



**Federal Bar
Association**
San Diego Chapter



presents:

NINTH ANNUAL ALL-DAY ETHICS, COMPETENCE, AND ELIMINATION OF BIAS MCLE EVENT

January 25, 2023, from 9:00 a.m. to 3:35 p.m.

Cost (per course): San Diego FBA & ICLA Members – FREE
FBA National Members – \$10.00
Non-FBA Members – \$40.00

Location: Webinar (Zoom)

MCLE: 4.0 hours Ethics; 1 hour Competence; 1 hour Elimination of Bias

The San Diego FBA invites you to attend its ninth annual all-day California MCLE event.

California MCLE credits are available separately for each of the sessions listed below. The meeting link and written materials will be sent to all participants one day prior to the event.

9:00 a.m. – 10:00 a.m.: [*Duties to Current, Former and Prospective Clients, Including with Regard to the Safekeeping of Funds \(Ethics 1 of 4\)*](#)

Anne Rudolph and Eric Deitz
San Diego County Bar Association Ethics Committee

10:05 a.m. – 11:05 a.m.: [*Lawyers, Substance Use Disorders and Wellbeing \(Competence\)*](#)
Greg Dorst, The Other Bar

11:15 a.m. – 12:15 p.m.: [*Engagement Agreements, Candor in Mediation, and More \(Ethics 2 of 4\)*](#)

Deborah Wolfe and Charles Berwanger
San Diego County Bar Association Ethics Committee

12:20 p.m. – 1:20 p.m.: [*Communications with Represented and Unrepresented Persons \(Ethics 3 of 4\)*](#)

Michael Crowley and Richard Hendlin
San Diego County Bar Association Ethics Committee

1:30 p.m. – 2:30 p.m.: [*Civility and Candor \(Ethics 4 of 4\)*](#)

Irean Swan and Andrew Servais
San Diego County Bar Association Ethics Committee

2:35 p.m. – 3:35 p.m.: [*Microaggressions \(Elimination of Bias\)*](#)

Carolina Bravo-Karimi, Wilson Turner Kosmo LLP

The background features abstract, overlapping geometric shapes in various shades of blue, ranging from light sky blue to deep navy blue. These shapes are primarily located on the left and right sides of the frame, creating a modern, layered effect. The central area is a clean, white space where the text is positioned.

Duties of Civility and Candor

Interplay of Civility and Ethics

- ▶ Business and Professions Code section 6068
- ▶ California State Bar Attorney Guidelines of Civility and Professionalism
- ▶ SDCBA Attorney Civility and Practice Guidelines

Interplay of Civility and Ethics

Courts have adopted civility and professionalism guidelines:

- ▶ Northern District of California guidelines
(<https://www.cand.uscourts.gov/forms/guidelines-for-professional-conduct/>)
- ▶ Central District of California guidelines
(<https://www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines>)
- ▶ Southern District of California, Civil Local Rule 2.1
(https://www.casd.uscourts.gov/_assets/pdf/rules/2023.1.20%20Local%20Rules.pdf)

Interplay of Civility and Ethics

Civility is an ethical component of professionalism. Civility is desirable in litigation, not only because it is ethically required for its own sake, but also because it is socially advantageous: it lowers the costs of dispute resolution. The American legal profession exists to help people resolve disputes cheaply, swiftly, fairly, and justly. Incivility between counsel is sand in the gears.

Incivility can rankle relations and thereby increase the friction, extent, and cost of litigation. Calling opposing counsel a liar, for instance, can invite destructive reciprocity and generate needless controversies. Seasoning a disagreement with avoidable irritants can turn a minor conflict into a costly and protracted war. All those human hours, which could have been put to socially productive uses, instead are devoted to the unnecessary war and are lost forever. All sides lose, as does the justice system, which must supervise the hostilities.

By contrast, civility in litigation tends to be efficient by allowing disputants to focus on core disagreements and to minimize tangential distractions. It is a salutary incentive for counsel in fee-shifting cases to know their own low blows may return to hit them in the pocketbook.

Karton v. Ari Design & Construction, Inc., 61 Cal.App.5th 734, 747 (2021).

Interplay of Civility and Ethics

▶ Notable case law

- ▶ “We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel. All too often today we see signs that the practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the slightest provocation to turn upon each other.” *Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 641.
- ▶ “Respect for individual judges and specific decisions is a matter of personal opinion. Respect for the institution is not; it is a sine qua non.” *In Re Paul M. Mahoney*, (2021). 65 Cal.App.5th 376, 381
- ▶ “[I]t is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law. In order to instill public confidence in the legal profession and our judicial system, an attorney must be an example of lawfulness, not lawlessness.” *People v. Chong* (1999) 76 Cal.App.4th 232, 243.
- ▶ “The rule also manifests itself by prohibiting irrelevant ad hominem attacks. Personal attacks on the character or motives of the adverse party, his counsel or his witnesses are misconduct.” *Bigler-Engler v. Breg, Inc.* (2017)7 Cal.App.5th 276, 295.

Interplay of Civility and Ethics

- ▶ **BEYOND THE OATH: Recommendations for Improving Civility**
 - ▶ Chair: Justice Brian Currey
 - ▶ Report issued September 9, 2021
 - ▶ Four recommendations:
 - ▶ Proposal 1: Ask the State Bar Board of Trustees to mandate one hour of civility MCLE training (without increasing total MCLE hours). Some portion of the civility training should be devoted to making the profession more welcoming to underrepresented groups by addressing the link between incivility and bias.
 - ▶ Proposal 2: Ask the Chief Justice, as head of the Judicial Council, and the Center for Judicial Education and Research Advisory Committee (CJER) to provide specific training to judges on promoting civility inside and outside courtrooms. CJA should commit to do the same.

Interplay of Civility and Ethics

- ▶ **BEYOND THE OATH: Recommendations for Improving Civility**
 - ▶ **Four recommendations:**
 - ▶ **Proposal 3: Ask the State Bar Board of Trustees to recommend to the Supreme Court revisions to the Rules of Professional Conduct to clarify that repeated incivility constitutes professional misconduct and that civility is not inconsistent with zealous advocacy.**
 - ▶ **Proposal 4: Ask the Supreme Court to amend Rule of Court 9.7 to require all attorneys, when annually renewing their licenses to practice law, to swear or affirm: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity"**

California Rules of Professional Conduct

Rule 3.3: Candor to the Tribunal

- California Rules of Professional Conduct Rule 3.3: Candor to the Tribunal
 - (a) A lawyer shall not:
 - Knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal;
 - Knowingly fail to disclose controlling, adverse legal authority or misquote language of a book, statute, decision or other authority; or
 - Offer evidence that the lawyer knows to be false.

California Rules of Professional Conduct

Rule 3.3: Candor to the Tribunal

- California Rules of Professional Conduct Rule 3.3: Candor to the Tribunal

(b) A lawyer who represents a client in a proceeding before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Business and Professions code section 6068, subdivision (e) and rule 1.6

[Comment 5] “Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer’s duty of candor to the tribunal. (See, e.g., rules 1.2.1, 1.4(a)(4), 1.16(a), 8.4; Bus. & Prof. Code, §§ 6068, subd. (d), 6128.) Remedial measures also include explaining to the client the lawyer’s obligations under this rule and, where applicable, the reasons for the lawyer’s decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Business and Professions Code section 6068, subdivision (e) and rule 1.6.”

California Attorney-Client Privilege v. Duty of Confidentiality

- ▶ It is a duty of a lawyer: “To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” (Bus. & Prof. Code § 6068(e)(1).)
- ▶ “The ethical duty of confidentiality is much broader in scope and covers communications that would not be protected under the evidentiary attorney-client privilege.” *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189;
- ▶ Duty applies to information lawyer knows about a client or the client’s matter - *even if the information is public record* ethical duty of confidentiality “prohibits an attorney from disclosing facts and even allegations that might cause a client or a former client public embarrassment” *Id.*

California Attorney-Client Privilege v. Duty of Confidentiality

- ▶ Cal. Rule 1.6: “(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule.”
 - ▶ (b) *A lawyer may, but is not required to*, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c).
 - ▶ (c) Before revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable under the circumstances:
 - (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act; or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
 - (2) inform the client, at an appropriate time, of the lawyer’s ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b).
- Comment [5] “No duty to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1).”

ABA MODEL Rule 1.6

- ▶ A lawyer shall not disclose information relating to the representation of a client unless the client gives informed consent.
- ▶ A lawyer *may* reveal information if the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;*
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;*
 - (4) to secure legal advice about the lawyer's compliance with these Rules;
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - (6) to comply with other law or a court order; or*
 - (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Wadler v. Bio–Rad Labs., Inc., 212 F. Supp. 3d 829 (N.D. Cal. 2016)

- ▶ District Court concluded former general counsel was permitted to rely on privileged communications and confidential information that was "reasonably necessary" to his claims and defenses in his whistleblower retaliation action under Sarbanes-Oxley Act
- ▶ Court rejected employer's claim that Bus. & Prof. Code 6068(e) precluded plaintiffs claim finding "the standard set forth in Rule 1.6 of the Model Rules of Professional Conduct is the applicable standard under federal common law and therefore under Rule 501 of the Federal Rules of Evidence in this case." *Id.* at 849.
- ▶ And "that the California ethical rules cited by [Defendant Employer] in support of its assertion that [Plaintiff] may not disclose client confidences in connection with his Sarbanes-Oxley claim are preempted." *Id.* at 854.

QUESTIONS?