



THE NEW ELLIS GROUP

Monday Monday

Connecting the Dots with Karen Kaplowitz



*Helping you create and reinforce the habits of successful career building,
gleaned from my work as a business development strategist, trainer and coach*

Volume 12, Issue 9

April 23, 2018

Unforced Errors: Losing Business Because of Incivility

Scorched earth tactics and threats from powerful lawyers who represent powerful clients have been making the news lately. The behavior of the President's own personal lawyer, Michael Cohen, has been widely reported. But incivility is not news. Most lawyers encounter incivility by other lawyers at times in their careers. Sometimes, the incivility amounts to abuse of power within law firms. See [here](#). More often, lawyers face incivility from opponents. But there are many indications that there is less tolerance for incivility than there used to be. For example, in litigation between Oracle and Hewlett Packard, United States Magistrate Judge Elizabeth Laporte recently issued an [order](#) admonishing Oracle for "extreme, unnecessary, overheated rhetoric" and Oracle's failure to adhere to the Northern District of California's "Guidelines for Professional Conduct." The judge cited the rule that, "A lawyer should avoid denigrating the intelligence, ethics, morals, integrity or personal behavior of the opposing party, counsel, or witness, unless such matters are at issue in the proceeding." The judge then went a step further. She ordered lead outside counsel to give a copy of her order to the General Counsel of their respective clients. When a judge orders counsel to report her ruling on their misconduct to their clients, the judge is putting everyone on notice of serious potential consequences of incivility. Some clients in this type of situation will undoubtedly choose to replace the lawyers involved. If you are a client relationship partner or a practice group leader, consider these questions:

- Have you emphasized highly aggressive tactics in client pitches and branding?
- Do your clients expect unbridled aggression from your lawyers?
- Do you monitor the tone of your lawyers' interaction with opponents?
- Do you need to change your tactics or branding with greater scrutiny of incivility by courts and media?

The order against Oracle was widely reported and may become a template for other judges. The Oracle order makes clear that the stakes are not only financial and substantive judicial sanctions and rulings, but also client retention.

Example: After a company was forced to change counsel in the middle of a major matter because its lead counsel had been sanctioned by the court for violations of the court's rules of professional conduct, the general counsel of the company instructed the law department to add a new question to all RFPs. The company's RFPs had traditionally asked if there were any lawsuits pending against law firms submitting responses to RFPs. The company added a new question: "Have any of the lawyers who will be involved in work on our matters been the subject of court orders in which they have been sanctioned for misconduct? If so, please attach copies of those orders." For its next RFP, the client relationship partner at the firm asked all lawyers under consideration for the client team if they had been subject to orders sanctioning them for misconduct and eliminated those who had from the RFP response.

Are you protecting your firm from potential embarrassment and loss of business by encouraging your lawyers to refrain from incivility in their dealings with opposing counsel and other parties? Are you willing to take the risk that there will be no adverse consequences from judges or clients for incivility?