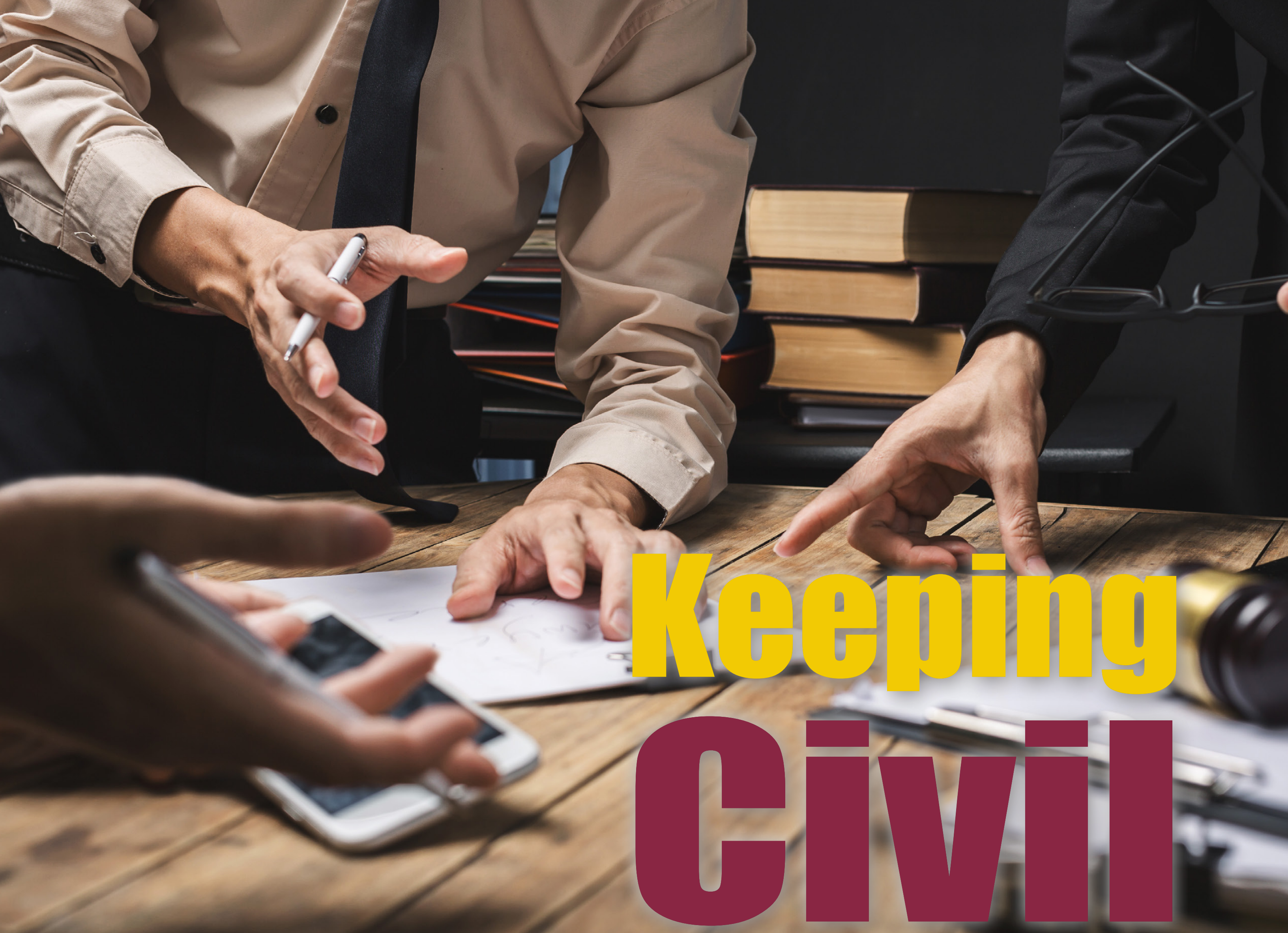

Keeping Civil Discovery Civil

BY COMMISSIONERS ERIN LEE TRUMAN
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Civil discovery needs to be civil. What does that mean? Civility is often defined as being courteous, polite, and kind – in essence, using good manners. Demonstrating good manners alone is insufficient in the context of the legal profession. The American Bar Association defines civility as "the capacity to act in a manner that engenders respect for the law and the profession." Julie T. Houth, *The Importance of Civility*, GP Solo, February 11, 2022, at 2. https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2022/january-february/importance-civility/. All too often, we observe counsel behaving badly and see a "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). Lawyers should behave in a way that fosters respect for the profession, rather than exhibiting the bad behavior that becomes fodder for more lawyer jokes.

Civility in the practice of law – or the concerning lack of it – is not a new concept. More than 50 years ago, former Chief Justice Warren Burger noted that law professors should teach law students "that good manners, disciplined behavior and civility – by whatever name – are the lubricants that prevent lawsuits from turning into combat." Warren E. Burger, *The Necessity for Civility*, Litigation, American Bar

Association, Vol. 1, No. 1, at 10, Winter 1975. In response to law professors who thought it was sufficient to merely teach law students how to think, Burger stated, "[L]awyers who know how to think but have not learned how to behave are a menace and a liability, not an asset, to the administration of justice." *Id.* He expounded:

> [w]ithout civility no private discussion, no public debate, no legislative process, no political campaign, *no trial of any case*, can serve its purpose or achieve its objective. When men shout and shriek or call names, we witness the end of rational thought process if not the beginning of blows and combat…. [A]ll too often, overzealous advocates seem to think the zeal and effectiveness of a lawyer depends on how thoroughly he can disrupt the proceedings or how loud he can shout or how close he can come to insulting all those he encounters — including the judges.

(Emphasis in original). Warren E. Burger, "The Necessity for Civility," *Litigation,* American Bar Association, Vol 1, No. 1, at 8-9, Winter 1975.

Bad behavior presents itself in many ways during litigation. Name-calling in a brief, at a deposition, or in court hearings constitutes incivility. Unreasonably withholding consent to continue a deposition or a hearing is another example. Failing to honor an agreement or using any discovery tool to harass, annoy, or embarrass an opposing party or counsel are examples of incivility. If you look in the mirror and recognize any of these bad behaviors, ***stop it***.

Some practitioners try to justify their lack of civility by cloaking themselves in the hero's cape of "zealous advocacy." The premise that an educated, licensed attorney cannot effectively and zealously represent a client within the bounds of civility is false. Civility standards do not interfere with the obligation of a lawyer to represent a client zealously. Model Rule of Professional Conduct 1.3, Comment 1 explains:

> A lawyer is not bound, however, to press for every advantage that might be realized for a client. … The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

Justice Sandra Day O'Connor rejected the notion that acting with civility is incongruent with zealous advocacy:

> The common objection to civility is that acting courteously will somehow diminish zealous advocacy for the client. … In my view, incivility disserves the client because it wastes time and energy – time that is billed at hundreds of dollars an hour, and energy that is better spent working on the client's case than working over the opponent.

Sandra Day O'Connor, *Professionalism*, 76 Wash. U. L. Q. 5, 9 (1998).

Zealous advocacy must never be an excuse for offensive tactics or treating another with discourtesy or disrespect. No thinking person is fooled when zealous advocacy is used to justify bad behavior.

The Creed of Professionalism and Civility

Perhaps incivility in a post-COVID world is ratcheted up by the increased remoteness of the legal practice. It may be that attorneys are more inclined to exhibit bad behavior toward a face or name on a computer screen than to someone sitting across the table. The State Bar of Nevada Board of Governors' adoption of the Creed of Professionalism and Civility this past January demarks a standard that seeks to eradicate bad behavior in our bar. The preamble of the creed reads:

> Uncivil, abrasive, abusive, hostile, or obstructive conduct impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Incivility tends to delay, and often deny, justice.
>
> Lawyers should exhibit courtesy, candor, and cooperation when participating in the legal system and dealing with the public. These standards encourage lawyers to fulfill obligations to each other, to litigants, and to justice. These honorable actions achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

The creed specifically addresses the standards to which Nevada attorneys are expected to commit. Judicial officers are encouraged to reinforce these standards in the courtroom and make clear that incivility may hurt the client's case.

The creed offers comprehensive directives on attorney behavior that should prevail at all times, but many are specifically aimed at the discovery process. The tenets of the creed can be found on pages 4-5.

Civility and Deposition Behavior – Administrative Order 22-08

The Eighth Judicial District Court (EJDC) issued the Administrative Order Regarding Deposition Behavior, EJDC Administrative Order: 22-08 (AO 22-08) in an effort to elevate the deposition practice and promote civility in the process. AO 22-08 applies to all civil and family division cases filed in the EJDC for which discovery disputes are heard by a discovery commissioner or discovery hearing master. All counsel are expected to comport their behavior with AO 22-08, as follows:

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> Counsel must behave professionally at all times during depositions; they must treat parties, other counsel, court reporters, videographers, interpreters, and others involved in any aspect of a deposition with civility and respect.

AO 22-08, at 1:14-18.

AO 22-08 first requires counsel to cooperate with each other, demonstrating civility and respect when scheduling a deposition, pointing out that it is counsel's ethical duty to do so. This requirement extends to making reasonable efforts to accommodate the schedules of both counsel and witnesses, unless doing so would adversely affect a party's rights. Counsel must behave at depositions as they would at trial with a judge and jury present, but they are required to police their own behavior during depositions.

Duration, location, and logistics of depositions are governed by AO 22-08; counsel are required to cooperate regarding the allocation of examination time between attorneys, especially where the case involves multiple parties or the deposition is of a third party. Counsel are reminded that pre-occupation with clock-watching is disfavored and they should cooperate to extend the duration of a deposition when fairness requires.

AO 22-08 denounces gamesmanship in the deposition process; it prohibits conducting a deposition in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or impedes, delays, or frustrates the fair examination of a witness. Lawyers are further ordered to refrain from overly aggressive, repetitive, or argumentative questions or those asked for the purpose of intimidation. Counsel must not trick or purposefully mislead the witness. Similarly, attorneys are prohibited from mischaracterizing a witness' prior testimony. Examining counsel may not interrupt a witness during an answer. The deponent's attorney may insist the witness be allowed to finish an answer before another is posed. These behaviors are not allowed before a judicial officer and they are not allowed during a deposition.

Finally, AO 22-08, together with NRCP 16.1, requires that deposing counsel provide all parties and counsel with any document that will be referred to, utilized, or attached as an exhibit during a deposition *prior* to the deposition. NRPC 3.4; NRCP 16.1(a)(1)(A)(ii) (Family Division cases are governed by the provisions of NRCP 16.2 and NRCP 16.205, but similarly require disclosure of documents prior to deposition).

It is important to note that a party "must make its initial disclosures based on the information then reasonably available to it." NRCP 16.1(a)(1)(E). Disclosures must be seasonally supplemented and must allow adequate time for counsel to review and prepare with clients before depositions begin.

Gamesmanship has no Place in Discovery

Gamesmanship is both antithetical to the purpose of discovery and unethical. Simply put – ***nothing*** will spark the ire of a discovery commissioner in the EJDC more than seeing counsel and/or parties playing games with the discovery rules.

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What is gamesmanship? A simple definition is any attempt to gain a competitive advantage by artful manipulation of the rules, untimely or nondisclosure of information, or outright deception. The Advisory Committee Notes to 1993 Amendments to Fed.R.Civ.P. 26(a), state "litigants should not indulge in gamesmanship with respect to the disclosure obligations." *See* Advisory Committee Notes to 1993 Amendments to Fed.R.Civ.P. 26(a); cited by *Sender v. Mann,* 225 F.R.D. 645, 650 (2004). Gamesmanship also violates NRPC 3.4.

Manipulation of the discovery rules frustrates the entire process "because one of '[t]he purpose[s] of discovery is to remove surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their dispute.' Thus, '[o]pen discovery is the norm [and] **gamesmanship with information is discouraged and surprises are abhorred**.'" *Jackson v. United Artists Theatre Circuit, Inc.,* 278 F.R.D. 586, 592 (D. Nev. 2011) (Emphasis in original. Internal citations omitted).

Counsel may not withhold or manipulate the timing of disclosures for their advantage. Similarly, all counsel have an affirmative obligation pursuant to NRCP 26(g) to make a certification to the court that their discovery requests and responses are complete and accurate as of the date of service, consistent with the rules (including their prohibition against boilerplate objections), and warranted by law. This certification functions the same as the more-familiar NRCP 11 certification—it is automatically made by signing a discovery request, response, or pleading.

NRCP 26(g)(1) reads:

> … By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:
>
> …
>
> (B) ***with respect to a discovery request, response, or objection***, it is:
>
> (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
>
> (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
>
> (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(Emphasis added).

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Further, the rule makes a sanction mandatory when a lawyer "violates this rule without substantial justification." NRCP 26(g)(3). Therefore, when coupled with counsel's automatic certification under NRCP 26(g), one who serves an incomplete disclosure; makes a non-tailored, overbroad, or overly burdensome discovery request; makes a boilerplate objection; or files a pleading in support of the same, is subject to *mandatory* sanctions. NRCP 26(g)(3).

Another way that counsel or parties attempt to game the discovery rules is through late disclosure or supplementation of expert opinions. The Appellate Court of Illinois, in the case of *Clayton v. Cook County,* 805 N.E.2d 222 (Ill. App. 2004), held it reversible error to allow one party to produce previously undisclosed opinions at trial. In that case, one of the plaintiff's experts reviewed additional materials after her deposition, and so rendered new opinions at trial that had not been disclosed, causing unfair prejudice. 805 N.E.2d at 230, 231. The *Clayton* court stated:

> Discovery rules allow litigants to ascertain and rely upon the opinions of experts retained by their adversaries. Parties have a duty to supplement seasonably or amend prior answers or responses whenever new or additional information subsequently becomes known to that party. To allow either side to ignore the plain language of [the expert disclosure rule] defeats its purpose and encourages tactical gamesmanship. *Id.* at 232.

Revealing expert opinions piecemeal is "tactical gamesmanship" and doing so violates the clear mandates of Nevada's discovery rules. When expert disclosure deadlines are manipulated by a party, "the opposing party has the option of moving to [1] strike only the portion of the testimony that violates the rules; [2] strike the witness' entire testimony and bar the witness from testifying further; [3] have a mistrial declared." *Id.*

Another improper game-playing tactic is the last-minute filing of "emergency" motions. The court in *Cardoza v. Bloomin' Brands, Inc.,* 141 F. Supp. 3d 1137, 1141 (D. Nev. 2015) addressed the prevalent misuse of emergency motions, stating:

> Lastly, the filing of an emergency motion is rife with the possibility of bad faith gamesmanship. It is not uncommon for the Court to receive emergency motions filed for no apparent legitimate reason on the eve of a deadline or noticed deposition. Often times, the emergency motion itself is fully developed, well-researched, and polished. Such motions carry with them the strong implication that the movant is attempting to game the system by providing itself proper time to present its positions to the Court but depriving the opposing party of a reasonable opportunity to respond, effectively becoming an *ex parte* motion by which the opposing party has "notice" of its filing but no real chance to adequately respond. Perhaps even more nefarious, attorneys will sometimes manipulate the rules to *de facto* grant themselves the relief they are seeking through the delayed filing of a motion seeking emergency relief. The odor of gamesmanship is often especially pronounced in the context of discovery disputes where it appears parties routinely seek to delay their discovery obligations by filing an emergency motion for protective order on the eve of a discovery deadline or noticed deposition.

Id., at 1141.

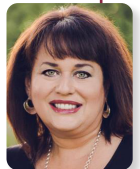
The Ninth Circuit's decision in *Haeger* clearly set forth why gamesmanship and discovery do not mix:

> Litigation is not a game. It is the time–honored method of seeking the truth, finding the truth, and doing justice. When a corporation and its counsel refuse to produce directly relevant information an opposing party is entitled to receive, they have abandoned these basic principles in favor of their own interests. The little voice in every attorney's conscience that murmurs turn over all material information was ignored.

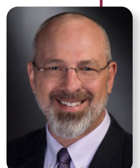
Haeger v. Goodyear Tire & Rubber Co., 813 F.3d 1233, 1237 n.1 (9th Cir. 2016), *rev'd and remanded,* 581 U.S. 101, 137 S. Ct. 1178, 197 L. Ed. 2d 585 (2017).

Fairness to counsel and compliance with the discovery rules is the only way to ethically litigate. If you play games with the discovery rules – ***stop it***.

Incivility has no place in discovery. It frustrates the process, subverts justice, and degrades our profession – play fair.



ERIN LEE TRUMAN became a discovery commissioner for the Nevada Eighth Judicial District Court in 2019. In addition, she serves as commissioner of the Alternative Dispute Resolution (ADR) Program. Truman was appointed as the ADR commissioner in May 2017. Prior to her appointment as ADR commissioner, she had been practicing law for 25 years in Las Vegas.



JAY YOUNG became an ADR/Discovery Commissioner for the Eighth Judicial District Court in 2021. He has practiced as a complex commercial litigator, mediator, and arbitrator in Clark County since 1994, and has served as a judge, mediator, arbitrator, and special master, as well as judge pro tem in the Henderson, Nevada Municipal Court. Young was also a member at Howard & Howard, PLLC, practicing as a neutral and in business litigation. He also worked as a full-time arbitrator/mediator at Advanced Resolution Management and the American Arbitration Association.