Judge Mary Ann Murphy
LOS ANGELES SUPERIOR COURT

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Avoiding unforced errors

FROM REDUCED FEE AWARDS OWING TO INCIVILITY, TO DISCOVERY SANCTIONS AND YOUR UNRULY EXPERT WITNESSES, UNFORCED ERRORS CAN COST YOU AND YOUR CLIENT

Unforced errors. Making a mistake in a situation in which you should have been in full control. The Red Socks sold Babe Ruth to the Yankees in 1919 and what followed was 86 years without a championship. St. Louis traded Bill Russell to the Celtics in 1956. The Trailblazers selected Sam Bowie over Michael Jordan in the 1984 NBA draft. In litigation, unforced errors can hurt you and your client.

Civility

Incivility with opposing counsel is counterproductive. It raises stress levels, breeds distrust, and makes the case unpleasant. This does not help you or your client. Your opposing counsel may become so annoyed with you that she makes it a "weekend case." If you do not do as well in trial as you thought you would, your request to dismiss for a waiver of costs may fall on deaf ears.

Judges make it a point to rule in favor of the party who has the facts and law, regardless of counsel's behavior. However, incivility to the court and counsel is not without consequences.

Negative multipliers due to incivility, embroilment and overlitigation

Published cases decided by Divisions Three and Eight of the Second District Court of Appeal affirmed the trial courts' application of a negative multiplier due to the requesting attorneys' incivility, embroilment and overlitigation. Civility is an aspect of attorney skill, which is considered in arriving at a multiplier.

The lodestar is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rate prevailing in the community for the same work. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122.) Once the court has fixed the lodestar, the court may increase or decrease that amount by applying a positive or negative multiplier to take into account a variety of factors, including the nature of the litigation, the novelty and difficulty of the questions involved, the attorney's experience and ability, the skill displayed by counsel, success or failure, the extent to which the nature of the litigation precluded other employment by the attorneys, the contingent nature of the fee agreement and fee award. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132; *Salton Bay Marina v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 957.)

A negative multiplier reduces the amount of the lodestar. For example, if the lodestar is $100,000 and a negative multiplier of 0.4 is applied, attorney fees are reduced from $100,000 to $60,000, a reduction of $40,000.

In *Snoeck v. Exaktime Innovations* (2023) 96 Cal.App.5th 908, a Division Three panel affirmed a $457,863 reduction of attorney fees sought by an attorney who was repeatedly and intentionally uncivil to the court and to opposing counsel throughout the entire course of the litigation. In that FEHA employment case, counsel for plaintiff requested more than $2 million in attorney fees. The trial court applied positive multipliers for contingent risk and other factors and applied a negative 0.4 multiplier due to counsel's lack of civility. The negative multiplier was based on attorney skill, of which civility is an aspect. The trial court's attorney fee order quoted statements from 12 of counsel's emails and referred to counsel's belittling and antagonistic tone of voice with the court, which at times verged on contemptuous. In affirming the trial court, the Court of Appeal did not require the trial court to identify every unreasonable charge related to counsel's incivility to justify a downward adjustment to the lodestar. The court observed that antagonizing the trial court does not further one's client's cause.

In *Karton v. Ari Design & Construction Co.* (2021) 61 Cal.App.5th 734, a Division Eight panel held that judges deciding attorney fee motions may consider whether the attorney seeking the fee has become personally embroiled and thus over-litigated the case and whether his incivility has affected litigation costs. Plaintiff requested $271,530 in attorney fees and the court affirmed the trial court's award of $90,000. The trial court found that counsel over-litigated a straightforward case and attributed some of the overlitigation to counsel's personal embroilment in the matter, noting his agitation at court hearings.

The Court of Appeal in *Karton* wrote that excellent lawyers deserve higher fees, and excellent lawyers are civil. Civility lowers the costs of dispute resolution, as it allows the parties to focus on core disagreements and minimize distractions. On the other hand, seasoning a disagreement with unavoidable irritants throws sand in the gears and can turn a minor conflict into a costly and protracted war. The knowledge that low blows may return to hit counsel in the pocketbook incentivizes civility in fee-shifting cases.

Snoeck and *Karton* involved the behavior of counsel seeking attorney's fees. The behavior of counsel opposing an award of attorney's fees may increase the cost of litigation and increase the attorney fees awarded against his client. Absent facts rendering the award unjust, parties who qualify for a fee should recover for all hours reasonably spent. (*Serrano v. Unruh* (1982) 32 Cal.3d 621,

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632-633; *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 394; *Vo v. Las Virgines Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 446.)

In *Snoeck* and *Karton*, the appellate courts identified the attorneys at issue by name and *Snoeck* referred to the attorney's "sub-par skill (due to his incivility)." This is not the sort of thing that attracts clients or increases referrals. If nothing else, incivility can be bad for business.

Pretrial unforced errors

Discovery sanctions against you and your client are typically unforced errors, as most discovery motions involve routine matters that can and should be worked out if counsel are reasonable and can communicate with each other.

When you are taking a deposition, understand the rules for objecting, instructing not to answer and terminating depositions. Not following these basic rules can be expensive.

Stewart v. Colonial Western Ins. Agency (2001) 87 Cal.App.4th 1006 is still a go-to case on instructing deponents not to answer questions, privilege objections and terminating depositions. It's been more than 20 years since I was the trial court judge in that case and sanctioned counsel $2,400 ($4,100 in today's dollars) for improperly instructing the deponent not to answer questions. Justice Daniel Curry, now deceased, wrote an excellent opinion on proper conduct at depositions in affirming my order. Attorneys still tell me they keep a copy of the *Stewart* opinion in their conference rooms or have a copy of the opinion ready to give opposing counsel who engage in improper conduct at a deposition.

Unforced errors in trial

Attorneys who are disrespectful to the court and counsel do not seem to do as well with juries as counsel who display professional comportment. You are not going to win every motion and every argument. Accepting an adverse ruling in a professional manner is appreciated. Displaying irritation and dissatisfaction, rolling your eyes, or shaking your head is disrespectful to the court and is unlikely to endear you to the jury. Judges know that you do not like adverse rulings, just as we did not like adverse rulings when we practiced law.

Make sure your experts are not reacting to the court's rulings or worse, arguing with the court. One frequent expert gets on the witness stand, turns his back to the judge and gives a running nonverbal commentary on the judge's rulings with his facial expressions. Some experts argue with the court in front of the jury regarding the court's rulings on objections. Experts may not understand how counterproductive this behavior can be. It is up to counsel to prepare their experts in advance regarding appropriate courtroom behavior.

Periodically look behind you to the back of the courtroom. Is your claims adjuster displaying hostile body language to the jury as the jury exits the courtroom? Are the younger lawyers on your trial team or support staff chatting and laughing in the back of the courtroom during a jury trial or when the judge is on the record? Is anyone affiliated with your side nodding their head in agreement or shaking their head in disagreement with testimony or the court's rulings? Are you doing this?

Don't give opposing counsel "verdict insurance"

When you cross over the line, it is like getting up out of your seat at counsel table, walking over to opposing counsel, and presenting him with grounds for appeal or mistrial on a silver platter. Infusing your own case with reversible error is an unforced error that provides the other side with insurance in the case of an adverse verdict against them.

Convincing the court to give an incorrect jury instruction or special verdict form, admit inadmissible evidence or exclude admissible evidence may result in a new trial or reversal of your case. The time to do your legal research is before the trial. You do not want to get a telephone call from appellate counsel advising you that you may be looking at a reversal because the court adopted a position that you urged.

Sometimes counsel get carried away on cross-examination or closing arguments. Asking questions or making statements in argument that are over the line may result in a reversal of a verdict you worked so hard to obtain or a finding of attorney misconduct.

If you get caught doing something that may be interpreted as inappropriate or unethical, immediately apologize to the Court and counsel and take corrective action. In one case, counsel included a jury instruction into the closing argument PowerPoint that was not requested by either side, not discussed in the jury instruction conference, and not given when the court instructed the jury before the closing arguments. When his opposing counsel brought this to the court's attention during the closing argument, he should have immediately apologized to the court and counsel. Instead, he argued that the court should give the instruction. This attorney did not obtain a good result for his client.

If you are in the very small minority of attorneys who believe it is appropriate to board your numbers for the first time in your reply closing argument, reconsider your position. The court may sustain an objection during your reply argument, and you may lose an important opportunity to argue your client's case.

If you are on the receiving end of such conduct, bring the conduct to the attention of the court so the court can address the issue. Be sure to make an appellate record by objecting in a timely manner and, where appropriate, make a motion for mistrial.

It is my experience that, for the most part, attorneys who behave in the manner described in this article do not do well with the jury. Most successful attorneys behave in an ethical, professional, and civil manner, even in the heat of battle.

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How did we get here?

We have all heard stories about practice of law in the old days. The attorneys old enough to tell those stories are disappearing. But the stories are true.

It was a different world. Confirming letters were not the norm and an attorney's word was his bond. While chatting with the lawyers while waiting for a verdict in a trial, I asked a CAALA elder statesman when this changed. He said it was the introduction of MagCard (magnetic card) typewriters. In 1973, IBM introduced the $11,000 ($76,000 in today's dollars) MagCard II Selectric Typewriter. It had an 8,000-character memory and corrections capability. Prior to the introduction of typewriters with memories, secretaries typed letters on a typewriter without a memory and used whiteout paper to make corrections. Prior to the widespread use of the Xerox machine in the late 1960s, secretaries typed letters and used blue carbon paper to make a file copy. Confirming letters were rarely sent.

Cases were settled because attorneys talked to each other about settlement. There was no widespread use of alternative dispute resolution (ADR). The major local ADR firms were founded in the early 1990s.

Before attorneys had personal computers and could send emails, they communicated with each other by having telephone or in-person conversations, documenting the conversation with handwritten notes to the file or a memo to the file typed by a secretary.

When attorneys began using personal computers and email became widespread (think 1990s), attorneys communicated with each other less frequently in person or by telephone and more by email. At about the same time, attorneys increasingly relied on ADR to settle cases instead of settling most cases by talking with each other. ADR is now big business.

The decrease in in-person and telephone communication between opposing counsel may be one cause of increasing incivility. California state court judges lack tools to meaningfully address most incivility. Except in extreme cases, the State Bar does not address incivility in any meaningful way.

Incivility has become so endemic that the California Civility Task Force's 2021 report recommended that the State Bar amended its disciplinary rules to prohibit repeated incivility.

What we can do

Try calling your opposing counsel instead of sending an email. Before you speak about business, ask about their children or family. Connect on a personal level as a fellow human being. Remember what your opposing counsel told you the last time you spoke. Ask about it. How is your mother doing? How did your son do in the lacrosse travel team during the summer? This will be appreciated. We should do this more often.

When appearing before a judge with an impossible case inventory, begin by saying good morning and smile at the judge. When someone smiles at you, you smile back. Smiling is like pressing the reset button. Chat with your opposing counsel while you are waiting for a verdict. Shake hands with your opposing counsel after a verdict.

Attend a bar association meeting and break bread with lawyers on the other side of the aisle and with judges. Some of the most successful plaintiffs' attorneys attend the Association of Southern California Defense Counsel (ASCDC) defense attorney functions and some sponsor them. A double-digit percentage of CAALA Vegas attendees are defense attorneys. Attend Association of Business Trial Lawyers (ABTL) meetings even if you don't do business cases. There are CAALA members on the board and one prominent CAALA attorney was president last year. You will connect with many lawyers and judges at ABTL, and their speaker program is excellent.

When you have enough trials, have someone put you up for the American Board of Trial Advocates (ABOTA), a collegial group of attorneys from both sides of the aisle. Check the LA-ABOTA website for membership requirements.

If you are so inclined, join your ethnic bar association or womens' bar association.

You may find one or two bar associations you really enjoy and you may be involved with them for a long time. Join a committee, do the work, and go to the events. It is extremely rewarding to be a member of these groups and you will make lifelong friends.

Many years ago, there was a young lawyer who appeared in my court. He was unfailingly prepared, professional, polite, and courteous to the court and counsel. After one hearing, I predicted that someday he would be president of CAALA. That lawyer was president of CAALA in 2022.

Civility is good for everyone. Incivility is unforced error. It makes it harder for you to achieve great results for your clients. It is bad for you and for your practice.

Judge Mary Ann Murphy is assigned to a trial court at the Spring Street Courthouse, Department 4. She has been a judge of the Superior Court for more than 30 years and has presided over more than 400 jury trials. She was the first judge to lead the Best Practices discussion for the Mosk Central Civil judges and did so for nine years. Her leadership resulted in numerous improvements to the administration of justice, including the asbestos working group. She has served five terms on the Court's Executive Committee, has served on the Judicial Council Civil and Small Claims Committee and on numerous court and statewide working groups. She was an officer and executive board member of the California Judges Association. Judge Murphy was an Associate Editor for Weil and Brown, Civil Procedure Before Trial for seven years. She has taught and moderated numerous programs for judges and attorneys. Judge Murphy is a past president and board member of the Irish American Bar Association (IABA). She supervises summer externs from law schools in the Republic of Ireland and Northern Ireland. She received IABA's Daniel O'Connell award.