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Warriors for civility

THE HIGH ROAD IS THE WINNING ROAD

Civility is a topic close to my heart – not because I’ve always been perfectly civil (none of us have), but because after decades in the trenches, I’ve learned what real strength looks like. We hear too often in today’s world about lawyers who pontificate, who yell, who argue and insist their position is correct. Real strength isn’t loud. It isn’t angry. It isn’t performative. Real strength is controlled, principled, and real strength is civil. And if you’re a plaintiff’s trial lawyer, that strength is not optional – it’s mission-critical.

What the law teaches us: Behave yourself!

In *Findleton v. Coyote Valley Band of Pomo Indians* (2021) 69 Cal.App.5th 736, a unanimous court cast civility, or more precisely the lack of it, in very stark terms. Obviously frustrated by the briefing and conduct below, the court was clear: “It is vital to the integrity of the adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law.” (*Findleton*, 69 Cal.App.5th at 762, quoting *People v. Chong* (1999) 76 Cal.App.4th 232, 243.)

“Unwarranted personal attacks on the character or motives of the opposing party, counsel, or witnesses are inappropriate and may constitute misconduct.” (*Findleton*, citing *In re S.C.* (2006) 138 Cal.App.4th 396, 412.) “[Z]ealous advocacy does not equate with ‘attack dog’ or ‘scorched earth’; nor does it mean lack of civility. [Citations.] Zeal and vigor... are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive.” (*Findleton*, quoting *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1537.) “As another court put it, “Ad homi-

nem arguments, of course, constitute one of the most common errors in logic: Trying to win an argument by calling your opponent names (‘Jane, you ignorant etcetera....’) only shows the paucity of your own reasoning.” (*Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, 1430.)” (*Findleton*, 69 Cal.App.5th at 762.)

The court *condemned* the accusations made by defense counsel in that case, stating, “These assertions are scurrilous and have no place in this appeal.” (*Findleton*, 69 Cal.App.5th at 762.) This is one of the clearest expositions rebuking uncivil attorney behavior. Courts do not reward this rudeness. In *In re Marriage of Davenport*, the court ruled that counsel’s correspondence was a litany of hostility, rudeness, and disrespectful ad hominem attacks that completely disregarded the norms of civility, and this decision like the others, makes clear that such conduct backfires. (*Id.*, 194 Cal.App. 4th at 1536.)

Not only do our courts punish a lack of civility, they reward civility, as we should. “It is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism.” (*People v. Chong* (1999) 76 Cal.App.4th 232, 243.) *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, is a published decision famous for its witty but devastating critique of bad lawyering and uncivil appellate practice. Examples of conduct condemned:

- A brief riddled with insults, misstatements, and baseless accusations
- Accusing the judge of bias without evidence
- Engaging in sarcasm, snide comments, and unprofessional rhetoric

The *Kim* court almost seemed to beg for honesty and civility: “It is critical to both the bench and the bar that we be able to rely on the honesty of counsel. The term ‘officer of the court,’ with all the assumptions of honor and integrity that append to it, must not be allowed to lose its significance. While some might find these to be only ‘little’ lies, we feel the distinction between little lies and big ones is difficult to delineate and dangerous to draw. The corrosive effect of little lies differs from the corrosive effect of big lies only in the time it takes for the damage to become irreversible.”

The *Kim* Court went on to say:

Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It’s time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions. We do not come to this conclusion lightly. Judges are lawyers, too. And while we have taken on a different role in the system, we have not lost sight of how difficult it is to practice law. Indeed, at the appellate level, we are reminded daily how complex and recondite the issues that confront practitioners daily can be.

So we are loath to act in any way that would seem to encourage courts to impose sanctions for mistakes or missteps. But for serious and significant departures from the standard of practice, for departures such as dishonesty and bullying, such steps are necessary. We will step onto the slippery slope and trust our colleagues on the trial court bench to tread carefully along with us. It is time to make it clear that there is a price to pay for cynical practices.

If this be quixotic, so be it. Rocinante is saddled up and we are prepared to tilt at this windmill for as long as it takes.

(*Kim*, 201 Cal.App.4th at 284–285. See also, *WasteXperts, Inc. v. Arake-lian Enterprises, Inc.* (2024) 103 Cal. App.5th 652.)

California appellate courts – in dozens of opinions, including the recent *Findleton* decision – have made the law unmistakably clear: Civility is mandatory. Incivility is misconduct. Judges will call out and sanction abusive behavior. Civility increases credibility and persuasiveness. From the cases above, courts have expressly condemned:

- Personal attacks on opposing counsel
- Calling the other lawyer unethical, corrupt, incompetent, etc.
- Accusing the judge of bias or misconduct without evidence
- Threatening opposing counsel or a third party
- Filing briefs “riddled with sarcasm, invective, misrepresentation, and hostility”
- Obstructing discovery through gamesmanship, intimidation, or sham appearances
- Repeated refusal to follow court orders

California courts also praise good behavior:

- Professionalism even in heated disputes – Courts repeatedly note that courtesy demonstrates confidence, command, and respect for the

justice system.

- Cooperation in discovery – In many cases, courts expressly praise counsel who resolve problems informally.

- Clear, respectful writing – Courts compliment lawyers who advance strong positions without sarcasm or hostility.

- Respectful behavior in trial – Judges note that jurors respond positively to lawyers who maintain composure and civility.

Civility is required of lawyers under ethical and statutory authority – California Rules of Professional Conduct Rule 8.4(d): A lawyer must not engage in conduct that is “prejudicial to the administration of justice.” Incivility qualifies. (California Attorney Guidelines of Civility and Professionalism (2014).)

In *Lossing v. Superior Ct.* (1989) 207 Cal.App.3d 635, the court was clear about the peril of unprofessional practices:

We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel. All too often today we see signs that the practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle.

(*Id.* at 641.)

With *In re Mahoney* (2021) 65 Cal. App.5th 376, the court recounted a lawyer’s attacks on both the trial court and court of appeal and issued

a contempt citation. The lawyer was called to account for a petition that “impugned the integrity of both the trial court and this court.” The attorney made various unsupported claims the court did not “follow the law” and “indiscriminately screw[ed] [the party].” (*Id.* at 378-379.)

Counsel persisted even after the court attempted to “nudge him towards a more temperate position.” “. . . [W]e are confronted with a member of the bar who, after 52 years of practice, believes this is legitimate argument.” (*Mahoney*, 65 Cal.App.5th at 380.) “This kind of over-the top, anything goes, devil-take-the-hindmost rhetoric has to stop.” (*Ibid.*) “The judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity and it is his bounden duty to protect the integrity of his court.” [citations]. ‘However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides.’” (*Ibid.*) “The timbre of our time has become unfortunately aggressive and disrespectful. Language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse Respect for individual judges and specific decisions is a matter of personal opinion. Respect for the institution is not; it is a *sine qua non*.” (*Id.* at 381.)

People v. Chong (1999) 76 Cal. App.4th 232 (*Chong*), is also instructive for what counsel must avoid.

By mocking the court’s authority, an attorney in effect sends a message to the jurors that they, too, may disregard the court’s directives and ignore its authority. This type of attorney misconduct must be dealt with in the jury’s presence in order to dispel any misperception regarding the credence that jurors must give the court’s instructions. Furthermore, when an attorney engages in repetitious misconduct, it is too disruptive to the proceedings to

repeatedly excuse the jury to admonish counsel. (*Id.* at 244.)

The court concluded, “[i]n our collective 97 years in the legal profession, we have seldom seen such unprofessional, offensive and contemptuous conduct by an attorney in a court of law.” (*Chong*, 76 Cal. App.4th at 245.) Obviously, anyone reading the decision for precedent will associate the name of the offending lawyer with misconduct.

Incivility can be costly, and not just in sanctions. *Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal. App.5th 734, is an example. There the Court of Appeal affirmed a reduction in attorney fees awarded due, in part, to the attorney’s incivility attacking opposing counsel’s integrity with repeated baseless claims. “Attorney skill is a traditional touchstone for deciding whether to adjust a lodestar. [Citation.] Civility is an aspect of skill. [¶] Excellent lawyers deserve higher fees, and excellent lawyers are civil. Sound logic and bitter experience support these points.” (*Id.* at 747.)

Incivility can rankle relations and thereby increase the friction, extent, and cost of litigation. Calling opposing counsel a liar, for instance, can invite destructive reciprocity and generate needless controversies. Seasoning a disagreement with avoidable irritants can turn a minor conflict into a costly and protracted war. All those human hours, which could have been put to socially productive uses, instead are devoted to the unnecessary war and are lost forever. All sides lose, as does the justice system, which must supervise the hostilities.

(*Karton*, 61 Cal.App.5th at 747.)

Snoeck v. ExakTime Innovations, Inc. (2023) 96 Cal.App.5th 908, relied heavily on the *Karton* opinion to affirm an attorney-fee award reduction based on counsel’s repeated incivility and hostile statements to opposing counsel, the trial court, and the appellate court. Civility is

an aspect of an attorney’s skill, and thus incivility “may be considered” in adjusting the lodestar on an award of attorney’s fees. (*Id.* at 927.)

Discovery sanctions are much easier to award against mean-spirited practitioners. In *Masimo Corp. v. The Vanderpool Law Firm, Inc.* (2024) 101 Cal.App.5th 902, the Court of Appeal affirmed discovery sanctions against defendants’ counsel based on hostile and belittling email correspondence directed at opposing counsel. The Court pointed out, “Civility is not about etiquette. This is not a matter of bad manners. Incivility slows things down, it costs people money – money they were counting on their lawyers to help them save.” (*Id.* at p. 911.) “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.” (*Ibid.*)

Lawyers must approach every problem with professionalism to avoid getting mired in the incivility “weather system,” that dilutes the power of any claim or defense. It plays as much in the courtroom as in our briefing.

A jury taught me something I’ll never forget

I had a recent trial with tough liability issues, sharp motions, expert battles, and cross-examinations that demanded every ounce of my preparation, restraint, and focus. Nothing came easy. But after the verdict, several jurors came to speak with us. What they told us stopped me cold:

We noticed how respectful you and the defense lawyer were to each other. You even seemed to like each other. That helped us, as jurors, be civil with each other. It helped us listen, work through disagreements, and reach a consensus.

Think about that. The tone we set as lawyers didn’t just shape the

trial – it shaped the deliberations. By being civil to each other, we gave 12 strangers permission to be civil to one another. Our behavior influenced their behavior. Our professionalism allowed them to create the conditions for justice. If you’re a trial lawyer reading this, ask yourself: What tone are you setting? And do you realize who is watching?

Obviously, it’s not just the judge and opposing counsel. It’s the court clerk and entire venire, right down to the 12 citizens who will quietly decide how much they can trust you. Incivility is like noise because it muddles the message you are trying to send for your clients. You really cannot be heard (well) unless you are civil.

The false choice between zeal and civility

The legal world tends to follow a dubious, anachronistic myth: Civility is weakness. To be a warrior, you must be aggressive. Rudeness has an equivalence with toughness and strength. But it’s a false choice, and it’s killing our credibility as a profession.

When I started practicing, I thought winning meant being the smartest, fastest, and most forceful voice in the room. I know in my early years in the law, I was a very forceful advocate for my clients, but in the process, I also developed the bad habit of talking too much and not listening enough. Over time – through hard cases, tough losses, and humbling victories – I learned the truth: You can fight like hell and still be civil. You can be relentless without being reckless. You can be feared because you are prepared – not because you are loud. You can be polite and still be a warrior for justice.

As trial lawyers, we serve the injured, the grieving, the voiceless. That is sacred work. Ego has no place at that table. When we make the fight personal – when we take the bait, raise our voices, or let our emotions drive the ship – we take attention away from the very people we swore to serve. Civility is not surrender. Civility is controlled power. Every judge expects it. And jurors instinctively gravitate toward it.

Civility is strategy

Some lawyers think civility is just about being “nice.” They couldn’t be more wrong. Civility is a weapon. A quiet one. An effective one, because not only can you win, but you do so with honor, with the facts, not with some egotistical flourish at your opponent’s expense. Judges notice. They reward lawyers who keep their cool. Jurors notice. They believe lawyers who act like grown-ups. Clients notice. They trust lawyers who don’t lose control and are more comfortable being with you as their advocate. Opposing counsel notices. More stipulations, more order in the court, a more focused trial, these are some of the rewards of civility.

Civility disarms hostility and opens doors to stipulations, agreements, and settlement. On close calls – evidentiary, procedural, discretionary – the lawyer with the reputation for professionalism always gets the benefit of the doubt. Every. Single. Time.

Civility in the courtroom

Jurors don’t just hear your words; they study your conduct. They notice:

- how you handle objections
- whether you attack opposing counsel or the evidence
- how you speak to witnesses
- how you treat courtroom staff
- whether you’re calm or whether you’re volcanic

When you remain composed in the chaos of trial, jurors read that as confidence and credibility. When you lose your cool, they read that as insecurity. Lawyers sometimes forget that jurors are not performing a verdict only at the end – they’re performing a silent verdict on you throughout the trial.

Teaching civility to the next generation

We owe something to the lawyers coming up behind us. Some of the fiercest trial warriors I’ve known – Marines, legends, icons of this profession – were the most civil people in the courthouse. They taught me that respect disarms hostility. Professionalism amplifies persuasion. Humanity builds trust. Johnnie L. Cochran, Jr. showed us that devastating cross-examination can coexist beautifully with grace and warmth outside the courtroom. Jurors responded to that humanity. It was a reason Johnnie enjoyed the respect of both sides of the bench and the bar. Long after his death, judges who knew I worked at his firm would pull me aside and share stories that generally were about Johnnie and civility. The next generation is watching us. Let’s give them something worth emulating.

Conclusion: Be the warrior for civility

We can be warriors for our clients

– fierce, relentless, uncompromising – and still be civil. In fact, civility is what makes us most effective. We fight hard, but fair. We battle fiercely, but honorably. We advocate passionately, but with restraint. Because when we take the high road, we bring everyone up with us – our clients, our colleagues, our jurors, and our profession. Civility is not a courtesy. It is a superpower. It sharpens our weapons, steadies our hand, and gives jurors confidence that the truth is on our side. So, I say to my CAALA family:

- Be the warrior for civility. Fight hard. Fight smart. Fight with honor.
- The high road is not easy – but it is always, always the winning road. 

Joseph M. Barrett is a Los Angeles trial lawyer for the people, and former president of the Consumer Attorneys Association of Los Angeles (CAALA) in 2015. Joe was the past president of the Los Angeles Trial Lawyers’ Charities (LATLC) 2011-2012. His practice focuses on cases involving catastrophic injury, wrongful death, premises liability, and corporate negligence. Barrett is the author of Trial Lawyers for the People: Recipe Book for Success, as well as numerous articles on trial practice, voir dire, and the art of persuasion.