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ADVERTISING INDEX

AMERICAN ARBITRATION ASSOCIATION.....	17	LAWPAY	IFC
AMERICAN BAR ASSOCIATION.....	16	LEGISLATIVE COUNSEL BUREAU	BC
CHARLESTON INSURANCE.....	33	MERCER CONSUMER	21
CLARK COUNTY BAR ASSOCIATION.....	9	NEEMAN & MILLS	25
COGBURN LAW OFFICES.....	19	STATE BAR OF NEVADA.....	29, 30, 35, 41
FASTCASE.....	IBC	THOMAS & MACK DEVELOPMENT.....	28
HUTCHISON & STEFFEN.....	13	VERITI CONSULTING	27
KENDALL MEDIATION & ARBITRATION.....	32		

Message from the President

By Alan J. Lefebvre, Esq., President, State Bar of Nevada



IS CIVILITY FOR WIMPS?

“Why do some naturally aggressive lawyers go beyond the pale? My answer, gleaned from 35 years of observation, is simple – they want to win and aggression is a shortcut.”

Not according to Sun Tzu, the great eastern teacher of strategy: “To win 100 victories in 100 battles is not the acme of skill. To subdue the enemy without fighting is the supreme excellence.”

If so, why have Jerry-Springer-type vignettes become so commonplace in the litigation context? That, I report, is for sociologists to go figure. Let’s stick with our profession. Why is civility on the decline... and does the ‘why’ matter?

First, are we less civil toward each other than we were 10, 20 or 30 years ago?

The short answer is yes. The state is bigger and a reputation for surliness, does not take hold quite as quickly as it did 30 years ago, when a horse’s rear end earned the appropriate label within a year at most; and it usually stuck – to the bitter end, poisoning the well of collegiality.

Well, who cares? I do, as do many people like me, who actually enjoy practicing law. I might find it in me to wax eloquently about the glories of our profession, but that is beside the point. I want to be liked and I enjoy almost all lawyers I meet; indeed, my friends are all lawyers, and a decent lot they are.

A state bar civility task force is endeavoring to address the problem by first acknowledging it, and then by seeking to raise the level of awareness that lack of civility in the legal profession is a problem that we have. The end game is that the perpetually obnoxious will eventually find themselves in discipline court if they can’t all change just a little. Most of us don’t wake up worrying that the public thinks the legal community is harboring some rotten apples. What offends most like-minded lawyers, is the presence of those among us, trying to make everybody else miserable; it is tedious.

So where does this lack of civility rear its head? Mostly in litigation, according to conventional wisdom. Why do some naturally aggressive lawyers go beyond the pale? My answer, gleaned from 35 years of observation, is simple – they want to win, and aggression is a shortcut.

They count on their ability to wear out their adversaries – to the point where they get what they want because everyone just wants them to go away. Sometimes, this can be an effective strategy. Some clients want their lawyers to be hyper-aggressive and view civility as a weakness. Rudeness is a calling card for some lawyers.

Incivility is often a substitute for skill and competence. Admit it: bullies sometimes win. Bullies can get other lawyers off their game, causing them to become flustered and not focused on asking the right questions.

Depositions are the context in which the most basic forms of incivility thrive. However, all we need to do is make Magistrate Hoffman’s opinion in *Luangisa v. Interface Operations*¹ (*NO 2:11-CV-00951-RCJ-CWH*) a rule of practice and, voila: a sea change! Aggrieved lawyers need to halt proceedings and call the judge. Easier said than done, but it needs to start. Whack-a-mole can be therapeutic, if the judges are prepared to man the stick.

Where else does the menace show? In court! This is an arena in which judges can show real strength, using their powers to police incivility. The degeneration of courtroom behavior starts in the pitch of argument when judges permit lawyers to address each other rather than the bench. The sails need to be trimmed, and the captain needs to take back command of the deck.

The advent of the judicial survey was a seminal event in the slow but steady erosion of court room authority; not that some judicial wings did not need clipping. The survey was made for many reasons, but one not at the forefront was the rudeness of quite a few judges to litigants and lawyers. Once a spotlight was focused on the malady, the infection of bad judicial manners cleared up a bit. But next came the prototypical judicial ruler, who softened the rhetoric from “motion granted” to “Counsel, I am inclined to rule for the defendant, but some more discovery is needed. Motion denied without prejudice to renew,” and other such measures taken to assure nobody was offended.

All problems need to be acknowledged, and that is what the bar has done with the creation of the Civility Taskforce. To become involved, contact Richard Scotti. scotti.ccbog@gmail.com ■

1. <http://www.leagle.com/decision/In%20FDCO%2020111206996>

Questions? Comments?

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