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Civility as Smart Advocacy

If Shakespeare were a lawyer, he might have written, “To be, or not to be: that is the question: Whether ‘tis nobler in the mind to [be civil].” (*Hamlet*, Act III, Scene I.) Many engaged in the modern practice of law have encountered that special opposing counsel who makes “civil litigation” somewhat less than civil. The California Civility Task Force (CCTF), a joint project of the California Judges Association and the California Lawyers Association, studied the civility problem and issued a 2021 report (*Beyond The Oath: Recommendations for Improving Civility*), which noted that “[d]iscourtesy, hostility, intemperance, and other unprofessional conduct prolong litigation, making it more expensive for the litigants and the court system,” and “[b]ullyng, intimidation, and nastiness have too often replaced discussion, negotiation and skillful, hard-fought advocacy.” The CCTF recommended remedial action, including mandatory civility MCLE training, and making “repeated incivility” a basis for discipline.

Civility is an aspect of skill considered in awarding attorney fees. In *Karton v. Ari Design & Construction, Inc.*, 61 Cal.App.5th 734 (2021), the trial court found lack of civility as a reason to reduce an attorney fee request by 67 percent. The Court of Appeal affirmed, noting that attorney skill is a traditional touchstone for deciding whether to adjust a lodestar. “Civility is an aspect of skill. Excellent lawyers deserve higher fees, and excellent lawyers are civil.” (*Id.* at 747.) In *Snoeck v. Exaktime Innovations, Inc.*, 96 Cal.App.5th 908 (2023), the trial court applied a .4 negative multiplier to its adjusted lodestar calculation “to account for [p]laintiff’s counsel’s ... lack of civility throughout the entire course of this litigation.” (*Id.* at 911.) The Court of Appeal affirmed the \$457,863 (40 percent) reduction in attorney fees “in light of plaintiff’s counsel’s sub-par skill (due to his incivility) in presenting the issues.” (*Id.* at 929.)

Civility can result in better outcomes for your clients in settlement negotiations. Dr. Robert Cialdini, an expert in the field of influence and persuasion, developed six principles of persuasion, two of which are relevant to civility. The first principle of persuasion is reciprocity: People are obligated to give back to others the form of behavior, gift or service that they have received first. In negotiations, making a concession in your next move can be seen as cooperative behavior, or a “gift” which triggers the social obligation to reciprocate. The fifth principle of persuasion is liking: People prefer to say yes to those that they like. We like people who are similar to us, people who pay us compliments, and people who cooperate with us towards mutual goals.

Dr. Cialdini’s liking negotiation studies found that rather than getting straight down to business, before you begin negotiating, exchange some personal information with your counterpart, or identify a similarity you share in common. (Seek an opportunity for a brief conversation, such as

while grabbing coffee in the lobby). Ninety percent of the test group that invoked the liking principle before negotiating reached an agreement, typically worth 18 percent more to both parties. By comparison, only 55 percent of the group that skipped the conversation and dove straight into negotiations reached an agreement.

Civility is not just a moral good, but is an aspect of attorney skill that can reward you and your clients. Civility is also consistent with smart zealous advocacy.

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