

The rise of incivility in the legal profession

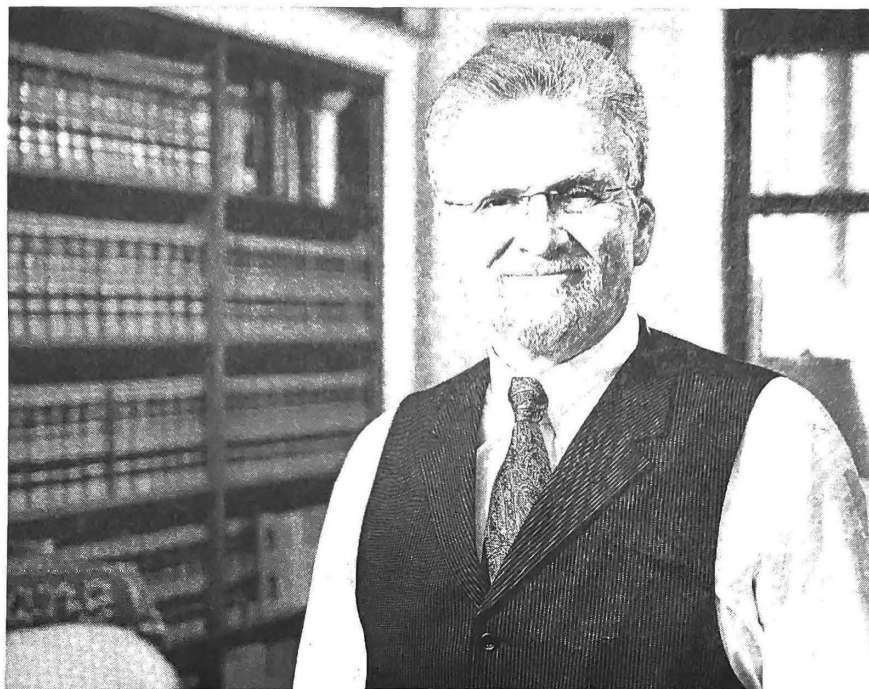
By Dan Jacobson

“Although we have not as yet reached the point where the participants at a deposition will be required to be licensed by the state boxing commission [citation], we note with dismay the ever growing number of cases in which most of the trappings of civility between counsel are lacking.” *Townsend v. Superior Court*, 61 Cal. App. 4th 1431, 1438 (1998). Although 23 years have passed since Justice Arthur Gilbert’s ruling in *Townsend*, it is apparent that incivility in our profession is still “ever growing.”

But before one can solve a problem, one must define the problem. So what is incivility in the legal profession?

Funk & Wagnalls defines “civil” to mean “Observing the social proprieties; decently polite; not rude.” So, “incivil” can be said to mean not observing the social proprieties; not decently polite; and being rude. In addition, to attack the problem of incivility, an addition was made to the oath for new attorneys. It now reads, “As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.” From these sources one can properly define incivility in the legal profession as such: The practice of law by way of behavior that is without the social proprieties, decent politeness, dignity, courtesy and integrity; and with rudeness.

Any argument that such behavior is excused by a lawyer’s duty to zealously advocate for his or her client must fall on deaf ears. “The idea that zealotry can be an excuse for unethical and unprofessional behavior is a pernicious disease that threatens to eat away at the integrity and nobility of the court as an institution.” *In re Moncier*, 550 Fed. Supp. 2nd 768, 807 (E.D. Tenn. 2008). While *Moncier* calls the excuse of zeal “a pernicious disease,” it is fair to categorize all of incivility in the practice of law



Justice William Bedworth in his chambers.

Daily Journal photo

In *Lasalle v. Vogel*, 36 Cal. App. 5th 127 (2019), Justice Bedsworth’s discussion lamented that lawyers now very often think of their practice as a business rather than a profession.

as such. As all attorneys are officers of the court, it is apparent that that “pernicious disease threatens to eat away at the integrity and nobility” of the legal profession, and to eat away at attorneys themselves.

The authorities tell us that the germ of incivility dates back to at least the 1970s. “Like tennis, the legal profession used to adhere to a strict etiquette that kept the game mannerly. And, like tennis, the law saw its old standards crumble in the 1970s and 1980s. Self-consciously churlish litigators rose on a parallel course with Jimmy Connors

and John McEnroe.” Gee & Garner, “The Uncivil Lawyer: A Scourge at the Bar,” 15 Rev. Litig. 177, 190 (1996).

What happened in the 70s to trigger the rise of incivility? Author and engineer Randal P. Munroe has said, “Correlation doesn’t imply causation, but it does waggle its eyebrows suggestively and gesture furtively while mouthing ‘look over there.’”

In 1977, U.S. Supreme Court disallowed then-existing rules around the nation that banned legal advertising in general. *Bates v. State Bar*

of Arizona, 433 U.S. 350 (1977). In his opinion dissenting in part and concurring in part, Chief Justice Warren Burger said, “[T]he exact effect of [outlawing the rules against attorney advertising] cannot now be known.” That was 1977; it seems now we know what *Bates* unleashed.

Cases demonstrate that the pernicious disease of incivility has grown exponentially since *Bates*. *Correlation*. Businesses are indeed competitors, and at times fierce competitors, but sometimes they’re just selling hardware. Litigation attorneys are always at DEFCON

1. When an attorney answers the phone or opens an email, a figurative bomb may go off. But as a professional, the attorney’s response to that “bomb” is supposed to be tempered by social proprieties, decent politeness, dignity, courtesy, integrity and a disdain for rudeness. That worked until *Bates*. Consider, it is plain that a business advertisement, and it was plain that generally attorneys didn’t advertise prior to 1977. A factor in the answering the phone/response equation changed. Attorneys advertised, and thus acted like businesses. Adding behaving like a fierce competitor to the already combustible combatant part of being an attorney was too much for many attorneys to respond to the phone call with dignity, courtesy, integrity and without rudeness.

The cases that make clear the progressive nature of the pernicious disease, from its formation to the present, are telling.

Any gestating disease takes time to form. By 1989 incivility had bubbled-up to Division 5 of the 1st District Court of Appeal: “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.” *Lossing v. Superior Court*, 207 Cal. App. 3d 635, 641.

In 1994, Justice Gilbert of Division 6 of the 2nd District Court of Appeal,

who would later author *Townsend*, opened his opinion in *Green v. GTE California*, 29 Cal. App. 4th 407, 409 with this: “If this case is an example, the term ‘civil procedure’ is an oxymoron.” *Green* involved what the court “euphemistically call[ed] a verbal altercation, so lacking in civility, that we decline to repeat it here.”

In 1997, Division 3 of the 4th District Court of Appeal published *Pham v. Nguyen*, 54 Cal. App. 4th 11. In that case Justice James Sills warned, “The law should not create an incentive to take the scorched earth, feet-to-the-fire attitude that is all too common in litigation today.” Five years later, in *DeRose v. Heurlin*, 100 Cal. App. 4th 158 (2002), an attorney wrote to opposing counsel, “I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit.”

In 2011, Division 2 of the 1st District Court of Appeal tried to ward off the pernicious disease as Division 5 did in *Lossing*: “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.” *In re Marriage of Davenport*, 194 Cal. App. 4th 1507, 1536.

Division 3 of the 4th District found the facts in *Kim v. Westmore*, 201 Cal. App. 4th 267 (2011), so appalling that the panel went nuclear. Justice William Bedsworth wrote, “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 is 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

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Incivility's 'ever growing' presence in the legal profession

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lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions." The court sanctioned the errant attorney \$10,000. In extreme cases a strong steroid is needed to treat incivility.

Although powerful "teeth" were not only justified, but necessary in *Kim*, Justice Bedsworth recognized that unwarranted requests for sanctions can be part of the problem. The court put quotations marks around a question that it asked itself: "How much do you sanction an attorney who lies to the court, seeks unwarranted sanctions, bullies opposing counsel, shows no remorse, and effectively vows to continue such tac-

tics by endorsing his conduct when challenged on it?"

It may be that, like COVID-19, incivility hit the bigger cities first. After moving to Oregon in 2010, Peter Appleton, retired president of the Beverly Hills Bar Association wrote, "[W]hen I was practicing in Los Angeles almost every motion or opposition I saw contained a word processor request for sanctions. I always wondered what our clients thought about our fascination with sanctions. Sanctions are like the lottery. Can we intimidate our opponent? Can we get a busy frustrated judge to make an award big enough to inflict serious financial damage on him or her? If so, will he or she beg for mercy? Will he or she abandon his or her cli-

ent? Let's go for it. Bingo." Appleton, "Parting Thoughts: Sanctions are Like the Lottery," 71 Or. St. B. Bull. 62 (2010).

In 2019, Justice Bedsworth diagnosed a major cause of incivility, and simultaneously suggested a cure. In *Lasalle v. Vogel*, 36 Cal. App. 5th 127 (2019), Justice Bedsworth's discussion lamented that lawyers now very often think of their practice as a *business* rather than a *profession*. The facts of *Lasalle* can be summed-up as a race to the courthouse to file a default before an answer was filed. "[Practitioners] have heard the mantra so often unthinkingly repeated that, 'This is a business,' that they have lost sight of the fact the practice of law is *not* a business. It is a

profession. And those who practice it carry a concomitantly greater responsibility than businesspeople."

In diagnosing the problem, Justice Bedsworth suggested a cure. A business doesn't have the noble responsibilities with which the legal *profession* is laden. It is with pride that an attorney can say "My profession requires its members to follow social proprieties, be decently polite, behave with dignity, behave with courtesy, behave with integrity, and behave without rudeness." This author is not suggesting that businesses don't so behave; he is saying that, attorneys are *required* to so behave. Be proud of that. That pride can act as an antidote to the pernicious disease.

British philosopher Rabbi Jonathan Sacks said, "The Hebrew Bible contains multiple provisions to ensure that no one would go hungry." Similarly, incivility has multiple cures. The cures shown here are pride in the profession's values, blunt force in extreme case, and sunlight, which is implied in the courts' publication of the post-*Bates* cases. There have to be others. The

profession is beseeched to publish and shout from the mountain tops, well-thought-out cures. Together we can kill the pernicious disease, kill it before it "eat[s] away at the integrity and nobility" of the courts, the profession and attorneys themselves. ■

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