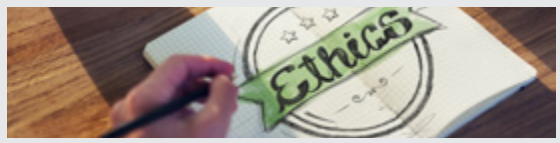
Q&A



LAWYER LIABILITY AND ETHICS

What's the Matter with California?

Joseph Brophy

United States Supreme Court Justice Warren Burger once stated: "Lawyers who know how to think but have not learned how to behave are a menace and a liability." He was right. The legal profession has worked hard to earn its reputation as a group of bombastic, know it all jerks. As federal Judge Marvin Aspen once observed, "ethnic and blonde jokes have been replaced by equally tasteless lawyer jokes." He was also right. But not all jurisdictions are the same in this regard.

If you have litigated with California lawyers in California cases, you probably noticed they are not as civilized as the ladies and gentlemen of the Arizona bar. The contrast is stark. Many California lawyers need a smack upside the head, or a hug, or maybe both. A recent California appellate decision is illustrative. The story begins how most stories of lawyer incivility do – with a discovery dispute.

Lawyer represented defendants in a civil fraud case. Plaintiff served interrogatories and requests for production of documents. Lawyer responded with boilerplate objections and not a single substantive response. A discovery referee was appointed. Following a motion to compel, Lawyer agreed to provide supplemental discovery responses. However, Lawyer took the opportunity to add additional objections while keeping the impermissible boilerplate objections from the original responses. Moreover, the supplemental responses contained no additional substance, unless you count as substantive providing the defendant's date of birth, current residence, educational history, and admitting to having a driver's license and speaking English. Perhaps sensing what was coming, Lawyer withdrew. Another motion to compel followed.

The discovery referee, who expected Lawyer to provide substantive supplemental responses, was not amused or deterred by Lawyer's withdrawal. He sanctioned Lawyer in the amount of $10,000, notwithstanding Lawyer's withdrawal before the second motion to compel. Lawyer appealed the sanction. The California Court of Appeals affirmed in a reported decision, and paid particular attention to Lawyer's civility, or lack thereof.

When plaintiff's counsel tried to meet and confer over the discovery responses, Lawyer refused, stating "your remedy is elsewhere, and an attorney with your billing rate should know that. We are not here to educate you." When plaintiff filed its motion to compel, Lawyer responded with an email with the subject line "You are joking right?" and stated in the email: "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. Otherwise we're going to be requesting sanctions against your firm for even bothering us with this nonsense." Lawyer made good on his promise to seek sanctions for "bothering" him. He was unsuccessful.

The appellate court's opinion might fairly be characterized as a cry for help. The court noted that, in prior opinions, it traced the "deterioration in the way attorneys now address and behave toward each other" and observed "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." There are more than a handful of California appellate decisions going back 30 years expressing similar sentiments with increasing alarm. In a 2021 opinion, California's appellate court noted that "language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse. This is not who we are." At a certain point one must wonder if maybe that is who they are.

Notably, Arizona does not have appellate decisions expressing similar laments.

The California courts' palpable frustration is better understood against the backdrop of California's efforts to address the California bar's civility problem. In 2014, the California Supreme Court enacted Rule 9.7 of the California Rules of Court, which required anyone thereafter admitted to practice law to affirm: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity." Hopefully you are sitting down, because the new affirmation did not fix the California bar's civility problem. In a 2021 report, the California Civility Task Force concluded that "many who have taken the oath have forgotten their promise" and "the legal profession suffers from a scourge of incivility."

In 2023, the State Bar of California's Board of Trustees, at the task force's recommendation, approved what the task force described as "powerful proposals to improve civility in California's legal profession," including: (1) requiring lawyers to annually affirm their civility oath; (2) requiring one hour of CLE each year devoted to "civility training"; and (3) imposing discipline upon California lawyers who violate any oath they have taken. Neither the task force nor the trustees explained how they concluded that the 2014 civility oath was ineffective because it was not repeated often enough.

Of those new measures, the third option has the potential to make a difference. But given the California State Bar's dysfunction in recent years, it is questionable whether that body can impose collegiality in California's legal community.

You might think that jurisdictions where lawyer civility is a problem would be interested in implementing procedures from jurisdictions where it is less of a problem. You would be wrong. I am referring specifically to Arizona's mandatory affirmative disclosure obligations in Rule 26.1 and its expedited discovery dispute resolution process in Rule 26(d), which dramatically reduce discovery games and disputes that increase the cost and contentiousness of litigation.

Several years ago, I asked Ninth Circuit Judge Andrew Hurwitz, formerly of the Supreme Court of Arizona, why Arizona's judges did not push for similar rules in federal court. Judge Hurwitz smiled, told me he was on a committee that governed those issues in federal court, and that when he raised the concept of mandatory, substantive disclosure like the kind Arizona has enacted, lawyers and judges looked at him like he was crazy. The notion that a party would be required to hand over relevant evidence, identify witnesses and the substance of their testimony, and explain legal theories, all without being asked, is viewed as somehow antithetical to the adversarial process.

This is not to suggest that Arizona's procedural rules are a panacea or that Arizona's lawyers are fanatical acolytes of the great Judith Martin, also known as Miss Manners. And although picking on California is easy, that state is not alone in having lawyer civility issues. But the case discussed above, which resulted in yet another reported California decision bemoaning a lack of lawyer civility, was ultimately a discovery dispute involving two motions to compel, much of which would not have occurred under Arizona's procedural rules. ■

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