



**Federal Bar
Association**
San Diego Chapter

Civility Series Part I: Understanding and Incorporating Civility into Practice

MCLE Written Materials

August 26, 2020

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How do we define uncivil behavior

- Failing to acknowledge another person's presence
- Using abusive language
- Gossiping
- Discounting employee contribution
- Bullying and intimidating co-workers/ Sexual Harassment
- Discriminating against a particular individual or group
- Sabotaging individual and company efforts
- Practicing insensitivity against co-workers' needs
- Practicing poor etiquette in dealing with correspondence


Workplace Incivility Scale (Cortina, et al (2001) Journal of Occupational Health Psychology , 6, 64 – 80.)



Factors Causing Incivility

- What is appropriate behavior?
- Long hours/overworked/ Fatigued
- Workplace stress/ Stress in general/ Dissatisfaction
- Passive Aggressiveness
- Intolerance of individual differences/ Dominant Conflict Management Style
- Being in a Protected Position or Position of Authority
- Lack of Self-Restraint
- Anonymity
- Individualism/ Entitlement
- Gender and Race/ Intersection relate to risk especially in careers as Law





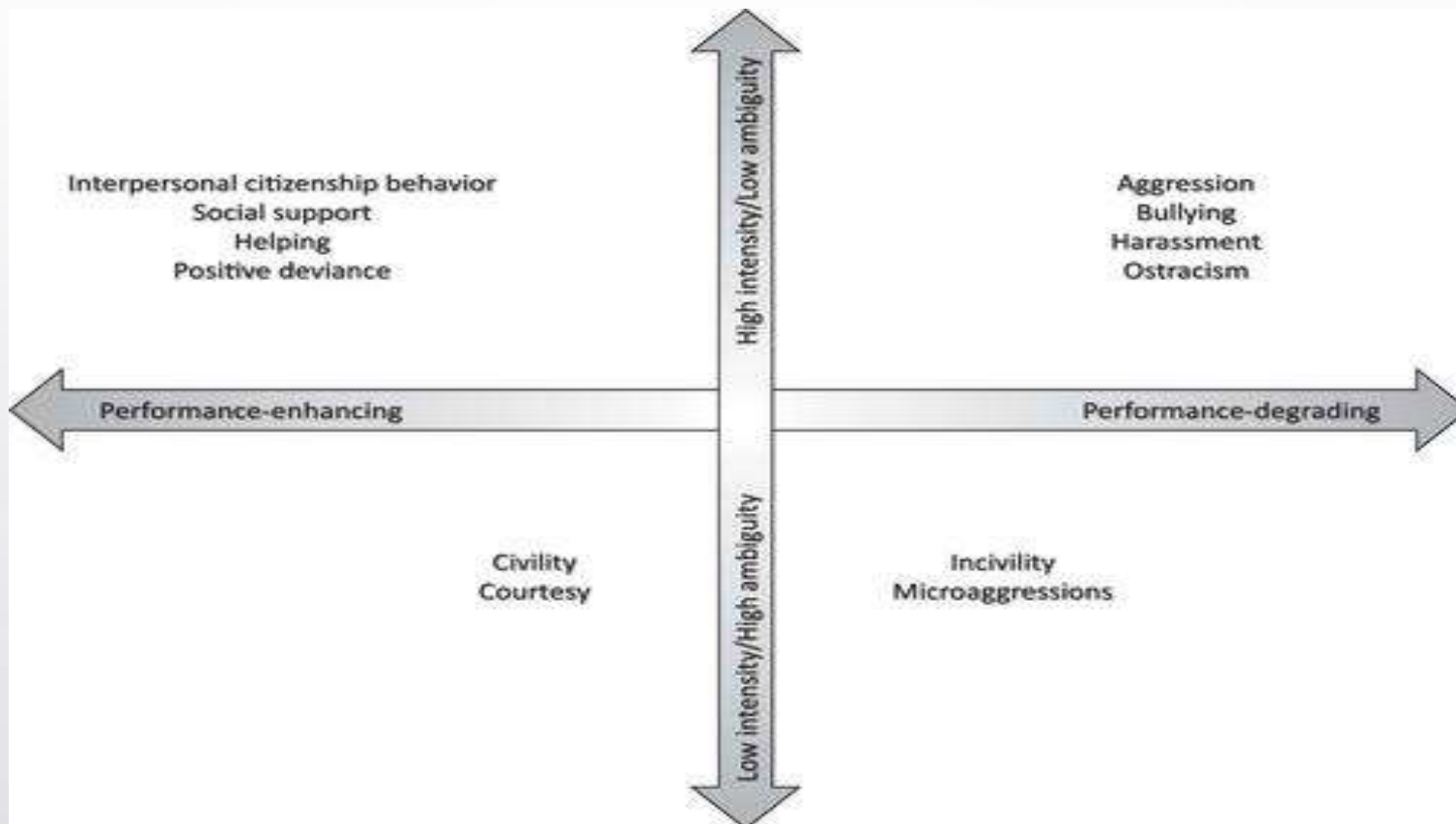
Cost of Incivility in the Workplace

- Avoid offering new ideas and solutions
- Deliberately decrease their productivity
- Lower the quality of their work
- Avoid offering help
- Steer clear of the offender, creating inefficiencies
- Take their frustrations out on customers
- Spend less time at work
- Leave the company
- Witnesses to the incivility are harmed as well




Cognitive and Emotional Mechanisms

- Impairs task engagement and performance
 - Disrupts memory systems
 - Deplete mental, emotional and social energy
- Negative affect and guilt associated with decreased empowerment and self-esteem/ Learned Helplessness
- Optimism and coping strategies can mediate
- Third parties can act as buffers



Two-dimensional spectrum of interpersonal organizational behavior. (Cortina, Kabat-Magley, & Nelson (2017). *Researching Rudeness: The Past, Present and Future of the Science of Incivility*. *Journal of Occupational Health Psychology*, 22(3), 299 – 313.



What can be done

- Provide clear feedback to employees regarding types of behaviors that are desired – set up the social norms for your work environment
 - Code of Conduct that is referred to during orientations
 - Reinforce norms as a role model
 - Bring out any issues during performance evaluations
- If norms are violated
 - Make sure to address promptly
 - Offer trainings or development opportunities around the issue



Leadership

- Examine your own behavior and how you contribute to civility or incivility.
- Take a temperature check in your unit to see how staff treat one another.
- Don't listen to or tolerate rumors and gossip.
- Encourage staff not to jump to conclusions about the intent or motives of other staff, patients or families.
- Stop the blame game and encourage a solutions orientation to problems.
- Encourage acts of kindness among staff.
- Go out of your way to say thank you and promote this behavior in staff.
- Look for common ground in dealing with conflict.
- Encourage the practice of forgiveness.
- Make it safe for staff to ask questions and discuss problems.

Sutton, R.I. (2007). *The No-Asshole Rule: Building a Civilized Workplace and Surviving One that Isn't*. New York: Business Plus.

Individuals

- Seek Help
- Be An Ally to Others
- Don't Ignore



Incivility is not a Vice of the Soul, but the effect of several Vices; of Vanity, Ignorance of Duty, Laziness, Stupidity, Distraction, Contempt of others, and Jealousy.

(Jean de la Bruyere)

IZQuotes

ATTORNEY CIVILITY IN FEDERAL COURTS

1. The following California federal district courts adopted civility guidelines or rules for attorneys, which are located at the links provided.

a. U.S. District Court for the Central District of California

i. Civility and Professionalism Guidelines¹

<http://www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines>

b. U.S. District Court for the Northern District of California

i. Guidelines for Professional Conduct²

<https://www.cand.uscourts.gov/forms/guidelines-for-professional-conduct/>

ii. Civil Local Rule 11-4 (Standards of Professional Conduct)

<https://www.cand.uscourts.gov/forms/guidelines-for-professional-conduct/>

c. U.S. District Court for the Southern District of California

i. Civil Local Rule 2.1 (Professionalism)

¹ These guidelines explain that the federal courts in the Central District “expect that judges and lawyers will voluntarily adhere to these standards as part of a mutual commitment to the elevation of the level of practice in our courts.” As *Keith H. v. Long Beach Unified School Dist.* (2005) 228 F.R.D. 652, 655 explains, courts expect attorneys to be familiar with the guidelines:

“Further, the Court notes that in some of defendant County's documents there are inferentially disparaging references to plaintiff's counsel. The parties are admonished that in the future this Court will strike sua sponte any document that refers in an offensive manner to the opposing counsel (or party), including documents containing abusive correspondence as exhibits. Moreover, the parties must become familiar with the Court's Civility and Professionalism Guidelines, which are available under the Attorney Admissions section of the Court's website at <http://www.cacd.uscourts.gov/>.”

² The Guidelines explain that “Every attorney who enters an appearance in this matter shall be deemed to have pledged to adhere to the Guidelines.”

[https://www.casd.uscourts.gov/assets/pdf/rules/2020.06.01%20Local%20Rules%20\(edited\).pdf](https://www.casd.uscourts.gov/assets/pdf/rules/2020.06.01%20Local%20Rules%20(edited).pdf)

2. The Federal Courts possess inherent powers to redress attorney civility violations and allow the court to: sanction counsel, reduce or eliminate an attorney fee and cost award, or award the opposing side with attorney's fees and costs.
3. The Federal Rules of Civil Procedure provide tools for attorneys and courts to redress civility violations.

a. Federal Rule of Civil Procedure 1, which provides:

“These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”³

b. Federal Rule of Civil Procedure 11, which provides in relevant part:

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented.

* * *

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

³ *Sahyers v. Prugh, Holliday & Karatinos, P.L.* (2010) 603 F.3d 888, 891 explains how FRCP 1 is related to civility:

“While I promised that I would not repeat everything I said in the panel opinion, I will end by repeating footnote 5 from the panel opinion: ‘We believe and defend the idea that maintaining a bar that promotes civility and collegiality is in the public interest and greatly advances judicial efficiency: better “to secure the just, speedy and inexpensive determination of every action and proceeding,” as Rule 1 demands. For background, see Fed.R.Civ.P. 1.’ ”

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

* * *

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

4. Federal Statutes provide courts with tools to redress civility violations.

a. 28 USC 1927 (Counsel's liability for excessive costs), which provides:

“Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.”⁴

⁴ As *Revson v. Cinque & Cinque, P.C.* (1999) 49 F.Supp.2d 686, 688 explains, 28 U.S.C. § 1927 may for the basis of a sanction award for uncivil conduct:

“The Court concludes that a substantial likelihood exists that Ms. Revson and Mr. Burstein engaged in vexatious and unreasonable conduct in these proceedings.

5. Several federal cases have addressed attorney civility issues. These penalties for uncivil conduct range from public admonishment to various forms of sanctions.

- a. *Ahanchian v. Xenon Pictures, Inc.* (2010) 624 F.3d 1253 (admonishment).

In *Ahanchian*, the court admonished an attorney who refused allow opposing counsel additional time to respond to a summary judgment motion, noting that such conduct was inconsistent with general principles of professional conduct and undermined the truth-seeking function of our adversarial system designed to resolve cases on their merits.

Key quotations from *Ahanchian* contained at pages 1262-3 include:

Perhaps contributing to the district court's errors and certainly compounding the harshness of its rulings, defense counsel disavowed any nod to professional courtesy, instead engaging in hardball tactics designed to avoid resolution of the merits of this case. We feel compelled to address defense counsel's unrelenting opposition to Ahanchian's counsel's reasonable requests. Our adversarial system depends on the principle that all sides to a dispute must be given the opportunity to fully advocate their views of the issues presented in a case. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir.2003); *Iva Ikuko Toguri D'Aquino v. United States*, 192 F.2d 338, 367 (9th Cir.1951). Here, defense counsel took knowing advantage of the constrained time to respond created by the local rules, the three-day federal holiday, and Ahanchian's lead counsel's prescheduled out-of-state obligation. Defense counsel steadfastly refused to stipulate to an extension of time, and when Ahanchian's counsel sought relief from the court, defense counsel filed fierce oppositions, even accusing Ahanchian's counsel of unethical conduct. Such uncompromising behavior is not only inconsistent with general principles of professional conduct, but also undermines the truth-seeking function of our adversarial system. *See Cal. Attorney Guidelines of Civility & Professionalism* § 1 (“The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice.”); *see also Marcangelo v. Boardwalk Regency*, 47 F.3d 88, 90 (3d Cir.1995) (“We do not approve of the ‘hardball’ tactics unfortunately used by some law firms today. The extension of normal courtesies and exercise of

Accordingly, plaintiff Rommy Revson and her attorney Judd Burstein, Esq., are hereby ORDERED TO SHOW CAUSE why sanctions should not be imposed against either or both of them pursuant to Rule 11 of the Federal Rules of Civil Procedure and the Court's inherent power and against Mr. Burstein pursuant to 28 U.S.C. § 1927.”

civility expedite litigation and are of substantial benefit to the administration of justice.”).

Our adversarial system relies on attorneys to treat each other with a high degree of civility and respect. *See Bateman*, 231 F.3d at 1223 n. 2 (“[A]t the risk of sounding naive or nostalgic, we lament the decline of collegiality and fair-dealing in the legal profession today, and believe courts should do what they can to emphasize these values.”); *Peterson v. BMI Refractories*, 124 F.3d 1386, 1396 (11th Cir.1997) (“There is no better guide to professional courtesy than the golden rule: you should treat opposing counsel the way you yourself would like to be treated.”). Where, as here, there is no indication of bad faith, prejudice, or undue delay, attorneys should not oppose reasonable requests for extensions of time brought by their adversaries. *See Cal. Attorney Guidelines of Civility & Prof.* § 6.

- b. *Dolores Press, Inc. v. Robinson* (Apr. 23, 2020, No. CV 15-2562-PA (PLAX)) Slip Copy [2020 WL 3881617] (directive to review civility guidelines).

In *Dolores Press*, the court ordered the parties to review the court’s civility and professional guidelines to correct and prevent further acts of incivility.

Key quotations from *Dolores Press* contained at pages *2-3 include:

The Court finds that counsels' conduct with respect to the **very basic tasks** of working together to schedule a third-party deposition — or any deposition — under the current nationwide circumstances, and with complying with the Local Rule 37 procedures, does not comport with the standards expected of litigants and counsel before this Court, or with the professionalism expected by the Court from parties in federal cases to work cooperatively and in good faith to accomplish the task of conferring with each other on such basic discovery issues. Counsel are advised that “failure of any counsel to comply or cooperate” in the Joint Stipulation procedures of Local Rule 37 “may result in the imposition of sanctions.” Local Rule 37-4.

The Court anticipates that going forward the parties will work together to fully comply with the Local Rules, the Federal Rules of Civil Procedure, and the Central District's Civility and Professionalism Guidelines found at the Court's website under “Attorney Admissions” at:

<http://www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines>

The Court once again **orders** all counsel of record to read the Central District's Civility and Professionalism Guidelines (“Guidelines”) found at the Court's website, under “Attorney Admissions,” at <http://www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines#Scheduling>. **No later than April 30, 2020, all** counsel of record for each party shall file a declaration with the Court stating that he/she has completely read the Guidelines and agrees to fully abide by all of its terms.

c. *In re First City Bancorporation of Texas Inc.* (2002) 282 F.3d 864 (\$25,000 monetary sanction).

In, *First City Bankcorporation*, the court sanctioned an attorney \$25,000 for uncivil conduct based on the court’s inherent power and Rule 9011 of the Federal Bankruptcy Rules of Procedure (similar to FRCP Rule 11).

Key quotations from *First City Bankcorporation* contained at pages 865-67 include:

After listening to the oral arguments of the parties and closely examining the record, we conclude that the sanctioned lawyer in this case, Harvey Greenfield, was appropriately sanctioned by the bankruptcy court. His attitude and remarks toward opposing attorneys, opposing parties, and the bankruptcy court were—to understate his conduct—obnoxious. Although incivility in and of itself is call for concern, what is most disconcerting here is the rationale Greenfield gives for his behavior. Greenfield asserts that his deplorable and wholly unprofessional conduct helps him recover more money for his clients. Unremorsefully and brazenly, Greenfield contends that his egregious behavior serves him well in settlement negotiations and is therefore appropriate. Because we find that the bankruptcy court did not abuse its discretion when it issued sanctions in this case, we affirm the district court's judgment affirming the bankruptcy court's sanction order.

* * *

The imposition of sanctions is discretionary—thus, we review the exercise of this power for abuse of discretion. *Matter of Terrebonne Fuel and Lube, Inc.*, 108 F.3d 609, 613 (5th Cir.1997). “A court abuses its discretion when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Chaves v. M/V Medina Star*, 47 F.3d 153, 156 (5th Cir.1995). A court, however, should exercise restraint when considering using its inherent power to impose sanctions. *Id.*

In the instant case, the bankruptcy court assessed sanctions pursuant to (1) Rule 9011 of the Federal Bankruptcy Rules of Procedure and (2) its inherent authority to police practitioners before it.

* * *

The only cognizable argument Greenfield makes is that the sanction imposed was unduly harsh. Sanctions must be chosen to employ “the least possible power to the end proposed.” *Spallone v. United States*, 493 U.S. 265, 280, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990)(quoting *Anderson v. Dunn*, 6 Wheat. 204, 231, 5 L.Ed. 242 (1821)). In other words, the sanctioning court must use the least restrictive sanction necessary to deter the inappropriate behavior. Here, the bankruptcy court repeatedly urged Greenfield not to engage in personal attacks. He did not respond to either the oral or the written warnings of the bankruptcy court. We therefore hold that the bankruptcy court did not abuse its discretion by imposing a sanction of \$25,000. Accordingly, the district court judgment affirming the bankruptcy court is

AFFIRMED.

- d. *Cambrian Science Corp. v. Cox Communications, Inc.* (2015) 79 F.Supp.3d 1111 (attorney’s fees awarded to opposing party).

In *Cambrian Science Corp.*, an attorney’s uncivil conduct formed the basis for an award of attorney’s fees to the opposing party.

Key quotations from *Cambrian Science* contained at pages 1113-20 include:

The Patent Act provides that “[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party.” 35 U.S.C. § 285. In this statute, “exceptional” has its ordinary meaning of “ ‘uncommon,’ ‘rare,’ or ‘not ordinary.’ ” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, — U.S. —, 134 S.Ct. 1749, 1756, 188 L.Ed.2d 816 (2014). Thus, “an ‘exceptional’ case is simply one that stands out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.” *Id.* Section 285 discourages certain “exceptional” conduct by imposing the cost of bad decisions on the decision maker.

District courts determine whether a case is exceptional “considering the totality of the circumstances.” *Id.* Fees may be awarded where “a party’s unreasonable conduct—while not necessarily independently sanctionable—is nonetheless” exceptional. *Id.* at 1757. “A case presenting either subjective bad faith or exceptionally meritless claims may sufficiently set itself apart from mine-run cases to warrant a fee award.” *Id.* A party must prove its entitlement to fees by a preponderance of the evidence. *Id.* at 1758.

In the companion case to *Octane Fitness*, the Supreme Court held that “[b]ecause § 285 commits the determination whether a case is ‘exceptional’ to the discretion of the district court, that decision is to be reviewed on appeal for abuse of discretion.” *Highmark Inc. v. Allcare Health Mgmt. Sys.*, — U.S. —, 134

S.Ct. 1744, 1748, 188 L.Ed.2d 829 (2014). The abuse-of-discretion standard applies to “all aspects of a district court’s § 285 determination.” *Id.* at 1749.

Federal Rule of Civil Procedure Rule 54(d)(2)(C) provides that “[t]he court may decide issues of liability for fees before receiving submissions on the value of services.”

* * *

The Court has already repeatedly recognized Cambrian's less-than-cooperative litigation behavior. Denying an early motion to compel, Magistrate Judge Nakazato stated that “[t]he failure of Plaintiff’s *pro hac vice* counsel to prepare proper Rule 37–1 letters is particularly egregious here due to the large number of requests served upon each defendant.” (Order Den. Pl.’s Mot. to Compel, Dkt. No. 119 at 2.) That order goes on: “Plaintiff’s *pro hac vice* counsel are notified and warned that, if they are unable to determine what Local Rule 37 requires and continue to present defective discovery motions to the Court, their *pro hac vice* status may be revoked.” (*Id.* at 3.)

Ruling on another one of Cambrian's later motions to compel, Magistrate Judge Rosenbluth stated that “Plaintiff has unnecessarily dragged out these discovery proceedings, both by filing serial motions concerning largely identical discovery disputes against the various customer defendants, despite the latter's suggestion that they all be handled in one joint consolidated motion (May Decl. Ex. D at 78), and by initially failing to agree to the Federal Circuit's discovery order (*id.*)” (Order Granting in Part and Den. in Part Pl.’s Mot. to Compel, Dkt. No. 174 at 2.)

Because of the importance of professionalism and civility, the Court has attached to its website the *Orange County Bar Association Standards for Professionalism and Civility Among Attorneys*, hoping that litigants would read the standards and abide by them. A review of the following standards in that attachment highlight the exceptionally improper conduct here.

* * *

To be clear, *Octane Fitness* is not a vehicle to revisit discovery orders or a second bite at imposing sanctions that could have been properly imposed for violation of a party's discovery obligations. The Court here discusses the prior discovery rulings because they are part of the totality of the circumstances of Cambrian's manner of litigating this case.

Although litigation tactics are getting increasingly harsh, the Court will not condone the exceptionally improper conduct here. Cambrian's litigation tactics are “ ‘uncommon,’ ‘rare,’ [and] ‘not ordinary’ ” in this Court. *Octane Fitness*, 134 S.Ct. at 1756. Cambrian's litigation behavior renders its case against Cox exceptional under 35 U.S.C. § 285. Cox is therefore entitled to a reasonable award of fees for its defense of the entire case.

- e. *Lee v. American Eagle Airlines, Inc.* (2000) 93 F.Supp.2d 1322 (attorney’s fees reduced).

In *Lee*, the court reduced the attorney’s fees awarded by \$358,423.20 due to the uncivil conduct of their attorney.

Key quotations from *Lee* contained at pages 1329–36 include (footnotes omitted):

Courts presiding over civil rights actions may, in their discretion, award the prevailing party a “reasonable attorney's fee (including expert fees)” as part of its costs. *See* 42 U.S.C. § 1988; 42 U.S.C. § 2000e-5(k).

* * *

Courts determining attorney's fee awards begin by determining the “lodestar”: the product of the number of hours reasonably expended on the litigation and a reasonable hourly rate for the attorney's services.

* * *

Although the lodestar formula has since displaced the “*Johnson* factors,” the Eleventh Circuit has permitted district courts to consider the factors in establishing a reasonable hourly rate. *See Loranger*, 10 F.3d at 781 n. 6. Among those factors is the experience, reputation, and ability of the attorneys and the skill requisite to perform the legal service properly. *See Johnson*, 488 F.2d at 717-19. As explained more fully in the findings of misconduct, contained in Section II, *supra*, the conduct of Ira Kurzban and Marvin Kurzban both during and prior to trial was very troubling. In my estimation, the manner in which a lawyer interacts with opposing counsel and conducts himself before the Court is as indicative of the lawyer's ability and skill as is mastery of the rules of evidence. Upon review of the trial transcripts and the evidence presented during the evidentiary hearing on attorney conduct and based on observations at trial, I find that the conduct of Ira Kurzban and Marvin Kurzban in the litigation of this case fell far below acceptable standards, especially in light of the \$300 hourly rate the attorneys claim. Accordingly, I find “special circumstances” justifying a departure from counsels' requested rates: Ira Kurzban shall be awarded \$150 per hour for his pretrial work and \$0 for his trial work; Marvin Kurzban's rate for this action is \$0. *Cf. Chaney v. New Orleans Pub. Facility Management, Inc.*, 1998 WL 87617 (E.D.La. Feb.20, 1998) (denying prevailing party attorneys' fees in Title VII action, finding performance of plaintiff's attorneys did not merit attorneys' fees).

For further support of the above rate reductions, we rely upon our “inherent power” to sanction attorney misconduct. “It is well-established that ‘[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,’ powers ‘which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.’ For this reason, ‘Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.’ These powers are ‘governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’ ” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (internal citations omitted).

* * *

There is precedent for denying a party attorney's fees to which it was otherwise statutorily entitled as a sanction for attorney misconduct. In *Litton Sys., Inc. v. American Tel. and Tel. Co.*, 700 F.2d 785 (2d Cir.1983), the Second Circuit Court of Appeals affirmed the district court's denial of attorney's fees to a prevailing plaintiff in an antitrust suit. The plaintiff was entitled to its costs and fees under, among other provisions, the Clayton Act, 15 U.S.C. § 15. See *Litton*, 700 F.2d at 826-27. Though the *Litton* court based its decision on its power to sanction disobedience of court orders under Federal Rule of Civil Procedure 37(b), it noted that “[g]iven the court's express findings of bad faith, it could also have imposed sanctions on [the plaintiff] as an exercise of its inherent powers.” *Id.* at 827.

* * *

V. Conclusion

As I considered this issue, I reflected upon a letter recently received from a trial lawyer following a discussion on civility and professionalism with the Miami Chapter of the American Board of Trial Advocates. This lawyer stated:

It seems to me that the courts are basically facing this issue as one of education. Hence we have seminars, guidelines and articles from both that state and federal bench explaining what lawyers should do to be civil and professional to each other. However, I do not think that problem is that lawyers do not know how to act in a civil manner. Rather, I think some lawyers will simply do that with which they can get away.

Special masters, grievance committees and educational seminars are not as effective as a sanction for uncivil behavior.

I know our federal court is quite busy and that the time it takes to consider uncivil behavior may have to be taken from some other pending case. However, I would submit that eliminating uncivil behavior not only helps that case, but every other case in which that lawyer is involved. Moreover, as the word spreads as to the price to be paid for unprofessionalism, other lawyers and other cases will be implicated.

I believe that this reduction in attorney fees is an appropriate response to the conduct by Plaintiff's counsel in this case, but I am not convinced it will deter future misconduct. I frankly considered denying fees altogether but while I have reviewed many of the depositions, I did not observe everything that happened during the pretrial phase of the case. The reduction in attorneys' fees based upon misconduct of counsel is therefore approximately \$358,423.20.

- f. *Sahyers v. Prugh, Holliday & Karatinos, P.L.* (2009) 560 F.3d 1241 (all attorney's fees and costs eliminated).

In *Sahyers*, the court denied the recovery of all attorney's fees and costs for the incivility of plaintiff's in refusing to try and resolve a case prior to litigation, which resulted in unnecessary litigation.

Key quotations from *Sahyers* contained at pages 1243-46 include (footnotes omitted):

This appeal is about the power of a district court to supervise the work of the lawyers who practice before it. Christine Sahyers (Plaintiff) appeals a district court order denying her request for attorney's fees and costs in her lawsuit under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219. We affirm the order.

* * *

In general, a prevailing FLSA plaintiff is entitled to an award of some reasonable attorney's fees and costs. 29 U.S.C. § 216(b); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1223 n. 12 (11th Cir.2007); *Kreager v. Solomon & Flanagan, P.A.*, 775 F.2d 1541, 1542 (11th Cir.1985). But the district court treated this case as an exception to that rule by finding that a reasonable fee and cost award here was zero. The district court, in substance, based this exception on its inherent powers to supervise the conduct of the lawyers who come before it and to keep in proper condition the legal community of which the courts are a leading part. Plaintiff criticizes this decision as an abuse of discretion. We disagree.

That federal courts are accorded certain inherent powers is well-established. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 2132, 115 L.Ed.2d 27 (1991). Those powers are not governed by rule or by statute, “but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962). Because of the potency of those powers, they must be “exercised with restraint and discretion.” *Chambers*, 111 S.Ct. at 2132.

A federal court may wield its inherent powers over the lawyers who practice before it. This control derives from a lawyer's role as an officer of the court. *Theard v. United States*, 354 U.S. 278, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342 (1957). It encompasses, among other things, the authority to police lawyer conduct and to guard and to promote civility and collegiality among the members of its bar. *See, e.g., Chambers*, 111 S.Ct. at 2132 (“[A] federal court has the power to control admission to its bar and to discipline attorneys who appear before it.”); *In re Finkelstein*, 901 F.2d 1560, 1564 (11th Cir.1990) (court has power to supervise professional conduct of lawyers who practice before it).

In exercising its powers, a court need not free a client from the acts of his lawyer, especially when the client is aware of or directs those acts. *See Jochum v.*

Schmidt, 570 F.2d 1229, 1232 n. 5 (5th Cir.1978) (“[F]ailing to impose sanctions [] merely because the plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of the plaintiff’s lawyer on the defendant.”) (internal quotation marks omitted); *Anderson v. United Parcel Serv.*, 915 F.2d 313, 316 (7th Cir.1990) (“There is no injustice in holding a client responsible for acts of his attorney of which he is aware.”). A court, therefore, may deny an award of litigation expenses to which a client is otherwise entitled. See *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785, 827–28 (2d Cir.1983).

The district court’s inherent powers support its decision here. Defendants are lawyers and their law firm. And the lawyer for Plaintiff made absolutely no effort—no phone call; no email; no letter—to inform them of Plaintiff’s impending claim much less to resolve this dispute before filing suit. Plaintiff’s lawyer slavishly followed his client’s instructions and—without a word to Defendants in advance—just sued his fellow lawyers. As the district court saw it, this conscious disregard for lawyer-to-lawyer collegiality and civility caused (among other things) the judiciary to waste significant time and resources on unnecessary litigation and stood in stark contrast to the behavior expected of an officer of the court. The district court refused to reward—and thereby to encourage—uncivil conduct by awarding Plaintiff attorney’s fees or costs. Given the district court’s power of oversight for the bar, we cannot say that this decision was outside of the bounds of the district court’s discretion.

United States District Court
Southern District
of California



L O C A L R U L E S

Revised as of:
June 1, 2020

Civil Rule 2.1 Professionalism

- a. **Code of Conduct.** The following Code of Conduct establishes the principles of civility and professionalism that will govern the conduct of all participants in cases and proceedings pending in this court. It is to be construed in the broadest sense and governs conduct relating to such cases and proceedings, whether occurring in the presence of the court or occurring outside of the presence of the court. This Code of Conduct is not intended to be a set of rules that lawyers can use to incite ancillary litigation on the question whether the standards have been observed, but the court may take any appropriate measure to address violations, including, without limitation, as set forth in Civil L. Rule 2.2.

1. **Principles of Civility.** To borrow from others who have considered the importance of civility in our state and federal courts, we should all understand that the law preserves our freedom, and it is the courts that preserve our laws. Fair, impartial and accessible courts are fundamental to the preservation of our democracy. We-- judges, lawyers, court staff, parties—all have a responsibility in ensuring that we preserve the legacy of this institution by conducting ourselves according to the Golden Rule—to treat others as we ourselves would like to be treated.

In seeking justice through the courts, attorneys and parties subject themselves to an inherently adversarial system. Although adversarial, the experience does not have to, and should not, be antagonistic or hostile. Civility is paramount and not to be confused with weakness. Civility in action and words is fundamental to the effective and efficient functioning of our system of justice and public confidence in that system.

The Federal Rules and this court's Local and Chambers' Rules serve as safeguards to ensure that the principles of equity and fairness govern the procedural course of all litigation. At the same time, these resources, without more, may not sufficiently quell incivility amongst those who litigate in this court. The court has therefore adopted the following Code of Conduct. No one is above the law and, equally important, no one is entitled to act in such a way that erodes the public's trust in the administration of justice, impartiality, and the search for the truth. Civility should not only be aspirational, but rather it should be inherent within us all. Nevertheless, this Code of Conduct serves as the court's reminder that we owe it to ourselves, one another, and our justice system to act in accordance with the principles of fairness and equal treatment that underpin the law of our land.

This court is committed to ensuring that all who work within it and come before it treat each other with decency, dignity, and respect. As such, the court expects that all who practice in this court will adhere to this Code of Conduct in all of their interactions within the courts of this judicial district, in order to nurture, rather than tarnish, the practice of law and to maintain the public's faith in the legitimacy of our judicial system. The Court acknowledges the substantial work of the San Diego County Bar Association in developing the Association's Attorney Civility and Practice Guidelines, which this Court has adopted, in substantial part, in this Code of Conduct.

2. Duties Owed to the Court

- a. We expect lawyers to be courteous and respectful to the court and all court and court-related personnel.
- b. We expect lawyers arguing for an extension of existing law to clearly state that fact and why.
- c. We expect lawyers appearing in court to dress neatly and appropriately and encourage their clients to do the same.
- d. We expect lawyers to be on time and adhere to time constraints.
- e. We expect lawyers to be prepared for all court appearances.
- f. We expect lawyers to attempt to resolve disputes promptly, fairly and reasonably, with resort to the court for judicial relief only if necessary.
- g. We expect lawyers to discourage and refuse to accept a role in litigation that is meritless or designed primarily to harass or drain the financial resources of the opposing party.
- h. We expect lawyers to honor and maintain the integrity of our justice system, including by not impugning the integrity of its proceedings, or its members.

3. Duties Owed to Other Lawyers, Parties and Witnesses.

- a. We expect lawyers to address legal arguments with other lawyers professionally, and not personally.
- b. We expect lawyers to treat adverse witnesses, litigants and opposing counsel with courtesy, fairness and respect.
- c. We expect lawyers to conduct themselves in the discovery process as if a judicial officer were present.
- d. We expect lawyers to not arbitrarily or unreasonably withhold consent to a reasonable request for cooperation or accommodation.
- e. We expect lawyers to refrain from attributing to an opponent a position the opponent has not clearly taken.
- f. We expect lawyers to be accurate in written communications intended to make a record.
- g. We expect lawyers to refrain from proposing a stipulation in the presence of the court or trier of fact unless the other parties have previously agreed to it.
- h. We expect lawyers to refrain from interrupting an opponent's legal argument unless making an appropriate objection for a legitimate basis.

- i. We expect lawyers in court to address opposing lawyers through the court.
- j. We expect lawyers to seek sanctions sparingly, and not to obtain a tactical advantage or for any other improper purpose.
- k. We expect lawyers to refrain from seeking to disqualify opposing counsel for any improper purpose or for any reason not supported by fact or law.
- l. We expect lawyers to encourage other lawyers to conform to the standards in this Code of Conduct.
- m. We expect lawyers to conduct themselves so that they may conclude each case amicably with the opposing party.

**SUPERIOR COURT
of
CALIFORNIA
COUNTY OF SAN DIEGO**

LOCAL RULES
Effective January 1, 2020

PREFACE

The San Diego County Bar Association has adopted Attorney Civility and Practice Guidelines. They are set forth below. The San Diego Superior Court expects all attorneys who appear before it to abide by these guidelines.
(Rev. 1/1/2020)

I. DUTIES OWED TO THE COURT

- A. We expect lawyers to be courteous and respectful to the court and all court and court-related personnel.
 - B. We expect lawyers arguing for an extension of existing law to clearly state that fact and state why.
 - C. We expect lawyers appearing in court to dress neatly and appropriately, and encourage their clients to do the same.
 - D. We expect lawyers to be on time and adhere to time constraints.
 - E. We expect lawyers to be prepared for all court appearances.
 - F. We expect lawyers to attempt to resolve disputes promptly, fairly, and reasonably, with resort to the court for judicial relief only if necessary.
 - G. We expect lawyers to discourage and refuse to accept a role in litigation that is meritless or designed primarily to harass or drain the financial resources of the opposing party.
 - H. We expect lawyers to honor and maintain the integrity of our justice system, including by not impugning the integrity of its proceedings, or its members.
- (Rev. 1/1/2020)

II. DUTIES OWED TO OTHER LAWYERS, PARTIES, AND WITNESSES

- A. We expect lawyers to address legal arguments with other lawyers professionally, and not personally.
 - B. We expect lawyers to treat adverse witnesses, litigants, and opposing counsel with courtesy, fairness, and respect.
 - C. We expect lawyers to conduct themselves in the discovery process as if a judicial officer were present.
 - D. We expect lawyers to not arbitrarily or unreasonably withhold consent to a reasonable request for cooperation or accommodation.
 - E. We expect lawyers to refrain from attributing to an opponent a position the opponent has not clearly taken.
 - F. We expect lawyers to be accurate in written communications intended to make a record.
 - G. We expect lawyers to refrain from proposing a stipulation in the presence of the court or trier of fact unless the other parties have previously agreed to it.
 - H. We expect lawyers to refrain from interrupting an opponent's legal argument unless making an appropriate objection for a legitimate basis.
 - I. We expect lawyers in court to address opposing lawyers through the court.
 - J. We expect lawyers to seek sanctions sparingly, and not to obtain a tactical advantage or for any other improper purpose.
 - K. We expect lawyers to refrain from seeking to disqualify opposing counsel for any improper purpose or for any reason not supported by fact or law.
 - L. We expect lawyers to encourage other lawyers to conform to the standards in these guidelines.
 - M. We expect lawyers to conduct themselves so that they may conclude each case amicably with the opposing lawyer or party.
- (Rev. 1/1/2020)

California Rules of Professional Conduct

Rule 1.1 - Competence

(a) A lawyer **shall not** intentionally, recklessly, with gross negligence, or repeatedly **fail to perform legal services with competence**.

(b) For purposes of this rule, “**competence**” in any legal service **shall mean to apply the** (i) learning and skill, and **(ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service**.

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.

(d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

California Rules of Professional Conduct

Rule 1.3 - Diligence

(a) A lawyer **shall not** intentionally, repeatedly, recklessly or with gross negligence **fail to act with reasonable diligence in representing a client.**

(b) For purposes of this rule, “**reasonable diligence**” shall mean that a lawyer acts **with commitment and dedication to the interests of the client** and **does not** neglect or disregard, or **unduly delay a legal matter entrusted to the lawyer.**

LAWYER ASSISTANCE PROGRAM



The State Bar
of California

Do you need support managing stress, anxiety, depression, substance use, burnout, grief, relationship challenges, or other personal problems?

THE LAWYER ASSISTANCE PROGRAM CAN HELP



LAP is Confidential

- › Confidentiality is absolute unless waived by you
- › Cannot be disclosed as part of a civil proceeding, a disciplinary proceeding, or a public records request (Business and Professions Code section 6234)



Orientation & Assessment

- › Free professional mental health assessment
- › Three free group sessions
- › Two free one-on-one short-term counseling sessions with a local therapist
- › Two free career counseling sessions for career dilemmas/decisions
- › No long-term commitment



Support

- › Weekly support groups with other participants
- › Support of a qualified mental health professional
- › Fee for group participation



Monitoring

- › Satisfy a specific monitoring or verification requirement imposed by the State Bar, employers, or other entities
- › Weekly support groups with a mental health professional
- › Individual therapy, if applicable
- › Lab testing, if applicable
- › Fees for services



Locations all over California



www.calbar.ca.gov/LAP
877-LAP-4-HELP • LAP@calbar.ca.gov

LAWYER ASSISTANCE PROGRAM

The mission of the State Bar of California Lawyer Assistance Program is to support law students, State Bar applicants, inactive, active, and former/disbarred attorneys in their rehabilitation and competent practice of law, enhance public protection, and maintain the integrity of the legal profession.



The State Bar
of California

LAWYER ASSISTANCE PROGRAM



TOLL FREE:

877-LAP-4-HELP

877-527-4435

213-765-1190

LAP@calbar.ca.gov

www.calbar.ca.gov/LAP



LOCATIONS:

180 Howard Street
San Francisco, CA 94105

865 South Figueroa Street
Los Angeles, CA 90017

LAWYER ASSISTANCE PROGRAM

Supporting law students, State Bar applicants, and attorneys through life's challenges



www.calbar.ca.gov/LAP

Confidential Hotline

877-LAP-4-HELP



The State Bar
of California

Contact the Lawyer Assistance Program to see if financial assistance is available for your particular situation.

THE PRACTICE OF LAW IS DEMANDING.

It demands your time, your energy, and your attention. Whether you are preparing to enter the profession, already practicing, or winding down for retirement, your responsibilities to others often require you to forsake your own well-being in order to achieve success. Over time, this can take a toll on your mental and physical health.

Are you:

- › Feeling that things are not quite right or could be going better?
- › Struggling to keep up personally and professionally?
- › Having problems with sleep, appetite, concentration, and/or procrastination?
- › Drinking, using drugs, or engaging in other unhealthy behaviors to cope?
- › Willing to reach out and get the help you deserve?



The Lawyer Assistance Program Can Help

www.calbar.ca.gov/LAP

**Confidential Hotline
877-LAP-4-HELP**

"This is the first time since I was 22 years old that I can look towards a future—any future— with confidence rather than fear and worry."

Lawyer Assistance Program participant

Be proactive when facing life's challenges.

Research confirms that legal professionals suffer from mental health issues and addiction at much higher rates than the general population. Substance use and mental health disorders are not moral issues. They are treatable illnesses with effects that result in the deterioration of moral and ethical practices.

There is no shame in having an illness. The challenge is to seek treatment once its presence is recognized.

The Lawyer Assistance Program is confidential.

Confidentiality is absolute unless waived by you. Information cannot be disclosed as part of a civil proceeding, a disciplinary proceeding, or a public records request (Business and Professions Code section 6234).

MCLE Presentation

The State Bar provides a free one-hour MCLE presentation that satisfies the competency credit for all attorneys at their law firms, bar associations, agencies, organizations, conferences, seminars, or conventions. The presentation is also available to all law students and Bar Exam applicants at their law school, student association, student organization, conference, seminar, or convention. To request an MCLE presentation, contact LAP at 877-LAP-4-HELP or LAP@calbar.ca.gov.

LAWYER ASSISTANCE PROGRAM SERVICES



Short-Term Counseling

- › Two free one-on-one short-term counseling sessions with a local therapist
- › Two free career counseling sessions for career dilemmas/decisions
- › No long-term commitment



Orientation & Assessment

- › Free professional mental health assessment
- › No long-term commitment to the program
- › Confidential appointment with a Clinical Rehabilitation Coordinator (CRC)



Support

- › Weekly support groups with other participants
- › Support of a qualified mental health professional
- › Voluntary and confidential program
- › Fee for group participation



Monitoring

- › Specific monitoring or verification requirement imposed by:
 - State Bar Court, employers, and other entities
- › Long-term structure
- › Weekly support group
- › Support of a professional CRC
- › Individual therapy, if applicable
- › Lab testing, if applicable
- › Fees for services
- › No disclosure without prior written authorization