on deaf ears. Several years ago an attorney actually told a jury in closing argument: "It is your GUYS'ES job to decide the facts in this case." Hopefully, an English teacher was not a member of that jury.

Some lawyers foolishly make an attempt at humor. During the course of a trial, something really funny usually does happen. Good lawyers take advantage of such an occasion and evoke a genuine laugh from the jury. Other lawyers, however, seem compelled to attempt to create their own humor. Such efforts usually fall flat. In my experience, jurors simply don't like jokes during trial, particularly during a serious closing argument. Some attempts at humor are fairly innocuous; others are clearly offensive to most jurors. For example, I have actually heard a lawyer tell a joke during closing argument that began, "There was a Mexican, and a …." No kidding.

Many people, including jurors, are sensitive to the fact that some witnesses lie and shade the truth during legal proceedings. Some lawyers personify this negative image without even realizing it. I believe using language to this effect can have a profoundly negative effect on your credibility. How many times have I heard a witness begin an answer with, "To be truthful…" or "In all honesty …" These are examples of incomplete preparation of the witness by the attorney. And attorneys can also inadvertently fall into this trap. For example,

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after asking three or four questions after assuring the court that he or she would ask only one question, the attorney then says, "Okay, I lied." Think about it: when your credibility as an advocate is all you have at trial, why on earth would you even remotely suggest that you have lied to the jury?

During closing argument, I have heard a lawyer make the following amazing statement to the jury, "If I am lying, take it out on me and not on my client." Is the lawyer admitting that he is lying, or saying that he is so confused about truth and falsity that he does not even know when he is lying? Neither scenario instills confidence in the jury. Another lawyer commented: "On damages, I will be very honest with you." The obviously implied suggestion is that this trained legal advocate has been less than honest when speaking to jurors during other parts of the case. These jurors are then left to wonder, "What did the lawyer say during the trial that was not honest?" These are not questions you want the jury to be pondering during your closing argument.

Some lawyers appear to actively perpetrate a perceived low public opinion of their own profession. Picture a lawyer writing figures on a board in front of the jury during a critical cross examination of a damage expert. The lawyer makes an insignificant mathematical error and then tells the jury, "I'm a lawyer. Don't trust my calculations." Why in the world would a member of a "learned" profession suggest that he is a mathematical idiot just because he is a lawyer?

How about the lawyer who asks during voir dire: "Do you put lawyers in the same category as used car salesmen?" With all due respect to car salesmen, by even asking the question the advocate has undermined his or her efficacy. Or consider the lawyer who admits to the jury, "During the trial I will probably ask questions that make no sense." Jurors appreciate humble and even self-effacing behavior under certain circumstances, but this does not mean that a lawyer should take the concept to the extreme and portray himself or herself as a moron, or worse, dishonest. Such an admission is an unnecessary slight to the legal profession in general and hardly enhances the reputation of the lawyer. Not only is it unnecessary; it can cause significant damage to the client.

Courtesies matter

I have observed that some lawyers antagonize a jury simply by failing to heed common courtesies in speech and manner. Lawyers who are obviously rude probably have no clue regarding the impact of their conduct. Lawyers who continually interrupt, make faces, badger witnesses and treat courtroom staff as "hired help" are not only rude—they do a significant disservice to themselves and to their clients.

Less obvious discourtesies can be equally significant, particularly over the course of a long trial. Good attorneys, when reading from a deposition or other document, will always be mindful of the court reporter. Ineffective attorneys, oblivious to the reporter, will read so fast as to necessitate a request by the reporter or the Court to slow down. These attorneys, incredibly, have to be reminded to slow down each and every time they read something. I do not believe that jurors see much humor in this.

Good attorneys always ensure that enlargements and other demonstrative evidence are positioned for effective viewing by all jurors. They show courtesy to opposing attorneys by making sure that their view is not blocked. Good lawyers make certain that jurors hear every word of testimony and audio evidence. Poor lawyers, on the other hand, seem oblivious to these basic courtesies.

Many times more than courtesy is involved. On a couple of occasions, jurors have announced during trial that they have been unable to hear or understand a witness' testimony - 10 or 15 minutes after the witness has taken the stand! How much valuable information has been lost to these jurors? I have observed jurors trying to stay awake while a lengthy but virtually inaudible tape recording is played. A few lawyers will ask the Court to have the lights dimmed during a visual screen or VCR projection. Most, however, do not. Most people would be annoyed if a movie theater failed to dim the house lights, so why should a courtroom be any different?

I once had a written request from a jury during trial to take a laser pointer away from a witness who had demonstrated an almost deliberate unawareness of others in the courtroom.

Some lawyers, I believe, fail to think through the effect on a jury of certain photographic blow ups and other demonstrative evidence. Two such examples stand out. One was a photograph of a rather obese plaintiff in a semi-nude state. I am not sure what it was supposed to actually depict, but the blow up remained in the jury's view for the duration of the trial. It was hardly a flattering portrayal of the plaintiff.

I will never forget the plaintiff who claimed he had sustained penile scarring. His attorney presented a blown-up portrayal of the plaintiff in full frontal nudity. No scar was apparent in the photograph, but I have little doubt that the exhibit scarred the jurors.

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Concluding thoughts

Lawyers are some of the most educated and powerful people in our society. They can accomplish an enormous amount of good for their clients, and help make the world a better place. But when these smart people do dumb things in court, they not only undermine their cases and hurt their clients, they pull down the entire legal profession with them. Next time you step into a courtroom, remember to act in way that reflects all that education and training, and don't give your trial judge more material when he or she tells fellow colleagues: "You'll never believe what happened in my courtroom today."

Hon. John S. Meyer is a judge of the Superior Court of San Diego County in California, department 64.

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* Go to ABTL.ORG/SANDIEGO - to view our 2023 calendar of events *(dates subject to change)*

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Winning Manners for Virtual Courtrooms: A Remote Appearance Etiquette Guide

By Katherine C. Fine (Duckor Metzger & Wynne) with collaboration from Hon. Allison H. Goddard, Hon. Carolyn M. Caietti, and Hon. Robert C. Longstreth

Created out of necessity during the COVID-19 pandemic, it seems that remote court appearances are here to stay. And while remote court appearances can offer great convenience, they also give rise to potential pitfalls that attorneys and their clients should make sure to avoid. I spoke with the Honorable Allison H. Goddard (Southern District of California), the Honorable Carolyn M. Caietti (San Diego Superior Court), and the Honorable Robert C. Longstreth (San Diego Superior Court) to gather their advice on how attorneys and clients appearing virtually are expected to act, along with behaviors to absolutely avoid.

All three judges agreed that the primary rule of a remote appearance is to behave and dress as if you were appearing in person. If you wouldn't do something in the courtroom, don't do it during a remote appearance. The judges had quite a few examples of things that they've seen during remote appearances that most lawyers would never dream of doing in the courtroom. Judge Caietti told of people chewing tobacco and eating dinner. Judge Longstreth has had people appear while driving. And while Judge Goddard is not bothered by the background noise of a small child or pet, she cautions that not all judges will be as understanding.

In the same vein, if you wouldn't wear something to the courtroom, don't wear it for a remote appearance. Judge Goddard stressed that there is no excuse for attorneys not to be dressed professionally during a remote appearance – men should be wearing a button up shirt with a tie and suit jacket; women should be in a blouse or dress with a suit jacket or blazer.

Behaving and dressing properly is not about a judge's ego. It's about respecting the judicial system.

All three judges also spoke about the importance of the location of someone making a remote appearance. Remote appearances should be made in front of appropriate backgrounds, in a space that is free from noise and distractions. If an attorney is appearing in trial, or if a witness is testifying remotely, a completely neutral background is best. Really, this just requires spending some time using common sense. Don't make a remote appearance from bed. Don't make a remote appearance from your Uber. Don't make an appearance from your garage office if there's going to be a trash truck picking up garbage in the background. (Each of these has been seen by at least one judge with which I spoke.) And it's not just attorneys who need to follow these guidelines.

If your client is going to appear remotely, it is critical to have a preparation session before the appearance. It is always beneficial to have a practice run with your client. This gives the attorney an opportunity to evaluate the client's selected location and choice of clothing. Judge Longstreth emphasized that when a witness is appearing, it is very important that the person's camera be on – he wants to know if the witness is looking at documents or if someone is whispering in his or her ear.

The same goes for experts. They should appear in front of a neutral background, without diplomas, certificates, and awards behind them that could affect the weight a jury might give to the expert's testimony.

As a final takeaway, some judges are more comfortable with remote appearances than others. The three judges that I had the pleasure to speak with are all very comfortable with remote appearances and appreciate that the technology gives the public greater access to the justice system. However, other judges may be less comfortable with the technology and have rules as to which appearances can be made remotely and which require an in-court appearance. Judge Caietti also stressed the importance of knowing your judge: check the department's guidelines or rules before deciding whether or not to appear virtually. For example, Judge Longstreth has guidelines regarding remote bench trials in his department that are available through the Court's website, and he expects attorneys and self-represented litigants to familiarize themselves with those guidelines and follow them. If the rules aren't clear, call the judge's clerk. The clerks know what their judges prefer and can help you decide when to appear remotely and when to make the drive to the courthouse.

Katherine C. Fine is an associate at Duckor Metzger & Wynne. She advises and represents corporations, trusts, organizations, and individuals in civil litigation, including employment, commercial, and business related matters.

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We congratulate Justice Aaron on her retirement after three decades of distinguished service to the courts.

Her impressive career includes 20 years as an associate justice in California's Fourth District Court of Appeal and eight years as a magistrate judge in the U.S. District Court for the Southern District of California. Prior to the bench, she was a successful trial lawyer and co-founded her own law firm.

Justice Aaron has served on the board of various organizations as an active member of the legal community. Recognized for her commitment to equity, justice, and excellence in the application of law, she was honored with the AJC Judge Learned Hand Award.

Based in San Diego, she is available for mediation, mock appellate arguments, neutral evaluations, and appellate consultations nationwide.

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Humble Roots to Historic Heights:
A Conversation with Chief Justice Patricia Guerrero

By Erin Lupfer

The U.S. Grant has hosted many trailblazing women in the legal profession, sometimes more willingly than others.

In 1971, Lawyers Club founders Hon. Lynn Schenk and Justice Judith McConnell, along with Elaine Alexander, arrived at the Grant Grill to demand a seat at the (lunch) table in defiance of the brass sign declaring "Men Only Until 3:00 P.M." They kept up this "invasion" until the Grant Grill relented and rescinded its exclusionary policy.

In 2023, the U.S. Grant welcomed Chief Justice Patricia Guerrero, the first Latina member and Chief Justice of the California Supreme Court, for ABTL's February dinner program. Justice Martin Buchanan of the Fourth District Court of Appeal, Division One, moderated a conversation that gave the audience a chance to learn about Chief Justice Guerrero's path from the Imperial Valley to California's highest court.

Growing up in Imperial Valley—"a source of strength and pride." Chief Justice Guerrero was born in Imperial Valley to immigrant parents from Mexico. Her parents instilled in her the importance of hard work. Neither had had the opportunity to go to college. Indeed, her father got pulled out of school in fifth grade to work full time. Consistent with this strong work ethic, Chief Justice Guerrero got her first job at age 16, working at a local grocery store. She juggled work with almost every possible high school sport and activity. As a result, Chief Justice Guerrero learned time management and multitasking early on.

After her eighth grade principal told her to think about going to a good school like Berkeley or Stanford, Chief Justice Guerrero did just that. Without telling her parents, Chief Justice Guerrero applied and got into Berkeley. There, she majored in Legal Studies because she "wanted to be something important," and a high school coach had told the future jurist that she would make a good attorney. After graduating from Berkeley she continued on the path to becoming an attorney by attending Stanford Law School.

Chief Justice Guerrero's legal career. Chief Justice Guerrero started her legal career in private practice at Latham & Watkins. While she does not miss billing her time in 6-minute increments, Chief Justice Guerrero enjoyed the opportunity to do sophisticated work and serve the community through pro bono work. She got a taste for trials, which prompted Chief Justice Guerrero to join the United States Attorney's Office to get more trial experience. Although Chief Justice Guerrero enjoyed being an advocate, she had always secretly wanted to be a judge. She liked looking at both sides of a problem and wanted to be a role model for her young children.

In June 2013, Chief Justice Guerrero joined the San Diego Superior Court, where she spent time in the Family Law Division, including as Supervising Judge. She described it as a "wonderful experience" with great mentors where she got to help people at a difficult time in their lives. From there, she moved up to the Fourth District Court of Appeal, Division One.

Joining the California Supreme Court—"The First." Just shy of a decade after first taking the bench, Chief Justice Guerrero was tapped to lead the California court system as the 29th Chief Justice. This new role came less than a year after becoming the first Latina member of the California Supreme Court. Chief Justice Guerrero is proud to be "the first," recognizing the historical significance of her appointment—and the added pressure that comes with it.

While her elevation to Chief Justice happened quickly, she observed that "you don't get to pick when you are called to serve." In some ways, Chief Justice Guerrero has been preparing for this role her whole life, and will use those experiences to help guide her. She also expressed that this job is a team effort and one of the best things about her job is that she is surrounded by wonderful staff and attorneys.

In her position, Chief Justice Guerrero seeks to provide clear and timely guidance to the California courts. She also seeks to improve the way the California judicial system serves the general public. As part of that effort, Chief Justice Guerrero has a project underway to gather data about cases petitioning for review in order to understand how those petitions are being handled.

Sources of inspiration—"My heroes have always been cowboys." Many people have inspired Chief Justice Guerrero throughout her life. Her teachers encouraged her to go to college and consider a legal career. Chief Justice Guerrero credits her colleagues, from her partners in private practice to the other Justices on the California Supreme Court, as other sources of inspiration. Chief Justice Guerrero frequently mentioned Justice McConnell as someone who continually supported, sponsored, and inspired her.

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It all started, however, closer to home. Referencing a Willie Nelson song, Chief Justice Guerrero shared that "my heroes have always been cowboys"—specifically, her father and grandfather. Chief Justice Guerrero's grandfather convinced her father to move to the United States for more opportunities. At age nineteen, her father came to Imperial Valley and paved the way for the future Chief Justice of the California Supreme Court.

Finally, Chief Justice Guerrero's mother taught her that there were no limits. Although her mother did not live to see Chief Justice Guerrero join California's highest court, the top jurist credits her mother's lessons with giving her the confidence to grow and pursue her dreams.

Erin Lupfer is a litigation associate at Morrison Foerster LLP and a member of ABTL's Leadership Development Committee.

(Above left to right): Among the approximate 200 attendees who joined ABTL at the US Grant Historic Hotel to network and see Chief Justice Guerrero were ABTL Sponsor, Charles Dick, and ABTL Board of Governor members, Hon. Timothy Taylor and Valentine Hoy.

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ABTL's Work On Civility And Professionalism Has Led to Three Proposals From the California State Bar

By Alan M. Mansfield

As many of our members may know, following the lead of efforts for many years in our legal community, a State Bar Task Force on Professionalism and Civility was created. This Task Force included several ABTL members nominated by our Board, including The Hon. Katherine Bacal, ABTL Past President Michelle Burton and the author. This Task Force was chaired by Justice Brian Currey of the Second District Court of Appeal and was co-chaired, among others, by ABTL member Heather Rosing, the most recent recipient of the Federal Bar Association's David H. Bartick Award for Civility and Professionalism.

After over a year of work the Task Force issued their final Report in September 2021. On February 17, 2022, the Task Force presented the Report to the State Bar Board of Trustees, which directed State Bar staff to recommend a workplan for the evaluation of three key proposals: (1) Revising California Rule of Court 9.7 to ensure all lawyers take the civility portion of the attorney oath; (2) Requiring lawyers to participate in mandatory continuing legal education (MCLE) relating to civility in legal practice and the connection between bias and incivility; and (3) Making repeated incivility a disciplinary offense.

These efforts finally reached fruition. Based on comments from many local Bar associations, including the ABTL, on November 18, 2022, the State Bar Board of Trustees approved for public comment three recommendations from State Bar staff. Public comments on these proposals are due by March 1, 2023. Four of the ABTL presidents submitted a joint letter endorsing all these proposals on January 27, 2023.

The following is the summary of the State Bar staff recommendations:

California Rule of Court 9.7 and Rules of Professional Conduct:

> Proposed amendments to California Rule of Court 9.7 that would require all licensees who did not take the attorney oath with the civility language (most pre-2015 admittees), as well as specially admitted attorneys (e.g., registered in-house counsel, foreign legal consultants, military spouse attorneys, etc.), to submit a one-time declaration with the civility pledge language by February 1, 2024. Additionally, all licensees and specially admitted attorneys would be required to complete the civility pledge on an annual basis when paying licensing fees or registering as a specially admitted attorney.

> Recommending amendments to Rules of Professional Conduct Rule 1.2 Comment [1] and Rule 8.4 Comment [6]. The staff has also drafted a new standalone rule, proposed Rule 8.4.2 defining "Prohibited Incivility", and clarifying that a lawyer may be disciplined for incivility and providing a new basis in the rules that would make repeated incivility a disciplinary offense. These proposals are intended to strengthen the duty of civility by proposing a new standalone rule as well as amending comments to existing rules.

MCLE Civility Course Requirements:

> That the MCLE rules be amended require that all licensees complete one hour of civility in the legal profession as part of their existing 25-hour MCLE requirement, including a consideration of the connections between bias and incivility. The proposed change would not increase the total hours required under the current MCLE rules

For more information on the specifics of these proposals and to review these proposals, we encourage our members to sign up with the State Bar through the Public Comment section at https://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment.

A special thanks goes out to Judge Bacal and ABTL Past Presidents Michelle Burton and Randy Grossman, as well as David Majchrzak, all of whom worked on the genesis of these proposals for years through ABTL and the San Diego County Bar Association. They have been some of the early voices and driving forces to have an open discussion on the lack of civility and professionalism in our profession, which has ultimately led to the consideration of these concrete proposals by the State Bar. Their work will soon lead to meaningful changes that will continue to improve on ABTL's mission of encouraging dialogue, civility and professionalism between members of our Bench and Bar.

Alan Mansfield is of counsel at Whatley Kallas Litigation & Healthcare Group. and ABTL Past President, 2020.

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A Day in the Life…. What is it REALLY like to be a judge?

By Hon. Katharine Bacal

A number of programs are focused on how to become a judge, but how many tell you what a judge actually does, day in and day out? I'm going to try to do that, focusing only on the civil division of the San Diego Superior Court.

The California Code of Judicial Ethics requires that "judicial duties" take precedence over all other judicial activities. Code of Jud. Ethics, Canon 3(A). This means I had to make sure all my legal work was done before writing this article. Of course, it is not really possible to be "done" with all your work when you have over a thousand cases assigned to you (as with our civil independent calendar judges). The work is non-stop. So, what is that work? It's not limited to trials and motions. Every day when we come in, we are faced with inboxes containing, among other things, stipulations, pro hac vice requests, petitions to approve the compromise of minor's claims, proposed default judgments, fee waivers, peremptory challenges, and requests for/objections to statements of decision. (The supervising department gets some other things, too.) We (not our clerks) have to decide all of these.

Defaults judgements sound easy, don't they? A complaint is filed, served and there's no answer: judgement for plaintiff, right? Not so fast. While our clerks are great and will tag helpful information, it is the judge's name that goes on the document. Indeed, cases have been published just to "remind trial courts that however burdened they be, they must vigilantly attend to their duty in connection with the default process…." *Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1000. The court of appeal was not "reminding" a clerk. The judge has to look at, at the very least, the complaint, the proof(s) of service and the requested default judgement. Service has to be good and the judgment cannot exceed the amount sought in the complaint. Even the California Supreme Court weighed in recently on whether a default judgment was properly entered (it was not). *Sass v. Cohen* (2010) Cal.5th 861.

Similarly, a peremptory challenge (under § 170.6) sounds like it should be an easy matter – the San Diego Superior Court actually has a form that a party/attorney can use (ADM-381). Sign the form and the judge has one less case (and his/her colleague has one more). Not so easy. Judges are required to hear and decide all matters assigned to them unless they are disqualified. Code of Jud. Ethics, Canon 3(B)(1). Unless the judge finds that he/she is disqualified (and not just because an attorney/party would like a different judge), the judge is required to keep the case. Section 170.6 has a timing requirement, requires a statement to be under oath and allows only one challenge for each side. If the judge does not make sure that all these requirements are met, she might be in violation of her judicial duties.

We receive many stipulations in our in-boxes. But just because the parties agree to something does not mean it is appropriate for a judge to sign an order. For example, the Rules of Court say a court is permitted to grant a continuance of trial "only on an affirmative showing of good cause requiring the continuance." CRC, Rule 3.1332. That the parties have stipulated to the continuance is only one of the factors the Court is supposed to consider. Similarly, just because the parties have stipulated to a confidentiality agreement does not mean their proposed order is appropriate. Every other document in our inbox requires a similar review.

In the courtroom, as you know, we handle trials, motions, ex partes, case management conferences, trial readiness conferences, informal discovery conferences (we like conferences – you get the idea). Each of these also has its own paperwork that has to be read and considered before the hearing can be conducted. During the hearings (and at all times), the judge must be "patient, dignified and courteous." Code of Jud. Ethics, Canon 3(B)(4). Sounds easy enough, doesn't it?

Picture this. The judge is in the middle of a jury trial. The jurors are scheduled to come in at 9:00. The ex parte calendar has four matters on it: (1) a request for a temporary restraining order, with numerous supporting declarations; (2) a request for an earlier hearing date for a motion for summary judgement, so that it can be heard 30 days before trial (but there are already 3 or more MSJs on your calendar every week for the next five months); (3) a discovery dispute; and (4) a request for a trial continuance. The papers were all efiled the day before, maybe with courtesy copies. (Local Rule 2.1.4 requires courtesy copies of all ex parte papers but we don't always get them.) The party opposing the TRO walks in with a 20 page opposition, with their own declarations. And the first words out of counsel's mouths on the discovery dispute are, "she's lying!" followed by the response, "no, he is!" Oh, and then counsel on the trial say, "there's something we need to take up before the jurors come in." You say to yourself, "remember, patient, dignified and courteous…."

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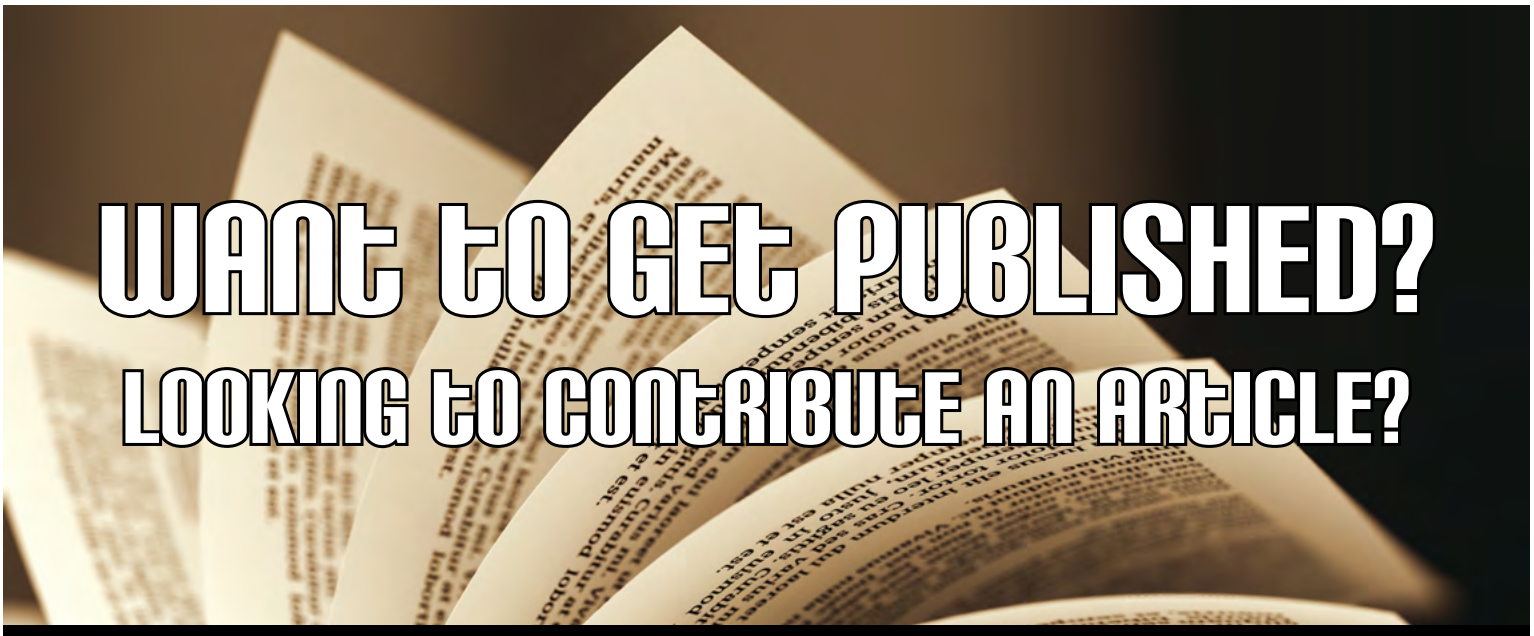
In addition to the cases assigned to our own departments, the IC judges also get asked to help out with other departments. In addition to the 17 independent calendar departments (13 downtown and 4 in Vista), we have a collections department, a dedicated unlawful detainer department for limited jurisdiction UDs, civil harassment departments, and small claims. If one of the specialty departments can't handle a scheduled matter because of a lengthy time estimate or a demand for a jury trial, an IC department may be asked to take it. The IC departments also hear small claims appeals. In the same week, an IC department can hear both complex, cutting-edge cases and a request from a tenant for the return of a security deposit. Of course, to the parties involved they seem equally important.

So how has Covid affected any of this? Having people appear by video or phone is the new norm. Frankly, I'm a fan of virtual appearances as this increases the access to justice and access to the courthouse. **But.** Allowing someone to appear remotely assumes that they -- and you -- can hear and be understood. It is very frustrating to have people who have not learned to use their mute button, and who continue to talk, type and or let their dogs bark when another hearing is trying to go forward. People should (but don't always) test their microphones and cameras before using them for court. And it seems as though some are more "relaxed" when they appear remotely than they would have been if they appeared in person. Do I have to say that it's not appropriate to appear in court in bed, in pajamas or bathing suits, while eating breakfast, or that you should get dressed before you turn the camera on? Apparently, yes, as each of these has happened.

Want to learn more about what we do? Come watch. As you know, the courtrooms are public, and our doors are usually open. Most of us also allow the public to view proceedings through our remote links. Just please remember to mute your microphone!

Judge Katherine Bacal is the presiding judge in Department 69 of the San Diego Superior Court.



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