



# California LITIGATION

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# Civility in the Legal Profession: It's Up to Us to Save It

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Have you noticed a decline in civility in your law practice over the recent past? If so, you are not alone. Many observers have commented, written, and spoken on civility's decline in the legal profession. Even the courts have joined the ever-louder chorus. Judicial commentary on the lack of civility in our profession can be found in many cases, including *LaSalle v. Vogel* (2019) 36 Cal.App.5th 127; *Lossing v. Superior Court* (1989) 207 Cal. App.3d 635; *DeRose v. Huerlin* (2002) 100 Cal.App.4th 158; and *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267. Aptly, Justice William Bedsworth observed: "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." (*LaSalle*, at p. 134.)

This article will assess how the evolution in technology, the fractured political and media climate, and the pandemic have each affected civility in the legal profession. It will conclude with a discussion of an effort by an organization of trial attorneys to improve the climate.

## Technology

Technology has undoubtedly made our lives as litigators easier and our practices more efficient. The speed and pace of communication have vastly shortened the time to accomplish tasks. But this evolution has also led to a less civil profession. To illustrate my point, let's take two examples of how things have changed even just during my career: the manner and method of written communication among lawyers and court appearances.

When I started practicing law in the early 1990's, I had no cell phone, no work computer, and no work e-mail address. Our office's fax machine was in a locked room and faxes were distributed once a day. First class mail was actually a thing. The mail was also distributed once a day. To create and send written communications, whether a letter or a pleading, we would use a dictating machine containing an audiocassette. Once we finished dictating the document, we would give the audiocassette to a secretary or word processor, who would transcribe it for us and then print it onto stationery or pleading paper. She — yes, it was almost always a "she" then — would return the hard-copy draft, which we would further edit and then return to the secretary,

who would make the changes and return it back, again in a hard copy. Once the document was finalized, the attorney would sign it in person and it would be mailed through the post. This process took what now seems like an insanely long time — usually days — depending on how busy the secretary was and how much “rush” the project demanded.

For court appearances, we would travel to the courthouse and appear in person in the courtroom. Lawyers would check in with the courtroom clerk or bailiff and see and interact with both the judge and the opposing counsel in court. While waiting for your case to be called, you would see other attorneys appear for their cases and watch how the judge interacted with them. After your court appearance, you had the opportunity to meet and talk with your opposing counsel as you walked out together. Perhaps, you would even continue the conversation over a cup of coffee.

Today, we send and receive each day staggering amounts of e-mails, text messages, and other messages in various formats (Microsoft Teams, Slack, etc.). With the click of a mouse, we can send thousands of documents to each other. What previously took hours, days, and weeks to accomplish can now be done in a fraction of the time. No more driving an hour or more to court for a routine appearance. With telephonic and remote-video court appearances, we save time and money, and reduce carbon emissions.

There is no doubt that technology advances over the past decades have brought us significant and meaningful benefits. But I fear that they have also led to a decrease in civility. How?

Let’s first take the example of receiving an uncivil or even nasty communication. Before e-mail, given how long it would take

to dictate, transcribe, and edit the response, there were several opportunities over a long period of time to consider and reconsider your response before sending. What seemed like a quick and witty retort, perhaps dripping with sarcasm with a dose of nastiness, may have initially felt great. But with time and reflection, it looked snarkier and nastier on paper. You had the opportunity to tone it down, not even respond at all, or respond with humor. I was fortunate to be mentored by the late, great Tom Caselli, who died in 1996 at the age of 44. Caselli was both hilarious and civil and knew how to defuse almost every situation with a joke. For example, on receipt of a nasty letter, he’d typically send this response: “Dear Joe- I am concerned! A madman broke into your office, wrote a crazy letter on your letterhead, and signed your name to it! I’d suggest you contact building security immediately. In the meantime, please give me a call to discuss the case. All the best, Tom.” Anyone with a sense of humor would of course respond with less rancor.

Today, with your PC or laptop and phone pinging constantly with e-mails, texts, and other messages, it is all too easy to read a hostile incoming message in seconds, fire off a quick and equally nasty (or worse) response, and hit send. It might initially satisfy, or even delight. But it almost invariably leads to a degradation in the professional relationship with that correspondent.

Let’s move on to appearing in court. Although it was incredibly inefficient to travel to and from the courthouse for relatively brief or routine hearings (and bad for the environment), the live court appearance provided several distinct advantages. First, you could see how a particular judge handled cases and litigants and could adjust your arguments accordingly. You would get to “know” and have

the opportunity to observe different judges in courthouses wherever you practiced. Second, this gave the chance to meet your opposing counsel in person. I would typically invite him or her to join me for a cup of coffee after the appearance and we could get acquainted, discuss the case, and exchange information. For example, you could bring counsel up to speed on your client's recent surgery, inquire about the excess insurance policy, find out what information the defense needed to evaluate the case, or discuss potential mediators. Of course, not every court appearance led to a fruitful exchange, and opposing counsel could refuse to meet. But such rebuffs were rare.

These nearly bygone opportunities to “cool off” before reacting in writing and to meet and get to know opposing counsel in court diminished both the tendency and frequency to act uncivilly. Anonymity can lead to a lack of respect and civility. How many of us have reacted to another motorist who cut us off in traffic with an unkind gesture or word within the confines of our car? (I plead guilty.) On the other hand, how many of us would make the same unkind gesture or comment while chatting on the sidewalk or seeing the offending person face to face? Making unkind comments to others on social media is all too easy while hiding behind a screen, and much less prevalent when interacting in person.

## Politics and Media

In our nation's history, people of opposing political viewpoints have not always engaged in perfectly peaceful and constructive discourse. In 1856, Representative Preston Brooks nearly brained Senator Charles Sumner with a cane on the floor of the Senate over a dispute about slavery.

But over the last few decades, we've seen a significant deterioration of courtesy and civility in the political square. It all seems a far cry

from 1984, when then-President Ronald Reagan debated his challenger, Walter Mondale. About Mondale's lesser age, 73, Reagan famously quipped, “I will not make age an issue in this campaign. I am not going to exploit, for political purposes, my opponent's youth and inexperience.” In 2008, Senator John McCain assured a woman in the audience at a campaign event that Barack Obama was not “an Arab” (a fact, not a slur) and that “he's a decent family man, [a] citizen, that I just happen to have disagreements with on fundamental issues. That's what this campaign is about.” McCain could have allowed the woman to carry on, falsely, about Obama being a member of an ethnicity or religion he's not, or having been born outside the United States. Instead, McCain cut her off and insisted that the debate be over policy.

In contrast, in a 2016 Republican campaign debate, Senator Marco Rubio insulted Donald Trump by implying that the size of Trump's “small hands” extended to other parts of his body, presumably his genitalia. The same year, Trump retweeted an unflattering picture of Senator Ted Cruz's wife, implying that she was less attractive than Trump's wife. Trump also falsely suggested that Cruz's father was involved in the assassination of President Kennedy in 1963. (For a more detailed discussion of politics and incivility, I recommend Columbia Law School Professor Bernard Harcourt's excellent work *The Politics of Incivility* (2012) 54 Ariz. L.Rev. 345, also found at [www.scholarship.law.columbia.edu/faculty\\_scholarship/638](http://www.scholarship.law.columbia.edu/faculty_scholarship/638) [as of Feb. 17, 2022].)

Media, both traditional and social, has become more stratified. Decades ago, most Americans obtained their news from the three major networks and their local newspaper. Now, we tend to consume media tailored to our political likings, whether it's MSNBC on

the left or Fox/OAN/Newsmax on the right. This allows us to listen only to views with which we already agree, thereby confirming them. And it makes it easy to demonize the other side, each burrowed in its silo. (See Jamieson et al., *The Political Uses and Abuses of Civility and Incivility* (2018) The Oxford Handbook of Political Communication <[www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199793471.001.0001/oxfordhb-9780199793471-e-79?print=pdf](http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199793471.001.0001/oxfordhb-9780199793471-e-79?print=pdf)> [as of Feb. 17, 2022].)

It does not stretch the imagination to conjure that regularly seeing incivility practiced as a norm in politics and omnipresent media allows us to treat opposing counsel in our professional lives with incivility as well. Too many lawyers now view opposing counsel not as a mere opponent in a case but as an enemy.

## The Pandemic

Now that we are entering the third year of the COVID-19 pandemic, we've had time to adjust to working from home, remote appearances, Zoom depositions, and even Zoom trials. Attorneys, paralegals, office-support staff, and even judges are all, in many or most cases, working from home at least some of the time. Commutes have gone the way of the fax machine. So how has the pandemic and the dramatic increase in working remotely affected civility?

One recent study published in the *Journal of Occupational Health Psychology* (See Park & Martinez, *An "I" for an "I": A Systematic Review and Meta-analysis of Instigated and Reciprocal Incivility* (2022) J. Occ. Health Psych. 27(1), 7-21 <[www.psycnet.apa.org/record/2021-69212-001?doi=1](http://www.psycnet.apa.org/record/2021-69212-001?doi=1)>) suggests that rude and uncivil behavior exhibited in the workplace has increased during the pandemic. The lack of face-to-face interactions and the anonymity

of hiding behind a darkened computer monitor has led to workers being out of practice at having difficult in-person conversations. The authors note that the failure to stop or call out uncivil behavior allows it to spread and creates an ever-deteriorating pattern.

My own observation is that while initially there was some improved civility in the pandemic due to the shared changed circumstances of our new work environments, incivility has returned to prepandemic levels. We've become accustomed to our new normal and people have reverted to their baseline behavior, whether civil or not. Meritless objections and boorish behavior occur as often on Zoom as they did in person and in conference rooms before the pandemic.

## What Can We Do About It?

In response to grave concerns about the lack of civility in our profession, the American Board of Trial Advocates (ABOTA), an invitation-only, nationwide association of approximately 7,500 experienced trial lawyers and judges, has worked to improve the climate among litigators. ABOTA's mission is to promote and improve the American civil justice system and to preserve the Seventh Amendment right to civil jury trials. One of the main tenets of its Constitution is "to elevate the standards of integrity, honor and courtesy in the legal profession."

As early as the 1990's, ABOTA published its *Principles of Civility, Integrity and Professionalism* and the *Code of Professionalism* (<[www.abota.org/Online/About/Principles\\_of\\_Civility\\_\\_Integrity\\_\\_and\\_\\_Professionalism.aspx](http://www.abota.org/Online/About/Principles_of_Civility__Integrity__and__Professionalism.aspx)>). Examples of some of these guidelines are to "always remember that the practice of law is first and foremost a profession" and to "never, without good cause, attribute to other counsel bad motives or improprieties." ABOTA created a program called "Civility Matters," which

is presented to bar associations, law schools, law firms, and other legal professional groups around the country. The program is typically moderated by one plaintiff's attorney, one defense attorney, and a judge, if possible. It presents examples of uncivil behavior, including rude conduct at depositions, nasty e-mails and correspondence, and even a video of a Florida judge leaving the bench to physically fight an attorney appearing before him. More importantly, the program offers advice and strategies to combat incivility. Perhaps most of all, the program draws attention to the importance of civility and helps promote it by having litigators address and consider it.

ABOTA has also worked with state legislatures to incorporate language promoting civility in the oath that new attorneys must take. For example, in California, the line "I will strive to conduct myself at all times with dignity, courtesy and integrity" was added in 2014. To date, 24 states have added civility language to their attorney oath as a result of ABOTA's efforts.

Whether one reads ABOTA's pronouncements or not, it is up to each one of us to set the tone to improve civility in the legal profession, if not more broadly. A good start to this is to make a practice in every case of picking up the telephone and cordially introducing yourself to your opposing counsel. Ask her what is needed to resolve the case. Be courteous in scheduling matters and do your best to accommodate requests to move deadlines. Consider voluntarily disclosing materials in the case that are clearly discoverable, mutually reducing the time and expense of litigation. When reading e-mails, remember that it is not

necessary to respond immediately, and you may not have to respond at all. Some of my best work has been ignoring snarky e-mails or comments that invite me to go down an uncivil path.

I am a sinner. I confess that there have been occasions on which I have not been as kind as I should have been or have not responded with the civility that ABOTA strives to achieve. I have too often responded sharply at a contentious deposition and have hit "send" on an e-mail when restraint was the better course. But I am now more mindful of civility and strive every day to, as my mentor Tom Caselli taught me, "kill them with kindness." I encourage you to do the same. Our profession demands it and your reputation depends on it.

