Civility, Setting the Tone for Respect!

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What is Civility?

Civility is an attitude that lawyers will treat everyone (opponents, witnesses and judges) with dignity and respect. Respect is the foundation of civility as it is to good sportsmanship, good manners, and the Golden Rule. We as trial lawyers are expected to fight the good fight, but we must always remember that our individual and collective reputations and the viability of the legal system are more important than any disputed issue or case. We seem to have forgotten this, and that is why our reputation has fallen to such depths.

Lawyers have always been subject to scorn because we take sides in hotly contested public disputes. Even William Shakespeare acknowledged that we understood civility in his day when he wrote the following passage in The Taming of the Shrew: "And do as adversaries do in law – strive mightily but eat and drink as friends."

We must not lose our way as a profession. Without respect there can be no civility, and without civility there can be no respect for lawyers or the legal system. We are not just another "business" – we are a noble profession.

Incivility manifests itself in many forms, including bad behavior during discovery, distasteful advertising and rudeness to judicial officers. Our reputation as a profession has fallen so far, so fast as reflected in best-selling novels, popular TV shows and movies, because of a lack of civility.

The good news is that we can do something about it, and it starts with each of us. We must learn what incivility is, how it manifests itself, how to combat it, and then try to do something every day to change the tone. Good behavior based on respect has the power to influence the behavior of others; it is an infectious attitude. You will find that the practice of law is easier, less stressful, less costly and more profitable when you make civility a habit.

1. The California Civility Guidelines

Incivility usually arises in the context of pretrial discovery where there is less judicial supervision. Following is an outline of where you will expect to see it with citations (where applicable) to the California Attorney Guidelines of Civility and Professionalism issued by the State Bar of California on July 20, 2007.

In its Introduction, the State Bar made it clear that its guidelines are "voluntary" and not to be used as an independent basis for disciplinary charges by the State Bar or for claims of professional negligence. The goal is to transform these "guidelines" into enforceable rules of court.

A. Depositions

- Scheduling depositions without prior contact for convenient times and locations. [Sections 6(a), 6(b), 9(a)(1)]
- Cancelling depositions at the last moment. [Section 6(d)]

- Showing up late for depositions. [Sections 5(a), 5(b), 9(a)(2)]
- The use of foul and hostile language. [Sections 4(f), 9(a)(3), 9(a)(4)]
- Rude-toned questioning techniques, intimidation and badgering
- Obstructionism: speaking objections [Section 9(a)(8)], inappropriate instructions to witnesses [Section 9(a)(7)], witness coaching [Section 9(a)(6)], attempts to manufacture inconsistencies with broad, repetitive, tiresome questioning.

B. Interrogatories

- Lengthy or frequent sets of interrogatories used as a weapon. Ask only what you need. [Section 9(c)(1)]
- Hiding the ball. Be responsive when you are answering [Section 9(c)(2)]. Object only in good faith and answer what is not objectionable [Section 9(c)(3)].
- Refusing extensions of time. Reasonable requests for extensions of time not adverse to your client's interests should be granted [Section 6].

C. Document Requests

- Lengthy request used as a weapon. Ask only for what you need [Section 9(b)(1)]. You should avoid trying to use a request to create an "inordinate burden or expense" [Secction 9(b)(2)].
- Hiding the ball. When you receive a document request, do not purposely try to avoid disclosure or withhold documents on the basis of privilege [Section 9(b)(4)]. It also is inappropriate to take a "needle in a haystack" approach of providing documents in a disorganized fashion or in an unintelligible form to hide them [Section 9(b)(5)]. Likewise, delaying the production of documents until the last moment hoping an opponent will not inspect them or use them is improper [Section 9(b)(6)].

D. Scheduling Continuances and Extensions of Time

- Section 6(a) provides: Unless time is of the essence, an attorney should agree to an extension without requiring motions or other formalities *regardless of whether the requesting counsel previously refused to grant an extension*. This is an acknowledgement that it is up to you to end the downward spiral of incivility. You should not bear grudges nor seek sweet revenge. Again, this is an opportunity to apply the Golden Rule to reset the tone.

E. Conducting litigation in bad faith: accusations, name-calling, claims that are baseless

F. The use of threats: threatening no settlement unless certain conditions are met, threatening the reputation of an opponent (e.g. threatening to or reporting someone to the State Bar without a valid reason) and threatening adverse publicity

If you do not practice in California, check your state and local rules for the applicable civility rules.

2. The ABOTA Civility Principles

ABOTA has been the leader in promulgating civility and professionalism standards. In the early 1990s it published *Principles of Civility, Integrity and Professionalism* and a

one-page *Code of Professionalism*. These early standards are echoed in California's civility guidelines and those issued by other states and courts.

The ABOTA Code of Professionalism contains ten general rules to follow. The last two rules justify an early telephone call to your adversary before the case starts.

Rule 9: Be respectful in my conduct toward my adversaries

Rule 10: Honor the spirit and intent, as well as the requirements of applicable rules or codes of professional conduct, and…encourage others to do the same.

The entire Code can be found online at www.ABOTA.org.

ABOTA's Principles of Civility, Integrity and Professionalism supplement the Code of Professionalism and are more specific. For example:

A. Depositions

- Principle 19: Never take depositions for the purpose of harassment or to burden an opponent with increased litigation expenses.
- Principle 20: During a deposition, never engage in conduct which would not be appropriate in the presence of a judge.
- Principle 21: During a deposition, never obstruct the interrogator or object to questions unless reasonably necessary to preserve an objection or privilege for resolution by the court.
- Principle 22: During depositions, ask only those questions reasonably necessary for the prosecution or defense of an action.

B. Interrogatories/Document Requests

- Principle 23: Draft document production requests and interrogatories limited to those reasonably necessary for the prosecution or defense of an action, and never design them to place an undue burden or expense on a party.
- Principle 24: Make reasonable responses to document requests and interrogatories and do not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-privileged documents.
- Principle 25: Never produce documents in a manner designed to obscure their source, create confusion or hide the existence of particular documents.

C. Scheduling, Continuances and Extensions of Time

- Principle 10: Never use any form of discovery scheduling as a means of harassment.
- Principle 13: Never request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.
- Principle 14: Consult other counsel on scheduling matters in a good faith effort to avoid conflicts.
- Principle 15: When calendar conflicts occur, accommodate counsel by rescheduling dates for hearings, depositions, meetings and other events.
- Principle 16: When hearings, depositions, meetings or other events are to be canceled or postponed, notify as early as possible other counsel, the court, or other persons as appropriate, so as to avoid unnecessary inconvenience, wasted time and expense, and to enable the court to use previously reserved time for other matters.
- Principle 17: Agree to reasonable requests for extension of time and waiver of procedural formalities

when doing so will not adversely affect my client's legitimate rights.

D. Conducting Litigation in Bad Faith: Accusations, name-calling, claims that are baseless

- Principle 1: Advance the legitimate interests of clients without reflecting any ill will they may have for their adversaries, even if called on to do so, and treat all other counsel, parties and witnesses in a courteous manner.
- Principle 2: Never encourage or knowingly authorize a person under your direction or supervision to engage in conduct proscribed by these principles.
- Principle 3: Never without good cause, attribute to other counsel bad motives or improprieties
- Principle 26: Base discovery objections on a good faith belief in their merit, and not for the purpose of withholding or delaying the disclosure of relevant and non-privileged information.
- Principle 28: During argument, never attribute to other counsel a position or claim not taken, or seek to create such an unjustified inference.

E. The use of threats

- Principle 4: Never seek court sanctions unless they are fully justified by the circumstances and necessary to protect a client's legitimate interests and then only after a good faith effort to informally resolve the issue with counsel.

Once again, the ABOTA Principles of Civility, Integrity and Professionalism can be found on page __.

Why is the Profession Less Civil Today?

1. Society Has Changed

People are less civil to one another and courtesy, good manners and chivalry are disappearing. The Golden Rule is not valued as much as it was in the past. You see it on the roads, in the supermarket and at the courthouse. The focus now is on immediate results and winning at all costs. Technology has increased the pace of life, and fax machines, email and texting help keep the focus on immediacy. We have forgotten the need to pause, take a deep breath and reflect before reacting.

As noted above, lawyers' reputations have declined as reflected by lawyer jokes, books and movies. Television shows on CNN and Fox News, the McLaughlin Group and Judge Judy put a premium on rude behavior and constant interruption, which send the message that it is acceptable not to respect the views of others.

Incivility and bad manners are everywhere. We see it in sports with recent outbursts by tennis star Roger Federer and Serena Williams at the U.S. Open. We see it in the rude behavior of rapper Kanye West at the MTV Video Music Awards that resulted in President Obama calling him a "jackass." We also see it in the political arena at the highest levels. South Carolina Congressman Joe Wilson felt it appropriate to call President Obama a liar to his face during a joint session of Congress, which was nationally televised in prime time.

2. Lawyers' Attitudes About Law As A Profession Have Changed

The first rule in ABOTA's Code of Professionalism is:

"Always remember that the practice of law is first and foremost a profession."

Unfortunately, many of us have forgotten this principle, but it is not surprising that more and more lawyers view their calling as a "business." Law firms pressure their lawyers to increase billable hours even though it is well known that the best time to resolve a dispute is at the beginning and not at the end. There is intense competition for clients who are shopping for legal services. Declining client loyalty is a reality.

Distasteful advertising is another form of incivility. Lawyers market themselves as attack dogs, fighters, Supermen and gladiators where winning and big results are promoted and valued. This is becoming more prevalent on internet websites, the Yellow Pages, TV and billboards. A prevailing attitude is that litigation is war and that trial practice should be described in military terms. Winning at all costs is the goal which can justify Rambo and "scorched earth" tactics to make life miserable for your opponent. Discovery is to be used for purposes of intimidation rather than for fact-finding. In fact, clients select lawyers for this aggressive "take no prisoners" attitude.

Threats are used to achieve the desired goals. The John McEnroe Syndrome is popular with some lawyers who think it is productive and actually enjoyable. There is a declining importance of the concept that "my word is my bond" because of a belief that "it is the result that counts."

There is a declining appreciation for one's reputation as opposed to how much money you can make, how many clients you have and how many cases you have won. In fact, many lawyers have realized that you do not need a good reputation in the legal community to get cases if you have a good marketing strategy and spend a lot of money on a fancy website. Who cares about being recognized by your peers and being a member of organizations like ABOTA, IATL, ISOB and the American College of Trial Lawyers when you are dealing on the Internet with potential clients who do not know the difference and do not care?

So, when you add this all up, does it sound like we are becoming just another business? It certainly does.

3. The Legal Community Has Changed

There are more lawyers, so there is less incentive to maintain cordial relationships because lawyers may never meet again. The legal community is no longer insular; it is more diverse and globalized. This inevitably leads to loss of collegiality. There seems to be an inverse relationship between the size of the community and civility.

The disappearing jury trial is another big change. Many lawyers have never tried a case, let alone a jury trial, and many never will. Jury trials teach you important lessons. If you are uncivil at trial, the jury will hold it against you and you will learn a very expensive lesson.

Mushrooming discovery also is a perfect medium for the growth of incivility as outlined above. Discovery abuse can lead to sanctions and bad will.

Mentoring of young lawyers no longer exists. There is little time for it in the big firms and many senior lawyers have little experience.

Judges do not always appreciation that they are in a position to set the tone for

civility. In fact, Code of Judicial Conduct, Canon (3)A(3) "requires" judges to be patient, dignified and courteous. ABOTA's *Principles of Civility, Integrity and Professionalism* also apply to judicial conduct.

Why Should We Embrace Civility?

1. Incivility Hurts Your Client

Incivility results in increased costs and fees. It leads to law and motion, sanctions, unnecessary expensive discovery and the need to pay expensive expert witnesses. It delays resolution of a dispute. No one wants to discuss settlement or attend a mediation when engaged in an uncivil emotional battle.

Incivility is less effective. Offending a witness at a deposition causes the witness to be guarded and defensive, but a friendly, skilled approach will usually obtain all the facts you need to develop and to win your case.

2. Incivility Hurts You

It destroys your reputation. No one wants to refer cases to someone who is unprofessional and who wastes a client's time and money. The most respected lawyers get the business.

It makes your life miserable. Unnecessary fighting generates stress and can make the practice of law intolerable. It can adversely affect your health and relationships. Collegiality is rewarding and healthy.

3. Incivility Hurts the Legal Profession and the Justice System

Incivility results in a lowered image of lawyers. No one likes this except the comedians. Incivility interferes with a lawyer's role of helping the client obtain justice. Any lawyer who has selected a jury recently can tell you about juror attitudes and how they affect the system.

How Do We Solve the Problem of Incivility?

1. The Short-Term Solutions

There is an old saying that "anyone can steer a ship on a calm sea." The true test of your civility is how you act under pressure. There is constant pressure to perform to win and to please your client and your partners. There are some techniques which will help you minimize incivility on both sides of a case.

Start every case with a telephone call to your opponent to introduce yourself and discuss how you would prefer to handle issues like discovery disputes, deposition notices, extensions of time and vacation scheduling. This will set an early tone of mutual respect and make your life easier. Instead of risking a downward spiral of incivility, you can hope to create an upward spiral of cooperation.

When you encounter uncivil behavior, say something about it. Do not take the bait and make it worse. Resist the temptation to fire back a nasty email response or leave an angry phone message. Instead, diffuse the situation. There are many ways to do this, but one good way is to invite your opponent to have a cup of coffee or lunch so you can discuss your differences in person. A personal relationship will help overcome incivility. You have the power to take the high road. Remember – civility starts with you.

Encourage voluntary disclosure during discovery whenever possible including identifying persons with knowledge, the mutual exchange of documents, arranging document reviews of voluminous records so an opponent can mark what he needs, and

arranging informal interviews of parties in the presence of counsel where appropriate or necessary. Thinking "outside the box" may help you resolve your case sooner and more profitably for your client.

Stand up to bullies. Videotape depositions with uncivil opponents. Disclose uncivil behavior to a judge who has the inherent power in most courts to control it (See Federal Rules of Civil Procedure, Rules 30 and 37).

2. The Long-Term Solutions

We have to educate lawyers and law students about the advantages of civility. They need to learn to appreciate what John F. Kennedy said years ago: "Civility is not a sign of weakness." ABOTA is at the forefront of these efforts with its Civility Matters programs in law schools, local bar associations and law firms. The various Inns of Court have mentoring programs that also address civility and professionalism, too. Some law firms still have active mentoring programs. What we need is for more states to have a standing program for mentoring young lawyers in civility.

ABOTA also is leading the way with efforts to change the attorneys' oath in all fifty states. As of 2015, sixteen states have changed their attorney oaths to include civility or analogous terms. California was the latest to do this in 2014. It was due to the direct efforts of Cal-ABOTA, a regional group of ABOTA members.

Utah has been at the forefront of this effort and serves as an example for everyone. In 2008, its Supreme Court approved a mandatory program to help lawyers during their first year of practice in professionalism, ethics and civility. Below is an excerpt from Utah's attorney oath:

> I do solemnly swear that I will support, obey and defend the Constitution of the United States and the Constitution of Utah; that I will discharge the duties of attorney and counselor at law as an officer of the courts of this State with honesty, *professionalism and civility;* and that I will observe the Rules of Professional Conduct and the Standards of Professionalism and Civility promulgated by the Supreme Court of the State of Utah.

All the states should take the lead of the sixteen states that have added professionalism and civility to their attorney oaths and adopted civility standards. Civility standards should be mandatory and not merely voluntary guidelines.

Incivility will not end until we demand that officers of the court treat others with respect.