

Incivility may cost you

Snoeck v. ExakTime Innovations, Inc. holds that courts may take civility into account when determining a lodestar multiplier

By Michael Levinson

Attorneys beware: Courts may place emphasis on the "civil" aspect of civil litigation when determining the reasonableness of attorneys' fees. In *Snoeck v. ExakTime Innovations, Inc.* (2023) 96 Cal.App.5th 908, the Second District Court of Appeal affirmed a finding that an attorney's "pervasive incivility" towards opposing counsel and the trial court served as ample justification to apply a negative multiplier to an award of attorney's fees in a FEHA case. It also put the legal community on notice that acting civilly is not only a virtue, but a skill all attorneys are expected to possess and uphold.

Facts

Plaintiff Steve Snoeck brought multiple claims under FEHA against his former employer and obtained a partial jury verdict in his favor for just over $130,000. (*Id.* at 913.) As the prevailing party, plaintiff filed a motion for attorneys' fees under FEHA (Gov. Code, § 12965, subd. (c)(6) [then § 12965(b)]), seeking a lodestar of $1,293,870 plus a 1.75 lodestar multiplier. (*Ibid.*) After adjusting for billing errors and applying a 1.2 multiplier due to the contingency nature of the case, the trial court then applied a 0.4 *negative* multiplier based on counsel's "repeated and apparently intentional lack of civility throughout the entire course of the litigation." (*Id.* at 916.) This reduced the fees awarded by over $450,000. (*Ibid.*)

In making its ruling, the trial court cited multiple instances of unprofessional conduct by plaintiff's counsel in emails to defense counsel. The emails accused the defense attorneys of telling lies, committing fraud, mispresenting facts and law to the court, and engaging in sleazy and cringeworthy conduct, amongst other claims. (*Id.* at 921.) The court also

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referenced plaintiff's counsel's conduct at hearings, describing his tone as "belittling," "antagonistic," and "contemptuous." (*Id.* at 922.)

On appeal, plaintiff argued he was being punished for a fictional "civility rule," asserting that lack of civility may not serve as a basis for discipline by the State Bar and the word "civil" is absent from the oath all new attorneys take upon swearing in. (*Id.* at 920-21.) In rejecting plaintiff's contention, the appellate court relied on past precedent to reassert that civility "'is an ethical component of professionalism' *and* it 'is socially advantageous [as] it lowers the costs of dispute resolution.'" (*Id.* at 921 (quoting *Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal.App.5th 734, 747.)

In reaching its conclusion, the appellate court rebuffed plaintiff's reading that *Karton* was limited to the proposition that an incivility fee reduction *only* applies if such conduct increased costs during litigation. (*Id.* at 924.) First, the court found the record *did* support an implicit finding that counsel's emails unnecessarily increased litigation costs. (*Ibid.*) But even if that were not so, it cited *Karton* and other authority holding that civility is a standalone "skill," which may be factored into a fee award. (*Id.* at 925.) In other words, nitpicking about whether counsel's conduct increased costs will not overshadow counsel's overall conduct. The Court reasoned that if a lodestar calculation may be increased due to exceptional representation above and beyond what might be expected by an attorney with similar skill and experience, then the converse is true too when the representation fails to meet such a standard. (*Id.* at 925-26.)

Plaintiff further argued that even if his counsel's actions were uncivil, they were not only warranted, but tacitly accepted by defense counsel's failure to respond to such attacks. (*Id.* at 923.) Again, the appellate court dismissed these arguments with ease. It first noted that there was no evidence to support a finding that defense counsel misrepresented facts or law to the court. (*Ibid.*) More significantly, the court observed that litigation is inherently contentious, and inappropriately attacking opposing counsel and the court does nothing to further a client's interest given such attacks are unlikely to persuade the other side. (*Ibid.*) It also agreed that opposing counsel need not respond under such circumstances. (*Ibid.*)

Finally, the court rejected plaintiff's additional arguments, including that the 0.4 reduction was an impermissible sanction (*id.* at 927), that it contravened the principles of FEHA (*Id.* at 928), and that it was unconscionable, (*Id.* at 929-30).

Analysis

Snoeck is important because it expands the holding in *Karton*, which was the first case to tie incivility with a decrease in attorney's fees just over two years ago.

In *Karton*, the court upheld a reduction in attorney's fees awarded to plaintiff as the prevailing party in a construction dispute, in part, because of incendiary language plaintiff used in briefing his fees motion. (*Karton*, 61 Cal.App.5th at 747.) The record showed plaintiff made similar accusations to those made in *Snocek*, including that defense counsel made knowingly false claims and frivolous comments. (*Id.* at 741-42.) The court explained the general importance of acting civilly in litigation, proclaiming, "[i]t is a salutary incentive for counsel in fee-shifting cases to know their own low blows may return to hit them in their pocketbook." (*Id.* at 747.) As set forth above, it also deemed civility as a component of attorney skill and expanded upon guidance approved by the California Supreme Court that attorney skill may play a role in adjusting a fee award. (*Id.* at 734 (citing *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132).)

Incivility, however, was only one of five reasons the *Karton* court relied upon to reduce the award. (*Id.* at 746.) Rather than parse out each reason, the court looked at them in their totality to slash the attorney's fees requested by nearly 70%. (*Id.* at 746.)

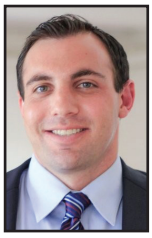
Though *Karton* considered counsel's incivility as a factor in calculating fees, it was not a standalone factor. By grouping it with other reasons instead of applying a specific incivility multiplier, the court made it difficult to determine the exact magnitude of counsel's transgressions and just how much of a role they played. *Snoeck*, on the other hand, approved a specific 0.4 multiplier – the first negative multiplier of its kind directly linked to counsel's incivility. Stated differently, *Karton* showed that attaching a price to incivility *can* be done, whereas *Snoeck* took it a step further by providing a road map as to *how*.

Snoeck is also notable because it opens up potential attorneys' fee reductions based on incivility to different types of cases. Now, it is more likely that the conduct of parties and their counsel may be taken into consideration in any matter where courts have discretion to award attorneys' fees.

Conclusion

While *Snoeck* leaves open certain questions like how pervasive any incivility must be to issue a negative multiplier and what multiplier to use in less egregious cases, it still serves as an important benchmark going forward. Trial courts are afforded great deference in their decision-making regarding fee awards and will no doubt look to *Snoeck* to further carve out potential reductions based on inappropriate attorney conduct. Most importantly, however, *Snoeck* serves as a reminder to attorneys everywhere of the adage: It pays to be nice.

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