Civility and the Elimination of Unprofessional Conduct Towards Women

Presented by:
The College of Labor and Employment Lawyers

Co-Sponsored by:
The Labor and Employment Sections of the Bar Association of San Francisco and the Alameda County Bar Association

Thursday, April 27, 2017
Reception: 5:30 to 6:30 PM
Program: 6:30 to 7:30 PM
Davis Wright Tremaine LLP,
505 Montgomery Street, Suite 800
San Francisco, CA

D With respect to the public and our system of justice:

1. Fellows should remember that, in addition to a commitment to their clients' causes, their responsibilities as lawyers and Fellows of the College include a devotion to the public good.

2. Fellows should endeavor to keep current in the areas of law in which they practice and, when necessary, to associate with, or refer clients to, others knowledgeable in a field of practice in which they do not have the requisite experience.

3. Fellows should conduct themselves in a manner that reflects acceptance of their obligations as Fellows of the College and as members of a self-regulating profession. Fellows should also encourage fellow lawyers to conduct themselves in accordance with the standards set forth in these Principles and other standards of civility and professionalism.

4. Fellows should be mindful of the need to conduct themselves in a way that will enhance the image of the legal profession in the eyes of the public, and should be so guided when considering methods and contents of advertising.

5. Fellows should conduct themselves in a manner that reflects acceptance of their obligation as attorneys to contribute to public service, to the improvement of the administration of justice and to the provision of uncompensated time and civic influence on behalf of those persons who do not have access to adequate legal assistance.

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The College of Labor and Employment Lawyers

LEADERSHIP FOR GREATER PURPOSE

PRINCIPLES of CIVILITY and PROFESSIONALISM for ADVOCATES

PREAMBLE

As a Fellow of The College of Labor and Employment Lawyers, I recognize that I have a special obligation to ensure that our system of justice works fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all practitioners, but I will also conduct myself in accordance with the following Principles of Civility and Professionalism as guidance for Fellows when dealing with clients, opposing parties, their counsel, the courts, other adjudicators, arbitrators, mediators and neutrals, and the general public.

A With respect to client(s):

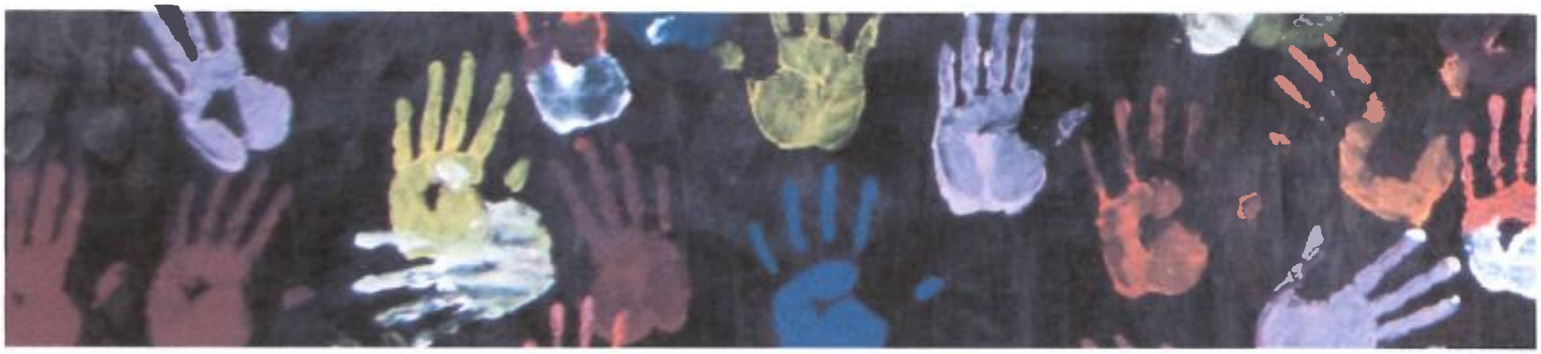
1. Fellows should be loyal and committed to their client's cause. Fellows should not permit that loyalty and commitment to interfere with their ability to provide clients with objective and independent advice.
2. Fellows should endeavor to accomplish their client's objectives in all matters as expeditiously and economically as possible.
3. Fellows should counsel their clients with respect to mediation, arbitration and other forms of alternative dispute resolution in appropriate cases.
4. Fellows should advise their clients against pursuing litigation (or any other course of action) that is without merit, and against insisting on tactics which are intended to unduly delay resolution of a matter or to harass or drain the financial resources of the opposing party.
5. Fellows should advise their clients, colleagues and co-workers, and demonstrate by example, that civility and courtesy are not to be equated with weakness.
6. Fellows should counsel their clients that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation, and should abide by the client's decisions concerning the objectives and strategies of the representation.

B With respect to opposing parties and their counsel:

1. Fellows should be zealous advocates, but should treat opposing counsel, opposing parties, tribunals and tribunal staff with courtesy, civility, respect and dignity, conducting business in a professional manner at all times.
2. In litigation and other proceedings, Fellows should zealously advocate for their clients, consistent with their duties to the proper functioning of our judicial system.
3. Fellows should consult with opposing counsel before scheduling depositions, meetings and hearings, and be cooperative with opposing counsel when scheduling changes are requested.
4. Fellows should refrain from utilizing litigation or any other course of conduct to harass the opposing party.
5. Fellows should refrain from engaging in excessive or abusive discovery tactics.
6. Although delay may be necessary or appropriate in certain circumstances, Fellows should refrain from utilizing improper delaying tactics.
7. In depositions, proceedings and negotiations, Fellows should act with dignity, avoiding groundless objections and maintaining a courteous and respectful demeanor towards all other persons present.
8. Fellows should be guided by the clients' goals in completing a transaction. Pride of authorship, when matters of substance are not involved, only contributes to delay and cost in a transaction.
9. Fellows should clearly identify for other counsel or parties all changes that they have made in documents submitted to them for review.

C With respect to the courts and other tribunals:

1. Fellows should recognize that the proper functioning of our system of justice is enhanced by both vigorous and zealous advocacy and civility and courtesy.
2. Where consistent with the clients' interests and instructions, Fellows should communicate with opposing counsel or parties in an effort to minimize or resolve litigation.
3. Fellows should voluntarily withdraw claims or defenses when it becomes apparent that they do not have merit.
4. Fellows should refrain from filing frivolous claims, motions or responses thereto.
5. Fellows should make reasonable efforts to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery.
6. Fellows should attempt to resolve by agreement objections to matters contained in the opponents' pleadings and discovery requests or responses.
7. Fellows should notify opposing counsel and, if appropriate, the court or other tribunal, as early as possible when scheduled hearings, meetings or depositions must be cancelled, postponed or rescheduled.
8. Fellows should verify the availability of known key participants and witnesses before dates for hearings or trials are set-- or, if that is not feasible, immediately after such dates have been set -- so that the court (or other tribunal) and opposing counsel or party can be promptly notified of any scheduling conflicts.
9. Fellows should be punctual in court proceedings, hearings, arbitrations, conferences, depositions and other meetings.
10. Fellows should approach all tribunals with candor, honesty, diligence and utmost respect.



New Model Rule 8.4(g) makes knowing discrimination and harassment a black letter ethical violation

It provides model language and sends an essential strong definitive statement about what is a minimum standard of conduct for all lawyers.

By Wendy Wen Yun Chang

At the ABA's Annual Meeting in August, the House of Delegates passed Model Rule 8.4(g), making knowing discrimination and harassment a black letter ethical violation under the Model Rules of Professional Conduct (model rules). The rule's strong passage gave testament to the substantial effort that brought the proposed rule, Resolution 109, to a successful vote on the House floor.

The pathway to the rule was neither fast nor easy. The rule, as passed, was the fourth official draft of the rule, which had gone through a two-year transparent and

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New Model Rule 8.4(g)

It is professional misconduct for a lawyer to … (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

collaborative effort. The Rule's sponsor, ABA's Standing Committee on Ethics and Professional Responsibility (SCEPR), started its work in May 2014 after SCEPR received a joint letter from the ABA's four Goal III Commissions: the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, Commission on Disability Rights and the Commission on Sexual Orientation and Gender Identity. SCEPR was tasked with developing a proposal to amend the Model Rules to better address issues of harassment and discrimination and to implement the ABA's Goal III, "Eliminate Bias and Enhance Diversity."

For two years, SCEPR went through an extensive national formal and informal comment process and continued to refine the rule based upon the ongoing conversation with numerous stakeholders. These extended efforts resulted in the fourth and final version of the rule released on August 3, and approved on August 8.

The Rule was, and continues to be, subject to significant debate and scrutiny. NAWL participated in the public support effort leading up to the vote, making a strong case for why a rule was needed. In its July 21, 2016, letter of support, NAWL wrote:

> The amended Rule is necessary because explicit and implicit discrimination is still pervasive in our institutions as well as across a counsel table. Our members experience unequal pay for equal work, misogynistic comments and actions by opposing counsel, limited access to decision-makers, sexual harassment and objectification, inequitable reviews that lead to inequitable compensation, diminishing comments and behavior in meetings, and mistaken assumptions that undermine earned progression in the profession. Those who have experienced these instances of discrimination and harassment are the ones whose careers are derailed, stalled or halted while the perpetrators continue to climb the ladder of success unimpeded in what is essentially an endorsement of their behavior.

A united coalition of the national minority bar associations, the Hispanic National Bar Association (HNBA), the National Asian Pacific American Bar Association (NAPABA), the National Bar Association (NBA), the National LGBT Bar Association (National LGBT Bar), and the National Native American Bar Association (NNABA), also submitted a joint letter, observing:

> Our members regularly face discrimination and harassment in their day-to-day practice. There is a constant state of "otherness" that requires our members to justify their right to simply be an equal member at the bar or at the table. Far from a "presumption of competence,"[1] there exist requirements that our members demonstrate higher "objective" metrics to be taken seriously and/or to prove their value. These concerns play out in situations

SCEPR went through an extensive national formal and informal comment process and continued to refine the rule based upon the ongoing conversation with numerous stakeholders.

NAWL led one arm of the public support effort leading up to the vote, making a strong case for why a rule was needed

> including, but not limited to, pay disparities and exclusion from case assignments, opportunities, development, sponsorship, or resources. Study after study has shown stagnant progress of women and diverse attorneys in the profession, against the backdrop of an America, and of a profession, that is becoming increasingly diverse. Unfortunately, diverse attorneys, already underrepresented in private law firms, have a disproportionately high attrition rate.

Ultimately, Rule 8.4(g)'s coalition of support before the vote included ABA Board of Governors, seven sections of the ABA, every standing committee in the ABA's Center for Professional Responsibility, five ABA divisions, and outside-ABA support from a large and unanimous coalition representing the national women's bar associations, and each of the major national affinity bar associations, representing a collective membership in the hundreds of thousands of lawyers.

As passed, Model Rule 8.4(g) provides:

> It is professional misconduct for a lawyer to … (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

On its face, the rule does not nullify application of Model Rule 1.16's provisions about declining, continuing or terminating a representation.

Comment 3 defines discrimination and harassment, and explicitly states that the substantive law of antidiscrimination and anti-harassment guides its application.

Comment 4 defines "conduct related to the practice of law," and requires a connection between the alleged conduct to the practice of law. It applies to anything that a lawyer may do in his or her professional capacity, which includes representation, legal employment and legal business-social events such as bar association events, etc. Comment 4 makes clear that Rule 8.4(g) does not apply to conduct and programs to promote diversity.

Comment 5 discusses exceptions. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis do not, standing alone, establish a violation of 8.4(g). Comment 5 states a lawyer does not violate 8.4(g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these rules and other law. Still further, a lawyer may charge and collect reasonable fees and expenses, and Model Rule 1.5(a) [fees] continues to apply.

In the four months since Model Rule 8.4(g) was passed, mainstream media has reported positively on the legal profession's step to bring equality to the profession.

The most significant changes to the final draft were the addition of a mens rea ("knows/reasonably should know") and the rewording/moving of the legitimate advocacy statement into the black letter of the rule itself, enlarging the scope slightly to apply to both legitimate advice (transactional) or advocacy (before a tribunal). The clause "consistent with these Rules" clarifies "legitimate."

Model Rule 8.4(g) is a very important step forward – but it is just a first step. It provides model language and sends an essential strong definitive statement about what is a minimum standard of conduct for all lawyers. As a Model Rule, it fosters uniformity. However,

Model Rules are not self-executing, and must be adopted by each state to be enforceable in that state

the Model Rules are not self-executing, and must be adopted by each state to be enforceable in that state. The responsibility now turns to each state to take the next step to consider the rule, and either adopt a new rule or amend an existing one.

In the four months since Model Rule 8.4(g) was passed, mainstream media has reported positively on the legal profession's step to bring equality to the profession. And yet, negative articles continue to appear within the legal media, arguing that states should not adopt 8.4(g), asserting that a disciplinary apocalypse for innocent nonviolators is coming. Getting individual anti-discrimination and anti-harassment rules adopted in each state – that are as protective as Model Rule 8.4(g) – will take some effort by lawyers on the ground in each state. This effort is not "just" a women's issue. It is not "just" a minority issue. It is not "just" a progressive issue. Equality is a core American value. The right to self-regulate is a privilege that lawyers must exercise responsibly. NAWL's July 21, 2106, letter provides that "[p]erhaps when the refusal to accept discrimination and harassment is literally written into the moral code of the legal profession, women and minorities will be fully accepted as colleagues, partners, bosses, and opposing counsel." Perhaps. All eyes now pass to the states. ■

ENDNOTES

1 Deborah L. Rhode, "Law is the least diverse profession in the nation. And lawyers aren't doing enough to change that", Washington Post, May 27, 2015.

Guidelines for Professional Conduct

These Guidelines for Professional Conduct are adopted to apply to all lawyers who practice in the United States District Court for the Northern District of California. Lawyers owe a duty of professionalism to their clients, opposing parties and their counsel, the courts, and the public as a whole. Those duties include, among others: civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, cooperation and competence.

These Guidelines are structured to provide a general guiding principle in each area addressed followed by specific examples which are not intended to be all-encompassing.

Every attorney who enters an appearance in this matter shall be deemed to have pledged to adhere to the Guidelines. Counsel are encouraged to comply with both the spirit and letter of these Guidelines. Nothing in these Guidelines, however, shall be interpreted to contradict or supersede any Order of the Court or agreement between the parties. The Court does not anticipate that these Guidelines will be relied upon as the basis for a motion; rather, it is the Court's expectation that they will be followed as Guidelines.

These Guidelines should be read in the context of the Federal Rules of Civil Procedure, the Local Rules of the United States District Court for the Northern District of California (including, specifically, Civil Local Rule 11-4), the standards of professional conduct required of members of the State Bar of California, and all attorneys' underlying duty to zealously represent their clients. Nothing in these Guidelines should be read to denigrate counsel's duty of zealous representation. However, counsel are encouraged to zealously represent their clients within highest bounds of professionalism. The legal profession must strive for the highest standards of attorney behavior to elevate and enhance the service to justice.

1. Responsibilities to the Public

A lawyer should always be mindful that the law is a learned profession and that among its goals are devotion to public service, improvement of the administration of justice, and the contribution of uncompensated time and civic influence on behalf of persons who cannot afford adequate legal assistance.

2. Responsibilities to the Client

A lawyer should work to achieve his or her client's lawful and meritorious objectives expeditiously and as economically as possible in a civil and professional manner.

For example:

a. A lawyer should be committed to his or her client's cause,but should not permit that loyalty to interfere with giving the client objective and independent advice.

b. A lawyer should advise his or her client against pursuing positions in litigation (or any other course of action) that do not have merit.

3. Scheduling

A lawyer should understand and advise his or her client that civility and courtesy in scheduling meetings, hearings, and discovery are expected as professional conduct.

For example:

a. A lawyer should make reasonable efforts to schedule meetings, hearings, and discovery by agreement whenever possible and should consider the scheduling interests of opposing counsel, the parties,witnesses, and the court. Misunderstandings should be avoided by sending formal notice after agreement is reached.

b. A lawyer should not arbitrarily or unreasonably withhold consent to a request for scheduling accommodations.

c. A lawyer should not engage in delay tactics in scheduling meetings, hearings, or discovery.

d. A lawyer should try to verify the availability of key participants and witnesses before a meeting,hearing, or trial date is set. If that is not feasible, a lawyer should try to do so immediately after the meeting, hearing,or trial date is set so that he or she can promptly notify the court and opposing counsel of any likely problems.

e. A lawyer should (i) notify opposing counsel and, if appropriate, the court as early as possible when scheduled meetings, hearings, or depositions must be cancelled or rescheduled, and (ii) provide alternate dates for such meetings, hearings, or depositions when possible.

4. Continuances and Extensions of Time

Consistent with existing law and court orders, a lawyer should agree to reasonable requests for extensions of time when the legitimate interests of his or her client will not be adversely affected.

For example:

a. A lawyer should agree to reasonable requests for extensions of time or continuances without requiring motions or other formalities.

b. Unless time is of the essence, a lawyer should agree as a matter of courtesy to first requests for reasonable extensions of time, even if the requesting counsel previously refused to grant an extension.

c. After agreeing to a first extension of time, a lawyer should consider any additional requests for extensions of time by balancing the need for prompt resolution of matters against (i) the consideration that should be extended to an opponent's professional and personal schedule, (ii) the opponent's willingness to grant reciprocal extensions, (iii) the time actually needed for the task, and (iv) whether it is likely that a court would grant the extension if asked to do so.

d. A lawyer should be committed to the notion that the strategy of refusing reasonable requests for extensions of time is inappropriate, and should advise clients of the same.

e. A lawyer should not seek extensions or continuances for the purpose of harassment or extending litigation.

f. A lawyer should not condition an agreement to an extension of time on unfair or extraneous terms, except those a lawyer is entitled to impose, such as (i) preserving rights that could be jeopardized by an extension of time or (ii) seeking reciprocal scheduling concessions.

g. By agreeing to extensions, a lawyer should not seek to cut off an opponent's substantive rights, such as his or her right to move against a complaint.

h. A lawyer should agree to reasonable requests for extensions of time when new counsel is substituted for prior counsel.

5. Service of Papers

The timing and manner of service of papers should not be calculated to disadvantage or embarrass the party receiving the papers.

For example:

a. A lawyer should not serve documents, pleadings, or motions on the opposing party or counsel at a time or in a way that would unfairly limit the other party's opportunity to respond.

b. A lawyer should not serve papers so soon before a court appearance that it inhibits the ability of opposing counsel to prepare for that appearance or to respond to the papers if permitted by law.

c. A lawyer should not serve papers (i) simply to take advantage of an opponent's known absence from the office, or (ii) at a time or in a manner designed to inconvenience an

opponent.

d. A lawyer should serve papers by personal delivery, facsimile transmission, or email when it is likely that service by mail, even when allowed, will prejudice the opposing party.

e. A lawyer should serve papers on the individual lawyer known to be responsible for the matter at issue and should do so at his or her principal place of business.

f. A lawyer should never use the mode, timing, or place of serving papers primarily to embarrass a party or witness.

6. Punctuality

A lawyer should be punctual in communications with others and in honoring scheduled appearances.

For example:

a. A lawyer should arrive sufficiently in advance of trials, hearings, meetings, depositions, or other scheduled events so that preliminary matters can be resolved.

b. A lawyer should promptly notify all other participants when the lawyer will be unavoidably late.

c. A lawyer should promptly notify the other participants when he or she is aware that a participant will be late for a scheduled event.

7. Writings Submitted to the Court

Written materials submitted to the court should always be factual and concise, accurately state current law, and fairly represent the parties' positions without unfairly attacking the opposing party or opposing counsel.

For example:

a. Facts that are not properly introduced as part of the record in the case should not be used in written briefs or memoranda of points and authorities.

b. 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.

8. Communications with Opponents or Adversaries

A lawyer should at all times be civil, courteous, and accurate in communicating with opponents or adversaries, whether in writing or orally.

For example:

a. A lawyer should not draft letters (i) assigning a position to an opposing party that the opposing party has not taken, or (ii) to create a "record" of events that have not occurred.

b. A lawyer should not copy the court on any letter between counsel unless permitted or invited by the court.

9. Discovery

A lawyer should conduct discovery in a manner designed to ensure the timely, efficient, cost effective and just resolution of a dispute.

When propounding or responding to written discovery or when scheduling or completing depositions, a lawyer should be mindful of geographic or related timing limitations of parties and non-parties,as well as any relevant language barriers, and should not seek to use such limitations or language barriers for an unfair advantage.

A lawyer should promptly and completely comply with all discovery requirements of the Federal Rules of Civil Procedure.

For example:

As to Depositions:

a. A lawyer should take depositions only (a) where actually needed to learn facts or information, or (b) to preserve testimony.

b. In scheduling depositions, a lawyer shall follow the requirements of Civil Local Rule 30-1, should be cooperative in noticing depositions at mutually agreeable times and locations and shall accommodate the schedules and geographic limitations of opposing counsel and the deponent where it is possible to do so, while also considering the scheduling requirements in the litigation.

c. A lawyer representing a deponent that requires translator services or other special requirements shall promptly advise the noticing party of such requirements sufficiently in advance of a scheduled deposition so that counsel may seek to reasonably accommodate the deponent. A lawyer should be respectful of any translation or other special requirements that a particular deponent might have and should not seek to take unfair advantage of such requirements during a deposition.

d. When a deposition is scheduled and noticed by another party for the reasonably near future, a lawyer should ordinarily not schedule another deposition for an earlier date without the agreement of opposing counsel.

e. A lawyer should only delay a deposition if necessary to address legitimate scheduling conflicts. A lawyer should not delay a deposition for bad faith purposes.

f. A lawyer should not ask questions about a deponent's personal affairs or question a deponent's integrity where such questions are irrelevant to the subject matter of the deposition.

g. A lawyer should avoid repetitive or argumentative questions or those asked solely for purposes of harassment.

h. A lawyer representing a deponent or another party should limit objections to those that are well founded and necessary for the protection of his or her client's interest. A lawyer should remember that most objections are preserved and need be made only when the form of a question is defective or privileged information is sought.

i. Once a question is asked, a lawyer should not coach the deponent or suggest answers, whether through objections or other means.

j. A lawyer should not direct a deponent to refuse to answer a question unless the question seeks privileged information, is manifestly irrelevant, or is calculated to harass.

k. A lawyer should refrain from self-serving speeches during depositions.

l. A lawyer should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

As to Requests for Production of Documents:

a. A lawyer should limit requests for production of documents to cover only those documents that are actually and reasonably believed to be needed for the prosecution or defense of an action. Requests for production of documents should not be made to harass or embarrass a party or witness, or to impose an inordinate burden or expense on the responding party.

b. A lawyer should not draft requests for production of documents so broadly that they encompass documents that are clearly not relevant to the subject matter of the case.

c. In responding to requests for production of documents, a lawyer should not interpret the requests in an artificially restrictive manner in an attempt to avoid disclosure.

d. A lawyer responding to requests for production of documents should withhold documents on the grounds of privilege only where appropriate.

e. A lawyer should not produce documents in a disorganized or unintelligible fashion, or in a manner calculated to hide or obscure the existence of particular documents.

f. A lawyer should not delay producing documents to prevent opposing counsel from

inspecting documents prior to scheduled depositions or for any other tactical reason.

As to Interrogatories:

a. A lawyer should use interrogatories sparingly and never use interrogatories to harass or impose undue burden or expense on the responding party.

b. A lawyer should not read or respond to interrogatories in a manner designed to ensure that responses are not truly responsive.

c. A lawyer should not object to interrogatories unless he or she has a good faith belief in the merit of the objection. Objections should not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, a lawyer should answer the unobjectionable portion.

10. Motion Practice

Motions should be filed or opposed only in good faith and when the issue cannot be otherwise resolved.

For example:

a. Before filing a motion, a lawyer should engage in a good faith effort to resolve the issue. In particular, civil discovery motions should be filed sparingly.

b. A lawyer should not engage in conduct that forces opposing counsel to file a motion that he or she does not intend to oppose.

c. In complying with any meet and confer requirement in the Federal Rules of Civil Procedure or other applicable rules, a lawyer should speak personally with opposing counsel or a self-represented party and engage in a good faith effort to resolve or informally limit all applicable issues.

d. Where rules permit an *ex parte* application or communication to the court in an emergency situation, a lawyer should make such an application or communication only where there is a bona fide emergency—i.e., when the lawyer's client will be seriously prejudiced if the application or communication were made with regular notice. This applies, *inter alia*, to applications to shorten an otherwise applicable time period.

11. Dealing with Nonparty Witnesses

It is important to promote high regard for the legal profession and the judicial system among those who are neither lawyers nor litigants. A lawyer's conduct in dealings with nonparty witnesses should exhibit the highest standards of civility and be designed to leave the witness with an appropriately good impression of the legal profession and the

judicial system.

For example:

a. A lawyer should be courteous and respectful in communications with nonparty witnesses.

b. Upon request, a lawyer should extend professional courtesies and grant reasonable accommodations, unless doing so would materially prejudice his or her client's lawful objectives.

c. A lawyer should take special care to protect a witness from undue harassment or embarrassment and to state questions in a form that is appropriate to the witness's age and development.

d. A lawyer should not issue a subpoena to a nonparty witness for inappropriate tactical or strategic purposes, such as to intimidate or harass the nonparty.

e. As soon as a lawyer knows that a previously scheduled deposition will or will not go forward as scheduled, the lawyer should notify all applicable counsel.

f. A lawyer who obtains a document pursuant to a deposition subpoena should,upon request, make copies of the document available to all other counsel at their expense even if the deposition is canceled or adjourned.

12. *Ex Parte* Communications with the Court

A lawyer should not communicate *ex parte* with a judicial officer or his or her staff on a case pending before the court, unless permitted by law or Local Court Rule.

For example:

a. Even where applicable laws or rules permit an *ex parte* application or communication to the court, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent or likely to represent the opposing party before making such an application or communication. A lawyer should make reasonable efforts to accommodate the schedule of an opposing party or his or her counsel to permit them to participate in the *ex parte* proceedings.

13. Settlement and Alternative DisputeResolution

A lawyer should raise and explore the issue of settlement and alternative dispute resolution in every case as soon as the case can be evaluated.

For example:

a. A lawyer should always attempt to de-escalate any controversy and bring the parties together.

b. A lawyer should not falsely hold out the possibility of settlement as a means for terminating discovery or delaying trial. In every case, a lawyer should consider whether his or her client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation, or other form of alternative dispute resolution.

c. A lawyer should advise his or her client at the outset of the availability of alternative dispute resolution.

d. A lawyer involved in an alternative dispute resolution process should participate in good faith, and should not use the process for purposes of delay or other improper purposes.

14. Trial and Hearings

A lawyer should conduct himself or herself in trial and hearings in a manner that promotes a positive image of the legal profession, assists the court in properly reviewing the case, and displays appropriate respect for the judicial system.

For example:

a. A lawyer should be punctual and prepared for all court appearances.

b. A lawyer should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel, and the judge with courtesy and civility.

c. A lawyer should only make objections during a trial or hearing for legitimate and good faith reasons. A lawyer should not make such objections only for the purpose of harassment or delay.

d. A lawyer should honor requests made by opposing counsel during trial that do not prejudice his or her client's rights or sacrifice a tactical advantage.

e. While appearing before the court, a lawyer should address all arguments, objections, and requests to the court, rather than addressing them directly to opposing counsel.

f. While appearing in court, a lawyer should demonstrate sensitivity to any party, witness, or other lawyer who has requested, or may need, accommodation as a person with physical or mental impairment. This will help foster full and fair access to the court for all persons.

15. Default

A lawyer should not seek an opposing party's default to obtain a judgment or substantive order without giving that opposing party sufficient advance written warning to allow the

opposing party to cure the default.

16. Social Relationships with Judicial Officers or Court-Appointed Experts

A lawyer should avoid even the appearance of impropriety or bias in relationships with judicial officers, arbitrators, mediators, and independent court-appointed experts.

For example:

a. When a lawyer is assigned to appear before a judicial officer with whom the lawyer has a social relationship or friendship beyond normal professional association, the lawyer should notify opposing counsel (or a self-represented party) of the relationship.

b. A lawyer should disclose to opposing counsel (or a self-represented opposing party) any social relationship or friendship between the lawyer and an arbitrator, mediator,or any independent court appointed expert taking a role in the case, so that the opposing counselor party has the opportunity to object to such arbitrator, mediator, or expert receiving the assignment parties.

17. Privacy

All matters should be handled with due respect for the privacy rights of parties and non-parties.

For example:

a. A lawyer should not inquire into, nor attempt to use, nor threaten to use, facts about the private lives of any party or other individuals for the purpose of gaining an unfair advantage in a case. This rule does not preclude inquiry into sensitive matters that are relevant to a legitimate issue, as long as the inquiry is pursued as narrowly as is reasonably possible and with due respect for the fact that an invasion into private matters is a necessary evil.

b. If it is necessary for a lawyer to inquire into such matters,the lawyer should cooperate in arranging for protective measures designed to ensure that the private information is disclosed only to those persons who need to present it as relevant evidence to the court.

18. Communication About the Legal System and With Participants

Lawyers should conduct themselves with clients, opposing counsel, parties and the public in a manner consistent with the high respect and esteem which lawyers should have for the courts, the civil and criminal justice systems, the legal profession and other lawyers.

For example:

a. A lawyer's public communications should at all times and under all circumstances reflect appropriate civility, professional integrity, personal dignity, and respect for the legal system. This rule does not prohibit good faith, factually based expressions of dissent or criticism made by a lawyer in public or private discussions having a purpose to motivate improvements in our legal system or profession.

b. A lawyer should not make statements which are false, misleading, or which exaggerate, for example, the amount of damages sought in a lawsuit, actual or potential recoveries in settlement or the lawyer's qualifications, experience or fees.

c. A lawyer should not create a false or misleading record of events or attribute to an opposing counsel a position not taken.

d. A lawyer should not fail or refuse without justification to respond promptly by returning phone calls or otherwise responding to calls and letters of his or her clients, opposing counsel and/or self-represented parties.

e. A lawyer who is serving as a prosecutor or defense counsel should conduct himself or herself publicly and within the context of a particular case in a manner that shows respect for the important functions that each plays within the criminal justice system, keeping in mind that the defense of an accused is important and valuable to society as is the prosecution.

f. A lawyer should refrain from engaging in conduct that exhibits or is intended to appeal or engender bias against a person on account of that person's race, color, religion,sex, national origin, sexual orientation, or disability, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers or any other participants.

19. Redlining

A lawyer should clearly identify for other counsel or parties all changes that a lawyer makes in documents.

The Court gratefully acknowledges its reliance on the Santa Clara County Bar Association's Code of Professionalism.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSHUA CLAYPOLE, et al.,

Plaintiffs,

v.

COUNTY OF MONTEREY, et al.,

Defendants.

Case No. 14-cv-02730-BLF

ORDER GRANTING MOTION FOR SANCTIONS AND TO COMPEL DISCOVERY

(Re: Docket No. 122)

The Northern District's Guidelines for Professional Conduct are just that: guidelines. They only "encourage[]" counsel to comply with them, and the court "does not anticipate that these Guidelines will be relied upon as the basis for a motion." A one-off lapse, then, may not be a big deal. Attorneys are people, and people make mistakes. But where, as here, an attorney repeatedly and unapologetically flouts guideline after guideline, it is a big deal—and the court has little choice but to do something about it.

Plaintiffs Silvia Guersenzvaig and the Estate of Joshua Claypole move to compel and for sanctions against Defendants California Forensic Medical Group and Taylor Fithian.[1] They cite numerous violations by Defendants' counsel, Peter Bertling, of not just the Guidelines for Professional Conduct, but also the Federal Rules of Civil Procedure and an order to follow those Rules. Defendants' opposition consists only of a declaration from Bertling that fails to explain, let alone excuse, his conduct.[2]

Discovery is hard enough, even without conduct like that outlined below. Plaintiffs' motion is GRANTED.

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[1] *See* Docket No. 122.

[2] *See* Docket No. 133.

I.

This court has jurisdiction under 28 U.S.C. §§ 1331, 1343 and 1367. The undersigned was assigned discovery matters in this case pursuant to Fed. R. Civ. P. 72(a).

II.

"A lawyer should promptly and completely comply with all discovery requirements of the Federal Rules of Civil Procedure."[3] In addition, "[a] lawyer should not delay producing documents to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason."[4]

Plaintiffs deposed Defendants' expert, Dr. Richard Hayward, on October 16.[5] Along with the notice of deposition, Plaintiffs asked Hayward to produce all the documents he reviewed, relied on or created in the process of writing his report.[6] At the deposition, Bertling presented a physically cracked and unusable disc.[7] When Plaintiffs' counsel informed him of the problem, Bertling promised to send over the documents digitally the same day.[8]

That production did not happen for another six weeks. Despite Bertling's assurances, Defendants sent nothing over on October 16, the date of the deposition.[9] Even after Plaintiffs' counsel again prodded Bertling, on October 21, Defendants emailed four documents—Hayward's expert report, Plaintiffs' expert disclosure, Plaintiffs' expert report and certain emails between Hayward and Defendants' counsel—that they knew Plaintiffs already had.[10]

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[3] N.D. Cal. Guidelines for Professional Conduct, § 9.

[4] *Id.*

[5] *See* Docket No. 122-1, Ex. D.

[6] *See id.*, Ex. A at 2-5.

[7] *See id.*, Ex. C.

[8] *See id.*, Ex. D at 8:1-18.

[9] *See* Docket No. 122-1 at ¶ 5.

[10] *See id.* at ¶ 7; *id.*, Ex. E.

When Plaintiffs' counsel protested that the production was obviously incomplete, Bertling responded on October 26, "What do you believe we should be producing that has not already been produced? You already have many of the documents referred to by Dr. Hayward in his report."[11] Plaintiffs' counsel again reminded Bertling that "[t]he request for production included, inter alia, requests for all materials relied upon by Dr. Hayward . . . , notes from his jail visits, incident reports reviewed, as well as specific documents he referenced that had not previously been produced to Plaintiffs."[12] This time, Bertling did not answer at all, and Hayward produced nothing further.[13]

With no other recourse available, on November 10, Plaintiffs moved under Fed. R. Civ. P. 37(a)(1) to compel Hayward to produce the documents.[14] Almost two weeks later, Bertling's colleague finally wrote to Plaintiffs' counsel that the broken disc had contained a number of documents that Defendants believed Plaintiffs already had, but that Defendants could produce them again if necessary.[15] But the very next day, Bertling filed his opposing declaration, in which he said that he had "recently learned" that Hayward did have some paper notes that Plaintiffs had not received before.[16] He promised that Hayward would produce those notes by December 4.[17] Those notes, along with sign-in sheets for training sessions that Hayward relied on but Plaintiffs had never seen, finally arrived on December 8—the day after Plaintiffs had to submit their opposition to Defendants' motion for summary judgment.[18] Bertling offered no explanation,

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[11] *Id.*, Ex. E.

[12] *Id.*

[13] *See* Docket No. 122-1 at ¶ 7.

[14] *See* Docket No. 122.

[15] *See* Docket No. 139-2.

[16] Docket No. 133 at ¶ 2.

[17] *See id.* at ¶ 3.

[18] *See* Docket Nos. 124, 142.

either in his declaration or at the hearing on this motion, for Defendants' delay.[19]

Plaintiffs also seek to depose Hayward again so that Plaintiffs can ask him about the newly produced documents. Remarkably, despite this record of delay, Defendants object to the need for any further deposition. Their arguments are not persuasive.

Hayward's notes and the information about the training sessions certainly could have given rise to questions that Plaintiffs never got to ask at the first deposition. Defendants shall therefore make Hayward available for four more hours of deposition on any documents produced after the initial deposition within 14 days of this order. Plaintiffs are further awarded any fees and costs associated with taking the new deposition and filing this motion. And at least 7 days before the new deposition, Hayward must produce any remaining documents that he relied on and that are reasonably available to him or Defendants. This includes the sign-in sheets from training sessions as well as incident reports and other documents, to the extent Hayward has access to them and has not produced them already. Defendants have represented that Plaintiffs already have all the documents that were on the broken disc.[20] If that is true, and confirmed in a sworn declaration, Hayward need not produce them again. However, Hayward must identify specifically any documents that he relied on but can no longer access.

III.

"A lawyer representing a deponent or another party should limit objections to those that are well founded and necessary for the protection of his or her client's interest."[21] "An objection must be stated concisely in a nonargumentative and nonsuggestive manner."[22] "Once a question is

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[19] *See* Docket No. 133 at ¶¶ 2-3.

[20] *See* Docket No. 139-2.

[21] N.D. Cal. Guidelines for Professional Conduct, § 9.

[22] Fed. R. Civ. P. 30(c)(2); *see also* Sec. Nat'l Bank of Sioux City v. Day, 800 F.3d 936 (8th Cir. 2015) (citing Fed. R. Civ. P. 30(c)(2) advisory committee's note to 1993 amendment) ("[A]rgumentative objections, suggestive objections, and directions to a deponent not to answer, improperly disrupt, prolong, and frustrate deposition testimony.").

asked, a lawyer should not coach the deponent or suggest answers, whether through objections or other means."[23] "A lawyer should not direct a deponent to refuse to answer a question unless the question seeks privileged information, is manifestly irrelevant, or is calculated to harass."[24]

Bertling repeatedly ignored these standards. Plaintiffs' motion quotes dozens of deposition excerpts that show Bertling making extremely long speaking objections,[25] coaching witnesses,[26]

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[23] N.D. Cal. Guidelines for Professional Conduct, § 9; *see also Funk v. Town of Paradise*, Case No. 09-cv-01000, 2011 WL 2580357, at *2 (E.D. Cal. June 28, 2011) (sanctioning counsel for "appalling" behavior where counsel "repeatedly interrupted the proceedings, interjected editorial comments, and coached or suggested information to the witnesses"); *Cotton v. City of Eureka*, Case No. 08-cv-04386, 2010 WL 2889498, at *1-3 (N.D. Cal. July 22, 2010) (noting that an attorney had violated Rule 30(c)(2) when she "interposed improper coaching objections and improper speaking objections"); *BNSF Ry. Co. v. San Joaquin Valley Ry. Co.*, Case No. 08-cv-01086, 2009 WL 3872043, at *4 (E.D. Cal. Nov. 17, 2009) ("[C]ounsel for the witness being deposed is prohibited from acting as an intermediary, interpreting questions, assisting the deponent with formulation of the answers, or deciding which questions should be answered.").

[24] N.D. Cal. Guidelines for Professional Conduct, § 9.

[25] *See, e.g.*, Docket No. 122-1, Ex. D at 119:11-21 ("Q. So in your opinion, is Dr. Fithian reporting what Mr. Claypole was stating, or is Dr. Fithian making a clinical judgment that Mr. Claypole was stable? MR. BERTLING: Lacks foundation. Calls for speculation. Dr. Fithian could have been asking a number of questions that caused him to come to that conclusion."); *id.*, Ex. G at 79:19-80:6 ("Q. Are you familiar with the September 28th, 2014, suicide of Mikol Stewart in Sonoma County Jail? A. What jail? Q. Sonoma County Jail. MR. BERTLING: So we are not going to go through any other suicides. We are here today for the treatment and care that he provided to Mr. Claypole. That's what this deposition was for. The Court has allowed you to have a second—another deposition where that information was covered. We are not going to go over that today. You've asked nothing about Mr. Claypole, and it's about time that you did."); *id.* at 174:2-7 ("Q. Are you aware of whether any corrective action plan was identified or followed? MR. BERTLING: Lacks foundation that there was a need for any such corrective action plan to be identified or followed following the peer review of this case."); *id.*, Ex. H at 62:23-63:8 ("Q: . . . Do you know how, either specifically for this contract or in general, CFMG would come to the determination of putting in a specific time frame like that in a specific county? MR BERTLING: Well, let me just object that it's vague and ambiguous. Calls for speculation. This is also a juvenile facility as opposed to an adult facility with different titles and statutes that may be involved. But if you understand the question and can answer, please do, Dr. Fithian."); *see also* Docket No. 122 at 6-10 (quoting other examples).

[26] *See, e.g.*, Docket No. 122-1, Ex. D at 119:15-21 ("Q. So in your opinion, is Dr. Fithian reporting what Mr. Claypole was stating, or is Dr. Fithian making a clinical judgment that Mr. Claypole was stable? MR. BERTLING: Lacks foundation. Calls for speculation. Dr. Fithian could have been asking a number of questions that caused him to come to that conclusion."); *id.*,

cutting off witnesses[27] and even answering for them.[28] Bertling makes no attempt to defend any of this conduct.[29]

Rule 30(d)(2) allows a court to "impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or

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Ex. G at 139:9-141:22 (showing Bertling handing the witness a document to "help him respond" to a question); *id.* at 221:1-9 ("Q. Did you do any of that in Joshua Claypole's case? A. I don't believe I did, ma'am. MR. BERTLING: Lacks foundation that there was time to do that before committing suicide. . . . Q. And why didn't you do that? A. Again, Counselor, Mr. Claypole was in custody, I think, for about 48 hours."); *id.* at 226:16-21 ("Q. And given those stark conditions, prior to May 1st, 2013, did you ever recommend to the County of Monterey that they modify their safety cells? MR. BERTLING: Lacks foundation that there was any way to modify. But go ahead and answer her question."); *see also* Docket No. 122 at 6-12 (quoting other examples).

[27] *See, e.g.*, Docket No. 122-1, Ex. H at 40:23-41:8 ("Q. Do you know if it began prior to May 1st, 2013? A. No, I—again, I don't know with any certainty that it began before 2013. Staffing— MR BERTLING: You have answered the question."); *id.*, Ex. J at 64:22-65:18 ("Q. And do you know whose decision it was as between CFMG and the County of Monterey that custody officers do the initial health screening when an inmate comes into the jail? A. You know, Counselor, that has been a pattern of practice since 1981. I think the intake health screening prior to coming on board was done by custody administration, custody staff. I think we continued that through the years. MR. BERTLING: You've answered the question. . . . I don't think you want him to ramble.").

[28] *See, e.g.*, Docket No. 122-1, Ex. D at 129:1-5 ("Q. Do you know if Dr. Fithian asked about any prior suicidal statements during his meeting with Mr. Claypole on the morning of May 2nd? MR. BERTLING: You mean other than what's in his record where he said he denied it?"); *id.* at 133:3-8 ("Q. In conducting a suicide risk assessment of Mr. Claypole, subsequent to those statements that he made to Ms. Spano, in your opinion, should a suicide risk assessment have involved asking Mr. Claypole about the statements that he's made indicating suicidality? MR. BERTLING: Well, he did."); *id.*, Ex. G at 150:18-25 ("Q. And what evaluation did any medical or mental health staff do of Josh at the time that he was placed back on suicide watch on May 3rd? MR. BERTLING: Other than what you just went over with Ms. Spano's note?"); *id.* at 182:3-11 ("Q. Are you aware that the court found that conducting health and safety checks of inmates in segregation or lockdown units only once per hour violated correctional standards? MR. BERTLING: Objection. Lacks foundation, calls for speculation. That had nothing to do with CFMG. If you know. THE WITNESS: I think, again, I think Mr. Bertling is correct."); *id.*, Ex. I at 101:12-16 ("Q[:] What measures, if any, did CFMG or Dr. Fithian take to address that possibility? MR. BERTLING: You mean other than the fact that he was in a lock down cell being monitored by custody?"); *see also* Docket No. 122 at 6-16 (quoting other examples).

[29] *See* Docket No. 133.

frustrates the fair examination of the deponent." By persisting in this behavior throughout discovery on behalf of his clients, Bertling crossed well into sanctionable territory.[30] The court awards Plaintiffs their attorney's fees and costs for the following depositions: (1) the Hayward deposition on October 16, 2015,[31] (2) the Fithian deposition on August 31, 2015[32] and (3) the Fithian deposition on September 7, 2015.[33] Defendants shall make full payment within 14 days.

IV.

"Lawyers owe a duty of professionalism to their clients, opposing parties and their counsel, the courts, and the public as a whole."[34] "Those duties include, among others: civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, cooperation and competence."[35] "The practice of law before this [c]ourt must be free from prejudice and bias. Treatment free of bias must be accorded all other attorneys, litigants, judicial officers, jurors and support personnel."[36] One could defend some of Bertling's conduct as merely vigorous

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[30] *See Lund v. Matthews*, Case No. 13-cv-00144, 2014 WL 517569, at *4-6 (D. Neb. Feb. 7, 2014) (awarding sanctions where counsel whispered into deponent's ear, made objections with commentary that coached the deponent's answers and instructed the witness not to answer on the basis of an "asked and answered" objection); Craig v. St. Anthony's Med. Ctr., Case No. 08-cv-00492, 2009 WL 690210, at *2 (E.D. Mo. Mar. 12, 2009) (awarding sanctions where counsel "disrupted the proceedings by making argumentative and suggestive objections, conducting private conversations with his client, instructing his client not to answer questions without asserting a privilege, and answering questions on behalf of his client"); *Cordova v. United States*, Case No. 05-cv-00563, 2006 WL 4109659, at *2 (D.N.M. July 30, 2006) (awarding sanctions where counsel coached the witness through speaking objections, conferred with the witness off the record during pending questions and impermissibly instructed the witness not to answer).

[31] *See* Docket No. 122-1, Ex. D.

[32] *See id.*, Ex. G.

[33] *See id.*, Ex. H. Plaintiffs also seek preclusive relief, but only the presiding judge can award that sanction.

[34] N.D. Cal. Guidelines for Professional Conduct.

[35] *Id.*

[36] Civ. L.R. 11-4(b).

representation of his client, but Bertling also has stooped to an indefensible attack on opposing counsel.

At a contentious deposition, when Plaintiffs' counsel asked Bertling not to interrupt her, Bertling told her, "[D]on't raise your voice at me. It's not becoming of a woman . . . ."[37] There are several obvious problems with his statement, but, most saliently, Bertling endorsed the stereotype that women are subject to a different standard of behavior than their fellow attorneys. To make matters worse, in his declaration in opposition to this motion, Bertling offered only a halfhearted politician's apology "if [he] offended" Plaintiff's counsel, and he nevertheless tried to justify the comment because it "was made in the context of [Plaintiff's counsel] literally yelling at [his] client and creating a hostile environment during the deposition."[38]

A sexist remark is not just a professional discourtesy, although that in itself is regrettable and all too common. The bigger issue is that comments like Bertling's reflect and reinforce the male-dominated attitude of our profession. A recent ABA report found that "inappropriate or stereotypical comments" towards women attorneys are among the more overt signifiers of the discrimination, both stated and implicit, that contributes to their underrepresentation in the legal field.[39] When an attorney makes these kinds of comments, "it reflects not only on the attorney's lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice."[40]

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[37] Docket No. 122-1, Ex. G at 28:5-21. In full, Bertling said, "Move on with your next question and don't raise your voice at me. It's not becoming of a woman or an attorney who is acting professionally under the rules of professional responsibility." *Id.*

[38] Docket No. 133 at ¶ 4. Other than his own characterization, Bertling offers no deposition excerpts or other evidence that suggests this.

[39] Stephanie A. Scharf & Roberta A. Liebenberg, Am. Bar Ass'n, *First Chairs at Trial: More Women Need Seats at the Table* 14-15 (2015), *available at* http://www.americanbar.org/content/dam/aba/marketing/women/first_chairs2015.authcheckdam.pdf.

[40] *Cruz-Aponte v. Caribbean Petroleum Corp.*, Case No. 09-cv-02092, 2015 WL 5006213, at *3 (D.P.R. Aug. 17, 2015).

Sanctions may not fully compensate Plaintiffs' counsel for Bertling's conduct, but they might deter it in the future. "District courts have the inherent power to sanction a lawyer for a 'full range of litigation abuses.'"[41] Courts may exercise this power "even if procedural rules exist which sanction the same conduct."[42] Because the scope of the sanctioning power is so broad, the court must "exercise caution in invoking its inherent power, and it must comply with the mandates of due process."[43] Before it imposes sanctions, a court must "specifically find[] bad faith or conduct tantamount to bad faith."[44] And to satisfy due process, the court must ensure that the sanctioned party has notice of the challenged misconduct and the allegation of bad faith.[45] Subject to these safeguards, the court may "fashion an appropriate sanction for conduct which abuses the judicial process."[46]

Guided by these principles, the court finds that Bertling's conduct was in bad faith. In light of his other discovery misconduct and his failure to tender any meaningful apology—despite opportunities to do so on the papers and at the hearing—the remark was emblematic of an unacceptably disrespectful attitude towards Plaintiffs' counsel. Furthermore, the requirements of due process have been satisfied: Bertling had a full and fair opportunity to oppose the motion on the papers and at the hearing.

The only question, then, is what sanction to impose. The court already has awarded Plaintiffs their fees and costs in bringing this motion as well as a portion of their attorney's fees for the deposition during which Bertling made his sexist comment. Those sanctions help

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[41] *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1035 (9th Cir. 2012) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991)).

[42] *Chambers*, 501 U.S. at 49.

[43] *Id.* at 50.

[44] *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001).

[45] *See In re Deville*, 361 F.3d 539, 548-50 (9th Cir. 2004).

[46] *Chambers*, 501 U.S. at 44-45.

compensate Plaintiffs for Defendants' violation of discovery rules and Bertling's other conduct during depositions, but a specific and appropriate sanction for Bertling's comment is required. To that end, within 28 days, Bertling shall donate $250 to the Women Lawyers Association of Los Angeles Foundation[47]—an organization in Bertling's region dedicated to women in the legal profession—and submit a declaration to the court confirming his compliance with this order.

SO ORDERED.

Dated: January 12, 2016

PAUL S. GREWAL
United States Magistrate Judge

[47] Bertling may make his donation online at https://wlala.site-ym.com/donations/donate.asp?id=8677.

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Employment Lawyer Fined $7K For 'Female Energy' Remarks

By **Kat Sieniuc**

Law360, New York (March 22, 2017, 7:34 PM EDT) -- A California federal judge on Tuesday fined an employment attorney $7,706 for saying that a Reed Smith LLP partner was displaying "female energy" during a deposition, calling the comment unprofessional and suggesting the lawyer undergo sensitivity training.

The Feb. 2 sanctions motion accused plaintiff's attorney Michael Hoffman of calling Reed Smith's Michele Beilke names and saying a conspiracy of "female energy" in the deposition room made him feel uncomfortable.

In an order granting Reed Smith's request for sanctions against Hoffman, U.S. Magistrate Judge Kandis A. Westmore also referred Hoffman to the court's standing committee on professional conduct for further investigation.

The Reed Smith team, representing defendant The Chefs' Warehouse Inc., initially alerted the court to the deposition breakdown in a motion for administrative relief. But Judge Westmore directed the company in a Jan. 25 order to file a motion for sanctions instead, finding the allegations too serious for the administrative mechanism. Hoffman argued he shouldn't be sanctioned because the case had been highly contentious on both sides, especially during discovery.

But the court decided against considering discovery-related events that occurred before the deposition when ruling on the sanctions motion, saying, "While the Court understands that discovery in this case has been challenging, those disputes are not before the Court."

"No number of disputes or perceived professional misconduct justifies Mr. Hoffman's actions, in which he made disparaging remarks to opposing counsel, repeatedly insulted her and called her names," the judge said.

In referring Hoffman to the disciplinary committee, Judge Westmore said, "The Court firmly believes that Mr. Hoffman might benefit from mental health treatment and sensitivity training."

"It was evident from the hearing that he experiences trouble channeling his emotions, and the Court is concerned that he harbors issues, and perhaps even resentment, towards women," the judge said.

Hoffman told Law360 on Wednesday "despite Defendant's several objections to the contrary, Shaon Robinson is pleased to be moving forward with his substantive discrimination claims, utilizing the attorneys of his choice."

Beilke declined to comment.

Hoffman is representing Shaon Robinson in a suit against The Chefs' Warehouse for discrimination and pay violations and had set up in a conference room for a deposition of his client in San

Francisco on Jan. 12, court records show.

The session quickly went awry as Hoffman started verbally attacking Beilke as she questioned Robinson on behalf of Chefs' Warehouse, the company said in its motion for sanctions earlier this month. Hoffman countered in a declaration he was only responding to Beilke's false accusations against him, and that she'd been averse to him from the start, including disliking his "masculine appearance."

Beilke said she couldn't proceed with the deposition because she felt her safety and that of the other women in the room — the court reporter, a videographer and Chefs' Warehouse executive Lori Mulcare — was threatened, according to the motion.

The women "were offended by Mr. Hoffman's comment that he sensed a 'female energy' in the room that he found uncomfortable and that he referred to as a conspiracy," Beilke said.

Among other things, Hoffman told Beilke not to get angry because her anger might set off his own anger, and turned his back to the table, according to the motion

Hoffman has said the sanctions bid is just a diversion to distract the court from the company's failure to take action when employees complained about race discrimination.

In his response to the sanctions motion, Hoffman said the case "has been highly contentious from the beginning" and that his remarks "did not occur in a vacuum." He said both parties have engaged in "aggressive" discovery tactics. As an example, he alleged Beilke resisted handing over documents before the deposition, including key witness contact information.

The suit itself, filed in 2015, accuses Chefs' Warehouse of systematically discriminating against its African-American drivers, fostering an environment where the "N-word" was regularly used and managers gave black drivers more difficult routes and shoddy equipment, court records show.

Robinson is represented by Michael Hoffman, Leonard Emma and Stephen Noel Ilg of Hoffman Employment Lawyers.

The Chefs' Warehouse is represented by Michele Beilke, Julia Y. Trankiem and Zaher Lopez of Reed Smith LLP.

The case is Shaon Robinson v. The Chefs Warehouse Inc. et al., case number 3:15-cv-005421, in the U.S. District Court for the Northern District of California.

--Additional reporting by Kat Greene. Editing by Jill Coffey.

Judith Droz Keyes // PARTNER // DAVIS WRIGHT TREMAINE LLP

For more than 40 years, Judy Keyes has represented all types of employers in all manner of labor and employment law matters including counseling, training, policy development, workplace investigation, mediation, negotiation, arbitration, agency proceedings, and litigation. She has been a partner at Davis Wright Tremaine since 2006.

Judy is a Fellow in the College of Labor and Employment Lawyers and for several years served on its Ninth Circuit-North Credentials Committee. She consistently has been listed by Naifeh and Smith as one of the "Best Lawyers in America," by Chambers USA as a leading employment lawyer, by Martindale as an AV Preeminent lawyer, and as a "Northern California Super Lawyer." In 2015, Best Lawyers identified Judy as the San Francisco Employment Litigation Lawyer of the Year. Judy has been a Lawyer Representative to the Ninth Circuit Judicial Conference, President of the Alameda County Bar Association, and Chair of the Labor and Employment Law Section of the Bar Association of San Francisco. Judy serves as an evaluator and mediator of employment cases for the U.S. District Court for the Northern District of California, and has trained others for those roles. She is an active member of the ABA Labor and Employment Law Section International Committee and Committee on Practice and Procedure before the National Labor Relations Board, and is a Life Member of the American Bar Foundation. She has been a member of the Advisory Council of the Henderson Center for Social Justice at Boalt Hall Law School, her alma mater, an Officer and Director of the Nob Hill Association, and a Trustee of Grace Cathedral.

Claudia Wilken // US DISTRICT COURT JUDGE

Claudia Wilken is a judge on the United States District Court for the Northern District of California, Oakland division. She was appointed in 1993 by President Clinton. Prior to her appointment to the district court, she served as United States Magistrate Judge on the same court for ten years. She served as Chief Judge of the District from 2012 to 2014, when she assumed senior status.

Judge Wilken graduated with honors from Stanford University, and was elected to Phi Beta Kappa. She received her Juris Doctor degree from the University of California at Berkeley, Boalt Hall, where she was a member of the Order of the Coif. She served as an assistant federal public defender in the Northern District of California for three years, and then opened a law practice with a partner. She also taught criminal trial practice at Boalt Hall as an adjunct professor.

Brad Seligman // ALAMEDA SUPERIOR COURT JUDGE

Judicial Experience: Alameda Superior Court December 31, 2012 to present. Current assignment: Supervising Judge, Civil Complex/Asbestos. Prior Assignments: Asbestos (2015); Family Law (2013-2014). Member: Legal Services Trust Fund Commission; Judicial Council's Civil and Small Claims Advisory Committee, chair ADR subcommittee; Civil Law Curriculum Committee, Judicial Council Center for Judicial Education and Research (CJER)
Prior Experience: Founder and Executive Director of The Impact Fund; Of Counsel: Lewis Feinberg, Lee, Renaker & Jackson, P.C.; Managing Partner, Saperstein, Seligman, Mayeda and Larkin; Senior Law Clerk to Hon. Lawrence K. Karlton (E.D. Cal.).
Education: JD Hastings College of Law; BA Sonoma State University.

Wendy Wen Yun Chang // PARTNER // HINSHAW & CULBERTSON LLP

Wendy Wen Yun Chang is a partner in the Los Angeles office of Hinshaw & Culbertson, LLP. She represents lawyers in all types of complex matters that involve the practice of the law, including professional liability and litigation defense, risk management counseling, ethics, crises management, fee related issues, discipline defense, and hotline counseling. Ms. Chang is a Certified Specialist in Legal Malpractice Law by the State Bar of California's Board of Legal Specialization. Ms. Chang is a member of the American Bar Association's Standing Committee on Ethics and Professional Responsibility. She served as an Advisor to the State Bar of California's Commission for the Revision of the Rules of Professional Conduct and as past chair of the State Bar of California's Standing Committee on Professional Responsibility and Conduct.

Ms. Chang also represents businesses in all types of business litigation, with particular emphasis in high exposure complex litigation, trials and appeals. Ms. Chang represents corporate and governmental entities in a variety of high exposure media interest litigation, including complex tort defense, fraud and conspiracy claims, insurance litigation (coverage litigation, bad faith), contracts, and complex business disputes from filing through mediation, trial, arbitration, and/or appeal. She regularly appears before the trial courts and the courts of appeal. Ms. Chang also represents businesses in defense of employment litigation, in discrimination, harassment and retaliation claims. She has served as an independent workplace investigator for public entities in sensitive matters relating to human resource issues.

For close to a decade, Ms. Chang has served as Co-Chair of the Judiciary & Executive Nominations and Appointments Committee for the National Asian Pacific American Bar Association. She serves as an Advisor to the Asian Pacific American Bar Association of Los Angeles, and the Southern California Chinese Lawyers Association (of which she is a past president). She is active with the National Association of Women Lawyers, and a past board member of the Women Lawyers Association of Los Angeles. Ms. Chang also serves on the Los Angeles County Bar Association's State Appellate Judicial Evaluation Committee, and its Professional Responsibility and Ethics Committee.

Lori Rifkin // PARTNER // HADSELL STORMET & RENICK LLP

Lori Rifkin is a partner in the Bay Area office of the civil rights law firm Hadsell Stormer & Renick LLP. She represents adults and children in civil rights cases concerning law enforcement misconduct and jail or prison conditions. Ms. Rifkin also represents people in employment, public accommodation, and other matters involving discrimination or harassment on the basis of race, ethnicity, religion, sex, gender, sexual orientation, gender identity or expression, physical or mental disability, and/or age. Before joining Hadsell Stormer & Renick in 2016, Ms. Rifkin ran Rifkin Law Office, a civil rights law practice based in Oakland, California. Prior to founding Rifkin Law Office, Ms. Rifkin worked in a variety of public interest settings, including as a Senior Trial Attorney in the Special Litigation of U.S. Department of Justice Civil Rights Division, a staff attorney at the American Civil Liberties Union, and an associate at the civil rights firm Rosen, Bien, Galvan & Grunfeld, LLP.

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