2020 Construction Conference
September 30 – October 2
Chicago, IL

Civility, Civility, Wherefore Art Thou?

I. Why Be Civil?

For this discussion, "Why be Civil?" Seems rhetorical, but time and again, reminders are needed. A recent 2019 California Appellate Court opinion, *Lasalle v. Vogel* (2019) 36 Cal.App.5th 127, again embraces the concept of Civility within the legal profession. This panel will provide a history of previous appellate decisions which remind all to "Smile on your brother; Let's get together, try to love one another right now."

The panel will present a new approach to being civil: It is not just an ethical duty to get along: it can be codified in the law, such as California's Code of Civil Procedure section. 583.130. This course is a humble reminder that there are several legal reminders which beseech us all to get along. It will help you; it will help the process; and it will help your clients.

II. Legal Basis for Civility

A. Cooperative Efforts for Litigation.

Several states have codified a need for attorneys to cooperate. Also, claims professionals have obligations to cooperate, as well.

1. California Civil Procedure section 583.130: "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."

2. Texas Rule of Civil Procedure (TRCP) 191.2 expressly states the obligation of parties and their attorneys to *cooperate* in conducting discovery and to make agreements for efficient disposition of the case. Tex. R. Civ. P. 191.2.

3. Florida Rule of Civil Procedure 1.010 states "these [civil procedure] rules shall be construed to secure the just, speedy, and inexpensive determination of every action." Fla. R. Civ. P. 1.010.

4. Chartered Property Casualty Underwriters (CPCU) Rule 4.2 states that a CPCU organization "shall support efforts to effect improvements in all aspects of insurance operations that will both benefit the public and improve the overall efficiency with which the insurance mechanism functions."

Additionally, CPCU Canon 6 holds that "Insurance professionals should strive to establish and maintain dignified and honorable relationships with those whom they serve, with fellow insurance professionals, and with members of other professions."

B. Dignified Litigation Process.

These same states mandate respect for the institution of law. The CPCU has similar rules for have codified a need for attorneys to cooperate. Also, claims professionals have obligations to cooperate, as well.

1. California Rule of Court 9.7: In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity."

This extra part of the oath was championed by several chapters of the ABOTA organizations. ABOTA principles factor heavily into the concept of dignity and cooperation within litigation.

2. The Preamble to the Texas Disciplinary Rules of Professional Conduct states "As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. . . [and that] each lawyer's own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribes by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct[.]"

3. Florida's Rules of Professional Conduct states that "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice. . . [a lawyer must be] consistent with requirements of honest dealing with others . . . As a public citizen, a lawyer should seek improvement of the law."

4. Of course, within claims handling, a similar provision exists. **CPCU Rule 1.1** states that a CPCU member "should avoid even the appearance of impropriety when performing his or her professional duties and should act in a manner that ultimately will best serve his or her own professional interests. . . the needs and best interests of insurance purchasers are in fact served only when all insurance claimants, including third-party liability claimants, are accorded prompt, equitable, and otherwise fair treatment.

C. Only Proper Proceedings and Actions Must Be Pursued.

1. California Rules of Professional Conduct 3.1 (a)(1): A lawyer shall not bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person. This ethical construct is a great reminder that asserting positions or defenses that are without merit/cause is not a good way to go through life.

2. Texas Disciplinary Rule of Professional Conduct Rule 3.01 states that "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous."

3. Florida Rule of Professional Conduct 4-3.1 states "[a] lawyer shall not bring or defend a proceeding . . . unless there is basis in law and fact for doing so that is not frivolous[.]"

4. **CPCU Rule 3.1** provides that a CPCU member "shall not engage in any business practice or activity designed to restrict fair competition, [or] willfully misrepresent or conceal any fact or information."

D. Jurisdictions contain "mandates" to act in an ethical manner. Strive mightily, but ethically.

1. **California Rules of Professional Conduct 3.3**: A lawyer shall not offer false statements or withhold legal authority directly adverse to the position of the client and not disclosed by opposing counsel, or offer false evidence.

2. **Texas Rule of Civil Procedure 13** states that attorneys or parties shall certify that "to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith."

3. **Florida Rule of Professional Conduct 4-1.2** states that "[a] lawyer must not counsel a client to engage. . . in conduct that the lawyer knows or reasonably should know is criminal or fraudulent."

III. Appellate Basis For Civility

While the above combination of codes and professional conduct rules mandates that we all get along in the sandbox, there are constant examples over the years of less than desirable conduct. Hence the reference to "Once more into the *breach.*" This is another Shakespeare reference, twisted to suggest a break in cooperation. The "breach" in the referenced from Shakespeare's Henry V is an actual gap in the wall of the French city of Harfleur, which the English army held under siege at a crucial point during one of the wars between England and France. King Henry, a leader with strong speaking skills and speeches with staying power ("We few, we happy few, we band of brothers"), is rallying them to keep on keeping on.

Similarly, the argument FOR Civility has been ongoing, and appellate decisions every so often need to attack the breaches of cooperation and fight the good fight for the Civility side.

1. **Lossing v. Superior Court: 207 Cal.App.3rd 635**

"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…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."

2. **Gleason v. Isbell: 145 S.W.3d 354 (Texas)**

Civility standards apply to attorneys and pro se litigants: "[There is] less of an obligation than lawyers to act with respect and civility in their dealings with the court and those who participate in the legal process. . . In addition to repeatedly denigrating members of this court, appellant has unleashed similar attacks on appellees and their counsel, as well as the trial judge . . . The appellate courtroom is not the forum to vent personal grievances."

3. **Robinson v. Robinson: 88 So. 3d 973 (Florida)**

A lawyer's disparaging comments regarding this court . . . fell far below the standards of professionalism expected of members of the Florida Bar… [and the Florida Oath of Admission: "I will maintain the respect due to courts of justice and judicial officers."

4. DeRose v. Heurlin: 100 Cal.App.4th 158

Truly, *Huerlin* is a great of example of "really?" The opinion of *Heurlin* called out egregious conduct, told everyone they need to get along and work well with others, and punished an attorney for not doing so. The *Lasalle* opinion laments the necessity to bring this up, again

> "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 would get the bar's attention. It didn't." ***Lasalle***, 36 CA 5th, 127, at 133

The ironic twist regarding *Heurlin*: the intended target of Mr. Heurlin's remark was Christopher Day, a Califiornia attorney and Chairman for his local bar association's Annual Symposium on *Professionalism and Ethics*. He's also a former CAL-ABOTA President, and a regular ethics lecturer for California's Educational Board. Even though Mr. Day teaches ethics; lobbies for ABOTA principles; and regularly penned an "introductory" letter seeking cooperation among counsel. Whatever cooperation he was trying to foster, the other side wasn't having it. It goes to show, you never can tell.

5. Krim v. First City Bancorporation of Tex. Inc.: 282 F.3d 864

A Texas lawyer repeatedly abused opposing counsel and witnesses in a bankruptcy proceeding. The lawyer characterized various other attorneys as a "puppet," as a "weak pussyfooting 'deadhead' " who "had been 'dead' mentally for ten years," as "inept," as "clunks," as "a bunch of starving slobs," and as "an underling who graduated from a 29th-tier law school." The lawyer defended himself against sanctions not by denying that he made the insulting comments attributed to him, but by arguing that his characterizations were accurate. The Fifth Circuit rejected both arguments as "utterly meritless" and affirmed a $25,000 sanction.

6. Bedoya v. Aventura Limousine & Transp. Serv., Inc.: **861 F.Supp.2d 1346**

A Florida court held the attorney and his law firm were disqualified based on the egregious violations of the Florida Rules of Professional Conduct, including ex parte communications and the consistent course of disrespectful, unprofessional conduct. The Court found multiple instances in which Plaintiff's counsel violated professional conduct rules, such as berating defense counsel and playing the game Angry Birds during a deposition.

7. Lasalle v. Vogel: 36 Cal.App.5th 127

The interesting thing about *Lasalle* is the novelty of the concept. The underlying facts deal with the overturning of a default judgment, but the reason for the opinion is summed up in the first paragraph:

"Here is what Code of Civil Procedure1 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 nonlawyers. The policy of the state is that the parties to a lawsuit 'shall cooperate.' Period. Full stop."

The opinion, in essence, states that being civil isn't just an ethics mandate, it's codified. Because courts have had to urge counsel to turn down the heat on their inability to get along, even when factual scenarios differ, when dignity, courtesy, and integrity are conspicuously lacking, the appellate courts feel the need to expose all those "Exhibit A" letters and emails that show us how not to act. There are, unfortunately, lots of examples.

8. Dondi Properties v. Commerce Sav. & Loan Ass'n.: 121 F.R.D. 284

A Northern District of Texas convened solely for the purpose of establishing standards of litigation conduct to be observed in civil actions in district. The District Court held that standards of litigation conduct would be adopted:

> With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers. Judges and magistrates of this court are required to devote substantial attention to refereeing abusive litigation tactics that range from benign incivility to outright obstruction. Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive. . . We now adopt standards designed to end such conduct.

IV. Civility In Practice

1. Starting Out Correctly.

Some attorneys routinely serve the first volley regarding cooperation, by submitting initial letters to counsel basically saying "I want to cooperate with you, do things as informally as possible, and, if you have a problem with me or my staff, give me a call to figure things out." This letter goes a long way in diffusing matters from the outset, and shines an example of how we can act in order to work together.

2. Actually Talking to Each Other.

Electronic and telephonic communications are constantly in a fight for supremacy. To paraphrase the *Lasalle* opinion: "e-mails are a lousy medium with which to warn opposing counsel [about anything related to imminent drastic actions]." Whether it is a default, or a motion to compel, or ex parte notice, truly by law e-mails are insufficient to serve notices on counsel unless prior agreement and written confirmation by counsel exist, pursuant to Code of Civil Procedure sections 1013(e) and 1010.6(a)(2)(A)(ii).

And, if attorneys cannot get on the phone to discuss the matters in which they'll be embroiled for at least a year, how is anything supposed to resolve between the parties? Call opposing counsel: inquire about how that person is. It is information gathering, for sure, but it is also placing a trust between the parties that there will be attempts to strive mightily but still eat and drink as friends: whether remotely, through Zoom meetings, or in actuality.

To relate this to the newest reality, a recent article from the New York Times hailed the comeback of the phone call during the COVID lockdowns as, get this, a way to communicate with one another. This tidbit puts it in perspective: Verizon said it was now handling an average of 800 million wireless calls **a day** during the week, more than double the number made on Mother's Day, historically one of the busiest call days of the year. We're now realizing that the phone is, on a daily basis, an effective way not only to "call your mother," but anyone else out there.

3. Being Civil Cannot Hurt.

Additionally, EVERYONE is a potential juror, client, adversary or mediator. Without trying to sound catty, everyone has that list in their head of "not gonna do it" when it comes to the selections of mediators that I could pay, based on their actions or remarks on the bench, or as a practicing attorney, or as a prior mediator. If parties don't act in a shameful way, then the next event will go just as smoothly.

This applies to deposition and mediation attendance, both in person, and, now, videoconferencing. We've all been in a heated deposition, where the admonitions regarding "one at a time" turn into a wrestling battle royale. Again, we should all be reminded of the codified mandates to cooperate. Objections, frustrations and annoyances aside, what makes a tedious and laborious deposition even more so are the arguments, on or off the record, about how tedious and laborious the deposition is. Of course, "the record needs to be preserved," but just think how C.C.P section 583.130 could influence you for the next time this happens.

Also, think about the arbitrators and mediators, and their main reason for being here: resolution of this matter. Lawyers, for the most part, know how to conduct themselves within the confines of a courtroom, where the black robe and the guy with the handcuffs are relatively close to the action. The courtesy of cooperation should exist in the less formal settings, as well. It should not be a thought that the lack of handcuffs allows for more egregious behavior.

Finally, videoconferencing should have another side effect of more cooperation. Really, the need for "one at a time" is prevalent. The video cameras are all voice activated. If everyone starts talking over each other, nothing can get accomplished, since there's no ability, much like a court transcript, to have a cohesive record of who, what and where.

4. Exchange of Information.

For a Construction Defect tie-in, generally, there is a sense of cooperation on part of CD lawyers, at least as to the investigation of defects, and the costs associated with the defects. There are outliers for defects or costs, but those tend to get disciplined in the courts of public opinions. Now, the need to listen and process the information is even more necessary (was it ever less necessary?)

From a carrier's perspective, the setting of reserves, the resolution of claims, and the willingness to close files will be better served if it is known that all parties, or at least the two parties in dispute (claimant and insured) are working together toward an acceptable end. Of course, money is always the issue. If there is a concerted effort to agree on the issues, carrier representatives can be comfortable with a decision to close the matter, knowing that cooperation and Civility achieved a correct result.

5. Discovery Disputes.

The use of C.C.P section 583.130 can also be applied in a different proactive way. Of course, *Lasalle* asks us to cooperate, in general. A slightly different approach is to use section 583.130 as a sword. Figuratively "killing them with kindness." In motions to compel, or motions for sanctions (monetary or terminating), what could it possibly hurt to remind the court of the mandates set forth in section 583.130. The mandate to move the case along. The mandate to cooperate. Along with the list of horrible discovery abuses and the recitation of the discovery sanction rules, the encompassing rule to get along should be included. It may help the request for sanctions by showing that there was not a "good faith" reason to act in a way that created the need to bring a discovery squabble to the court's attention.

Courts are willing to listen. It is possible to win a rare terminating sanction against counsel who was not doing anything to move the case along. If you mentioned "cooperation" sections, like California's C.C.P. section 583.130, it is arguable that even with discovery motions, a court will recognize the continued burden placed on the court for non-compliant discovery responses, and bring the lawsuit to conclusion.

6. Bad Apples Still Exist.

A brief mention of Christopher Hook. Mr. Hook was the attorney who sent a string of vulgar, profane, and homophobic emails which he tried to play off as "zealous representation." He sheepishly asserted that such emails were designed to get an insurance company to discuss a settlement after counsel wouldn't return his phone calls. Now, of course, despite the plea for communication above emails, if counsel is belligerent across the board, Civility is lost.

In a well-publicized hearing before U.S. District Judge Otis Wright in December, 2019. Judge Wright was asked to decide whether Mr. Hook's clients' (now former clients') case would be dismissed because of threats and insults hurled at his opposing counsel. At the hearing, Mr. Hook arrived late to the hearing and lied to the judge about how late he was. Mr. Hook was not on solid ground to begin with, and eventually Judge Wright snapped. First, Hook argued that his incriminating emails could not be authenticated, prompting a warning from Judge Wright, who said, "This is not the day to be cute. And I am not the guy." Judge Wright told Hook that he had threatened people and behaved like a gangster, and declared that the legal profession didn't need lawyers like him.

As stated above, this is the typical "Exhibit A" on how not to act. Mr. Hook's examples probably reached Exhibit "NSFW," for sure.

V. Conclusion

To be sure, promoting a new approach to Civility takes the same effort, patience and open water needed to turn around an aircraft carrier: we will go miles before we get it headed in the direction we want. But we've made a start. Attorneys are addressing the problem, trial courts are becoming more willing to intercede, and published opinions are providing tools for attorneys and trial courts to use as remedies.

Justice Bedsworth reminds us that the profession belongs to the people in it, and this profession will be that which we are willing to make it, so long as the requisite work is completed. Now is the time to start that work. As such, please remember:

"Do as adversaries do in law, strive mightily;

But eat and drink as friends.”