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PERSPECTIVE

A tale of civility

By Patrick M. Kelly

October 9 marked the seventh anniversary of the date on which the State Bar of California recommended to the Supreme Court that a new California Rule of Court be adopted to add the now familiar concluding wording of the attorney oath which states, “*As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.*”

Particularly in this stressful time where COVID-19 challenges our Judicial Branch and civility itself, it is important to remember that time in 2013 when all California bars and courts unanimously came together to honor professionalism and civility by the enactment of California Rule of Court 9.4. (Rule 9.4 was renumbered to Rule 9.7 in 2018.) As president of the State Bar at the time, I was in the lead on this issue and thought it important to share the complex sequence of events that led to the addition of the “civility wording” and also to discuss the lessons learned and the current state of attorney civility in California.

When I became president of the State Bar in 2012, I identified improving the image of lawyers and consequently improving civility as a priority and committed the State Bar resources to addressing this issue. There was at that time a lengthy history of efforts by local bars and courts in California to address civility. For example, under then-president Margaret Morrow in 1988 the Los Angeles County Bar Association developed Civility Guidelines that were adopted by the Los Angeles County Superior Court. Two years later, as president of the LACBA I joined with the then chief judge of the Central District of California to have these guidelines adopted in that court. Moreover, under State Bar President Sheldon Sloan in 2007, the Board of Governors (now known

as the Board of Trustees) adopted the aspirational California Attorney Guidelines of Civility and Professionalism. These and other similar guidelines were adopted by local bars in California who also provided educational programs on civility. Concurrently, ABOTA had been nationally presenting educational programs on civility, successfully arguing to add a civility commitment to the attorney oath in some states and there was discussion of adding a civility commitment to the oath in California. Yet California had no statewide required civility commitment. We felt that commitment and

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possibly disciplinary and CLE initiatives were actions that could lead to presenting a clear civility message and improving civility throughout the state. Thus the issue was how to use the resources of the State Bar and other court and bar organizations to have the most meaningful impact.

We initially did research on how other states and bar associations were approaching the issue and found that it varied from jurisdiction to jurisdiction. It then was clear that civility education and court-and association-promulgated civility guidelines were a positive step in the process but were limited in their statewide impact. As noted, ABOTA had been active in these efforts nationally, had success in advocating for modification of the attorney oath to include civility wording in some other states and CalABOTA argued that California should do the same. We felt their



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experience, prior success and commitment to an oath addition would be important in addressing statewide civility measures in California. Thus

a Rule of Professional Conduct that addressed civility issues; and (3) a mandatory continuing legal education requirement of civility training. The State Bar legal office advised that action in these three areas could only be undertaken by a resolution from the State Bar Board of Trustees. Moreover since the Supreme Court had inherent constitutional authority over admissions, discipline and regulation of California attorneys, any suggested change or addition would have to be submitted to and approved by the court.

I communicated with Doug De-Grave, who was then the president of CalABOTA, and we agreed to join together in the effort to have a meaningful impact on civility on a statewide basis — most likely by adding civility wording to the attorney oath. We sought input and support from the other bar associations in California. To communicate the civility message and enlist their support, these issues and potential corrective action were discussed in my President’s Page of July 2013 that advocated for a civility wording addition to the attorney oath so that attorneys entering the profession were on notice that civility is a fundamental duty and an essential part of their professional activities.

As part of this process we considered three potential options for statewide action: (1) an amendment or addition to the attorney oath to include a civility commitment; (2)

One issue in California became whether the enforcement of civility by a disciplinary rule could be challenged under the Constitution. Although we believed there would be no violation of constitutional rights, our goal was to take meaningful action now rather than delay and dilute the impact of whatever action we pursued through litigation to accomplish it. There was already a pending disciplinary consequence under Rule 8.4 of the then-proposed revised Rules of Professional Responsibility. In particular, paragraph (d) of that proposed section provided that it was the duty of a lawyer not to engage in “conduct prejudicial to the administration of justice.” Arguably some forms of uncivil behavior fell within that definition. Also, adding a mandatory CLE element had complexities of its own and bar associations such as ABOTA were already providing civility education.

After significant research, consultation with staff of the Judicial Branch, and discussions with representatives of CalABOTA and other bars in California, we concluded that the most productive approach would be to pass a State Bar Board of Trustees resolution to urge the Supreme Court to add an aspirational civility commitment to the attorney oath. Although legislative action was considered to seek an amendment to the oath already required under Business and Professions Code Section 6067, we felt the most expeditious path was to ask the Supreme Court to enact a new Rule of Court containing civility wording under its inherent constitutional authority over admissions, discipline and regulation of California attorneys. That rule would add the civility wording to the oath wording required under Business and Professions Code Section 6067 and became proposed Rule of Court 9.4. The questions then became how do we get the rule enacted and what should it say?

As to the first question, we concluded that the enactment of this addition to the attorney oath would require an addition to the Rules of Court which in turn would require: (1) a State Bar Board Operations Committee recommendation to the Board of Trustees of the suggested mechanism and wording; (2) a 30-day public comment period followed by; (3) a review of those comments and possible amendments to the resolution prompted by them; (4) a Board of Trustees resolution to the Supreme Court and possibly a petition to the Supreme Court to add the suggested rule; and (5) Supreme Court action to adopt the new rule. .

Determining what the new rule should say was complex. There were many different potential oath wordings to be considered from many different stakeholders. There was thus very lengthy consultation among the Board Operations Committee, State Bar staff, Judicial Branch staff, CalABOTA and other bar association representatives. In the process we looked at the civility-related wording of every oath that had been approved in other states as well as applicable decisions on the meaning of various civility-related words and the potential impact of those words on constitutional rights. In the end, after an

exhaustive review of these sources, we concluded that the wording most likely to meet any legal challenges and be approved by the Supreme Court was, as stated above: “*As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.*” I then made the motion before the State Bar Board Operations Committee to recommend the creation of Rule of Court 9.4, which would add the aspirational wording noted above to the attorney oath which was already required under Business and Professions Code Section 6067 and circulate it for public comment. The resolution was passed unanimously.

It was necessary to publish the subject resolution to the public for comment for a period of 30 days. With one exception, the public comments were all positive. That one exception was a comment by an attorney that, rather than being aspirational, violation of the oath should be a disciplinary offense. Based upon our earlier research, we felt that addition would be unacceptable to the Supreme Court and created possible legal challenges. Also CalABOTA, through its chapters, strongly supported the proposed resolution but also suggested consideration that the words “professionalism” and “civility” be added or substituted to the wording of the proposed oath. The committee ultimately presented a resolution to the Board of Trustees recommending that the original wording noted above be recommended to the Supreme Court but it also included the suggestion to consider adding or substituting the words “professionalism” and “civility” to the oath wording. Although submitted as part of the final board resolution, the Supreme Court ultimately chose to approve the original proposed wording.

The resolution was then presented to the Board of Trustees on Oct. 9, 2013. The board unanimously approved the resolution. That day the board resolution and recommendation were presented to the Supreme Court by my letter advising the Supreme Court of our recommendation. The State Bar then filed a petition with the Supreme Court to add Rule 9.4, which recited the roles of the State Bar, CalABOTA and other supporters of the proposed addition

of Rule 9.4 as well as the history, rationale and authorities behind the recommendation. Finally, on April 25, 2014 the Supreme Court issued the “Order Adopting Rule 9.4 of the California Rules of Court” in the form originally submitted by the State Bar.

As you can see there was a tremendous effort by the court, numerous committed individuals and bar associations who joined together to make this addition to the oath happen. Most notably the State Bar trustees and staff and the Judicial Branch staff were essential to moving the resolution forward. A significant partner in this effort was CalABOTA and there was also strong support from the other bars throughout California. Most important however was the strong support of Chief Justice Tani Cantil-Sakauye and the other members of the Supreme Court who recognized the need for the formalization of the basic concepts of civility in the attorney oath by ordering the addition of Rule 9.4. The attorneys of California owe them a debt of gratitude for that far sighted action.

Since Rule 9.4 was enacted the vigorous commitment to attorney civility continues and there are many examples. Bar associations and courts throughout California including among many others ABOTA and ABTL continue in their adoption of civility guidelines and civility educational programs. The new Rules of Professional Responsibility were approved by the Supreme Court in 2018 adding Section 8.4(d) which forbids “conduct prejudicial to the administration of justice.” Moreover, the courts and Legislature are taking a stronger view towards incivility. See for example Business and Professions Code Section 6068, which defines the duties of attorneys. See also *LaSalle v. Vogel*, 336 Cal. App. 5th 127 (2019), where the Court of Appeal reversed the trial court’s refusal to set aside a default and the court noted that law is a profession not a business and lawyers as officers of the court are supposed to act with honor and integrity and cooperate with one another under Code of Civil Procedure Section 583.10; *Martinez v. O’Hara*, 32 Cal. App. 5th 853 (2019), where the appellant used spurious and derogatory lan-

guage toward the female trial judge and the court found it evidenced gender bias and violated Business and Professions Code Section 6068 and thus reported the misconduct to the State Bar; and *Briganti v. Chow*, 42 Cal. App. 5th (2019), where the court found that calling a woman judge “attractive” was both irrelevant and sexist. Most recently there is a proposed State Bar committee which is chaired by Justice Brian Currey of the 2nd District Court of Appeal, Division 4 (who wrote the *Briganti* decision) to evaluate and recommend initiatives to improve civility. I am honored to be on that committee. Thus as we look to the future of civility in California there is ample reason to believe the commitment to civility that gave rise to Rule 9.4 is even stronger today.

As a final note, the addition of California Rule of Court 9.4 — now Rule 9.7 — is a story of persistence, courage and cooperation by the courts, attorneys and bar associations of California. Particularly in this stressful time where COVID-19 challenges our very legal system and civility in our practice, it is important to renew our commitment to civility and to remember and draw strength from that inspirational time when all California courts attorneys and bar associations unanimously came together to honor professionalism and civility in our profession by adding to the attorney oath the words “*As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.*” ■

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