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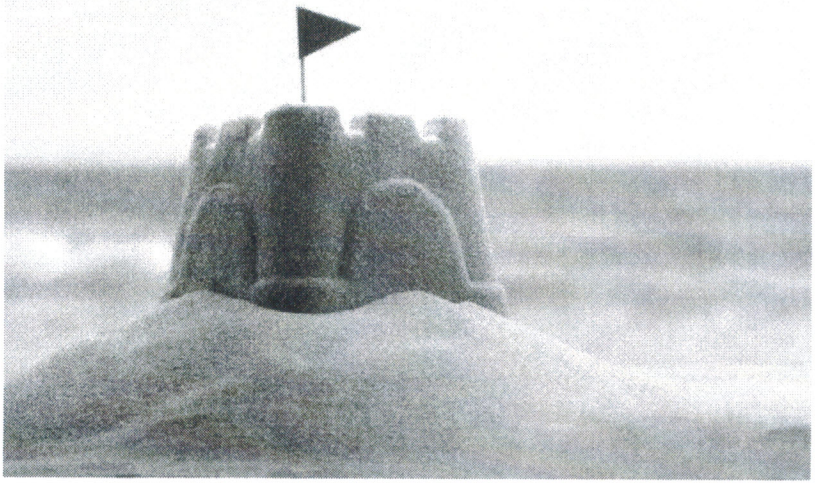
Playing in the Family Law Sandbox Together Nicely

A primer on civility in family law litigation.

By Chandra L. Moss, CFLS and Marie I. Braun, CFLS | April 29, 2016



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Threats by an attorney to "rip out" the throat of opposing counsel. Filing of motion after motion to financially impair an opposing party. Strong arm settlement tactics. Blatant misrepresentations of facts in pleadings and in argument. Name calling—even on the record. Ex parte contact with counselors and custody evaluators to posture a case. Disrespect to opposing litigants, opposing counsel and, yes, even the court. Is this appropriate advocacy? Some attorneys and parties think so, because all of the foregoing (including the threats by an attorney) have actually occurred. Lack of civility, ethics and professionalism seems to be on the rise in the family law courts.

These are the types of behaviors the California Court of Appeal addressed in *In re Marriage of Davenport* (1974) 194 Cal.App.4th 1507. In fact, the conduct noted in *Davenport* is less egregious than the examples set forth above.

In *Davenport,* the parties 42 year marriage culminated with the filing of a dissolution proceeding, highly conflicted from the start. The proceedings over the course of the following two years generated at least nineteen volumes of court files, including eight discovery motions, three contempt citations and, prior to the conclusion of the litigation, dueling motions for sanctions which ultimately brought the *Davenport* case to the Court of Appeal. The hearing on the competing motions for sanctions lasted five days (longer than many cases get for full trial) and resulted in a 31 page statement of decision (not required in a sanctions motion) with 15 specific findings. *In re Marriage of Davenport, supra,* 194 Cal. App. 4th at 1521.

Despite an early warning by the trial court, Petitioner's counsel engaged in a series of actions that the Court of Appeal found reprehensible. Those acts included:

- Failing to meaningfully communicate and when communicating, engaging in an aggressive, hyperbolic and hostile manner;
- Filing pleadings rife with misstatements, unsupported argument and material omissions;
- Impugning the honesty and professionalism of the opposing party and his counsel; and,
- In the appellate briefs, challenging the competency and professionalism of the judge.

Petitioner's counsel was completely unapologetic about his behavior, claiming he was "taught to litigate this case with unbridled passion," and blamed his inexperience and youth. *In re Marriage of Davenport, supra,* 194 Cal. App. 4th at 1522. Unfortunately for Petitioner's counsel, the Court of Appeal discounted his "inexperience and youth" excuse, upholding the trial court's sanctions exceeding $400,000 against his client.

The Appellate Court closed its discussion with a reminder to us that "regardless of practice, regardless of age – that zealous advocacy does not equate with 'attack do' or 'scorched earth'; nor does it mean lack of civility." It further noted that "zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive." *In re Marriage of Davenport, supra,* 194 Cal. App. 4th at 1537.

In 2007 the State Bar of California promulgated the California Attorney Guidelines of Civility and Professionalism. These Guidelines of Civility and Professionalism have been adopted by bar associations and courts throughout the state. Even "young" attorneys are bound by rules of civility. *California Rules of Court* Rule 9.4 sets forth the Oath Required when Admitted To Practice Law. The New Attorney Oath is taken be every person on admission to practice law and 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." (CRC Rule 9.4)

In addition, contained within the California Guidelines of Civility and Professionalism (Guidelines) are rules specifically designated for the family law practitioner. Section 19 of the Guidelines is titled "Additional Provision for Family Law Practitioners" and sets forth the "special duties" which should be undertaken when practicing family law. In part, Section 19

states: "In dissolution of marriage and child custody proceedings, an attorney should take a problem-solving approach and keep the best interest of the child in mind. The attorney should seek to reduce emotional tension and trauma and encourage the parties and attorneys to interact in a cooperative atmosphere."

Although following the Guidelines is not mandatory because the Supreme Court of California has not approved them and the Guidelines do not have the same force as legislative enactments, recourse for attorneys confronted with bad faith behavior ***by attorneys*** in violation of the Guidelines is available.

Will the New Incarnation of *California Code of Civil Procedure* §128.5 help?

Prior to 1994, *California Code of Civil Procedure* §128.5 was the standard for sanctions with respect to bad faith behavior. However, both attorneys and courts were reluctant to utilize the statute to enforce civility. Many thought that reluctance stemmed from the interpretation application of the statute required both an objective standard that the bad faith act was meritless and a bad faith motive – both of which were deemed too difficult to prove. *See, Legislative Comments, AB2494.* The statute was "deactivated" for cases filed after January 1, 1994. Its 1995 replacement was *California Family Code* §128.7, which only provided for sanctions where an attorney's conduct could be objectively unreasonable. The new statute was also convoluted in its procedure and in family law, often impracticable to implement.

Representative Ken Cooley, the author of the reincarnated statute, noted that "bad faith disobedience and tactics by either side are needlessly employed in litigation. It can result in clogging our courts and wasting precious judicial resources." *See, Legislative Comments, AB2494.* Bad faith tactics, overlitigation and quite frankly, complete misrepresentations to the courts are becoming rampant in family law and as Representative Cooley noted, "it is difficult to undo the waste of judicial resources or harm done to the litigant who was not at fault."

California Code of Civil Procedure §128.5 was reinstated effective January 1, 2015. Discovery abuses are exempted and, indeed, are covered under the Civil Discovery Act of 2006.

The difference between *California Code of Civil Procedure* §128.5 and *California Family Code* §271 is that "128.5" sanctions do not require a finding of ability to pay and can be assessed against both a litigant *and/or* his attorney. Further, "128.5" sanctions apply to the making or opposing of motions and other pleadings that are totally without merit or for the sole purpose of harassment. *California Code of Civil Procedure* §128.5. While "128.5" does not provide total coverage over all bad faith tactics and incivility, it does provide some teeth for the Court to curtail, via the sanctions process, some of the overlitigation, misrepresentation and harassment that seems rampant in court these days. Hopefully, Courts will see fit to implement these sanctions and litigants (and counsel) will think twice before engaging in the prohibited actions. However, "128.5" does not go far enough to curtail much of the conduct we see in family law litigation.

Many California counties have specific guidelines for civility during litigation. For example, Los Angeles County has established detailed standards for conduct in all aspects of litigation

including, continuances (e.g., advising against the strategy of granting no time extensions to appear "tough"), service of papers (e.g., not using the time and manner of service to take advantage of an opponent's known absence), submissions to a Court (e.g., not disparaging the intelligence, ethics or morals of an opponent), communications with adversaries (e.g., be civil and courteous), depositions and the like. *See, Los Angeles County Rules of Court* Chapter 3, Civil Division, Appendix 3.A.

As attorneys, we should set an example to the parties of ethical and courteous conduct. In family law, where emotions often run high, counsel has the obligation to stay above the fray and consider the following:

- Is this ex parte request really an emergency?
- Is it appropriate to have discovery responses due or set a hearing/deposition when opposing counsel is known to be on vacation?
- Can this issue be handled any other way to avoid coming to court?
- Does this correspondence contain unnecessary vitriol? Is it professional?
- Is my client assuming a completely unreasonable position? Am I fostering that unreasonable position?
- Is what is written in this pleading I am submitting to the court true and accurate? Are there omissions of any significance?
- Am I communicating with opposing counsel, both in and out of Court, in a manner that I would wish him/her to treat me?
- Is my obligation to engage in civility being subsumed by my need (or my client's) to win at any cost?
- Is my action, correspondence, motion written or presented in such a manner that it will be Exhibit A to a motion for sanctions?
- Can I afford personal sanctions, both by way of my pocketbook and by way of reputation?

"Civility costs nothing, and buys everything" – Mary Wortley Montagu

No truer words have been spoken. One courtroom clerk noted to the opposing attorneys how refreshing it was that the attorneys, despite the contentious nature of the litigation, were able to maintain cordiality and professionalism. As a result of that civility, the Judge was more inclined to be accommodating to attorney scheduling problems and bent over backward to ensure the matter was completed as expeditiously as possible.

Another courtroom clerk, after being berated by an attorney in a full courtroom, quietly slipped the attorney's documents to the bottom of her foot high stack.

An attorney who had been engaging in "hardball" tactics sought an extension for discovery responses, which was denied.

We truly reap what we sow.

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