THE HONORABLE JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

Presented by

THE UNITED STATES BANKRUPTCY COURT

EASTERN AND WESTERN DISTRICTS OF ARKANSAS

June 27, 2025

University of Arkansas School of Law

Fayetteville, Arkansas

CLE Credit Hours 6 (including 2 hours of ethics)

PROGRAM AGENDA

AND

HANDOUT MATERIALS

THE HONORABLE JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

Presented by the United States Bankruptcy Court Eastern and Western Districts of Arkansas University of Arkansas School of Law, June 27, 2025

PROGRAM

6 approved AR CLE hours (4 general hours; 2 ethics hour) Materials: https://www.areb.uscourts.gov/news

8:15 – 8:30 Welcome
Hon. Bianca M. Rucker, *U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas*

8:30-9:30 Ethics: Know Your Case Better Than You Know Your Name: A Legacy of Excellence
Judy Simmons Henry, Wright, Lindsey & Jennings, LLP

9:30-10:30 Update on Washington County Circuit Court – Let's All Agree to Do These Things First, Please
Hon. Matt Durrett, *Circuit Judge for Madison and Washington County, Arkansas*
Hon. Beth Bryan, *Circuit Judge for Madison and Washington County, Arkansas*

10:30–10:45 Break

10:45-11:45 Reparative Family Lawyering
Professor Daniel Bousquet University of
Arkansas School of Law

11:45-12:45 Lunch (provided at cost – select box lunch choice on registration form)

12:45-1:45 Ethics: Civility vs. Zealous Advocacy – Which is More Important?
Hon. Timothy L. Brooks, *U.S. District Judge for the Western District of Arkansas*

1:45-2:45 Trustee Esoterica: The Things You Know, and The Things You Might Not Know, and A Couple Of Things You May Have Never Considered a Chapter 7 Trustee Can Use in the Administration Of Chapter 7 Cases and Estates
Stanley V. Bond, Chapter 7 Panel Trustee
Brian Ferguson, Chapter 7 Panel Trustee

2:45-3:00 Break

3:00-4:00 Evidence
Hon. Phyllis M. Jones, *U.S. Bankruptcy Chief Judge for the Eastern and Western Districts of Arkansas* Hon. Richard D. Taylor, *U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas* Hon. Bianca M. Rucker, *U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas*

THE HONORABLE JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

June 27, 2025

Presentation from 8:30 to 9:30

Know Your Case Better Than You Know Your Name: A Legacy of Excellence

Judy Simmons Henry

Wright, Lindsey & Jennings, LLP

Handout Materials

James G. Mixon
2025 Trial Practice Symposium

KNOW YOUR CASE BETTER THAN YOU KNOW YOUR NAME: A LEGACY of EXCELLENCE

Judy Simmons Henry
Wright, Lindsey & Jennings LLP

The Fun Begins

- March 24, 1984 – appointment to federal bkr bench
- Feb. 1, 1993 – Dec. 31, 2002 – Chief Judge

- *In re O'Connor,* 42 B.R. 390 (June 11, 1984)
  - Garnishment contempt proceeding tried on stipulations
  - Willful stay violation
  - Deficient stipulation as to who violated stay
  - Justice served by reopening the record for more evidence

- *In re Butler, 42* B.R. 777 (June 15, 1984)
  - Ch 11 cramdown confirmation denied
  - Step by step statutory analysis for confirming ch 11 plan

FUN cont'd

- *In re Answerfone,* 48 B. R. 24 (Jan. 23, 1985)
  - Subordination of insider claims
  - "Court of equity"
  - Footnotes are important
  - Motion to reconsider – authority for motion not cited

- *In re Draper*, 48 B.R. 37 (Jan. 31, 1985)
  - Educational expenses for child in nature of support, despite contract was modifiable but only by state court
  - Footnote projecting required ch 11 claim treatment with interest

Final Opinions

- *In re Ballinger,* 502 B.R. 558 (Nov. 25, 2013)
  - Debtor's complaint to avoid judgment lien on marital residence of former wife of debtor's deceased husband granted
  - Creditor made arguments at trial and failed to brief – abandoned
  - Creditor attached appraisal to brief but valuation was not in evidence at trial – not considered

- *In re Caubble*, 505 B.R. 857 (Feb. 21, 2014)
  - Chapter 7 Trustee motion to approve settlement with Trusts and debtors denied
  - Footnotes state insufficient evidence to explain a portion of settlement
  - Record does not substantiate distribution estimate provided
  - Noted record in support of settlement was not fully developed

Trial Practice Lessons

- "Know your case better than you know your name"
  - Have Fun
- "Talk law" – mentors are critical
  - Have Fun
- "The details will kill 'ya"
  - Have Fun
- Active judges – preparing witnesses for trial
  - Have Fun
- Not sufficient to know the rules but how to use them
  - Ex., Fed. R. Evid. 615

More Trial Practice Tips

- "This is real court"
  - Have Fun
- "I don't practice here very much" "I don't know the Code or Rules"
  - Have Fun
- "This is not your case"
  - Have Fun
- Know your pleadings and know the pleadings of the other party as well
- HAVE FUN!

Memorable Cases

- *In re W.E. Tucker Oil Co., Inc.* (1984)
- *In re Couch* (1984)
- *In re Farmers Co-op of Arkansas and Oklahoma, Inc.* (1984)
- *In re N.S. Garrott & Sons* (1984)
- *In re Answerfone, Inc.* (1985)
- *In re Herbert Russell* (1985)
- *In re Hoffman* (1985)
- *In re Hilyard Drilling Co., Inc.* (1985)
- *In re Brown* (1985)
- *In re Holthoff* (1985)
- *In re McCrary's Farm Supply, Inc.* (1985)
- *In re Leird Church Furniture Mfg. Co.* (1986)

More Memorable Cases

- *In re Bonds Lucky Foods, Inc.* (1986)
- *In re Sanders* (1987)
- *In re Brittenum & Associates, Inc.* (1987)
- *In re Bearhouse, Inc.* (1988)
- *In re MacMillan Petroleum Inc.* (1989)
- *In re Cupples Farms* (1991)
- *In re Jones Truck Lines, Inc.* (1994)
- *In re Guy Jones, Jr.* (1994)
- *In re Bancroft Cap Co.* (1995)
- *In re Swaffar* (1998)
- *In re Meyer's Bakeries, Inc.* (2008)
- *In re Yarnell's Ice Cream Co., Inc.* (2012)

Body of Work

- March 1984 appointed – 2006 retired
- 2006 recalled and served full time until March 2014

- Presided over cases involving hospitals, farming operations, psychiatric facilities, equipment rental cos, environmental co, investment banking firms, hardware and industrial services and supply cos, auto dealerships and brokers, sports management business, flower and gift shops, real estate cos, broadcasting co, burger and fries shop and other eateries, graphic design firm, transportation co, glass co, hotel/inn, millwork shop, oil and gas cos, dairy co, insurance agency, tool co, and over thousand individual cases

Questions?

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THE HONORABLE JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

June 27, 2025

Presentation from 9:30 to 10:30

Update on Washington County Circuit Court – Let's All Agree to Do These Things First, Please

Hon. Matt Durrett

Circuit Judge for Madison and Washington County, Arkansas

Hon. Beth Bryan

Circuit Judge for Madison and Washington County, Arkansas

Handout Materials

UPDATE ON WASHINGTON COUNTY CIRCUIT COURT – LET'S ALL AGREE TO DO THESE THINGS FIRST, PLEASE

JUDGE BETH STOREY BRYAN, WASHINGTON COUNTY – 4TH CIRCUIT, DIV. 5

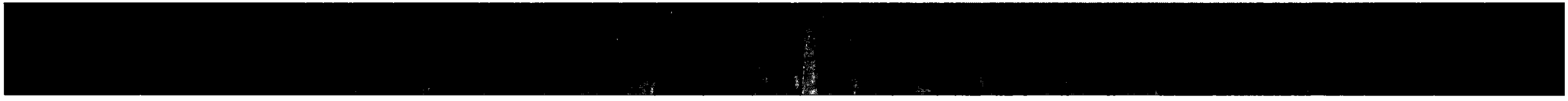
JUDGE MATT DURRETT – 4TH CIRCUIT, DIV. 6

JUDGE BETH STOREY BRYAN, FOURTH JUDICIAL CIRCUIT, FIFTH DIVISION

- University of Arkansas-B.A. in Political Science May 1995
- University of Arkansas School of Law-Juris Doctorate May 1998
- Everett Law Firm-August 1998-July 2003
- Beth Storey Bryan, PA -July 2003-December 31, 2011-Family Law and Civil Litigation
- Circuit Judge-January 1, 2011-Present (Civil, Criminal, Family Law, and Probate cases)
- University of Arkansas School of Law Adjunct Professor (Trial Advocacy Skills)-August 2024-Present

DIVISION 5 CASELOAD

- 2,000 cases currently pending
- 25% of all Civil Cases in Washington and Madison Counties
- 25% of all Criminal Cases in Washington County
- 25% of all Probate Cases in Washington and Madison Counties



JUDGE MATT DURRETT, FOURTH JUDICIAL CIRCUIT, SIXTH DIVISION

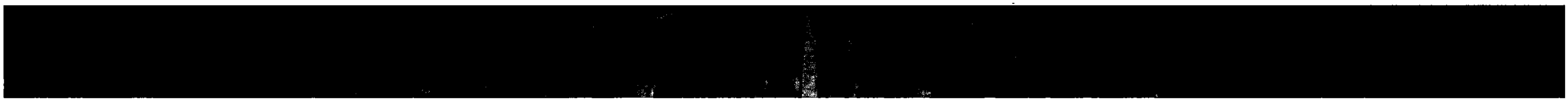
- University of Arkansas, B.A. 1995
- University of Arkansas, J.D. 1998
- Fourth Judicial District Prosecuting Attorney's Office
  - Deputy Prosecutor, 1998-2004
  - Senior Deputy Prosecutor, 2004-2007
  - Chief Deputy Prosecutor, 2007-2015
  - Prosecuting Attorney, 2015-2025
- Circuit Judge, 2025-
  - 25% Domestic Relations, 30% Civil, 33% Orders of Protection

PERSPECTIVE

- How is a judge going to rule?
- Does he/she have any preferences?
- Likes/Dislikes? Favorite song, etc.?
- Real Q: Does the judge have a pattern?
- Answer: I have no clue.

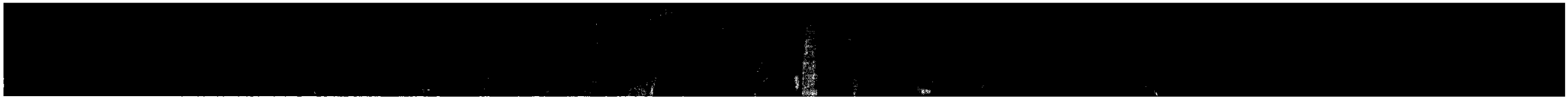
ALWAYS BE PREPARED

- "Before anything else, preparation is the key to success." – Alexander Graham Bell
- "By failing to prepare, you are preparing to fail." - Benjamin Franklin
- "Give me six hours to chop down a tree and I will spend the first four sharpening the axe." – Abraham Lincoln*



ALWAYS BE PREPARED

- Read Rule 4…and then read it again! Why is the rule on Warning Orders frequently not followed?
- In a DR case, the Affidavit of Financial Means should be prepared and completed by your client during your first meeting. An Affidavit of Financial Means is required at all hearings re: child custody, child support, or alimony.
- Working copies of all exhibits should be prepared and ready if you are trying your case. The Court is unable to review exhibits over the witness's shoulder.
- Provide copies of dispositive motions.
  - If you want a ruling, please check in and provide copies to the Court, as we do not receive any pleadings.



ALWAYS BE PREPARED

- Send discovery out with the Complaint. Delays in sending discovery could lead to a disaster at trial. Continuances are not granted for failure to send discovery!
- Do not ask for a continuance to try and settle your case.
  - Settlement attempts should always occur before the trial date.

ETHICS AND PROFESSIONALISM

- Formality is our Friend!
  - Let's remember we are in court and not your client's living room!
  - "Can I call you Tammy?" is not an appropriate question in the courtroom.

ETHICS AND PROFESSIONALISM

- Do not believe everything your client tells you. Gather your own facts!
  - When seeking an ex parte order, make an effort to confirm the allegations are TRUE.
  - Remember that judges are giving **you** the benefit of the doubt
- If you are ordered to mediation, you must go.
  - If you sincerely believe that mediation will not resolve the case, confer with counsel and notify the Court well in advance of the scheduled trial date.
- Always be respectful to all parties.
  - Court, opposing counsel, litigants, etc.

MEDIATION

- A.C.A. §16-4-202(a)
  - (1) "It is the duty of each trial court…to encourage the settlement of cases…"
  - (2) "On a motion of all the parties, the court must make such an order…"
- A.C.A. §16-4-202(b) – mediation can be ordered in any civil, juvenile, probate, or domestic relations case.
- A.C.A. §9-12-322(a)(2) – mediation can be required before or after a divorce decree in regard to parenting, custody, and visitation issues.
- Ideal for…

MEDIATION, CONT.

- Issue of custody, visitation, etc., UNLESS
  - Ad litem has been appointed
  - Wouldn't rule out both, but not likely to **require** both (mainly due to financial concerns)
- Division of property
  - Much better to work it out with a mediator
  - A.C.A. §9-12-315 – marital property to be divided 50/50, unless court finds that to be inequitable.
  - Even, unless

MEDIATION, CONT.

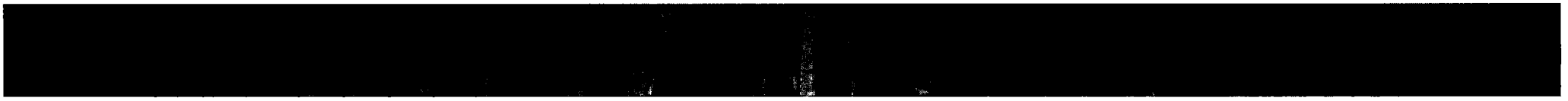
- Cost
- Efficiency, especially if done early
- Outcome, particularly when it comes to property
  - Parties have more of a say in the outcome
- Fosters a working relationship between the parties (esp. if children are involved)

TIMELINESS AND SCHEDULING

- Motions to compel must be timely. Another good reason to send discovery with the Complaint. You must file a Motion to Compel well in advance of the trial as opposing counsel is allowed a response.
- A trial date is a trial date.
  - Do not wait until the trial date to try and resolve your case.
- Follow scheduling orders.
  - Read and review scheduling orders and place the dates in your calendar.
  - Compliance is not optional.
- In DR and PR cases, request an Attorney Ad Litem at the beginning of a case.

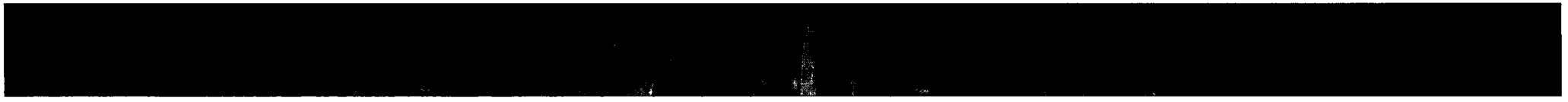
JURY INSTRUCTIONS

- Read and select jury instructions *before* filing your civil case.
- Parties must submit an agreed set of jury instructions.
  - This requires counsel for both parties to meet and confer.
  - 98% of jury instructions should be agreed upon and submitted as a completed set.



E-FILING

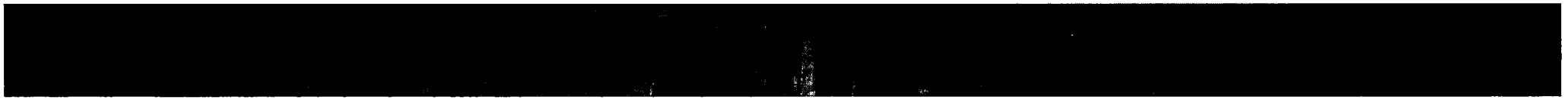
- Let's figure it out together!
- How can the Court and staff assist with E-filing Issues?
- Pros and Cons of E-Filing
- Submit orders without blanks
- Submit Agreed Orders with signatures of both attorneys



ANY QUESTIONS?

THINGS FOR LAWYERS TO KNOW
- FROM A COURT REPORTER'S STANDPOINT

- Making a Record
  - Clearly announce the name of the witness you are calling to the stand.
  - Please have the witness state their name on the record.
    - You may be surprised, many lawyers don't do this.
  - Please make sure the witness gives a verbal response as opposed to uh-huh/huh-uh or shaking/nodding their head.
    - The reporter really appreciates your help with this.
  - Please avoid clipping the witness's answers and ask the witness to not clip your questions.
  - Please explain to your witness the difference between overruled and sustained on an objection ahead of time and, when there is an objection to ***please stop talking*** until the Court rules on the objection.



THINGS FOR LAWYERS TO KNOW
- FROM A COURT REPORTER'S STANDPOINT

- Making a Record Note
  - Whether you are speaking to the Court, are in front of a jury, questioning witnesses, reading from documents, etc. please be mindful of the speed in which you talk and the volume of your voice.
  - You have been "living" the case for months and the Court, the jury, and the reporter are hearing it for the first time. It is important to slow down and let everyone hear and absorb the arguments and/or testimony, as well as settlements read into the record.
  - A court reporter's job is to produce an accurate verbatim record. However, rapid-fire speech and everybody talking at the same time makes the reporter's job extremely difficult.

THINGS FOR LAWYERS TO KNOW
- FROM A COURT REPORTER'S STANDPOINT

- Making a Record Note
  - When reading from documents, please read it at a slower pace and do not look down while you are reading the document.
  - Your voice needs to project out, not down.
  - Also, please do not turn your back to the court reporter.

THINGS FOR LAWYERS TO KNOW - FROM A COURT REPORTER'S STANDPOINT

- Exhibits
  - Most courts use numbers instead of letters for exhibit identification. When in doubt, ask the reporter!
  - Most reporters will provide exhibit stickers. Please mark your exhibits as you introduce them to prevent waste; i.e., mark ten and only introduce two.
  - If you want to introduce all or several of your exhibits at the start of the trial, please let the court reporter know ahead of time as it is the reporter's responsibility to log the exhibits and keep track of their admittance throughout the trial.

THINGS FOR LAWYERS TO KNOW - FROM A COURT REPORTER'S STANDPOINT

- Exhibits
  - If you mark an exhibit as Plaintiff's Exhibit No. 2 and it is not admitted into evidence, your next exhibit number will be Plaintiff's Exhibit No. 3 as you have already made a record on Plaintiff's Exhibit No. 2. This maintains accuracy and continuity in the record.
  - Please do not forget to move for the introduction of your exhibits into evidence, and please pause for the Court to rule on their admittance before moving on with your questioning.
  - Please provide the Court with a working copy of the exhibits during the trial as they are introduced and admitted.

THINGS FOR LAWYERS TO KNOW
- FROM A COURT REPORTER'S STANDPOINT

- Miscellaneous
  - Please let the Court and/or staff know if you are unable to meet the deadline for submission of court orders. (10 day deadline)
  - If you find yourself on the other side of a case with a pro se litigant, please do not hesitate to take that person on direct examination even though they are not your witness.
    - The Court will most likely welcome it.
  - Useful information can be obtained from the court staff.
    - Please do not hesitate to ask questions about procedures, policies, and preferences. We are always glad to help!

TOP 5 THINGS FOR LAWYERS TO KNOW - FROM A TCA'S STANDPOINT

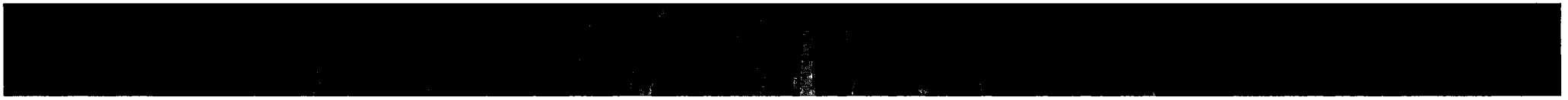
- Disposition Sheets
  - When submitting and closing order on a case, please submit an AOC Disposition sheet with the order.
    - This helps the Court ensure that the case will be closed and nothing further will be needed. If not, the case will remain open and only caught when running open cases for each particular court.
    - It could also cause problems if the case is reopened shortly after it should be closed.

TOP 5 THINGS FOR LAWYERS TO KNOW - FROM A TCA'S STANDPOINT

- Emergency Hearings
  - When filing for an Emergency Hearing, or anything on an Emergency basis, please let the court know to expect these filings, so they can be handled promptly.
    - E-Filing can be a little more timely when you are setting dates and such also allowing time for the clerk's review.
    - Filing cases at 4:15 does not make the process any easier.

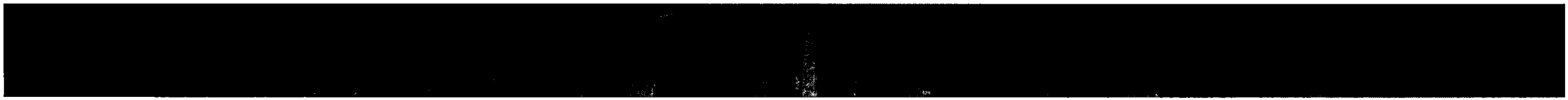
TOP 5 THINGS FOR LAWYERS TO KNOW - FROM A TCA'S STANDPOINT

- Interpreters
  - Let the Court TCA know on the front end of scheduling a hearing on a case if an interpreter will be needed.
    - Some interpreters are brought in from other states, so AOC needs as much notice as possible so they can arrange those accommodations.
    - Depending on the time of year, funds can also be an issue.



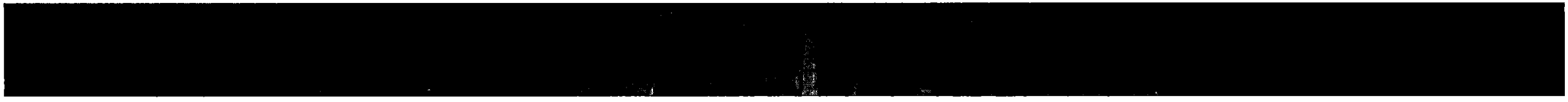
TOP 5 THINGS FOR LAWYERS TO KNOW - FROM A TCA'S STANDPOINT

- Witnesses
  - Always make the Court aware of any witnesses that plan to testify that may have very busy schedules or any other special circumstances.
    - Examples: Counselor, Police Officer, children, teacher, etc.
    - This helps to ensure that Court runs smoothly and also being considerate of everyone's time.



TOP 5 THINGS FOR LAWYERS TO KNOW - FROM A TCA'S STANDPOINT

- Be Timely with Orders
  - Not only does this help the Court staff, but it also helps others such as the Child Support Registry and opposing parties.
  - Agreements are frequently read into the record with deadlines to begin child support and/or alimony, as well as dates to begin visitation.
    - Its very confusing when no one has a signed Order to follow. This helps ensure everything goes smoothly and helps Court staff from getting calls from parties, police or the clerk's office.
    - It also helps you avoid a Show Cause Hearing!



A.I.

- [22] Unless otherwise specified, nothing in these rules prohibits an attorney's use of non-human assistance, including, but not limited to, artificial intelligence (AI). However, the use of non-human assistance does not excuse or mitigate any violation of the rules that occurs as a result of using such assistance. Please be advised of Administrative Order 25 before using AI. *Arkansas Rules of Professional Conduct Preamble*

A.I., *CONT.*

- Order 25. Artificial Intelligence.
- Section 1. Awareness.
- Everyone participating in the court system must be mindful of the following when entering client or court data into any electronic system that generates responses or generative artificial intelligence (GAI):
  - (a) Certain GAI tools retain the data submitted into their system and use it to keep building their large language models (LLM), or what you would consider their database.
  - (b) Anyone who enters confidential or sealed information into a GAI should determine whether the system is retaining and using the confidential or sealed data.
  - (c) Anyone who either intentionally or inadvertently discloses confidential or sealed information related to a client or case may be violating established rules, some examples are: (1) Arkansas Supreme Court Administrative Order No. 19, which limits access to certain court records and data; (2) the Arkansas Code, which has many statutes that limit access to certain court records and data; (3) the Arkansas Rules of Professional Conduct; (4) the Arkansas Code of Judicial Conduct; and (5) the many other rules governing other court staff—for example, court reporters.

ADMIN ORDER 25, CONT.

- (c) Anyone who either intentionally or inadvertently discloses confidential or sealed information related to a client or case may be violating established rules, some examples are:
  - (1) Arkansas Supreme Court Administrative Order No. 19, which limits access to certain court records and data;
  - (2) the Arkansas Code, which has many statutes that limit access to certain court records and data;
  - (3) the Arkansas Rules of Professional Conduct;
  - (4) the Arkansas Code of Judicial Conduct; and
  - (5) the many other rules governing other court staff—for example, court reporters.

ADMIN. ORDER 25, CONT.

- Section 2. Prohibition. The Administrative Office of the Courts is responsible for maintaining several court management systems for our state courts including case management, electronic filing, online payment, jury management, and others.
  - (a) The following are prohibited from intentionally exposing our state courts' internal data to a GAI:
    - (1) Administrative Office of the Courts staff;
    - (2) All clerks of the courts and their staff (district, circuit, and appellate); and
    - (3) Anyone else with access to internal CourtConnect.
  - (b) Research and Analysis. Anyone subject to the prohibition in Section 2 may request the approval of the Supreme Court's Automation Committee to engage in a research and analysis project related to the use of generative AI tools and general AI for the benefit of our courts.
  - (c) The CIS Division is allowed to engage in research and analysis related to the use of generative AI tools and general AI for the benefit of our courts.

ANY QUESTIONS?

THE HONORABLE JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

June 27, 2025

Presentation from 10:45 to 11:45

Reparative Family Lawyering

Professor Daniel Bousquet

University of Arkansas School of Law

Handout Materials

Reflections from a Veteran Judge

OBSERVATIONS FROM MY SIX MONTHS ON THE OTHER SIDE

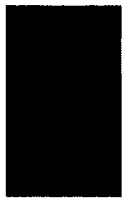
Judge Matt Durrett, Fourth Judicial Circuit, Sixth Division

- University of Arkansas, B.A. 1995
- University of Arkansas, J.D. 1998
- Fourth Judicial District Prosecuting Attorney's Office
  - Deputy Prosecutor, 1998-2004
  - Senior Deputy Prosecutor, 2004-2007
  - Chief Deputy Prosecutor, 2007-2015
  - Prosecuting Attorney, 2015-2025
- Circuit Judge, 2025-
  - 25% Domestic Relations, 30% Civil, 33% Orders of Protection

Perspective

- How is a judge going to rule?
- Does he/she have any preferences?
- Likes/Dislikes? Favorite song, etc.?
- Real Q: Do the judge have a pattern?
- Answer: I have no clue.

Joint Custody v. Whatever



- Act 604 of 2021
- A.C.A. §9-13-101
  - (a)(1)(A)(iii) – Joint Custody is favored in Arkansas
  - (a)(1)(A)(iv)(b) – Presumption can be rebutted
- When in doubt, revert to (a)(1)(A)(i)
- "The best interest of the child is the polestar in every child-custody case; all other considerations are secondary." *Taylor v. Taylor,* 345 Ark. 300 (2001)

Joint Custody v. Whatever

- Factors:
  - Previous domestic abuse
  - One parent is a sex offender
  - Judgment/Gray area/Crap shoot/Etc.
    - Stability (housing, employment, etc.)
    - Lifestyle negatives
  - Must rebut the presumption
  - Best interest of the child

Joint Custody v. Whatever

- Other Factors:
  - Willingness to co-parent
  - Location (and effect on Child(ren))
    - Feasibility
  - Parental history/emotional ties
  - Joint legal v. physical

Joint Custody v. Whatever

- Attorneys Ad Litem
  - The Friend of the judge
  - A.C.A. §9-13-101(e)
  - A.C.A. §9-13-106(b) – "…would facilitate a case in which custody is an issue and further protect the rights of the child…"
  - A.C.A. §9-13-106(e) - payment

Emergency Ex Parte Orders

- Rule 65(b)
- Specific facts in an affidavit or verified petition
- Efforts to give notice
- Immediate and irreparable injury, loss, or damage
- Hearing within 14 days

Emergency Orders, Cont.

- w/o Notice to the other side
- Remember that judges are giving you benefit of the doubt
- Custody is changing, even if only temporary
- Timing

Emergency Orders, Cont.

- Contempt (factors)
  - What is it? What has he/she done/not done?
  - How egregious?
  - What effect on other parties?
  - Appropriate sanctions?
    - Jail
    - Atty. Fees/costs
    - Counseling
    - Other?

Mediation

- A.C.A. §16-4-202(a)
  - (1) "It is the duty of each trial court…to encourage the settlement of cases…"
  - (2) "On a motion of all the parties, the court must make such an order…"
- A.C.A. §16-4-202(b) – mediation can be ordered in any civil, juvenile, probate, or domestic relations case.
- A.C.A. §9-12-322(a)(2) – mediation can be required before or after a divorce decree in regard to parenting, custody, and visitation issues.
- Ideal for…

Mediation, Cont.

- Issue of custody, visitation, etc., UNLESS
  - Ad litem has been appointed
  - Wouldn't rule out both, but not likely to **require** both (mainly due to financial concerns)
- Division of property
  - Much better to work it out with a mediator
  - A.C.A. §9-12-315 – marital property to be divided 50/50, unless court finds that to be inequitable.
  - Even, unless

Mediation, Cont.

- Cost
- Efficiency, especially if done early
- Outcome, particularly when it comes to property
  - Parties have more of a say in the outcome
- Fosters a working relationship between the parties (esp. if children are involved)

A.I.

- [22] Unless otherwise specified, nothing in these rules prohibits an attorney's use of nonhuman assistance, including, but not limited to, artificial intelligence (AI). However, the use of non-human assistance does not excuse or mitigate any violation of the rules that occurs as a result of using such assistance. Please be advised of Administrative Order 25 before using AI. *Arkansas Rules of Professional Conduct Preamble*

A.I., *Cont.*

- Order 25. Artificial Intelligence.
- Section 1. Awareness.
- Everyone participating in the court system must be mindful of the following when entering client or court data into any electronic system that generates responses or generative artificial intelligence (GAI):
  - (a) Certain GAI tools retain the data submitted into their system and use it to keep building their large language models (LLM), or what you would consider their database.
  - (b) Anyone who enters confidential or sealed information into a GAI should determine whether the system is retaining and using the confidential or sealed data.
  - (c) Anyone who either intentionally or inadvertently discloses confidential or sealed information related to a client or case may be violating established rules, some examples are: (1) Arkansas Supreme Court Administrative Order No. 19, which limits access to certain court records and data; (2) the Arkansas Code, which has many statutes that limit access to certain court records and data; (3) the Arkansas Rules of Professional Conduct; (4) the Arkansas Code of Judicial Conduct; and (5) the many other rules governing other court staff—for example, court reporters.

Admin Order 25, Cont.

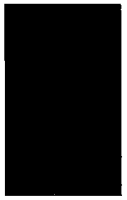
- (c) Anyone who either intentionally or inadvertently discloses confidential or sealed information related to a client or case may be violating established rules, some examples are:
  - (1) Arkansas Supreme Court Administrative Order No. 19, which limits access to certain court records and data;
  - (2) the Arkansas Code, which has many statutes that limit access to certain court records and data;
  - (3) the Arkansas Rules of Professional Conduct;
  - (4) the Arkansas Code of Judicial Conduct; and
  - (5) the many other rules governing other court staff—for example, court reporters.

Admin. Order 25, Cont.

- Section 2. Prohibition. The Administrative Office of the Courts is responsible for maintaining several court management systems for our state courts including case management, electronic filing, online payment, jury management, and others.
  - (a) The following are prohibited from intentionally exposing our state courts' internal data to a GAI:
    - (1) Administrative Office of the Courts staff;
    - (2) All clerks of the courts and their staff (district, circuit, and appellate); and
    - (3) Anyone else with access to internal CourtConnect.
  - (b) Research and Analysis. Anyone subject to the prohibition in Section 2 may request the approval of the Supreme Court's Automation Committee to engage in a research and analysis project related to the use of generative AI tools and general AI for the benefit of our courts.
  - (c) The CIS Division is allowed to engage in research and analysis related to the use of generative AI tools and general AI for the benefit of our courts.

Miscellaneous

- Pro se litigants
  - Patience, patience, patience
  - Objections, rulings, etc.
- Civility
  - Rudeness gets you nowhere
    - Remember Roadhouse
- The judge might not be the smartest person in the room (Don't tell anyone I said this)



- Questions?

THE HONORABLE JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

June 27, 2025

Presentation from 12:45 to 1:45

Civility vs. Zealous Advocate- Which is More Important?

Hon. Timothy L. Brooks

U.S. District Judge for the Western District of Arkansas

Handout Materials

Arkansas Rules of Professional Conduct

Rules Effectuating Civility

Rules 3.1, 3.3, 3.4, 3.5

Rule 3.1. Meritorious Claims and Contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because he facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

Rule 3.3. Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal; or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or had engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

COMMENT:

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. *See also* Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. *See also* Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. *See* Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably

believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. *See also* Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done–making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperates in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. *See* Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court. Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Rule 3.4. Fairness to Opposing Party and Counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. *See also* Rule 4.2.

Rule 3.5. Impartiality and Decorum of the Tribunal.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

Attorney's Oath of Office
Arkansas Supreme Court Rule Governing Admission to the Bar

Rule VII (G) — ATTORNEY OATH OF ADMISSION

The following oath shall be administered to and signed by members of the Arkansas Bar:

I DO SOLEMNLY SWEAR OR AFFIRM:

I will support the Constitution of the United States and the Constitution of the State of Arkansas, and I will faithfully perform the duties of attorney at law.

I will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them.

I will, to the best of my ability, abide by the Arkansas Rules of Professional Conduct and any other standards of ethics proclaimed by the courts, and in doubtful cases I will attempt to abide by the spirit of those ethical rules and precepts of honor and fair play.

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.

I will not reject, from any consideration personal to myself, the cause of the impoverished, the defenseless, or the oppressed.

I will endeavor always to advance the cause of justice and to defend and to keep inviolate the rights of all persons whose trust is conferred upon me as an attorney at law.

_____
ATTORNEY SIGNATURE

Sworn to and subscribed before me this _____ day of _____, 2_____.

_____
OFFICIAL AUTHORIZED TO ADMINISTER OATH

THE CODE OF CIVILITY IN PENNSYLVANIA

Judges Collaborating with Lawyers to Ensure Dignity of the Legal Profession

By Judge Stephanie Domitrovich

I can still recall the "twinkle" of excitement in the eyes of our then Pennsylvania Chief Justice John P. Flaherty as he reviewed the final draft of the Code of Civility with us as officers of the Pennsylvania Conference of State Trial Judges. Chief Justice Flaherty was so delighted to have directed the development and completion of the Code of Civility for Pennsylvania judges and lawyers in 2001. "The ideals of fairness, civility and justice should guide our actions," he said. "It is absolutely critical for judges and lawyers to work collaboratively to ensure the successful implementation of this code to enhance the dignity of the profession of law, thus furthering public trust and confidence in the system. I would like to express appreciation to the Pennsylvania Conference of State Trial Judges for its assistance in developing these guidelines."[1] Indeed, this Code of Civility was one of Chief Justice Flaherty's most rewarding accomplishments during his impressive tenure as chief justice.

The principles in the Pennsylvania Code of Civility aim to promote utmost professional integrity and personal courtesy among judges and lawyers. Such civility principles are consistent with the broadest definition of the concept of civility. Civility has its roots in the French and Latin as "relating to citizens."[2] So civility, in essence, is interpreted as being a good citizen, that is, "exhibiting good behavior for the good of a community."[3] To the ancient Greeks, the state was held together by the concept of civility, which was valued as being both a private virtue as well as a public necessity. This balance between the private and public evolved the concept of civility into "a behavioral code of decency or respect that is the hallmark of living as citizens in the same state."[4]

Consistent with being good citizens, judges and lawyers learn to value integrity and courtesy as indispensable tools for their toolboxes for administering justice as well as for the practice of law in Pennsylvania. In the Pennsylvania Code of Civility, judges are encouraged to abide by 15 principles specifically addressing the conduct that judges owe to lawyers and other

members of the legal profession. For example, judges should use professional titles of lawyers, and judges as well as lawyers are expected to be punctual for court proceedings. When judges schedule hearings and trials, judges should be courteous to lawyers by considering the lawyers' availability as well as the court's schedule.

Many of the principles set forth in the Code of Civility are the result of reasonable and rational approaches to resolving disputes between the litigants efficiently and effectively. For instance, judges should ensure disputes are promptly and efficiently resolved. When rendering decisions, judges should give deliberate, informed, and impartial analyses for issues in controversy and provide the reasons for the decisions when appropriate. Moreover, judges are encouraged to be involved with assisting jurists to ensure efficient and expedient processing of cases. Judges should afford courtesy and respect to other judges or colleagues. Judges are advised of their responsibilities to maintain control of their proceedings and to ensure those proceedings are directed in a civil manner. Judges are specifically informed of their obligations to demonstrate respect, courtesy, and patience to all parties, including the lawyers who appear before the court, and to do so with civility.

Lawyers should be permitted to present their arguments and be able to make complete and accurate records of their arguments before the court. Judges have the responsibility to inform their staff members about appropriate dress code and how to behave properly and with civility toward lawyers, parties, and witnesses. Judges are cautioned never to act upon or display racial, gender, or any other bias or prejudice toward any parties in the legal system. And judges must never use unpleasant or degrading words in their written opinions or verbal communications with lawyers and others before the court.

On the other hand, 17 other principles in the Code of Civility detail lawyers' duties, such as the duty to refrain from making baseless allegations and personal attacks. Lawyers also are urged to protect judges from unfair comments and criticism. The Pennsylvania Code of Civility also offers lawyers specific guidance when appearing before judges in court, such as advising lawyers to be courteous to the court as well as court personnel. Also, the Code of Civility provides specific advice to lawyers to address each judge as "Your Honor" or "the Court" and to begin legal arguments with "May it please the court." Lawyers appearing before the court are expected to identify themselves as well as their firms and the names of the clients they represent. Furthermore, lawyers appearing before the court are cautioned to direct their arguments to the court, not to the opposing counsel, and lawyers should not embarrass or personally criticize opposing counsel or the court.

Incivility places lawyers in a bad light in the eyes of many, including judges and jurors. Judges do not appreciate being the referee between counsel entrenched in squabbling with each other or with the court.[5] Once judges have quelled the unsavory exchanges between the lawyers, then judges must consciously avoid having any personal feelings about such disrespectful behavior spilling over to their decision making. As Jayne R. Reardon, executive director of the Illinois Supreme Court Commission on Professionalism, observed: "[I]f there is a close call on a motion or other issue, and the judge has a choice between ruling in favor of the client whose lawyer was civil and professional or in favor of the client whose lawyer has been a troublemaker, the Judges-Are-Human rule may well control."[6] Moreover, jurors are negatively influenced by discourteous behavior of trial counsel. I know from the feedback I have received from post-verdict discussions with jurors in cases I have presided over that they view impoliteness in the courtroom with disdain and indicate improper behavior by lawyers may adversely affect the jurors' decision-making process against the clients of the lawyers.

Civility has been described "as a set of core obligations that deal with what may be described as common sense or manners."[7] Codes of civility differ from ethical codes; codes of civility are not envisioned by bar associations to serve as grounds to discipline or disbar lawyers. Rather, codes of civility are aspirational and are viewed as offering guidance to lawyers as to expected behavioral norms before the court and with opposing counsel to avoid discipline under the ethics rules. Codes of civility differ from the intent of both professionalism and ethics by aiming to ensure the image of the court process is preserved and held in high esteem by the public. Interestingly, the principles set forth in codes of civility also have been viewed as being in tension with ethical obligations of lawyers to be zealous advocates for their clients. Judges have the "unenviable" position of deciding whether such behavior by a lawyer is merely zealousness or blatant incivility.[8]

Some experts theorize that certain situations may place pressure on lawyers to act in a manner inconsistent with civility. Lawyers engaged in voluminous discovery paperwork as well as lawyers in large firms pressured to charge billable hours can be overly stressed. These high-pressure situations can breed irrational treatment and incivility of others. Clients often have unrealistic expectations of how their lawyers should behave based on television or movies. Even lawyers may believe that to attract more clients, lawyers have to behave similar to performances portrayed in the media. Lawyers instead should resist emulating such behavior because lawyers should realize that such performances are merely for entertainment value, not for proper legal representation of clients before the courts.

Lawyers and judges should recognize that benefits are conferred on those lawyers and judges demonstrating civility. In fact, research indicates (1) lawyers who are civil to each other and the court benefit in achieving better outcomes; (2) lawyers have better reputations when they are civil to each other and the court; (3) lawyers who are courteous to each other and the court

Stephanie Domitrovich has served for 25 years as an elected general jurisdiction state trial judge of the Sixth Judicial District of Pennsylvania.

have better job satisfaction; and (4) incivility can possibly invite disciplinary charges to be filed.[9] Although the American Bar Association's Model Rules of Professional Conduct do not specifically address civility, incivility may implicate the competence provisions in Model Rule 1.1 or, more often, Rule 8.4(d), which prohibits "conduct that is prejudicial to the administration of justice." The quest and need for civility continue, for the "lack of civility has been blamed on everything from an increase in the cost of litigation to the cause of the public's lost faith in the legal profession."[10] As aptly stated by ABA President Stephen N. Zack in 2011: "As lawyers, we must honor civility. . . . Words matter. How we treat others matters."[11] Codes of civility assist lawyers and judges to know what is meant by their duties to act and behave as "civil" lawyers and "civil" judges.[12]

Judges and lawyers have important roles before the court wherein civility is a shared responsibility in preserving the dignity and respect of our rule of law. Long live civility as a vital conduit in promoting more "civil" lawyers and "civil" judges to improve the public's perceptions of Pennsylvania's fair and impartial courts. Thank you, Chief Justice Flaherty, for your wisdom and valuable foresight in developing our Code of Civility to promote the public's trust in those who serve and appear before the courts in Pennsylvania.

Code of Civility of Pennsylvania[13]

§ 99.1. Preamble.

The hallmark of an enlightened and effective system of justice is the adherence to standards of professional responsibility and civility. Judges and lawyers must always be mindful of the appearance of justice as well as its dispensation. The following principles are designed to assist judges and lawyers in how to conduct themselves in a manner that preserves the dignity and honor of the judiciary and the legal profession. These principles are intended to encourage lawyers, judges and court personnel to practice civility and decorum and to confirm the legal profession's status as an honorable and respected profession where courtesy and civility are observed as a matter of course.

The conduct of lawyers and judges should be characterized at all times by professional integrity and personal courtesy in the fullest sense of those terms. Integrity and courtesy are indispensable to the practice of law and the orderly administration of justice by our courts. Uncivil or obstructive conduct impedes the fundamental goal of resolving disputes in a rational, peaceful and efficient manner.

The following principles are designed to encourage judges and lawyers to meet their obligations toward each other and the judicial system in general. It is expected that judges and lawyers will make a voluntary and mutual commitment to adhere to these principles. These principles are not intended to supersede or alter existing disciplinary codes or standards of conduct.

§ 99.2. A Judge's Duties to Lawyers and Other Judges.

1. A judge must maintain control of the proceedings and has an obligation to ensure that proceedings are conducted in a civil manner.
2. A judge should show respect, courtesy and patience to the lawyers, parties and all participants in the legal process by treating all with civility.
3. A judge should ensure that court-supervised personnel dress and conduct themselves appropriately and act civilly toward lawyers, parties and witnesses.
4. A judge should refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.
5. A judge should always refer to counsel by surname preceded by the preferred title (Mr., Mrs., Ms. or Miss) or by the professional title of attorney or counselor while in the courtroom.
6. A judge should not employ hostile or demeaning words in opinions or in written or oral communications with lawyers, parties or witnesses.
7. A judge should be punctual in convening trials, hearings, meetings and conferences.
8. A judge should be considerate of the time constraints upon lawyers, parties and witnesses and the expenses attendant to litigation when scheduling trials, hearings, meetings and conferences to the extent such scheduling is consistent with the efficient conduct of litigation.
9. A judge should ensure that disputes are resolved in a prompt and efficient manner and give all issues in controversy deliberate, informed and impartial analysis and explain, when appropriate, the reasons for the decision of the court.
10. A judge should allow the lawyers to present proper arguments and to make a complete and accurate record.
11. A judge should not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which he or she represents.
12. A judge should recognize that the conciliation process is an integral part of litigation and thus should protect all confidences and remain unbiased with respect to conciliation communications.
13. A judge should work in cooperation with all other judges and other jurisdictions with respect to availability of lawyers, witnesses, parties and court resources.
14. A judge should conscientiously assist and cooperate with other jurists to assure the efficient and expeditious processing of cases.
15. Judges should treat each other with courtesy and respect.

§ 99.3. The Lawyer's Duties to the Court and to Other Lawyers.

1. A lawyer should act in a manner consistent with the fair, efficient and humane system of justice and treat all participants in the legal process in a civil, professional and courteous manner at all times.
2. A lawyer should speak and write in a civil and respectful manner in all communications with the court and court personnel.
3. A lawyer should not engage in any conduct that diminishes the dignity or decorum of the courtroom.
4. A lawyer should advise clients and witnesses of the proper dress and conduct expected of them when appearing in court and should, to the best of his or her ability, prevent clients and

witnesses from creating disorder and disruption in the courtroom.

5. A lawyer should abstain from making disparaging personal remarks or engaging in acrimonious speech or conduct toward opposing counsel or any participants in the legal process and shall treat everyone involved with fair consideration.
6. A lawyer should not bring the profession into disrepute by making unfounded accusations of impropriety or personal attacks upon counsel and, absent good cause, should not attribute improper motive or conduct to other counsel.
7. A lawyer should refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.
8. A lawyer should not misrepresent, mischaracterize, misquote or miscite facts or authorities in any oral or written communication to the court.
9. A lawyer should be punctual and prepared for all court appearances.
10. A lawyer should avoid ex parte communications with the court, including the judge's staff, on pending matters in person, by telephone or in letters and other forms of written communication unless authorized. Communication with the judge on any matter pending before the judge, without notice to opposing counsel, is strictly prohibited.
11. A lawyer should be considerate of the time constraints and pressures on the court in the court's effort to administer justice and make every effort to comply with schedules set by the court.
12. A lawyer, when in the courtroom, should make all remarks only to the judge and never to opposing counsel. When in the courtroom a lawyer should refer to opposing counsel by surname preceded by the preferred title (Mr., Mrs., Ms. or Miss) or the professional title of attorney or counselor.
13. A lawyer should show respect for the court by proper demeanor and decorum. In the courtroom a lawyer should address the judge as "Your Honor" or "the Court" or by other formal designation. A lawyer should begin an argument by saying "May it please the court" and identify himself/herself, the firm and the client.
14. A lawyer should deliver to all counsel involved in a proceeding any written communication that a lawyer sends to the court. Said copies should be delivered at substantially the same time and by the same means as the written communication to the court.
15. A lawyer should attempt to verify the availability of necessary participants and witnesses before hearing and trial dates are set or, if that is not feasible, immediately after such dates have been set and promptly notify the court of any anticipated problems.
16. A lawyer should understand that court personnel are an integral part of the justice system and should treat them with courtesy and respect at all times.
17. A lawyer should strive to protect the dignity and independence of the judiciary, particularly from unjust criticism and attack. ■

Endnotes

1. Press Release, Art Heinz, Admin. Office of Pa. Courts, Toward a "Civil" Court: Supreme Court of Pennsylvania Adopts Code of Civility (Dec. 7, 2000), http://www.pacourts.us/assets/files/newsrelease-1/file-1107.pdf?cb=7e840a.

2. Jayne R. Reardon, *Civility as the Core of Professionalism*, Bus. L. Today, Sept. 2014, at 35, https://www.americanbar.org/publications/blt/2014/09/02_reardon.html.

3. *Id.* at 36.

4. *Id.*

5. *Id.* at 42.

6. *Id.*

7. Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 Gonz. L. Rev. 99, 142 (2011).

8. *Id.* at 143.

9. Reardon, *supra* note 2, at 46.

10. Campbell, *supra* note 7, at 99.

11. G.M. Filisko, *Be Nice: More States Are Treating Incivility as a Possible Ethics Violation*, ABA J., Apr. 2012, http://www.abajournal.com/magazine/article/be_nice_more_states_are_treating_incivility_as_a_possible_ethics_violation.

12. *Id.* at 146.

13. Pa. Code of Civility ch. 99 (eff. Dec. 6, 2000).

Filed 6/11/19

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ANGELE LASALLE, Plaintiff and Respondent, v. JOANNA T. VOGEL, Defendant and Appellant.	G055381 (Super. Ct. No. 30-2016-00836641) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Randall J. Sherman, Judge. Reversed with directions.

Law Offices of Dorie A. Rogers, Dorie A. Rogers and Lisa R. McCall for Defendant and Appellant.

Law Office of Frank W. Battaile and Frank W. Battaile for Plaintiff and Respondent.

Here is what Code of Civil Procedure[1] section 583.130 says: "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition." That is not complicated language. No jury instruction defining any of its terms would be necessary if we were submitting it to a panel of non-lawyers. The policy of the 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.

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

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

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

email – 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 email 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 p.m. the following Monday, April 11. He filed a request for entry of default and emailed a copy to Vogel at 4:05 p.m. That got Vogel's attention and she emailed 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]

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

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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.

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

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 practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle." (*Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 641.)

In 1994, the Second District lambasted attorneys who were cluttering up the courts with what were essentially personal spats. In the words of a clearly exasperated Justice Gilbert, "If this case is an example, the term 'civil procedure' is an oxymoron." (*Green v. GTE California* (1994) 29 Cal.App.4th 407 408.)

In 1997, another appellate court urged bench and bar to practice with more civility. "The law should not create an incentive to take the scorched earth, feet-to-the-fire attitude that is all too common in litigation today." (*Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 17.)

By 2002, we had lawyers doing and saying things that would have beggared the imagination of the people who taught us how to practice law. We had a lawyer named John Heurlin who wrote to opposing counsel, "I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit." Admonishing counsel to "educate yourself about attorney liens and the work product privilege," Mr. Heurlin closed his letter with the clichéd but always popular, "See you in Court." That and other failures resulted in Mr. Heurlin being sanctioned $6,000 for filing a frivolous appeal and referred to the State Bar. Our court thought publishing the ugly facts of the case, which they did in *DeRose v. Heurlin* (2002) 100 Cal.App.4th 158, would get the bar's attention. It didn't.

Almost a decade later, in a case called *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1537, the First District tried again. They said, "We close this discussion with a reminder to counsel – all counsel, regardless of practice, regardless of age – that zealous advocacy does not equate with 'attack dog' or 'scorched earth,' nor does it mean lack of civility. [Citations.] Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive."

Six months later, our court said this, "Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time

lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It's time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions." We sanctioned counsel $10,000. (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 293 (Kim).)

This is not an exhaustive catalogue. Were we writing a compendium rather than an opinion, we could include keening from every state, because, "Incivility in open court infects the process of justice in many ways. It compromises the necessary public trust that the system will produce fair and just results; it negates the perception of professionalism in the legal community, and it erodes respect for all people involved in the process." (*In re Hillis* (Del. 2004) 858 A.2d 317, 324.)

Courts have had to urge counsel to turn down the heat on their litigation zeitgeist far too often. And while the factual scenarios of these cases differ, they are all variations on a theme of incivility that the bench has been decrying for decades, with very little success.

It's gotten so bad the California State Bar amended the oath new attorneys take to add a civility *requirement*. Since 2014, new attorneys have been required to vow to treat opposing counsel with "dignity, courtesy, and integrity."

That was not done here. Dignity, courtesy, and integrity were conspicuously lacking.

We are reluctant to come down too hard on respondent's counsel or the trial court because we think the problem is not so much a personal failure as systemic one. Court and counsel below are merely indicative of the fact practitioners have become inured to this kind of practice. They have heard the mantra so often unthinkingly repeated that, "This is a business," that they have lost sight of the fact the practice of law

is *not* a business. It is a profession. And those who practice it carry a concomitantly greater responsibility than businesspeople.

So what we review in this case is not so much a failure of court and counsel as an insidious decline in the standards of the profession that must be addressed. "The term 'officer of the court,' with all the assumptions of honor and integrity that append to it must not be allowed to lose its significance." (*Kim, supra*, at p. 292.) We reverse the order in this case because that significance was overlooked.

An order denying a motion to set aside a default is appealable from the ensuing default judgment. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 (*Rappleyea*).) We acknowledge the standard of review for an order denying a set aside motion is abuse of discretion. (*Ibid.*) But there is an important distinction in the way that discretion is measured in section 473 cases. The law favors judgments based on the merits, not procedural missteps. Our Supreme Court has repeatedly reminded us that in this area doubts must be resolved *in favor of relief*, with an order denying relief scrutinized more carefully that an order granting it. As Justice Mosk put it in *Rappleyea*, "Because the law favors disposing of cases on their merits, 'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.' (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233; see also *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1136.)" (*Id.* at p. 980.)[5]

Warning and notice play a major role in this scrutiny. Six decades ago, when bench and bar conducted themselves as a profession, another appellate court, in language both apropos to our case and indicative of how law ought to be practiced, said,

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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.) More on this point below.

"The quiet speed of plaintiffs' attorney in seeking a default judgment without the knowledge of defendants' counsel is not to be commended." (*Smith v. Los Angeles Bookbinders Union* (1955) 133 Cal.App.2d 486, 500 (*Bookbinders*).)[6]

In contrast to the stealth and speed condemned in *Bookbinders*, courts and the State Bar emphasize warning and deliberate speed. The State Bar Civility Guidelines deplore the conduct of an attorney who races opposing counsel to the courthouse to enter a default before a responsive pleading can be filed. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 702 (*Fasuyi*), quoting section 15 of the California Attorney Guidelines of Civility and Professionalism (2007).) Accordingly, it is now well-acknowledged that an attorney has an *ethical* obligation to warn opposing counsel that the attorney is about to take an adversary's default. (*Id.* at pp. 701-702.)

In that regard we heartily endorse the related admonition found in The Rutter Group practice guide, and we note the authors' emphasis on *reasonable time*: "Practice Pointer: If you're representing plaintiff, and have had *any* contact with a lawyer representing defendant, don't even *attempt* to get a default 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.)

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 (*Bellm*). Indeed, it was the most recent case cited by the trial court's minute order denying Vogel's set aside motion.

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

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 ["we decry this lack of professional courtesy"]) but deemed it an ethical issue rather than a legal one and affirmed the trial court's denial of relief. The *Bellm* dissent would have found an abuse of discretion. (*Bellm, supra,* 150 Cal.App.3d at p. 1040 (dis. opn. of Haning J.).)

But *Bellm* was handed down on January 19, 1984. That was only two weeks after section 583.130, quoted above, went into effect. The section obviously could not have been briefed or argued in that case, so the *Bellm* court did not have the benefit of the statute. The statute was passed to curb what the Legislature considered an inappropriate rise in motions to dismiss for lack of prosecution – sometimes brought, like this one, as soon as a time limit was exceeded. As the Law Revision Commission phrased it:

"Over the years the attitude of the courts and the Legislature toward dismissal for lack of prosecution has varied. From around 1900 until the 1920's the dismissal statutes were strictly enforced. Between the 1920's and the 1960's there was a process of liberalization of the statutes to create exceptions and excuses. Beginning in the late 1960's the courts were strict in requiring dismissal. In 1969, an effort was made in the Legislature to curb discretionary court dismissals, but ended in authority for the

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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.

Judicial Council to provide a procedure for dismissal. In 1970, the courts brought an abrupt halt to strict construction of dismissal statutes and began an era of liberal allowance of excuses that continued to the early 1980's. The judicial attitude in the latter time was stated by the Supreme Court: 'Although a defendant is entitled to the weight of the policy underlying the dismissal statute, which seeks to prevent unreasonable delays in litigation, the policy is less powerful than that which seeks to dispose of litigation on the merits rather than on procedural grounds.'" (*Wheeler v. Payless Super Drug Stores* (1987) 193 Cal.App.3d 1292, 1295, quoting *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; see also *Hocharian v. Superior Court* (1981) 28 Cal.3d 714.)

So to the extent it was possible for a party seeking a default with unseemly haste to commit an *ethical* breach without creating a *legal* issue, that distinction was erased by section 583.130. The ethical obligation to warn opposing counsel of an intent to take a default is now reinforced by a statutory policy that all parties "cooperate in bringing the action to trial or other disposition." (§ 583.130.) Quiet speed and unreasonable deadlines do not qualify as "cooperation" and cannot be accepted by the courts.

We cannot accept it because it is contrary to legislative policy and because it is destructive of the legal system and the people who work within it. Allowing it to flourish has been counterproductive and corrosive. First, it has led to increased litigation. Unintended defaults inevitably result in motions to overturn them (this case, exemplary in no other way, demonstrates well the resources consumed by such motions) or lawsuits against the defaulted party's attorney (who thought enough of his client's position to agree to represent him and then bungled it). There are plenty of demands on our legal resources without adding such matters.

But worse than that, it forces practitioners to sail between Scylla and Charybdis. They are torn between the civility we teach in law schools, require in their oath, and legislate in statutes like section 583.130, and their obligation to represent their

client as effectively as possible. We ask too much of people with families and mortgages – not to mention ex-spouses who fail to make tax and mortgage payments – when we ask them to choose "dignity, courtesy, and integrity" over easy "fish in a barrel" victories that are perceived to have statutory support. We owe ourselves an easier choice, and the legislature has given it to us in section 583.130.

With that in mind, we conclude that by standards now applicable to such motions, the trial judge here abused his discretion in not setting aside the default. Several factors combine to convince us of that.

The first is the use of email to give "warning." Email 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, email is ill-suited for a communication on which a million 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.

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.) While there is no due process problem in the case before us now (Vogel has not complained she wasn't actually served), emails 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 emails 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).)

Indeed, the sheer ephemerality of emails poses unacceptable dangers for issues as important as whether an *entire case* will be decided by default and not on the

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

merits. While some emails 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, non-advertising messages from lawyers who have an important legal purpose and keep them from reaching their intended destination – us. We have, on occasion, had to reschedule oral arguments because notices to counsel of oral argument dates and times sent by email got caught in spam filters and did not reach those counsel, or their requests for accommodation did not reach us.

The choice of email 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 [*Bookbinder*] justified vacating the default." (*Robinson v. Varela* (1977) 67 Cal.App.3d 611, 616 (*Robinson*).)

The third factor is the total absence of prejudice to Lasalle from any set-aside, given the relatively short time between respondent seeking the 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.) 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 [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 ["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 [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 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, 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.

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 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 ["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

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[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.

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.

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, 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 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 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 [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 that opposing counsel will act with "dignity, courtesy, and integrity."

CONCLUSION AND DISPOSITION

Supreme Court Chief Justice Warren Burger long ago observed, "[L]awyers who know how to think but have not learned how to behave are a menace and a liability . . . to the administration of justice. . . . [¶] . . . [T]he necessity for civility is relevant to lawyers because they are the living exemplars – and thus teachers – every day in every case and in every court and their worst conduct will be emulated perhaps 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.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.

THE HONORABLE JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

June 27, 2025

Presentation from 1:45 to 2:45

Trustee Esoterica: The Things You Know, and The Things You Might Not Know, and A Couple of Things You May Have Never Considered a Chapter 7 Trustee Can Use in the Administration of Chapter 7 Cases and Estates

Stanley V. Bond

Chapter 7 Panel Trustee

Brian Ferguson

Chapter 7 Panel Trustee

Handout Materials

THE HONORABLE JAMES G. MIXON TRIAL PRACTICE SYMPOSIUM

June 27, 2025

Presentation from 3:00 to 4:00

Evidence

Hon. Phyllis M. Jones

U.S. Bankruptcy Chief Judge for the Eastern and Western Districts of Arkansas

Hon. Richard D. Taylor

U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas

Hon. Bianca M. Rucker

U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas

Handout Materials