

Tools to Promote Civility

Setting The Courtroom Tone/Ground Rules for Promoting Civility

We have shared goals: timely, efficient, fair and just resolution of cases.

Be punctual.

Be courteous, not just to the bench officer, but to court staff. Especially to court staff. Good judges are good listeners and strong observers. Like umpires/referees – not the corrupt ones – we pay attention to how people behave and act in the courtroom. We see your body language, your facial expressions and we hear how you speak to each other, your clients and the court.

Case Management

Strong case management can help keep a case moving on track and reduce disputes and conflict.

Case management should include:

Discovery plans;

Pretrial orders, especially those focused on discovery;

Settlement tools: DSO, VSCs and MSCs may help to resolve cases, identify and narrow issues so that cases will move forward;

Meet & Confer Obligations

This is an obligation, not an invitation; think of this as our subpoena to you and your opposing counsel that you have to meet meaningfully with one another. We notice when a cursory exchange of emails takes the place of actually talking to someone face to face or on the phone.

- *Discovery plans/schedules:* Meaningfully discussing a discovery plan or schedule with your opposing counsel will facilitate more cordiality and civil discourse. Having a schedule for when remaining depositions are to be taken – and identifying the necessary parties to those depositions – and when document production/interrogatory responses are due and crafting that schedule with your opposing counsel is one way to keep even the most challenging of cases civil and in check. Have a schedule, but be flexible. As judges, we don't like to continue hearings/trials/matters. Still, things come up: (1) You're working to resolve an issue and having

a bit more time to do so would help with that. We're happy to accommodate when it's clear that you're working together and doing so civilly; (2) Someone – lawyer or client/party – is sick/has an emergency and the schedule has gotten off track – we are all human and things come up...if that means that the schedule gets delayed, or a hearing is put off so that someone can recover, expect that we are mindful of these requests and unreasonable delays in responding to such requests, or unreasonably withholding consent to such a request does not promote civility; (3) on the flip side of that, cases do need to proceed and we want to know what's been going on since the last time the case appeared on calendar so be prepared to discuss what kind of efforts have been made to ensure that the hearing/trial is going to be heard or that the case is going to be settled.

- *Discovery disputes:* There is very little mystery about the discovery process in California courts. It does not require a Bill Belichick hidden camera on the Jets' practice facility, or a Houston Astros' sign stealing campaign to know what your or opposing counsel's next move is. Discovery is not a game of sandbagging. There is to be no sign stealing. It is intended to facilitate an exchange of relevant information and to avoid surprise at trial or hearings. Many discovery disputes – motions to compel, evidentiary sanctions, terminating sanctions, etc. – come with requests for attorney's fees. As judges, we are guided by what is reasonable. Incivility is, by and large, unreasonable. And, your fee awards will be so reflected.

- *Informal Discovery Conferences:* As judges, on our own motion, and especially in cases where we are presented with motions/RFOs that are rife with emails and/or conduct that is uncivil, we may require you to conduct informal discovery conferences with us before a discovery motion may be filed. (Code Civ. Proc., § 2016.080.) Something with which we as judges can leave lawyers before concluding our informal discovery conferences is a plan for outstanding discovery and a schedule for when that discovery is to be completed. This, of course, comes with the expectation that once you leave our chambers/call/Zoom, you will work together meaningfully to get this to the finish line. When, after these conferences take place, we see you next on calendar (hopefully not for a discovery motion) for a trial setting or other hearing, be prepared to tell us what the status is of the outstanding issues.

Modeling Civil Behavior

As judges, we set the tone, the ground rules for how the courtroom operates. We're the umpires/referees. We model good behavior by treating lawyers, witnesses, litigants, court staff, and others with respect. We are, of course, 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." We also do such modeling because we're calling balls & strikes (and balks and the close call at the plate), holding, pass interference (I can go on with these analogies, but I like baseball and football). We don't want a bench clearing brawl and will not tolerate the constant fighting; so, we work to set a tone in our courtroom that informs lawyers that we treat you with respect and we expect that you will treat each other, the court staff and clients/litigants with that same respect. Repeating this expectation, especially when it appears that someone needs to take a 10-minute walk, can help to diffuse unnecessary hostility and incivility.

Tools To Promote Civility

Sanctions, which are discussed later, are an option. Contempt proceedings are also an option. But, they're really a last resort. They're available, just like red cards, flagrant 2s, ejections and targeting penalties...and that's what your case becomes about. Before you get there, before we get there, before we take a sledgehammer to your nail, here are a few other tools we can use to promote civility:

- Introduce yourselves to each other and the court, especially if it's the first time you've appeared before us. This is like setting up the net in volleyball, or the goals in soccer (assuming they're not on the field and ready). It needs to be done and it's a way to start the case off in a collaborative and positive manner.
- Blow the whistle on incivility: This isn't like Associate Justice Stewart's "I know it when I see it" reference to pornographic/elicited materials. If you see that your opposing counsel or your co-counsel is acting uncivilly – think interrupting, talking over each other, rolling of eyes, etc. – say something. We as judges see when you do; and we see when we need to blow the whistle and call a timeout for everyone. Almost like a commercial break in sports games.
- The handsaw/sandpaper: When you cut a piece of wood and it's uneven at the edges, it leaves fragments that lead to splinters. You can smooth and even out the poorly cut wood with sandpaper. When someone is being rude/nasty/demeaning in court, it's like that handsaw. Fight the rudeness with kindness and, sometimes, humor. Asserting control by

being uncivil will not win the day; responding to such behavior by not matching it – we don't want two uneven handsaw cuts – will promote civility. (The closest sports analogy I can think of with this is being the person who dunks but doesn't hang on the rim...don't hang on/break the rim; just take the bucket and get back on defense).

- The yellow card/Flagrant 1/Unsportsmanlike conduct warning: Think of this as the judge pulling out the drill, putting in the requisite drill bit, but holding off on drilling a hole to give you a chance to level set. When we witness incivility directed at a lawyer/party by a lawyer appearing before us, we will ask you to rephrase or act in a more courteous manner. We know you have client obligations and expectations to manage. Still, this is your bar card and your reputation. Yellow cards/Flagrant 1s/Unsportsmanlike conduct is bad for the game; it slows things down and often sets you back. The same is true for our cases.

Contempt

Contempt is like a chainsaw: It's the strongest tool in the toolbox and should only be used if absolutely necessary. Contempt sounds so much sexier than it actually is. In fact, contempt proceedings tend to slow down getting to the sought-after relief.

Two Forms of contempt: Direct Contempt and Indirect Contempt

Forms of Direct Contempt:

CCP §1209(a)(1) – (2) Conduct tending to disrupt a judicial proceeding;

Disorderly, contemptuous, or insolent behavior; breach of peace; causing a violent disturbance; Attorney's statements charging dishonesty or misconduct in the immediate view and presence of the court or of the judge in chambers. Deceit and concealment that mislead a judge. (*Daily v. Superior Court* (1935) 4 Cal.App.2d 127, 132.)

CCP §1209(a)(8): Unlawfully detaining a witness or party

Forms of Indirect Contempt:

Disobeying a lawful court judgment, order, or process. (CCP §1209(a)(5).)

- *Examples:* Failure to pay a support order, failure to comply with visitation schedule, failure to comply with court-ordered meet & confer and/or court ordered deadlines, misusing the discovery process, unlawfully interfering with process or proceedings

Classifying Civil Contempt

Direct contempt is committed in the immediate view and presence of the court or of a judge in chambers. CCP §1211(a).

Indirect contempt is not committed in the immediate view and presence of the court or of a judge in chambers. CCP §§ 1211 – 1217.

Hybrid contempt is committed in the court's presence, but the conduct may be excused by matters that occurred outside the courtroom. (e.g.: an absent or late attorney, who may be able to show a valid excuse.)

Sanctions – Violation of a Lawful Court Order – CCP §177.5.

-Involves a violation of a lawful court order by a person, done without good cause or substantial justification. This does not apply to advocacy before the court.

Under this section the term “person” includes a witness, a party, a party's attorney, or both.

The party to be sanctioned must be given adequate notice and an opportunity to be heard.

This notice can be contained in a party's moving or responding papers on the court's own motion, after notice and opportunity to be heard.

Sanctions under CCP §128.7

Sanctions for improper filings under CCP §128.7 are **not** appropriate in the following circumstances:

- The filing is not being presented primarily for an improper purpose, such as harassment or delay;
- The legal contentions in the filing are warranted by existing law or by nonfrivolous argument for modification of existing law;
- Factual contentions and allegations in the filing are warranted by the evidence or are likely to have evidentiary support after investigation; and
- The denial of factual contentions is warranted by the evidence or is reasonably based on lack of information of belief.

Under CCP §128.7, sanctions may be appropriate when: (1) papers are factually frivolous; (2) papers are legally frivolous; and (3) papers are interposed for an improper purpose.

Sanctions pursuant to CCP §128.7 must be requested in a separate motion. CCP §128.7(c)(1).

CCP §128.7 contains a 21 day “safe-harbor” provision to provide for a correction of the violation. The court may shorten or extend this period. CCP §128.7(c)(1).

The opportunity to withdraw or correct challenged papers is a safe harbor provision that allows the offending party to avoid sanctions. A party may not bring a motion for sanctions pursuant to CCP §128.7 unless the offending party has some opportunity to correct. (*See: Malovec v. Hamrell* (1999) 70 Cal.App.4th 434, 441.)

Sanction under CCP §128.7 must be limited to that which is sufficient to deter repetition of the conduct or comparable conduct by other. CCP §128.7(c).

Sanction may include: a penalty paid to the court and/or some or all of the reasonable attorney fees and expenses that were incurred as a result of the sanctionable conduct.

Consequences of Incivility in Civil Litigation

Reduction in Attorney Fee Awards

Snoeck v. Exaktime Innovations, Inc. (2023) 96 Cal. App. 5th 908, 926: Here, the trial court reduced an attorney fee request/award because that lawyer engaged in repeated name-calling, called opposing counsel a liar, misrepresented facts and used a tone of voice that was belittling and antagonistic. The appellate court affirmed the trial court's finding holding that the record supported the finding that the lawyer's "repeated and apparently intentional lack of civility throughout the entire course of this litigation—and seeming personal embroilment in the matter—resulted in inefficient, fractious, and thus more costly, litigation."

Karton v. Ari Design & Construction (2021) 61 Cal.App.5th 734: Here, the Court of Appeals affirmed the trial court's decision to reduce attorney fee award from \$300,000 to \$90,000 for, among other reasons, the incivility counsel demonstrated in its briefs. "Excellent lawyers deserve higher fees, and excellent lawyers are civil. Sound logic and bitter experience support these points. Civility is an ethical component of professionalism. Civility is desirable in litigation, not only because it is ethically required for its own sake, but also because it is socially advantageous: it lowers the costs of dispute resolution. The American legal profession exists to help people resolve disputes cheaply, swiftly, fairly, and justly. Incivility between counsel is sand in the gears." In its appeal, the appellant went on offense, defending its actions before the trial court. The court of Appeals found that "This approach demonstrates the trial court was within its discretion to conclude the [appellant] conducted litigation that was less than civil."

Discovery Sanctions

Masimo Corp. v. Vanderpool L. Firm, Inc. (2024) 101 Cal.App.5th 902: Masimo was unsuccessful in obtaining substantive discovery responses from the defendants – instead of boilerplate objections – and moved to compel responses to interrogatories and document requests. The referee supervising discovery recommended the motion to compel be granted and Masimo be awarded \$10,000 in discovery sanctions. The trial court agreed, awarded the sanctions and the appellate court affirmed the trial court's decision. After being served with the moving papers for the motion to compel, Vanderpool began an email to opposing counsel with the subject line "You are joking right?" The body of the email continued in the same vein: "In 30 years of practice this may be the stupidest thing I've ever seen. Robert is this really why you went to law school? Quit sending us paper. you know we are out of the case so just knock it off and get a life...." "Incivility is the adult equivalent of schoolyard bullying and we will not keep looking the other way when attorneys practice like this. They will be called out and immortalized in the California Appellate Reports. Here, the lack of civility, throwing even more sand into the gears, coupled with the blatant and pervasive substantive discovery misuse could only have confirmed to the referee and to the court that monetary sanctions against Vanderpool were warranted in this case. We find nothing to quarrel with in that conclusion."

Civil Harassment Orders

Hansen v. Volkov (2023) 96 Cal.App.5th 94. Here, an attorney who represented husband in dissolution/annulment proceeding filed petition for civil harassment protection order against the lawyer who represented wife. The trial court issued a temporary restraining order, and then issued a permanent civil harassment protection order following an evidentiary hearing. The

conduct that formed the basis for the harassment included the restrained lawyer's coming to the protected lawyer's office, demanding a meeting, and refusing to leave and continuing this behavior even though he was asked to stop more than 5 times, and still continued to engage in this behavior. The lawyer who was restrained under the order appealed; the appellate court reversed the order issuing the permanent restraining order but made important findings regarding civility. The Court of Appeal found that the lawyers' mutual lack of civility in this case lent support for the recommendations of the California Civility Task Force, which warned that "[d]iscourtesy, hostility, intemperance, and other unprofessional conduct prolong litigation, making it more expensive for the litigants and the court system." (Beyond the Oath: Recommendations for Improving Civility, Initial Report of the California Civility Task Force (Sept. 2021) p. 2.) Specifically, the court – citing the Task Force – concluded: "Civility matters not simply because lawyers are examples to others on how to engage competing ideas and interests. It matters because our system of justice simply cannot function fairly and reliably with systemic incivility." (*Hansen v. Volkov*, 96 Cal. App. 5th at 107.)

The Court of Appeal found that opposing counsel's conduct, despite being harassing in nature, could not have caused substantial emotional distress because the protected lawyer was an experienced family law lawyer "who presumably has litigated many cases with difficult opposing counsel." (*Id.* at p. 106.)

Basically, the appellate court has signaled that the practice of family law has become so uncivil that objectively harassing behavior should just be something with which lawyers should be expected to put up. We disagree. You should not be subjected to, nor should you engage in unsportsmanlike conduct, flagrant fouls or having a proverbial ball thrown at your head – and just take it – because you have chosen this career. Similarly, you should not demean the profession by engaging in this kind of behavior.

Sanctions Against a Party

In re Marriage of Davenport (2011) 194 Cal.App.4th 1507: In a family law action, the Court of Appeals upheld the trial court's decision awarding sanctions against the wife based on her lawyer's failure to treat the husband's lawyer with civility and respect. "We close this discussion with a reminder to counsel—all counsel, regardless of practice, regardless of age—that zealous advocacy does not equate with "attack dog" or "scorched earth"; nor does it mean lack of civility....Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive." Take your "unbridled aggression" for a walk.

Reversal of Default Judgment

Lasalle v. Vogel (2019) 36 Cal.App.5th 127: In legal malpractice action, the trial court entered default judgment after a lawyer failed to answer timely and then denied that attorney's motion to set aside the judgment. The Court of Appeals reversed, holding that the attorney's failure to respond timely was excusable neglect and that the other party was not prejudiced by the decision setting aside the default judgment. "Courts have had to urge counsel to turn down the heat on their litigation zeitgeist far too often. And while the factual scenarios of these cases differ, they are all variations on a theme of incivility that the bench has been decrying for decades, with very little success. It's gotten so bad the California State Bar amended the oath new attorneys take to

add a civility requirement. Since 2014, new attorneys have been required to vow to treat opposing counsel with ‘dignity, courtesy, and integrity.’ That was not done here. Dignity, courtesy, and integrity were conspicuously lacking.”