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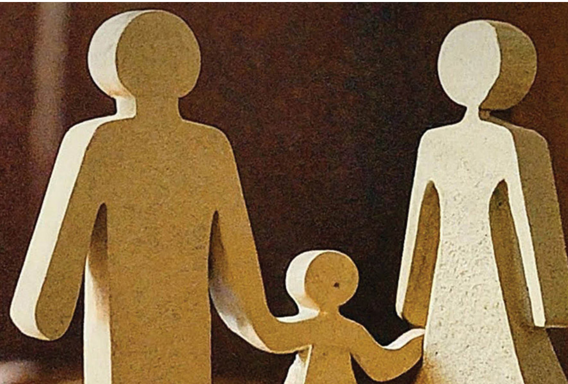
2024 TOP FAMILY LAWYERS



Uncivil conduct: is there a double standard in family law?

BY CHRISTINE BYRD

What should you do if opposing counsel comes to your office to personally serve discovery papers, and then storms past the reception, walks into the attorney's office area, and refuses to leave, demanding that an attorney meet with him to discuss his objections to discovery?

What should you do if opposing counsel does this eight times, even after you have written to him to stop?

What should you do if opposing counsel refuses to confirm that his client will appear for deposition, so you cancel the deposition, and then he sends you a series of unnecessary, argumentative, self-serving, and seriously annoying emails?

And what should you do if, despite the cancellation of the deposition, he appears at your office anyway and refuses to leave until you arrive and speak with him?

Whatever you do, do not request a civil harassment restraining order against him. That is the holding in *Hansen v. Volkov* , 96 Cal. App. 5th 94; 314 Cal. Rptr. 3d 1 (2023), as modified (Oct. 4, 2023), from which these facts were taken (full disclosure: I was the judge who issued the civil harassment restraining order in this case).

The California Code of Civil Procedure sets forth three grounds for a civil harassment restraining order; namely, "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose." Code Civ. Proc. § 527.6(b)(3). The statute provides, expressly, that "[c]onstitutionally protected activity is not included within the meaning of 'course of conduct.'" Code Civ. Proc. § 527.6(b)(1).

In *Hansen*, the primary issue was whether opposing counsel's emails were properly considered in the issuance of the restraining order.

On appeal, opposing counsel argued that the emails should not have been considered because they constituted constitutionally protected litigation conduct that is not included within the meaning of "course of conduct" for purposes of civil harassment. The holding in *Hansen* is that the emails surrounding the deposition should not have been considered. "However annoying they may have been, Volkov's emails regarding his client's deposition constituted constitutionally protected activity that may not be considered part of a course of conduct of harassment." *Id.* at 97.

Having found the emails to be constitutionally protected and excluded from consideration as a matter of law, the opinion then turns to review the remaining conduct and considers whether it was sufficient to satisfy the civil harassment standard. "The remaining evidence of his unprotected conduct did not support the trial court's finding that Volkov had engaged in a willful or knowing course of conduct that would cause a reasonable person substantial emotional distress." *Id.* at 97. This second holding should be of great interest to family law attorneys because of the unfortunate assumptions it makes about the practice of family law.

For a course of conduct to be sufficient to support the issuance of a restraining order, the course of conduct at issue "must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner." Code Civ. Proc. § 527.6(b)(3).

According to the opinion, opposing counsel's conduct (excluding the deposition emails, of course) could not possibly have caused substantial emotional distress to the petitioning attorney. Why? Because she was "an experienced family law attorney who presumably has litigated many cases with difficult opposing counsel." *Id.* at 106.

This statement about the practice of family law is troubling. The petitioning attorney's testimony was that opposing counsel had barged into her office on multiple occasions, ostensibly to serve papers, but then demanded to see an attorney and refused to leave. After at least five such incidents, she wrote to him, "I understand you recently came to my office and badgered my staff as well about the discovery objections. Your conduct is unbefitting of an attorney. I understand your position regarding discovery. Please do not harass me or my staff any further." *Id.* at 98.

Despite this appeal to his professionalism as an attorney, he continued the conduct. It was with this background that she felt "sick to her stomach" and "scared" when she got the call that opposing counsel was, again, at her office unexpectedly and despite notice that the deposition was canceled.

This, according to the opinion, is insufficient to establish substantial emotional distress because this is just an experienced family law attorney dealing with a difficult opposing counsel.

For most lawyers, describing these physical confrontations as simply the actions of someone who's being "difficult" would be quite an understatement. And it is highly questionable that even the most experienced lawyers would consider physical office incidents with opposing counsel to be so commonplace that they do not cause them any emotional distress.

The opinion is eloquent on the importance of civility in litigation and in commending the recommendations of the California Civility Task Force, but it begs the question of when lack of civility becomes civil harassment when it describes this case as "an argument over deposition scheduling that reasonable attorneys could have resolved without court intervention," suggesting that "one of the Task Force's recommendations would have been particularly helpful in this case: requiring attorneys to take an hour of mandatory continuing legal education devoted to civility." *Id.* at 107. It even chastises the petitioning lawyer for "mutual incivility" for seeking the civil harassment restraining order. *Ibid.*

It is troubling that an appellate court would say that experienced lawyers in family law should be so inured to such egregious conduct that it could not have caused emotional distress as a matter of law. While it may be true that the practice of family law often involves more emotional clients and pressure than other civil litigation, it should not be an excuse for requiring family law lawyers to endure behavior from opposing counsel that lawyers in other fields would not.

On the practical side, a lack of civility can quickly increase the cost of the case, especially in the discovery phase. The friction points between counsel can, however, be moderated by the appointment of a discovery referee who can respond within hours to resolve scheduling disputes and can attend and resolve disputes at depositions. A discovery referee cannot guarantee civility between counsel but can shepherd a case toward resolution despite a lack of civility.

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