The Core of Your Profession is Civility

Wednesday, August 16, 2023

PRESENTED BY: Hon. Steve Austin (Ret.), Hon. Barry Baskin (Ret.), Hon. Ellen Sickles James (Ret.), Hon. Winifred Smith

MODERATED BY: Audrey Gee, Esq.

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Open Video Clips:

- Angry Lawyer Goes Off Deep End
- Intolerable Cruelty – Movie Clip

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Rule 8.3 Reporting Professional Misconduct

- (a) A lawyer shall, without undue delay, inform the State Bar, or a tribunal* with jurisdiction to investigate or act upon such misconduct, when the lawyer knows* of credible evidence that another lawyer has committed a criminal act or has engaged in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation or misappropriation of funds or property that raises a substantial* question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

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Rule 8.3 Reporting Professional Misconduct

- (b) Except as required by paragraph (a), a lawyer may, but is not require to, report to the State Bar a violation of these Rules or the State Bar Act.
- (c) For purpose of this rule, "criminal act" as used in paragraph (a) excludes conduct that would be a criminal act in another state, United States territory, or foreign jurisdiction, but would not be a criminal act in California

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Rule 8.3 Reporting Professional Misconduct

- (d) This rule does not require or authorize disclosure of information gained by a lawyer while participating in a substance use or mental health program, or require disclosure of information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.8.2; mediation confidentiality; the lawyer-client privilege; other applicable privileges; or by other rules or laws, including information that is confidential under Business and Professions Code section 6234.

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CANON 3D. Judicial Disciplinary Responsibilities

- (2) Whenever a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority.

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S280290

ADMINISTRATIVE ORDER 2023-06-21-02

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

APPROVAL OF RULE 8.3 OF THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT

On June 2, 2023, the court received a request from the State Bar of California to approve a version of rule 8.3 of the California Rules of Professional Conduct. The request is granted.

Proposed Alternative 2 of rule 8.3 of the California Rules of Professional Conduct is approved as modified by the court.

The approved rule is set forth in the Attachment and is effective August 1, 2023.

It is so ordered.

GUERRERO
Chief Justice

CORRIGAN, J.
Associate Justice

LIU, J.
Associate Justice

KRUGER, J.
Associate Justice

GROBAN, J.
Associate Justice

JENKINS, J.
Associate Justice

EVANS, J.
Associate Justice

ATTACHMENT

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer shall, without undue delay, inform the State Bar, or a tribunal* with jurisdiction to investigate or act upon such misconduct, when the lawyer knows* of credible evidence that another lawyer has committed a criminal act or has engaged in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation or misappropriation of funds or property that raises a substantial* question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

(b) Except as required by paragraph (a), a lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act.

(c) For purposes of this rule, "criminal act" as used in paragraph (a) excludes conduct that would be a criminal act in another state, United States territory, or foreign jurisdiction, but would not be a criminal act in California.

(d) This rule does not require or authorize disclosure of information gained by a lawyer while participating in a substance use or mental health program, or require disclosure of information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.8.2; mediation confidentiality; the lawyer-client privilege; other applicable privileges; or by other rules or laws, including information that is confidential under Business and Professions Code section 6234.

Comment

[1] This rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required by these rules or the State Bar Act. (See, e.g., rule 8.4.1(d) and (e); Bus. & Prof. Code, § 6068, subd. (o).)

[2] The duty to report under paragraph (a) is not intended to discourage lawyers from seeking counsel. This rule does not apply to a lawyer who is consulted about or retained to represent a lawyer whose conduct is in question, or to a lawyer consulted in a professional capacity by another lawyer on whether the inquiring lawyer has a duty to report a third-party lawyer under this rule. The duty to report under paragraph (a) does not apply if the report would involve disclosure of information that is gained by a lawyer while

participating as a member of a state or local bar association ethics hotline or similar service.

[3] The duty to report without undue delay under paragraph (a) requires the lawyer to report as soon as the lawyer reasonably believes* the reporting will not cause material prejudice or damage to the interests of a client of the lawyer or a client of the lawyer's firm.* The lawyer should also consider the applicability of other rules such as rules 1.4 (the duty to communicate), 1.7(b) (material limitation conflict), 5.1 (responsibilities of managerial and supervisorial lawyers), and 5.2 (responsibilities of a subordinate lawyer).

[4] This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial* question" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

[5] Information about a lawyer's misconduct or fitness may be received by a lawyer while participating in a substance use or mental health program, including but not limited to the Attorney Diversion and Assistance Program. (See Bus. & Prof. Code, § 6234.) In these circumstances, providing for an exception to the reporting requirement of paragraph (a) of this rule encourages lawyers to seek treatment through such programs. Conversely, without such an exception, lawyers may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

[6] The rule permits reporting to either the State Bar or to "a tribunal* with jurisdiction to investigate or act upon such misconduct." A determination whether to report to a tribunal,* instead of the State Bar, will depend on whether the misconduct arises during pending litigation and whether the particular tribunal* has the power to "investigate or act upon" the alleged misconduct. Where the litigation is pending before a non-judicial tribunal,* such as a private arbitrator, reporting to the tribunal* may not be sufficient. If the tribunal* is a proper reporting venue, evidence of lawyer misconduct adduced during those proceedings may be admissible evidence in subsequent disciplinary proceedings. (*Caldwell v. State Bar* (1975) 13 Cal.3d 488, 497.) Furthermore, a report to the proper tribunal* may also trigger obligations for the tribunal* to report the misconduct to the State Bar or to take other "appropriate corrective action." (See Bus. & Prof. Code, §§ 6049.1, 6086.7, 6068.8; and Cal. Code of Jud. Ethics, canon 3D(2).)

[7] A report under this rule to a tribunal* concerning another lawyer's criminal act or fraud* may constitute a "reasonable* remedial measure" within the meaning of rule 3.3.(b).

[8] In addition to reporting as required by paragraph (a), a report may also be made to another appropriate agency. A lawyer must not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute in violation of rule 3.10.

[9] A lawyer may also be disciplined for participating in an agreement that precludes the reporting of a violation of the rules. (See rule 5.6(b); and Bus. & Prof. Code, § 6090.5.)

[10] Communications to the State Bar relating to lawyer misconduct are "privileged, and no lawsuit predicated thereon may be instituted against any person." (Bus. & Prof. Code, § 6094.) However, lawyers may be subject to criminal penalties for false and malicious reports or complaints filed with the State Bar or be subject to discipline or other penalties by offering false statements or false evidence to a tribunal.* (See rule 3.3(a); Bus. & Prof. Code, §§ 6043.5, subd. (a), 6068, subd. (d).)

Proposed Rule 8.3 Reporting Professional Misconduct

(a) A lawyer shall inform the State Bar when the lawyer has personal knowledge that another lawyer has committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects as prohibited by rule 8.4(b).

(b) For purposes of this rule, "personal knowledge" is distinct from the definition of "[k]nowingly," "known," or "knows" under rule 1.0.1(f) and is limited to information based on firsthand observation gained through the lawyer's own senses.

(c) This rule does not require or authorize disclosure of information gained by a lawyer while participating in a substance use or mental health program, or require disclosure of information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.8.2; the lawyer-client privilege; or by other rules or laws, including information that is confidential under Business and Professions Code section 6234.

Comment

[1] This rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required by these rules or the State Bar Act. (See, e.g., rule 8.4.1(d) and (e); Bus. & Prof. Code, § 6068, subd. (o).)

[2] The duty to report under paragraph (a) is not intended to discourage lawyers from seeking counsel. This rule does not apply to a lawyer who is consulted about or retained to represent a lawyer whose conduct is in question, or to a lawyer consulted in a professional capacity by another lawyer on whether the inquiring lawyer has a duty to report a third-party lawyer's professional misconduct.

[3] If a lawyer reasonably believes* that it would be contrary to the interests of a client of the lawyer or a client of the lawyer's firm promptly to report under paragraph (a), the lawyer should report as soon as the lawyer reasonably believes* the reporting will no longer cause material prejudice or damage to the client. The lawyer should also consider the applicability of other rules such as rules 1.4 (the duty to communicate) and 1.7(b) (material limitation conflict).

[4] Information about a lawyer's misconduct or fitness may be received by a lawyer while participating in a substance use or mental health program, including but not limited to the Attorney Diversion and Assistance Program. (See Bus. & Prof. Code, § 6234.) In these circumstances, providing for an exception to the reporting requirement of paragraph (a) of this rule encourages lawyers to seek treatment through such programs. Conversely, without such an exception, lawyers may hesitate to seek assistance from these programs, which may then result

in additional harm to their professional careers and additional injury to the welfare of clients and the public.

[5] In addition to reporting professional misconduct as required by paragraph (a), a report may also be made to another appropriate agency. A lawyer must not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute in violation of rule 3.10.

[6] A failure to report may also implicate rule 8.4(a) with respect to the prohibitions against assisting, soliciting, or inducing another lawyer's ethical violation; see also rule 5.6(b) and Business and Professions Code section 6090.5 with respect to the prohibition on agreements that preclude the reporting of a violation of the rules.

[7] Communications to the State Bar relating to lawyer misconduct are "privileged and no lawsuit predicated thereon may be instituted against any person." See Business and Professions Code section 6094; but see Business and Professions Code section 6043.5 with respect to criminal penalties for false and malicious reports or complaints.

Standards of Professional Courtesy

The following standards of professional courtesy describe the conduct preferred and expected by a majority of attorneys practicing in Contra Costa County in performing their duties of civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, cooperation and competence.

PREAMBLE

Attorneys are most often retained to represent their clients in disputes. The practice of law is largely an adversarial process. Attorneys are ethically bound to zealously represent and advocate their clients' interest. Nonetheless, there exist certain standards of professional courtesy that are observed and certain duties of professionalism are owed by attorneys to their clients, opposing parties and their counsel, the courts and other tribunals, and the public as a whole. Members of the Contra Costa County Bar Association have practiced law with a level of professionalism that goes well beyond the requirements of the State Bar mandated Code of Professional Conduct. The following standards of professional courtesy describe the conduct preferred and expected by a majority of attorneys practicing in Contra Costa County in performing their duties of civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, cooperation and competence. These standards are not meant to be exhaustive. They should, however, set a tone or guide for conduct not specifically mentioned in these standards.

These standards have been codified to make the level of professionalism reflected in them the standard of practice within Contra Costa County and with the hope that their dissemination will educate new attorneys and others who may be unfamiliar with the customary local practices. They have received approval of the Board of Directors of the Contra Costa County Bar Association. They have also been endorsed by the Judges of the Superior and Municipal Courts of Contra Costa County, who expect professional conduct by all attorneys who appear and practice before them. They will be considered by those judges in their rulings pursuant to California Code of Civil Procedure § 128, 177, and 177.5, as provided for in the Contra Costa County Superior Court Rules, Rule 30.

All attorneys conducting any practice of law in Contra Costa County are encouraged to comply with the spirit of these standards and not simply blindly adhere to the strict letter of them. The goals stated and inherent herein are equally applicable to all attorneys regardless of area of practice.

This Code is, of course, not a substitute for the statutes and rules. No provision of this Code is intended to be a method to extend time limitations of statutes and rules, including fast track time limitations, without appropriate court order.

SCHEDULING:

1. (1) Attorneys should communicate with opposing counsel prior to scheduling meetings, depositions, hearings and other proceedings and make reasonable efforts to schedule such meetings, hearings, depositions, and other proceedings by agreement whenever possible. At all times, attorneys should endeavor to provide opposing counsel, parties, witnesses and other affected persons, sufficient notice thereof.
   (2) Where such advanced efforts at scheduling are not feasible (for example, in an emergency, or in other circumstances compelling more expedited scheduling, or upon agreement of counsel) an attorney should not arbitrarily or unreasonably withhold consent to a request for scheduling accommodations that do not prejudice their clients or unduly delay a proceeding.
2. In all cases, attorneys should endeavor to reserve sufficient time for the completion of the proceeding to permit a complete presentation by counsel for all parties.
3. An attorney should not engage in delay tactics in scheduling meetings, hearings and discovery; nor should they seek extensions or continuances for the purpose of harassment or solely to extend litigation.
4. Attorneys should notify opposing counsel, the court and others affected of scheduling conflicts as soon as they become apparent and shall cooperate in canceling or rescheduling. Attorneys should also notify opposing counsel and, if appropriate, the court or other tribunal as early as possible of any resolution between the parties that render a scheduled hearing, deposition or meeting unnecessary or otherwise moot.
5. Consistent with existing law and court orders, attorneys should grant reasonable requests by opposing counsel for extensions of time within which to respond to pleadings, discovery and other matters when such an extension will not prejudice their client or unduly delay a proceeding.
6. Attorneys should cooperate with opposing counsel during trials and evidentiary hearings by disclosing the identities of all witnesses reasonably expected to be called and the length of time needed to present their entire case, except when their clients' material rights would be adversely affected. Attorneys should also cooperate with the calling of witnesses out of turn when the circumstances justify it.
7. The timing and manner of service of papers should not be calculated to disadvantage, overwhelm or embarrass the party receiving the papers. Attorneys should not serve papers simply to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience the adversary, such as late in the day (after normal business hours), so close to a court appearance that it inhibits the ability of opposing counsel to prepare for that appearance or to respond to the papers (if permitted by law), or in such other way as would unfairly limit the other party's opportunity to respond to those papers or other matters pending in the action.

DISCOVERY:

1. Attorneys should pursue discovery requests that are reasonably related to the matter at issue. Attorneys should not use discovery for the purpose of harassing, embarrassing or causing the adversary to incur unnecessary expenses as a means of delaying the timely, efficient and cost effective resolution of a dispute, or to obtain unfair advantage.
2. Attorneys should ensure that responses to reasonable discovery requests are timely, organized, complete and consistent with the obvious intent of the request. Attorneys responding to document demands and interrogatories should not do so in an artificial manner designed to assure that answers and responses are not truly responsive or solely to attempt to avoid disclosure.

3. Attorneys should avoid repetitive or argumentative questions, questions asked solely for purposes of harassment or questions that are known to the questioner to be an invasion of the rights of privacy of third parties not present or represented at the deposition.
4. Attorneys should bear in mind that depositions are to be taken as if the testimony was being given in court. Therefore, they should not engage in any conduct during the deposition that would not be allowed in the presence of a judicial officer. Attorneys should avoid, through objections or otherwise, improper coaching of the deponent or suggesting answers.
5. Attorneys should meet and confer on discovery requests in a timely manner and make good faith attempts to actually resolve as many issues as possible before proceeding with motions concerning the discovery. Before filing a motion concerning discovery, or otherwise, attorneys should engage in more than a mere pro forma effort to resolve the issue(s).

CONDUCT TOWARDS OTHER ATTORNEYS, THE COURT AND PARTICIPANTS:

1. Attorneys must remember that conflicts with opposing counsel are professional, not personal, that vigorous advocacy is not inconsistent with professional courtesy, and that they should not be influenced by ill feelings or anger between clients in their conduct, attitude or demeanor toward opposing attorneys.
2. Attorneys should never use the mode, timing or place of serving papers primarily to embarrass a party or witness.
3. Motions should be filed sparingly, in good faith and when the issue(s) cannot be otherwise resolved. Attorneys should not engage in conduct that forces opposing counsel to file a motion and then not oppose the motion, or provide information called for in the motion only after the motion is filed.
4. Attorneys should refrain from disparaging or denigrating the court, opposing counsel, parties or witnesses before their clients, the public and the media.
5. Attorneys should be courteous and respectful (not rude or disruptive) with the court, court personnel, opposing counsel, parties and witnesses (and should encourage their clients and witnesses to do the same).
6. Attorneys should make an effort to explain to witnesses the purpose of their required attendance at depositions, hearings or trial. They should further attempt to accommodate the schedules of witnesses when setting or resetting their appearance and promptly notify them of an cancellations. Dealings with nonparty witnesses should always be courteous and designed to leave them with an appropriately good impression of the legal system. Attorneys should instruct their clients and witnesses that they are not to communicate with the court on the pending case except with all counsel and/or parties present in a reported proceeding.
7. Where applicable laws or rules permit an exparte application or communication to the court, before making such an application or communication, attorneys should:
    1. make diligent efforts to notify opposing party or opposing counsel known to represent or likely to represent the opposing party;
    2. make reasonable efforts to accommodate the schedule of such attorney or party to permit the opposing party to be represented;
    3. avoid taking advantage of an opponent's known absence from the office.
8. Attorneys should draft agreements and other documents promptly so as to fairly reflect the true intent of the parties.

9. No attorney shall engage in any act of age, gender, sexual orientation, physical or mental impairment, religion or race bias while engaging in the practice of law in Contra Costa County.

CANDOR TO THE COURT AND OPPOSING COUNSEL:

1. Attorneys should not knowingly misstate, misrepresent or distort any fact or legal authority to the court or to opposing counsel and shall not mislead by inaction or silence. Written materials and oral argument to the court should accurately state current law and fairly represent the party's position without unfairly attacking the opposing counsel or opposing party.
2. If, after all briefing allowed by law or the court has been submitted, an attorney locates new authority that s/he desires to bring to the court's attention at the hearing on the matter, a copy of such new authority shall be provided to both the court and to all opposing counsel in the case at or prior to the hearing.
3. Attorneys should draft proposed orders promptly. The orders should fairly and adequately represent the ruling of the court. When proposed orders are submitted to counsel for approval, attorneys should promptly communicate any objections to the party preparing the proposed order to encourage good faith discussions concerning the language of the proposed order.
4. Attorneys should respect and abide by the spirit and letter of all rulings of the court.
5. Attorneys should not draft letters assigning to opposing party or counsel a position that party or counsel has not taken or to create a "record" of events that have not occurred.

EFFICIENT ADMINISTRATION:

1. Attorneys should refrain from actions which cause unnecessary expense or delay the efficient and cost-effective resolution of a dispute.
2. Whenever appropriate, attorneys should stipulate to all facts and legal authority not reasonably in dispute.
3. Attorneys should encourage principled negotiations and efficient resolution of disputes on their merits.
4. Attorneys should be punctual in communications with others, as well as prompt and prepared for all scheduled appearances.
5. As soon as and and every case can be reasonably evaluated, attorneys should consider whether the client's interest could be adequately served and the controversy more expeditiously and economically disposed of by settlement, arbitration, mediation or other form of alternative dispute resolution.
6. Attorneys making objections during a deposition, trial or hearing should do so for legitimate and good faith reasons. Attorneys should not make such objections only for the purpose of making a speech, harassment or delay. All remarks, argument, objections and requests by counsel during trial shall be addressed to the court rather than directly to adversaries. Objections should be in legal form and without argument, unless directed to make argument by the court.
7. Attorneys shall arrange for the appearance of witnesses during presentation of their case so as to eliminate delay caused by waiting for witnesses who have been placed on call.

APPROVED BY THE BOARD OF DIRECTORS OF THE CONTRA COSTA COUNTY BAR ASSOCIATION IN JUNE OF 1993 (updated October 2009). ADOPTED AND APPENDED TO THE RULES OF CONTRA COSTA COUNTY SUPERIOR COURT.

Download a print copy here. (https://www.cccba.org/wp-content/uploads/2022/03/cccba-statement-of-professional-courtesy.pdf)

CHAPTER THREE
CIVIL DIVISION

APPENDIX 3.A

GUIDELINES FOR CIVILITY IN LITIGATION

(a) CONTINUANCES AND EXTENSIONS OF TIME.

(1) First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery or motions, should ordinarily be granted as a matter of courtesy unless time is of the essence. A first extension should be allowed even if the counsel requesting it has previously refused to grant an extension.

(2) After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.

(3) A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough".

(4) A lawyer should not seek extensions or continuances for the purpose of harassment or prolonging litigation.

(5) A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions such as preserving rights that an extension might jeopardize or seeking reciprocal scheduling concessions. A lawyer should not, by granting extensions, seek to preclude an opponent's substantive rights, such as his or her right to move against a complaint.

(b) SERVICE OF PAPERS.

(1) The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

(2) Papers should not be served sufficiently close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or, where permitted by law, to respond to the papers.

(3) Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.

(4) Service should be made personally or by facsimile transmission when it is likely that service by mail, even when allowed, will prejudice the opposing party.

(c) WRITTEN SUBMISSIONS TO A COURT, INCLUDING BRIEFS, MEMORANDA, AFFIDAVITS AND DECLARATIONS.

(1) Written briefs or memoranda or points and authorities should not rely on facts that are not properly part of the record. A litigant may, however, present historical, economic, or sociological data if such data appear in or are derived from generally available sources.

(2) Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity or personal behavior of one's adversaries, unless such things are directly and necessarily in issue.

(d) COMMUNICATIONS WITH ADVERSARIES.

(1) Counsel should at all times be civil and courteous in communicating with adversaries, whether in writing or orally.

(2) Letters should not be written to ascribe to one's adversary a position he or she has not taken or to create "a record" of events that have not occurred.

(3) Letters intended only to make a record should be used sparingly and only when thought to be necessary under all the circumstances.

(4) Unless specifically permitted or invited by the Court, letters between counsel should not be sent to judges.

(e) DEPOSITIONS.

(1) Depositions should be taken only where actually needed to ascertain facts or information or to perpetuate testimony. They should never be used as a means of harassment or to generate expense.

(2) In scheduling depositions, reasonable consideration should be given to accommodating schedules or opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights.

(3) When a deposition is noticed by another party in the reasonably near future, counsel should ordinarily not notice another deposition for an earlier date without the agreement of opposing counsel.

(4) Counsel should not attempt to delay a deposition for dilatory purposes but only if necessary to meet real scheduling problems.

(5) Counsel should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition.

(6) Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment.

(7) Counsel defending a deposition should limit objections to those that are well founded and necessary for the protection of a client's interest. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought.

(8) While a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers.

(9) Counsel should not direct a deponent to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass.

(10) Counsel for all parties should refrain from self-serving speeches during depositions.

(11) Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

(f) DOCUMENT DEMANDS.

(1) Demands for production of documents should be limited to documents actually and reasonably believed to be needed for the prosecution or defense of an action and not made to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.

(2) Demands for document production should not be so broad as to encompass documents clearly not relevant to the subject matter of the case.

(3) In responding to document demands, counsel should not strain to interpret the request in an artificially restrictive manner in order to avoid disclosure.

(4) Documents should be withheld on the grounds of privilege only where appropriate.

(5) Counsel should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of particular documents.

(6) Document production should not be delayed to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason.

(g) INTERROGATORIES.

(1) Interrogatories should be used sparingly and never to harass or impose undue burden or expense on adversaries.

(2) Interrogatories should not be read by the recipient in an artificial manner designed to assure that answers are not truly responsive.

(3) Objections to interrogatories should be based on a good faith belief in their merit and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.

(h) MOTION PRACTICE.

(1) Before filing a motion, counsel should engage in more than a mere pro forma discussion of its purpose in an effort to resolve the issue.

(2) A lawyer should not force his or her adversary to make a motion and then not oppose it.

(i) DEALING WITH NON-PARTY WITNESS.

(1) Counsel should not issue subpoenas to non-party witnesses except in connection with their appearance at a hearing, trial or deposition.

(2) Deposition subpoenas should be accompanied by notices of deposition with copies to all counsel.

(3) Where counsel obtains documents pursuant to a deposition subpoena, copies of the documents should be made available to the adversary at his or her expense even if the deposition is canceled or adjourned.

(j) *EX PARTE* COMMUNICATIONS WITH THE COURT.

(1) A lawyer should avoid *ex parte* communication on the substance of a pending case with a judge (or his or her law clerk) before whom such case is pending.

(2) Even where applicable laws or rules permit an *ex parte* application or communication to the Court, before making such an application or communication, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent or likely to represent the opposing party and should make reasonable efforts to accommodate the schedule of such lawyer to permit the opposing party to be represented on the application.

(3) Where the Rules permit an *ex parte* application or communication to the Court in an emergency situation, a lawyer should make such an application or communication (including an application to shorten an otherwise applicable time period) only where there is a bona fide

emergency such that the lawyer's client will be seriously prejudiced by a failure to make the application or communication on regular notice.

(k) SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION.

(1) Except where there are strong and overriding issues of principle, an attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.

(2) Counsel should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

(3) In every case, counsel should consider and discuss with the client whether the client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other forms of alternative dispute resolution.

(4) Counsel are encouraged to discuss the various ADR processes with their clients and explain the confidentiality and non-binding nature of the selected process.

(5) The court ADR program may be used for 1 pro bono ADR process through an ADR hearing. The court ADR program is available for an additional ADR process, if the parties want to retain the Court ADR Neutral on a private basis.

(l) TRIALS AND HEARINGS.

(1) Counsel should be punctual and prepared for any court appearance.

(2) Counsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility.

Featured

April 2017

Civility and the Mediation Process

Civility is more critical to the mediation process than to any other form of dispute resolution. The reasons are several: First, unlike trial and arbitration, success in mediation depends entirely upon adversaries agreeing. No agreement; no deal. To no surprise, civility helps draw people toward a consensus, while incivility has the opposite effect.

Second, behavioral studies of client and attorney decision-making show that lawyers *and* clients often develop unduly optimistic views of their litigation prospects, often with unfortunate consequences.[1] As these studies reveal, both clients and counsel predict their chances of success with levels of confidence that defy mathematic principles and common sense. In turn, they often turn down pre-trial settlement opportunities only to incur much less attractive adjudicated outcomes – both for clients and counsel-client relationships.

Third, other psychological studies, by no means unique to disputes, reveal patterns whereby we all seek out reaffirming information and discount contrary data. Often referred to as cognitive dissonance, this phenomenon impacts us all, particularly under adversarial situations, where the contrary position and the adverse parties are discredited in favor of our rosier predictions.

Now link these phenomena to the mediation process: Lawyers and their clients approach mediation with rose colored glasses and a proclivity to undervalue the other side's position, and no one can make you do anything – not the mediator; not anyone. With these phenomena in mind, civility is critical to success – in initiating the mediation process, presenting your position, and conducting the mediation session.

***Commencing the mediation process*:** Incivility is often the biggest hurdle to simply initiating a mediation. Having served as the general counsel of different companies, I encountered several instances where our counsel warned that mediation would be pointless precisely because the other side was incapable of being civil.

However, we decided to plow ahead anyway with mediation, trusting our team and the mediator to maintain decorum and focus upon a realistic discussion of strengths, weaknesses, alternatives and tradeoffs. These efforts consistently bore fruit, immediately if not soon thereafter, contrary to the prior predictions. Obviously, maintaining a civil discourse from the outset is the best set up. But even in the face of prior incivility (on the other side *as well as* your own), the mediation forum provides a fresh opportunity to civilly engage with the aid of a skilled neutral.

Presenting your case: Remembering that counsel and clients start out with rose-colored glasses and an unfavorable view of the other side's position, imagine the impact of a mediation brief laced with invective as to parties and their positions. Briefs maligning the other side's intentions, brimming with words like "frivolous", "specious", or "baseless" rarely change the adversary's mind. Rather, they prompt the adversary to reply in kind, and the exercise devolves into both sides focusing on the slights and affronts rather than the merits of the dispute.

So what to do? Leave the incendiary language at home. First, focus on the essential elements of liability and damages – what's there and what's not. Concurrently, exercise the discipline to only argue what truly matters. Strong points are lost in the mire of arguing everything, and worse, minor points distract the mediator and impede the mediation.

Second, share your brief with the other side. While some courts mandate such exchanges, other courts and regional practice may not. Do it anyway. If your purpose is to convince the other side to compromise, this is one of your best means of doing so. Concurrently, holding back your best evidence rarely makes sense. Despite the protest that one side needs to hold their "smoking gun" in reserve, rarely does that protest hold up to scrutiny. To the contrary, cases settle *because* the parties have exchanged more, rather than less.

Civility at the mediation session: Practicing civility at the mediation session also produces unmistakable dividends, starting with your credibility with the mediator. While mediators take pride in our neutrality, uncivil behavior directed at the other side or the mediator is sheer madness. While your mediator does not decide your case, she or he will be positively or negatively impacted by the tone and level of professionalism counsel and their clients exhibit, with corollary effects on the mediation session.

Interestingly, the fear of uncivil exchanges has prompted many attorneys to avoid joint sessions altogether. But think about this tradeoff: The joint session may be your only real opportunity to speak directly with key decision makers about strengths and weaknesses, freed from concerns that what you say can and will be used against you. It is also an opportunity to show that you are not the demon or simpleton that maybe, just maybe, you have been described to be by adversary counsel. This is also your chance — shorn of invective and affronts — to tell the compelling story that you will lay out to a judge, jury or arbitrator if the case does not settle. Properly executed, this type of presentation will shape the mediator's assessment, and with the neutral's input, should prompt the adversary to reevaluate their position. It takes poise, discipline and confidence. But isn't this what you have been trained to do?

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[1] See, Donna Shestowsky, J.D., Ph.D., University of California, Davis School of Law, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, Iowa Law Review, Vol. 99., No. 2, 2014, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=402976 (http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=402976) ; Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision-Making for Attorneys and Clients* (Springer 2010), pp. 29-48; Mark LeHocky, *Navigating the Litigation Conversation:*

Confessions of a Litigator Turned General Counsel Turned Mediator, Best Law Firms 2016, 6th Edition, U.S. News & World Report, www.issuu.com/bestlawyers/docs/blf2016-cover-elements/52?e=3342698/30903449 (http://www.issuu.com/bestlawyers/docs/blf2016-cover-elements/52?e=3342698/30903449)

Civility

September 2022 **Alana Grice Conner**

R-E-S-P-E-C-T: Mediation Civility

Old sins cast long shadows. This idiom is true for Agatha Christie's Monsieur Hercule Poirot and for counsel in mediation. Picture it...a conference room with parties, their counsel, and a mediator. Plaintiffs' counsel is repeating, loudly, that the client's damages far exceed the offer being made by the Defendants. Plaintiff is, of course, nodding. Plaintiff's counsel refuses, again loudly, to reduce the demand and shouts that nothing less than five times what is being offered will even be considered. And each time the mediator or Defendant's counsel tries to speak, Plaintiff's counsel interrupts, shouting more reasons why the offer is unacceptable. This scenario may have happened to you because it happened to me. And as you might have guessed, the case did not resolve at the mediation table. Civility in mediation is not about capitulation or surrender.

The Institute for Civility in Government describes civility as follows:

"Civility is about more than just politeness, although politeness is a necessary first step. It is about disagreeing without disrespect, seeking common ground as a starting point for dialogue about differences, listening past one's preconceptions, and teaching others to do the same. Civility is the hard work of staying present even with those with whom we have deep-rooted and fierce disagreements. It is political in the sense that it is a prerequisite for civic action. But it is political, too, in the sense that it is about negotiating interpersonal power such that everyone's voice is heard, and nobody's is ignored."

Civility in the legal practice requires us to show respect. The California Attorney Guidelines of Civility and Professionalism adopted in July 2007 frame many of its recommendations in the context of respect: respect for your client; respect for the judiciary; respect for opposing counsel, and respect for the process. Treating all concerned with respect ensures that the parties, who are the ones with the dispute, are heard. Statistics gathered by the courts repeatedly show that even when a party is unsuccessful at trial, their satisfaction with the court hinges on being heard.

Mediation, a form of alternative dispute resolution, is often successful. Historically, some attorneys believe that agreeing to mediate shows weakness in the case. Some attorneys believe their case is a "slam dunk" and see no benefit to mediation. By this logic, no case should ever be mediated. But mediation is a proven success, and it is even more so when counsel demonstrates civility and respect. Why is that? Because counsel is trusted to handle a problem a client could not resolve on their own. And counsel is modeling behavior for a client who likely may not have ever been involved in litigation before. The client is, of course, emotionally invested in the dispute, and here's where civility matters. A series of 2016 studies conducted by the Journal o Applied Psychology found that, like the common cold, rudeness is easily contracted, and exposure to one episode can have long-lasting effects, being the long shadow of those old sir

Civility in Mediation also means counsel should not misuse the process. It should be reserved for good faith efforts to resolve the dispute and not for some tactical purpose such as to delay or for "free discovery" from your adversary. Using the process in this manner will usually make any later effort less likely to succeed and is a waste of resources when mediation costs are a significant outlay.

Your written submissions including mediation briefs should also have a civil tone avoiding ad hominem attacks or taking hard positions before actual negotiations start. If a participant disputes an opponent's legal or factual points, the differences should be highlighted on the merits without demeaning rhetoric, commentary or labeling your opponent as "a liar." Briefs should be exchanged according to the mediator's scheduled deadline to avoid the sense that one side is "hiding the ball" and not acting in good faith.

As most courts now strongly encourage parties to engage in some form of alternative dispute resolution (ADR), finding ways to maximize its effectiveness is critical. Unfortunately, ADR often occurs on the eve of trial, when counsel and the parties have had lots of time to reinforce their entrenched views about the dispute and have expended attorneys fees and costs. If counsel present mediation to their client as a mere procedural hurdle to trial, then finding a resolution will be nearly impossible. If counsel, as is required under Evidence Code Section 1129, provides the Mediation Disclosure Notification and Acknowledgment at the onset of the retention, counsel can prepare their client for the eventuality of mediation and set the expectations for treating everyone involved in the case with respect. Counsel your clients about these civility standards, what to expect, how to act and how to address the adverse party and their counsel if they meet in joint session.

For mediators, preparation and having a plan to deal with uncivil behavior is also beneficial. Many mediators begin the process before the day of mediation with an introductory phone call to counsel. An uncivil counsel is likely to reveal their nature during the call which provides the mediator with the opportunity to set expectations of how counsel and the parties should behave. If a joint session is held or if the parties meet in separate caucuses, the mediator has numerous opportunities to gauge counsel and their clients' behavior and model civility. Often a mediator will ask if counsel and the parties accept the "ground rules" if there is a concern about civility.

Civility applies to all types of mediations including those conducted virtually. Using Zoom to conduct a mediation does not suspend the standards of civility. Although it seems like common sense, your client should not appear for a virtual mediation wearing pajamas and eating breakfast with dogs barking in the background. Likewise, counsel should not be taking calls or playing Wordle on their cell phone. It is disrespectful and signals a lack of engagement in the process.

Finally, although there is no guarantee that a case will settle at mediation, the chances of success will increase exponentially if counsel and the parties treat each other with R-E-S-P-E-C-T.

Alana Grice Conner

Alana Grice Conner *has been in practice for over 25 years. Her primary focus in the real estate context is landlord-tenant litigation, rent board representation and residential and commercial leasing. She is also a certified mediator. Contact her at Fried, Williams & Grice Conner LLP, in Oakland or San Francisco.* www.friedwilliams.com (https://www.friedwilliams.com).

36 Cal.App.5th 127
Court of Appeal, Fourth District, Division 3, California.

Angele **LASALLE**, Plaintiff and Respondent,
v.
Joanna T. **VOGEL**, Defendant and Appellant.

G055381
|
Filed 6/11/2019

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... state is that the parties to a lawsuit "shall cooperate." Period. Full stop.

Yet the principle the section dictates has somehow become the *Marie Celeste* of California law – a ghost ship reported by a few hardy souls but doubted by most people familiar with the area in which it's been reported. The section's adjuration to civility and cooperation "is a custom, More honor'd in the breach than the observance."[2] In this case, we deal here with more evidence that our profession has come unmoored from its honorable commitment to the ideal expressed in section 583.130, and – in keeping with what has become an unfortunate tradition in California appellate law – we urge a return to the professionalism it represents.

***131** FACTS

From 2011 to 2015, appellant Attorney Joanna T. **Vogel** (**Vogel**) represented plaintiff/respondent Angele **Lasalle** (**Lasalle**) in the dissolution of a registered domestic partnership with Minh Tho Si Luu. **Lasalle** repeatedly failed to provide discovery in that case, and the court defaulted her as a terminating sanction. She said her failure to provide discovery was caused by **Vogel** not keeping her informed of discovery orders, so she sued **Vogel** for legal malpractice.

Vogel was served with the complaint on March 3, 2016. Thirty five days went by. On the 36th day, Thursday April 7, **Lasalle's** attorney sent **Vogel** a letter and an e-mail – the content was the same – telling her that the time for a responsive pleading was "past due" and threatening to request the entry of a default against **Vogel** unless he received a responsive pleading by the close of business the next day, Friday April 8. Our record does not include the time of day on Thursday when either the e-mail was sent or the letter mailed, so we cannot evaluate the chance of the letter reaching **Vogel** in Friday's post except to say it was slim.

Counsel did not receive any response from **Vogel** by 3:00 p.m. the following Monday, April 11. He filed a request for entry of default and e-mailed a copy to **Vogel** at 4:05 p.m. That got **Vogel's** attention and she e-mailed her request for an extension at 5:22 p.m., but by then the default was a fait accompli.

Vogel acted rather quickly now that her default had been entered. She found an attorney by Friday April 15th,[3] and that attorney had a motion to set aside the default on file a week later. We quote the entirety of **Lasalle's** declaration in support of the set aside motion in the margin.[4]

****266 *132 Vogel's** set-aside motion was made pursuant to those provisions of subdivision (b) of section 473 that commit the matter to the trial court's discretion in cases of "mistake, inadvertence, surprise, or excusable neglect." There was no "falling on the sword" affidavit of fault that might have triggered application of those provisions of section 473 *requiring* a set-aside when an attorney confesses fault.

In opposing relief, respondent's counsel asked the trial court to take judicial notice of state bar disciplinary proceedings against **Vogel** stemming from two unrelated cases, which had resulted in a stayed suspension of **Vogel's** license to practice. The court denied the set-aside motion in a minute order filed June 9, 2016, in which the trial judge expressly took judicial notice of **Vogel's** prior discipline. A year later, a default judgment was entered against **Vogel** for $ 1 million. She has appealed from both that judgment and the order refusing to set aside the default.

We sympathize with the court below and opposing counsel. We have all encountered dilatory tactics and know how frustrating they can be. But we cannot see this as such a situation, and cannot countenance the way this default was taken, so we reverse the judgment.

DISCUSSION

[1]Three decades ago, our colleagues in the First District, dealing with a case they attributed to a "fit of pique between counsel," addressed this entreaty to California attorneys, "We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel. All too often today we see signs that the...

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... entered without first giving such lawyer *written* notice of your intent to request entry of default, and a *reasonable time* within which defendant's pleading must be filed to prevent your doing so." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) § 5:73, p. 5-19 (rev. #1, 2008) as quoted in *Fasuyi, supra*, 167 Cal.App.4th at p. 702, 84 Cal.Rptr.3d 351.)

***136** To be sure, there is authority to the effect giving any warning at all is an "ethical" obligation as distinct from a "legal" one. The appellate case usually cited these days for this ethical-legal dichotomy is *Bellm v. Bellia* (1984) 150 Cal.App.3d 1036, 1038, 198 Cal.Rptr. 389 (*Bellm*). Indeed, it was the most recent case cited by the trial court's minute order denying **Vogel's** set aside motion.

Bellm was written at a time when incivility was surfacing as a problem in the legal profession.[7] "Like tennis, the legal profession used to adhere to a strict etiquette that kept the game mannerly. And, like tennis, the law saw its old standards crumble in the 1970s and 1980s. Self-consciously churlish litigators rose on a parallel course with Jimmy Connors and John McEnroe." (Gee & Garner, *The Uncivil Lawyer:* (1996) 15 Rev. Litig. 177, 190.) Thus the majority opinion in *Bellm* lamented the "lack of professional courtesy" in counsel's taking a default without warning (See *Bellm, supra*, 150 Cal.App.3d at p. 1038, 198 Cal.Rptr. 389 ["we decry this lack of professional courtesy"]) but deemed it an ethical issue rather than a legal one and...

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... has many things to recommend it; reliability is not one of them. Between the ease of mistaken address on the sender's end and the arcane vagaries of spam filters on the recipient's end, e-mail is ill-suited for a communication on which a million ***138** dollar lawsuit may hinge.[8] A busy calendar, an overfull in-box, a careless autocorrect, even a clumsy keystroke resulting in a "delete" command can result in a speedy communication being merely a failed one.

[9]We all learned in law school that due process requires not just notice, but notice reasonably calculated to *reach* the object of the notice. (See *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 318, 70 S.Ct. 652, 94 L.Ed. 865.) While there is no due process problem in the case before us now (**Vogel** has not complained she wasn't actually served), e-mails are a lousy medium with which to warn opposing counsel that a default is about to be taken. We find it significant that by law e-mails are insufficient to serve notices on counsel in an ongoing case without prior agreement and written confirmation. (§§ 1013, subd. (e); 1010.6, subd. (a)(2)(A)(ii); Cal. Rules of Court, rule 2.251(b).)

****271** Indeed, the sheer ephemerality of e-mails poses unacceptable dangers for issues as important as whether an *entire case* will be decided by default and not on the merits. While some e-mails seem to live on for years despite efforts to bleach them out, others have the half-life of a neutrino. We ourselves have learned the hard way that spam filters can ambush important,...

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... have, on occasion, had to reschedule oral arguments because notices to counsel of oral argument dates and times sent by e-mail got caught in spam filters and did not reach those counsel, or their requests for accommodation did not reach us.

The choice of e-mail to announce an impending default seems to us hardly distinguishable from stealth. And since the other course adopted by respondent's trial attorney was mailing a letter on Thursday in which he demanded a response by Friday, it is difficult to see this as a genuine warning – especially when 19th century technology – the telephone – was easily available and orders of magnitude more certain.

The second factor we consider is the short-fuse deadline given by respondent's counsel. It was *unreasonably* short. It set **Vogel** up to have her default taken immediately. "[T]he quiet taking of default on the beginning of the first day on which defendant's answer was delinquent was the sort of professional discourtesy which, under [*Bookbinders*] justified vacating the default." (*Robinson v. Varela* (1977) 67 Cal.App.3d 611, 616, 136 Cal.Rptr. 783 (*Robinson*).)

[10]The third factor is the total absence of prejudice to **Lasalle** from any set-aside, given the relatively short time

between respondent seeking the ***139** default and **Vogel** asking to be relieved from it. "When evaluating a motion to set aside a default judgment on equitable grounds, the 'court must weigh the reasonableness of the conduct of the moving party in light of the extent of the prejudice to the responding party.' " (*Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, 1248-1249, 240 Cal.Rptr.3d 900.) Setting aside *this* default would have involved little wasted time, and the de minimis expenses incurred could have been easily recompensed.

The fourth factor is the unusual nature of the malpractice claim in this case. Some cases are suited for defaults: An impecunious debtor who is sued for an unquestionably meritorious debt may very well make a rational decision not to spend good money after bad by contesting the case. (See *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1751, 33 Cal.Rptr.2d 391 [discussing dynamics bearing on whether a defendant might elect to default a given claim].) But this legal malpractice action covering the entirety of a family law action lies at the opposite end of the spectrum.

Because of the facts alleged in the complaint – namely that **Vogel** had been responsible for losing **Lasalle's** *entire* dissolution case – **Lasalle's** damages called for litigation of multiple items of property characterization, credits, reimbursement claims, and perhaps even claims for support. (See *d'Elia v. d'Elia* (1997) 58 Cal.App.4th 415, 418, fn. 2, 68 Cal.Rptr.2d 324 ["every item of marital property presents a host of challenging issues"].) This means the malpractice claim here was going to require a trial within a trial about some complex issues indeed. (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241, 135 Cal.Rptr.2d 629, 70 P.3d 1046 [plaintiff must prove that "*but for* the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in ****272** which the malpractice allegedly occurred."].) That's pretty much the opposite of simple debt collection.

A fifth factor favoring a set-aside here was the presence of a plainly meritorious defense to at least part of **Lasalle's** default judgment. That judgment eventually included emotional distress damages of $ 100,000. Those damages are contrary to law. In *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1038-1039, 13 Cal.Rptr.2d 133, this court squarely held that emotional distress damages are not recoverable in an action for family law legal malpractice. Even if we were not directing the trial court to set aside the default, we would have to reduce the judgment by at least this amount as contrary to law, and its inclusion only underscores the impossibility of respondent's 24-hour deadline for answering the complaint.

[11]Next, there was the trial court's taking judicial notice of, and reliance on, **Vogel's** two previous instances of discipline for not having properly communicated with clients on previous cases. Evidence Code section 1101 ***140** represents the Legislature's general disapproval of the use of specific instances of a person's character to establish some bad act. We note the statute is not limited to criminal cases by its terms,[9] though it usually shows up in criminal cases. (See *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1176, 214 Cal.Rptr.3d 467 ["The purpose of this evidentiary rule 'is to assure that a defendant is tried upon the crime charged and is not tried upon an antisocial history.' [Citation.]".) Nonetheless, the point is the same: Judicial decisions should fit the facts of a case and not be based on some general evaluation of a person's personal history. The fact **Vogel** had failed to comply with standards of professional conduct in the past should not have colored the determination of whether she deserved an extension in this case.

And finally, we are disappointed that **Vogel's** explanation of her botched reply in this case was not considered adequate. A single mother who is juggling the inevitable pressures of that role and a caseload of family law matters, and has just learned that her ex-has failed to pay the property taxes or make the house payment – thus, ironically, throwing those into default – deserves some consideration.

To be sure, **Vogel's** declaration in support of her set aside might have been more polished – but then again she had very little time to prepare it. As we have noted, one of the considerations in a section 473 motion is how much time has elapsed since the default. The clock was ticking, and the obligations noted in the last paragraph were not about to disappear.

[12]In a case like this one, where there would have been no real prejudice had the set-aside motion been granted, the rule is that a party's negligence in allowing a default to be taken in the first place "will be excused on a *weak showing*." (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 740, 216 Cal.Rptr. 300, italics added.) **Vogel's** declaration crossed that threshold.

We do not hold that every section 473 motion supported by a colorable declaration must be granted. Since every section 473 motion must be evaluated on its own facts, we can hold only that *this one* should ****273** have been granted. As we have said, **Vogel** was notified by unsatisfactory means of an unreasonably short deadline (just being out of the office for one day – for example, *on*

another case – would have prevented her from meeting it), and ***141** she had significant family emergencies of her own, including an urgent need to take care of taxes and unpaid mortgage payments lest she lose her home. *Her* neglect was excusable. (See *Robinson, supra*, 67 Cal.App.3d at p. 616, 136 Cal.Rptr. 783 [noting short period of time to respond, press of business, limited office hours during a holiday period and defense counsel's preoccupation with other litigated matters made failure to timely file an answer "excusable"].) We hope the next attorney in these straits will not have such a compelling set of facts to offer ... and...

*** Start Section
... more readily than their best." (Burger, Address to the American Law Institute, 1971, 52 F.R.D. 211, 215.) In recognition of this fact, section 583.130 says it is the policy of this state that "all parties shall cooperate in bringing the action to trial or other disposition." Attorneys who do not do so are practicing in contravention of the policy of the state and menacing the future of the profession.

The judgment is reversed. Appellant will recover her costs on appeal.

Moore, J., and Ikola, J., concurred.

All Citations

36 Cal.App.5th 127, 248 Cal.Rptr.3d 263, 19 Cal. Daily Op. Serv. 5414, 2019 Daily Journal D.A.R. 5093

Footnotes

1 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

2 Hamlet, Act I, Scene 4, ll. 15-16.

3 It took **Vogel** four days because she initially contacted an attorney who had just decided to represent one of the codefendants – other attorneys who had represented **Lasalle**, but are not parties to this appeal.

4 "I am an attorney at law, and the defendant in this matter. [¶] When I was served with the summons and complaint, I was in the middle of a number of family law matters in court as the attorney. [¶] I was also involved in my own divorce, wherein I had just discovered my husband had failed to pay the taxes on our property, and it had gone into default. Also he failed to pay the mortgage on the family residence and it went into default. [¶] I received the summons and complaint and the discovery and had met with an attorney to represent me. I then learned that the lawyer had just associated with one of the other defendants in this matter. [¶] I therefore, determined to find a new attorney and contacted the plaintiff's attorney to request a brief extension to respond to the complaint. While waiting to hear back and without having the courtesy of the extension, I received the notice of default. [¶] I was served with discovery before I even answered the complaint, and had begun to work on that as well. [¶] I am a single mother and between taking care of the family, the practice of law, and trying to revive [sic] the files of from the plaintiff, I did fail to timely file my answer. [¶] As soon as I could, I contacted [the attorney who filed the motion] and retained him to represent me. I provided for him the summons and complaint, but have yet to gather the files together to answer what appears to be an unverified complaint. [¶] I have attached hereto my proposed answer. [¶] I state the above facts to be true and so state under penalty of perjury this 16th day of April in Fullerton, California."

Vogel's counsel at the time is not **Vogel's** appellant's counsel on appeal.

5 Indeed, some cases go so far as to say " 'very slight evidence will be required to justify a court in setting aside the default.'

[Citation.]" (*Miller v. City of Hermosa Beach*, supra, at p. 1136, 17 Cal.Rptr.2d 408.) More on this point below.

6 Disapproved on other grounds in *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 551, 343 P.2d 36.

7 The incivility lamentations we quoted earlier began in 1989, although this case certainly falls into the voice-crying-in-the-desert type of entreaty that grew louder a few years later.

8 The default judgment obtained against **Lasalle** by respondent was exactly $ 1,000,000.

9 Subdivision (a) of which provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." By their terms all four statutory exceptions are limited to criminal actions.

...

Austin, Steven | ADR Services, Inc.

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Profile

Hon. Steven K. Austin (Ret.) joined ADR Services, Inc. in 2022 after a distinguished 23 years of judicial service as a Judge of the Superior Court for the County of Contra Costa.

Judge Austin was appointed to the bench by former Governor Pete Wilson in 1998. He served primarily in the Civil Department, with additional assignments in Family Law and Criminal Trials. For 13 years, Judge Austin managed a busy Civil Direct assignment caseload, where he was responsible for all case management, law and motion, discovery, settlement conferences, and trials. He became widely renowned for proactively and successfully settling his cases, conducting close to 1,000 settlement conferences over the course of his judicial career.

In addition, Judge Austin was deeply involved in Court leadership and worked tirelessly to promote better access to the court system for the underserved. He served six years as Civil Supervising Judge, five years as Supervising Judge of the Pittsburgh Branch, and served as a member of the Court's Executive Committee for more than a decade. From 2013 to 2017, he served as the Court's Assistant Presiding Judge and Presiding Judge. He was also an elected member of the Executive Committee of the Statewide Presiding Judges Advisory Committee and helped launch Community Homeless Court in 2008.

Judge Austin has been well recognized by the legal community for being a hardworking, and evenhanded judge with excellent legal acumen. He is a thoughtful jurist who appreciates the complexities and subtleties of each case before him and views everyone as a person rather than a problem, adding a humanizing element to each matter he handles. In 2022, he received the Lifetime Achievement Award from the Contra Costa County Bar Association, and he has been honored as Trial Judge of the Year by the San Francisco Chapter of the American Board of Trial Advocates (ABOTA) and twice by the Alameda-Contra Costa Trial Lawyers Association (ACCTLA).

Prior to his judicial career, Judge Austin was in private practice for 17 years specializing in personal injury, civil rights, insurance coverage and construction defect litigation. Judge Austin earned a B.A. in Communication Studies from the University of California, Los Angeles and a J.D. from UC Hastings College of the Law.

AREAS OF EXPERTISE

- Personal Injury
- Construction Defect/Landslide
- Property & Neighbor Disputes
- Business
- Medical Malpractice
- Elder Abuse

JUDICIAL SERVICE

Superior Court of California, County of Contra Costa 1998-2021

Judge of the Superior Court

- Presiding Judge and Assistant Presiding Judge, 2013-2017.
- Previously served as Supervising Judge of the Civil Department.
- Member of the Court's Executive Committee for more than a decade.
- Presided primarily in the Civil Department, with other assignments in Family Law and Criminal Trials.
- For 13 years, managed a busy Civil Direct assignment, handling all case management, law and motion, discovery, settlement conferences, and trials.
- Conducted close to 1,000 settlement conferences.

LITIGATION EXPERIENCE

Buresh, Kaplan, Jang, Feller & Austin 1985-1998

Buresh, Kaplan, Jang, Feller & Austin

- Worked as an Associate and later became a Member and Partner.
- Litigation practice specializing in Insurance Defense, Construction Defect, Earth Movement and Insurance Coverage.

Cole & Scott 1985-1998

- Litigation practice specializing in plaintiff-side Personal Injury and Civil Rights.

HONORS AND AWARDS

- Lifetime Achievement Award, Contra Costa County Bar Association, 2022
- Trial Judge of the Year, American Board of Trial Advocates, San Francisco, 2021
- Contra Costa Alumnus of the Year, UC Hastings College of the Law, 2016
- Trial Judge of the Year, Alameda/Contra Costa Trial Lawyers Association, 2014
- Pro Bono Judge of the Year, Contra Costa County Bar Association, 2005
- Trial Judge of the Year, Alameda/Contra Costa Trial Lawyers Association, 2004

EDUCATION

- Juris Doctor, UC Hastings College of the Law, 1981
- Bachelor of Arts in Communication Studies, University of California Los Angeles, 1978

PROFESSIONAL ACTIVITIES

- California Access to Justice Commission, 2004-2011. Served as Chair of the Commission 2007-2009. Ex Officio member of the Commission until 2022 and Chair of the Language Access Subcommittee.
- Center for Judicial Education and Research (CJER). Chair of the Fairness Education Committee, 2007-2009.
- Judicial Council of California. Chair of the Court Interpreters Advisory Panel, 2009-2015. Access and Fairness Advisory Committee, 2002-2008.
- Member of the Statewide Language Access Planning and Implementation Committees that expanded court interpreter and language services to Civil and Family Law cases.
- Selected as member of the California delegation to the National Judicial Conference on Self-Represented Litigation at Harvard Law School in 2007. Presented as part of plenary panel.
- Chair of three Statewide Court Conferences attended by hundreds of judges and court managers. Conference on Race and Ethnic Fairness in the Courts 2005, Conference on Language Access to the

Courts 2006, and the Women of Color in the Courts Conference 2007.
- Designed and conducted the Contra Costa Community Homeless Court, 2007-2021. Oversaw monthly court hearings conducted at local shelters to resolve old infractions for people who were homeless and worked through treatment, job training and counseling to improve their condition.
- Robert G. McGrath Inn of Court.
- Board Member and Chair of Disability Rights California (formerly Protection and Advocacy, Inc.), 1992-1998.
- California State Mental Health Planning Council, 1996-1998.

TEACHING / SPEAKING ENGAGEMENTS

Judge Austin frequently served as faculty at education programs for judges, court staff and attorneys, speaking on such topics as General Civil Practice to E-Discovery and the use of CCP 638 and 639 references. He is committed to promoting civility and professionalism in the practice of law and has presented on that subject to judicial and attorney audiences on many occasions.

Representative Cases

Business Disputes

- In a dispute among members of a substantial family business, a son and his parents were in litigation over control and distribution of capital assets. During negotiations, it became apparent that other non-party family members would have to agree to be bound by certain settlement terms in order to fully resolve the matter. They were persuaded to participate and after lengthy, emotional and direct negotiations with each of the family members, the case resolved.
- A property development company purchased a large plot of land that contained partially full oil storage tanks. It contracted with a steel salvage company to recycle the oil and salvage the steel containers. As the job began, the salvage company discovered that the oil could not be recycled because it was contaminated with sludge, so it refused to perform. The case was eventually resolved using a creative approach that involved cash payments and additional salvage services at no charge.
- A longtime business tenant that operated a neighborhood grocery store claimed that it had an option to purchase the building that was breached when the landlord sold to a third party. After difficult negotiations that included the third party purchaser, the matter was resolved with the tenant eventually purchasing the property.
- Partners in the ownership of a gas station ended up in litigation over numerous, longstanding disputes. Settlement negotiations were challenging due to the animosity between the parties. Through a great deal of direct discussions with the principals, the matter was resolved through a buy-out agreement.

Construction Defect/Landslide

- A landslide significantly damaged the backyards of adjacent homeowners. Successfully negotiated a complex settlement involving three different governmental entities and the insurance carriers for the homeowners.
- A massive landslide undermined several townhouses and extended into a creek below those properties. Conducted extensive settlement negotiations that resulted in a full settlement and repair of the slide.
- Successfully negotiated settlements in numerous residential construction defect cases involving both multi-unit and single family residences.
- Conducted a lengthy bench trial in a case involving the construction of a luxury swimming pool and patio. In addition to numerous and complex defect claims, the case presented unique issues of disgorgement arising from the contractor’s alleged failure to maintain adequate Workers’ Compensation coverage.

Elder Abuse

- Plaintiff claimed her father developed severe bedsores while a resident of a Skilled Nursing Facility, which led to sepsis and his eventual death. Defendants disputed the cause of death and that they had breached the standard of care in any way. After resolving numerous discovery disputes, a settlement was negotiated.
- In a financial elder abuse claim, siblings claimed that their brother had stolen a number of their father's assets. The brother denied wrongdoing, claiming that his father had made the transfers freely and that some of the funds claimed to be stolen were loans that had been repaid. Settlement was eventually achieved, mostly by persuading the brother to move out of the father's home.

Medical Malpractice

- Successfully resolved a significant Wrongful Death/Medical Malpractice case involving a young father of two after a physician failed to diagnose an aortic aneurysm.
- Presided over a birth injury medical malpractice case where the plaintiff child suffered loss of blood to his brain resulting in permanent neurological impairment. The case presented a number of complex issues, including the appropriate methods for establishing the cost of future medical treatment.
- Negotiated a settlement arising from a medication error that resulted in injuries to Plaintiff's gastrointestinal system.

Personal Injury

- Presided over a jury trial where a young man was rendered a quadriplegic during a competitive diving demonstration when he struck a synchronized swimmer in the water below the diving board. The case resulted in the largest personal injury jury verdict in Contra Costa County history.
- Extensive knowledge of issues involved in Traumatic Brain Injury (TBI) cases, having conducted lengthy jury trials with numerous issues regarding expert testimony and the admissibility of new scientific techniques. Successfully resolved several cases involving these issues.
- A worker fell from scaffolding and suffered traumatic injuries. The case presented significant workplace control and Privette issues that were extensively discussed during the settlement conference, leading to resolution.
- An office employee fell into an open hole in the floor during an office remodel. In reaching settlement, distinct efforts were made to persuade the employee's Workers Compensation carrier to significantly reduce the lien claim due to employer negligence.
- Plaintiff suffered serious injuries during a fight at a local athletic event. In reaching settlement, a great deal of time and effort were spent on establishing a rapport with Plaintiff so that she could accept the degree of her comparative fault.

Property and Neighbor Disputes

- A retired couple in rural Contra Costa County had been in a simmering dispute with the owner of a neighboring cattle ranch for many years over property lines and water rights. After a series of settlement conferences, including one at the ranch, the matter was resolved.
- Nearly 100 plaintiffs claimed that their homes were damaged due to toxic soil contamination from neighboring property that had been a railway station and later a site for machinery repair. This complex, multiparty action was resolved following extended settlement negotiations.
- Neighbors in an upscale community could not agree on the location or the terms of an easement adjacent to their shared property line. After visits to the property and a great deal of work with the neighbors, a comprehensive agreement was reached.
- Presided over a lengthy jury trial in a dispute between neighbors regarding their respective rights to a small parcel of land located on their boundary. After one side built a wooden deck and pergola in the disputed area, the other cut it in two with a chain saw while being filmed by a security camera. The case involved novel easement and equitable relief claims.
- Conducted a bench trial after floods caused by a blocked drainage pipe and earthen channel resulted in damage to a number of homes. The case involved difficult issues related to the "Natural Watercourse Rule," and was eventually affirmed on appeal. Contra Costa County v. Pinole Point (2015) 235 CA4th 914.

Testimonials

“Judge Austin was awesome. He treated all with respect, kindness, compassion, in such a way that he got this resolved. I wholeheartedly recommend Judge Austin and ADR Services, Inc. and I look forward to working with him in the future. Judge Austin cared about the case and me as counsel. And this made a huge difference in this case.”

“Great to see Judge Austin joining the ADR team. I have known Steve forever, and he is a terrific judge and an even better person. You could not have obtained a better person to add to the panel. Congratulations.”

“Judge Austin ran a great courtroom. Every party had a fair hearing or trial. He was a powerful voice for resolution of legal issues and treated all litigants with dignity and respect. He did not always agree with the position in our briefs, but he had a way of easing the blow. “Fairness” and “Intelligence” would be two words to describe him.”

“In my 47 years of practicing law in this county, Steve Austin was one of the best judges we have ever had. He was always courteous, listened to all sides carefully and frequently cut the tension with a great sense of humor. He never let the black robe go to his head.”

Please Share

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Fee Schedule

Hon. Barry Baskin (Ret.)

Mediator, Arbitrator, Referee/Special Master, Neutral Evaluator, Hearing Officer, Temporary Judge/Judge Pro Tem

Contact Information

Lisa Midel

1255 Treat Blvd. Suite 700 (at Buskirk Ave.)
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Hon. Barry Baskin (Ret.) is an arbitrator, mediator, special master/referee and neutral evaluator at JAMS. In 2002, Judge Baskin was appointed to the Contra Costa County Superior Court. For 20 years, Judge Baskin served on the bench, where he served in almost all divisions of the court. He served six years in the civil division, handling complex cases, including class actions. From 2019 to 2020, Judge Baskin served as presiding judge and helped steer the court through the pandemic. Prior to that, he served as assistant presiding judge from 2017 to 2018 and spent eight years on the Executive Committee. His last assignment on the bench was a second term in the civil division, where he handled complex litigation, construction defect litigation, class actions and a variety of other matters. He is the first person appointed to the bench in California who was born, raised and trained in South Africa.
Judge Baskin used mediation often as a lawyer, which helped him to successfully resolve well over 1,000 matters before trial. In 2009, he was honored as Trial Judge of the Year by the Alameda-

Contra Costa Trial Lawyers' Association. In 2008, he was selected as faculty to teach new judges at their orientation, and he continued to do so on a regular basis until leaving the bench.
Prior to joining the bench, Judge Baskin had a successful career handling complex civil litigation. Beginning in 1979, Judge Baskin was the managing partner of his family's law firm, Baskin & Partners, in South Africa. His practice consisted of business litigation and family law. In 1987, he emigrated from South Africa. He was admitted to the California Bar in 1987 and joined Pillsbury, Madison & Sutro. He served in the firm's antitrust and intellectual property group. In 1989, he joined Farrow, Bramson, Baskin & Plutzik and became a partner in 1990. Until his appointment to the bench, he served as lead trial counsel in the area of complex civil litigation, representing both plaintiffs and defendants.

Representative Matters

Business/Commercial

- Presided over matters involving breach of contract and contractual interpretation, including indemnity agreements, commercial leases and real estate contracts
- As counsel, defended Fortune 500 companies in complex business litigation, with an emphasis on antitrust and intellectual property rights
- As counsel, handled the review of data and documents germane to obtaining government approval of a larger merger and acquisition
- Served as lead trial counsel in complex federal and state court litigation, including successfully defending a $30-million shareholders' derivative suit

Class Actions and Mass Torts

- Presided over several motions for approval of class action settlements and California PAGA claims
- Presided over a class action involving unfair HOA dues-collection practices on behalf of members of many homeowners' associations, which included alter ego allegations
- Presided over wage and hour claims brought by employees against their employer for failure to pay overtime
- As counsel, defended and prosecuted class actions for over a decade; most of them were resolved through mediation

Intellectual Property

- Presided over a dispute involving members of a rock band and claims of theft of intellectual property and contract rights; claims were fully resolved short of trial and resulted in ongoing concerts/recordings
- Presided over shareholder disputes, including dissolution proceedings and claims for injunctive relief and summary judgment; the many rulings and settlement efforts resulted in dismissal of all claims
- As counsel, defended and pursued claims of theft of intellectual property rights

Employment

- Presided over wrongful termination matters, including sex and race discrimination allegations
- Presided over theft of trade secrets against former employees
- Presided over employment breach of contract disputes

- Presided over all claims/counterclaims for a law firm dissolution, including sexual harassment; racial, sexual and age discrimination; wage and hour claims; and class action claims
- Presided over contractual and statutory claims between a city and its emergency response workers
- Presided over PAGA disputes

Family Law

- Presided over many multi-day trials that included issues involving:
    - Date of separation
    - Validity of prenuptial contracts
    - Community of property
    - Breach of fiduciary duty
    - Child custody and move-away orders
    - Spousal and child support
    - Complex financial accounting
- As a judge, successfully handled many family law settlement conferences

Estate, Probate and Trusts

- Presided over trials involving inheritance issues and rights
- Presided over proceedings involving contested estates, wills and trusts

Personal Injury and Torts

- As a judge, handled many wrongful injury cases involving:
    - Premises liability
    - Product liability
    - Vehicular-related matters
    - Uninsured and underinsured motorists
    - Government immunity claims
    - Other tort claims:
        - Serious dog bite
        - Slip and fall
    - As a mediator, resolved multiple serious personal injury cases, including wrongful death claims involving insurance coverage

Real Property and Real Estate

- Presided over and resolved many matters involving real estate contracts
- Presided over multiple matters involving title and other partnership claims

Construction and Construction Defect

- Presided over numerous disputes between contractors, subcontractors and purchasers involving various construction defect claims
- Presided over multiple disputes involving single-family home construction defect disputes

Honors, Memberships, and Professional

Activities

Professional Trainings and Activities

- Adjunct Professor, Criminal and Constitutional Law, John F. Kennedy University School of Law, 2011
- Moot Court Judge for High School Competitions, 2002–2021
- National Institute of Trial Advocacy (NITA), 1987, 1988

Memberships and Affiliations

- Member, State Bar of California, 1986–present
- Member, Ethics Committee, California Judges Association (CJA), 2008–2011
    - In 2010, Judge Baskin served as a CJA liaison to assist judges statewide receiving complaints or proceedings from the Commission on Judicial Performance.
- President, Warren W. Eukel Teacher Trust, 1992–2002
    - The Warren W. Eukel Teacher Trust recognizes and awards four outstanding teachers in the county each year.
- Member, Panel of Arbitrators, American Arbitration Association, 1991–2000
- Member, Probation Monitor, California State Bar Court, 1991–1994
- Member, Committee on Rules and Procedures of Court, California State Bar, 1991–1994
- S. Supreme Court, 1991
- Supreme Court, South Africa, 1979

Selected Awards and Honors

- Trial Judge of the Year, Alameda-Contra Costa Trial Lawyers' Association, 2009
- Recipient, Major Contributions Award for Pro Bono Work, Contra Costa County Bar Association, 1999

Selected Publications

- "Summary Judgment After Matsushita," Anti-Trust, ABA, Vol. 1, No. 3, 1987 (assisted in preparation of the article).
- "To Discover or Not to Discover, That Is the Contradiction,"*South African Law Journal*, 1981.
- "Recognizing and Prosecuting Class Actions," *Contra Costa Lawyer*, June 1997.
- "Reflections of a South African–Born Jurist," *Contra Costa Lawyer*, April 2005.
- "How to Survive the Social Media Frenzy," *The Bench* (the official journal of the California Judges Association), Spring 2011.

Background and Education

- Superior Court, Contra Costa County, 2002–2022
    - Presiding Judge, 2019–2020
    - Assistant Presiding Judge, 2017–2018
- First District, Division Four, California Court of Appeal
    - Justice Pro Tem, August–December 2012
- Farrow, Bramson, Baskin & Plutzik, Walnut Creek, CA

    - Partner, 1989–2002
- Pillsbury, Madison & Sutro, San Francisco, CA
    - Associate, 1987–1989
- Baskin & Partners, South Africa
    - Managing Partner, 1983–1986
    - Partner, 1979–1983
- Law Degree; Oliver Schreiner School of Law; University of the Witwatersrand; Johannesburg, South Africa; 1978

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University of California, Berkeley, B.A., History

Santa Clara University, School of Law, J.D.

Audrey is a trusted advisor to businesses and their management teams. She provides sound legal advice on issues ranging from personnel disputes to corporate governance chess matches and charting a path to early resolution or a powered litigation win.

Audrey's clients have been startups to publicly traded companies, non-profits and public entities in wide and varied industries: food & beverage, natural & organics, transportation and logistics, technology, security, professional services, wellness & health care, manufacturing, financial services, real estate development and construction, energy, and green businesses. Matters are in State and Federal court, mediation and arbitrations, or before government agencies.

Audrey litigates individual and class actions involving a vast range of employment and workforce issues: wage and hour, meal and rest breaks, employee misclassification and independent contractor status, compensation and commission, theft of trade secrets, founder disputes, compliance with disability and medical leave laws (including reasonable accommodations), discrimination and harassment (sex, race, age, religion, disability and medical condition), wrongful termination, employee discipline, employee privacy, layoffs, reductions in force, & severance, contract claims, and employment related torts such as defamation, negligence, emotional distress, fraud and misrepresentation.

Audrey has also litigated a wide range of business matters including contract disputes for multi-billion dollar companies, breach of fiduciary duty, mismanagement and fraud claims against corporate directors and officers, shareholder claims, trade secret thefts, complex multi-plaintiff residential construction claims for publicly traded homebuilders and private construction companies, $100 million dollar contract and fraud claims between banks, and all manner of ordinary business disputes in between, including land sale acquisitions, trademark infringement, business to business collections, and issues arising out of the sale, merger, acquisition, or dissolution of businesses and partnerships.
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Honors

Audrey was named as the inaugural Outstanding Woman Lawyer by the Contra Costa Bar Association's Women's Section in 2018. Audrey has received a ratings of 10.0 on Avvo for litigation and employment work. Audrey has also been recognized as a Super Lawyer Rising Star in Northern California. No more than 2.5 percent of the lawyers in the State are named to the list.

Community

Audrey serves as a volunteer Discovery Facilitator through the Contra Costa Superior Court. Audrey is also a member of the East Bay Economic Development Alliance. Audrey Chairs the Human Capital group, a membership of professionals devoted to human resources and workforce matters. Audrey is the 2012 Past President of the Contra Costa County Bar Association and served on the CCCBA's Board of Directors, its Executive Committee and in other leadership roles for many years.

Audrey has been active in the Contra Costa Bar Association, initiating the CCCBA's first public service fellowship through partnering with Equal Justice Works, whose fellows have provided legal service in Contra Costa to stop predatory lending on the elderly, as well as providing legal assistance to low-income disabled persons living with mental illnesses. Audrey serves on the Charitable Contributions committee and has served on the CCCBA nominating committee for the Board and Executive Committee. Audrey also served on the Bar Association's Board of Directors for the Employment Law Section and the Women's Section, as well as

women & minorities in the legal profession, and law practice management for groups such as Lorman Education, the Employers Advisory Council for the EDD Contra Costa, Vistage, ProVisors, and the CCCBA for various sections and the MCLE spectacular.

Audrey has been involved in a number of community activities over the years including the Tuesday Forum, Walnut Creek Chamber of Commerce East Bay Women's Conference, the Walnut Creek Fountain for Youth and the East Bay Leadership Foundation. Audrey's pro bono activities have included legal work for HomeAid, the Contra Costa and Solano Food Bank, Diablo Ballet, Markum Arboretum, and the Napa Valley Symphony.

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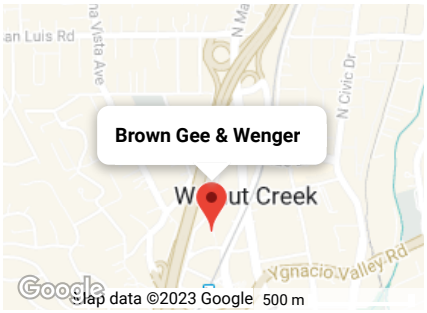

Smith, Winifred | ADR Services, Inc.

adrservices.com/neutrals/smith-winifred

Hon. Winifred Y. Smith (Ret.)

Case Manager: Joanna Barron, Mikaela Schmidt

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- joannateam1@adrservices.com
- download PDF bio
- visit website

Profile

Available for Mediations, Arbitrations, Discovery and Judicial References

The Honorable Winifred Y. Smith (Ret.) comes to ADR Services, Inc. with 21 years of experience as a Judge of the Alameda County Superior Court and 26 years as Deputy Attorney General in the California Attorney General's Office. During her tenure on the bench, Judge Smith presided over civil law and motion, civil direct, and complex litigation matters. She was also an integral member of court leadership, having served as a member of the Judicial Council, Supervising Judge of multiple courthouses, Supervising Judge of the court's Civil Division, and later as Presiding Judge.

Judge Smith has extensive experience in a variety of civil cases, including coordinated cases, class actions, employment, construction defect, and Proposition 65 matters, and has presided over many cases presenting questions of first impression. In her 13 years serving in civil assignments, Judge Smith presided over nearly 100 cases to verdict, including a Product Liability/Complex Litigation case which resulted in the largest civil award in California's history. She has been affirmed in 95% of her cases on appeal. In addition, Judge Smith served as a Justice *Pro Tem* for the California Court of Appeal, First Appellate District, Division Four.

Prior to her appointment to the bench, Judge Smith worked as a Deputy Attorney General with the California Department of Justice's Office of the Attorney General. During her tenure there, her assignments included working in the OAG's Health, Education, and Welfare Section representing state agencies.

Judge Smith is widely respected for her judicial demeanor and ability to deftly manage complex matters to resolution. She has been honored by many legal organizations for her commitment to judicial excellence, including being twice named Jurist of Distinction by the Women Lawyers of Alameda County and as Trial Judge of the Year by the American Board of Trial Advocates (ABOTA) in 2021. She has been invited to speak on numerous panels to offer her legal expertise and is currently a lecturer at Berkeley Law teaching Civil Trial Practice.

JUDICIAL EXPERIENCE

Alameda County Superior Court

- Civil Complex Litigation – 2016-2021
- Presiding Judge – 2014-2015
- Assistant Presiding Judge – 2012-2014
- Felony Criminal Assignment – 2012-2014
- Supervising Judge of Civil Division – 2010-2012
- Civil Direct Calendar – 2007-2012
- Civil Law and Motion – 2006-2007
- Supervising Judge – 2004-2005
  Wiley W. Manuel Courthouse

Allen E. Broussard Justice Center
- Felony Arraignments – 2004-2005
- Juvenile Court – 2002-2003
- Misdemeanor Pre-Trial – 2001

California Court of Appeal, First Appellate District

- Associate Justice Pro Tem, Division Four – 2018

HONORS AND AWARDS

Women Lawyers of Alameda County, Jurist of Distinction – 2021
American Board of Trial Advocates, Trial Judge of the Year – 2021
Women Lawyers of Alameda County, Jurist of Distinction – 2014
California Association of Black Lawyers, Judicial Excellence Award – 2013
Alameda County Bar Association, Distinguished Service Award – 2010
Charles Houston Bar Association, Judge of the Year – 2006

EDUCATION

J.D., Boston University School of Law – 1974
B.A., Stanford University – 1971

PROFESSIONAL AFFILIATIONS

- Judicial Council of California – 2008-2011
- Consultant for Civil Proceedings Bench Book, CJER – 2009-2010
- Continuing Judicial Studies Committee, CJER – 2007-2008
- Judicial Council Access and Fairness Advisory Committee – 2004-2007
- Lawyer Delegate – 1997-1999
  Northern District of California
  Ninth Circuit Court of Appeals

TEACHING EXPERIENCE

UC Berkeley, School of Law – 2022
CJER Civil Experienced Primary Assignment Orientation – 2021
CJER Complex Case Management and Trial – 2021

BOARD AFFILIATIONS

Association of Business Trial Lawyers – 2015-Present
Alameda County Bar Association, Volunteer Legal Services – 2008-2014
David P. McCullum Youth Court – 2003-2009

PROFESSIONAL MEMBERSHIPS

- California Judges Association
- Alameda County Bar Association
- Women Lawyers of Alameda County
- National Bar Association
- California Association of Black Lawyers
- Charles Houston Bar Association
- Earl Warren Inn of Court

Representative Cases

EMPLOYMENT

- Employee was terminated for failing to report on-the-job injuries as required by OSHA. The employee had been disciplined before for similar conduct. His employer refused to reinstate the employee but settled the matter for a monetary award in recognition of the employee's lengthy tenure at the company.
- Age discrimination case alleged against an insulation installment company under FEHA and under common law.
- Sex discrimination against major shipping company in which plaintiff alleged she was subject to a different standard for performance than her male colleagues. Case tried to verdict but settled before punitive damages phase of the trial.
- Discrimination alleged by professor seeking tenure.
- Plaintiff alleged wrongful termination from a medical center claiming that she was retaliated against for engaging in union activities.

- Plaintiff sued a university for wrongful termination from her position as an assistant professor when she failed to return to work after medical leave. The core issues in the case revolved around failure to achieve tenure and the status of her academic research. The case was tried to verdict and the Court of Appeal affirmed Judge Smith’s orders denying plaintiff's motion for reinstatement to her position as professor.
- Class action against a car manufacturer for racial bias on the production floor.

BUSINESS / CONTRACT

- Plaintiff sued defendant for misrepresenting accounts receivable he owed to a business to which plaintiff loaned a large sum of money.
- Parties entered into a stock purchase agreement for sale of food service business. The buyer alleged that the seller misrepresented the status of the accounts receivable resulting injury to the business. The buyer ceased payment on the promissory note. The seller threatened suit for breach of contract. The matter settled pre litigation.
- Action for breach of contract, fraud and concealment following the sale of stock in a newspaper publishing corporation.
- Dispute over purported ownership of a nightclub. Plaintiff alleged defendant granted him half ownership in exchange for his capital investment then excluded him for ownership and management of the club.
- Action by a bank against a title company for negligence in managing an escrow to which the bank was not a party. The theory of liability was that the bank had a financial interest in the outcome of the escrow and was therefore owed a duty of care.

- Declaratory relief sought against homeowners’ association to determine that amendments to development’s covenants, conditions and restrictions deprived owners of significant property rights.
- Action involving a dispute over competing claims for the surplus proceeds from a foreclosure sale of a residence.
- A case resolving the disputed financial matters of a couple who broke their engagement. The Court of Appeal affirmed the order apportioning the various assets owned or controlled by the parties.

PERSONAL INJURY

- Plaintiff suffered an injury when she tripped on the damaged asphalt surrounding a manhole while crossing a street. Her knee cap was shattered which require 3 surgeries to repair. The case presented issued of allocation of liability in the context of control over public streets responsibility for repair when utilities have easements for their equipment.
- Plaintiff suffered an injury to his knee and back when the concrete step at his apartment building collapsed. The rebar supporting the step was corroded and failed. The case presented issues of

premises liability, wage loss and future medical care
- During her tenure as a Direct Calendar judge, Judge Smith tried numerous personal injury cases ranging from catastrophic injuries to injuries sustained in motor vehicle and other accidents.
- For five years, Judge Smith was one of two judges assigned to try asbestos cases filed in Alameda County. She tried over a dozen cases to verdict and managed hundreds more.
- In a bellwether trial, part of a larger coordinated matter assigned by the Judicial Council, a couple alleged that their use of a popular fertilizer resulted in their contracting non-Hodgkins lymphoma. The trial resulted in the largest personal injury award in the state of California.

- Action against tire manufacturer for strict product liability and negligence for failing to provide warnings about the danger of older tires.
- Action against an airport shuttle company for injuries sustained in transit to a local airport.
- Dispute involving whether an airline carrier was liable for the injuries of a TSA airport screener when screener carried an oversize bag.

CLASS ACTIONS

- Plaintiff defaulted on business loan. Mediation resolved compromised amount and conditions of repayment.
- Plaintiff sued defendant for misrepresenting accounts receivable he owed to a business to which plaintiff loaned a large sum of money.
- Class action filed on behalf of over 80 thousand employees of a health care organization alleging that they were underpaid regularly and owed overtime wages due to the rounding of time entries when they clocked in and out of work.
- Consumer class action challenging wireless phone carrier's policy of charging early termination fees to consumers for terminating service before defined contract periods expired.
- Class action seeking injunctive relief under the UCL against a health plan for failing to provide coverage for necessary mental health services.

- Representative action brought by plaintiffs against defendants for their participation in illegal internet payday loan practices.
- A class of retirees from employment at a university sued to determine if there is a legal duty on the governing body of the university to pay retroactive monthly retirement benefits for periods of time prior to the date on which a retirement plan member submits a request for benefits under the plan.
- Plaintiff class sought damages from company utilizing automated debt collection practices which caused financial harm.
- The class sought an order requiring national retail chain to provide seating at cash registers.
- Class sought damages against major grocery store chain for misrepresenting the origin of the olives in the store label olive oil.

WAGE AND HOUR/ PRIVATE ATTORNEY GENERAL ACT (PAGA)

- Judge Smith handled over 200 hundred Wage and Hour and/or PAGA cases during her tenure in a Complex Litigation assignment. For example:

  • Employees sued national company providing helicopter emergency services for wage and hour and PAGA violations. After a phase 1 trial on whether certain Labor Code provisions exempted plaintiffs from meal and rest break requirements, the parties resolved the remaining liability issues for an award in excess of 100 million dollars.

  • Wage and Hour and PAGA claims alleging failure to provide meal and rest breaks against:
  o Fast food chain
  o Chain of restaurants operating in Northern California
  o National chain of nutritional products stores
  o Grocery store chain operating in northern and southern California

• Wage and Hour claims against a transportation company. The case raised issues of preemption by federal law because of the nature of the business.

COORDINATED PROCEEDINGS

- During her years in a Complex Litigation assignment, the Chief Justice of the California Supreme Court appointed Judge Smith to manage a number of cases coordinated throughout the state as a single case. The following are examples:
  • 31,000 cases nationwide filed in California in which plaintiffs sued the manufacturer of a non-surgical birth control device for various injuries. Judge Smith oversaw the case from filing to resolution.
  • Over 200 cases in which the plaintiffs sued the manufacturer of a national brand of fertilizer because it failed to warn that users may develop non-Hodgkins lymphoma.
  • Cases in Northern California filed on behalf of victims of clergy sex abuse.
  • Cases alleging a cancer-causing ingredient in an over-the-counter medication against manufacturer and retailers.
  • Cases alleging fraud by payday lending institutions.

COMPLEX LITIGATION

- Plaintiff, representing a trust created in Bankruptcy Court, sued defendant, an insurance organization, seeking a declaration that defendant was responsible for the obligations of certain insolvent insurers. This case was litigated for over five years and went to the Court of Appeal twice. After phase 1 of the trial which addressed the scope of defendant's potential liability, the parties resolved how the defendant insurance organization would participate in future litigation stemming from the trust.
- Case resolved two related issues: (1) was the defendant university authorized to enter into contracts for certain benefits for retirees, and (2) whether it had entered into an implied contract to provide those benefits to the retirees.
- Plaintiffs filed a petition for writ of mandate and complaint for declaratory and injunctive relief seeking to enforce the due process rights of criminal defendants declared incompetent to stand trial under the US constitution to timely treatment to restore them to competency so that they may proceed to trial.

PROPOSITION 65

- Action against manufacturer of energy drinks alleging lead in excess of the permitted limits.
- Action against national retail chain to warn of toxic components in accessories sold in the stores.
- Action against manufacturer of energy drinks to warn of alcohol in excess of permitted limits.
- Action against manufacturer of uniforms to warn of chemicals used to treat fabric used to make the uniforms.

LEGAL MALPRACTICE

- Plaintiff asserted defendant pressured her into agreeing to a settlement of her claims against a non-profit organization and several governmental agencies and that defendant dismissed her lawsuit without authorization. The underlying lawsuit alleged that defendants intentionally thwarted her efforts to establish a facility for disabled children.
- This malpractice suit followed a probate action in which the defendant drafted a trust to effect the disposition of a client's real and personal property.

PUBLIC ENTITIES

- Plaintiff sued a school district for alleged constitutional violations in assigning students to the district's elementary schools and assigning students to academic programs in the district high school.
- Case addressed public agency immunity from liability for accidents involving high speed chases by peace officers.

- A county mental institution was sued for injuries sustained by a patient assaulted by a fellow patient. The case addressed the issue of governmental immunity for public entities tortious conduct committed by mentally ill patients.
- Class action for injunctive and writ relief statewide on behalf of recipients of certain public benefits in that they were deprived of equal protection and discriminated against in the administration and supervision of said benefits.
- Retirees sued pension fund for age discrimination following a change in formula used for calculation of retiree pension benefits.

- A consolidated case addressed how to determine the integrity of electronic voting machines under the California Elections Code.
- Case addressed the issue of the disclosure of meeting minutes at the public university pursuant to the Public Records Act.

LANDLORD / TENANT

- Landlord allegedly forced plaintiff out of unit through threats and intimidation. Defendant landlord claimed plaintiff was not a tenant and that he had no relationship with the plaintiff.
- Plaintiffs rented a one bedroom apartment for 18 years. During that time the plaintiffs alleged that the apartment constantly needed repairs de to water intrusion and that they were exposed to mold and lead paint. The defendant owners and managers did not adequately addressed the maintenance issues and plaintiffs finally moved out. Plaintiffs sued for breach of warranty of habitability, violation of SF rent ordinance and constructive eviction.
- Plaintiff alleged that defendant failed to accommodate his physical disability when he refused to move him to an accessible apartment on the ground floor in the apartment complex. Plaintiff agreed to resolve the case by moving plus a cash amount to compensate him for future medical expenses he would incur because defendant failed to accommodate him timely.

Testimonials

“Hon. Winifred Smith was a spectacular mediator. She used her extensive experience as a judge to offer important insight that our client trusted. She was knowledgable, empathetic, and practical in her approach. I would definitely use her again.”

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Fee Schedule