

The College
of Labor and
Employment
Lawyers

LEADERSHIP FOR GREATER PURPOSE

“THE IMPORTANCE OF BEING CIVIL”

Hon. Richard Kramer

Hon. Donna Ryu

Hon. John True

Moderated by Fellow Alan Berkowitz

Presented by the 9th Circuit North Regional Planning
Committee of The College of Labor and Employment
Lawyers:

David Borgen, Norman Brand, Alan Berkowitz

Co-Sponsored by the National Academy of Arbitrators
Northern California Region

Hosted by Orrick, Herrington & Sutcliffe, LLP

October 22, 2013

6:00 pm – 8:00 pm

HON. JOHN M. TRUE, III

John M. True, III is a judge on the Alameda County Superior Court where he has served since 2003. He currently presides over civil trials and other civil proceedings in Department 23 in Oakland, California.

Before taking the bench, Judge True spent many years practicing labor and employment law on behalf of unions and employees. Right before his judicial appointment, he was a partner at the San Francisco Bay Area firm of Leonard Carder, LLP (from 2000 to 2003), and before that at Rudy Exelrod Zieff & True (1994 to 2000). From 1985 to 1994 he was a Senior Staff Attorney at the San Francisco Legal Aid Society's Employment Law Center. He began his legal career in 1975 as a Field Attorney in the San Francisco and Oakland offices of the National Labor Relations Board.

Judge True received his law degree from the U.C. Berkeley School of Law (Boalt Hall) in 1975. Prior to law school, Judge True served as a U.S. Peace Corps Volunteer in Nepal from 1966 to 1969 and as the Assistant Director of the Peace Corps program in Afghanistan from 1969 to 1972.

While on the bench, Judge True has presided over numerous settlement conferences in civil matters and, before appointment, he was an active mediator and arbitrator. During the course of his career, Judge True has taught Employment Law and other courses, including Negotiations, as an adjunct faculty member at several Bay Area law schools.

His publications include California Employment Litigation: Strategy and Tactics (LEXIS Law Publishing, 1999, now in third edition) and numerous articles on labor and employment law and alternative dispute resolution. He has been a Fellow in the College of Labor and Employment Lawyers since 2001 and was recently elected to the American Law Institute. He is currently the Chair of the Alameda County Superior Court's ADR Administration Committee.

HOME > Judges



Magistrate Judge Donna M. Ryu

Oakland Courthouse, Courtroom 4 - 3rd Floor
1301 Clay Street, Oakland, CA 94612

» Download the brochure *Consenting To A Magistrate Judge's Jurisdiction In The Northern District Of California* (.pdf)



Weekly Court Calendar Schedule

Criminal Law & Motion	2nd & 4th Thursdays	11:00 a.m.
	or during the regular criminal calendar when Mag. Judge Ryu is on criminal calendar duty	
Criminal Duty Matters	Daily During Duty Months	9:30 a.m.
Civil Law and Motion	2nd & 4th Thursdays	11:00 a.m.
Case Management Conferences	Wednesdays	1:30 p.m.

Staff

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About Magistrate Judge Donna M. Ryu

Magistrate Judge Donna M. Ryu was appointed in 2010. Before joining the Court, she served as a Clinical Professor of Law at U.C. Hastings College of the Law and as Associate Professor and Associate Director of the Women's Employment Rights Clinic of Golden Gate University Law School. Her clinical courses included instruction on negotiation, mediation, and trial techniques, as well as employment and social security disability law. She also taught in the area of legal ethics.

She began her legal career with McCutchen, Doyle, Brown & Enersen in San Francisco before joining an Oakland-based firm specializing in civil rights class actions. She later formed her own firm, Ryu, Dickey & Larkin. She has extensive experience in discovery and motion work, as well as trial work involving complex litigation.

She has been honored as a California Lawyer of the Year in Employment Law. She is also the recipient of the Asian American Bar Association's Joe Morozumi Award for Exceptional Legal Advocacy, and the Rutter Award for Excellence in Teaching. She co-designed and served on the faculty of a national training institute on class actions, and has written and lectured extensively in the areas of employment law, discovery, attorneys' fees, class actions, and professionalism in lawyering.

Judge Ryu graduated with honors from Yale University, and received her law degree in 1986 from U.C. Berkeley Law School, where she was a founder of the *Berkeley Journal of Gender, Law and Justice*.

Judge Richard Kramer was appointed to the San Francisco Superior Court by Governor Pete Wilson in December, 1996. He presided over a felony trial department for five years, then a general civil trial department. From 2002-2013, he has been assigned to the San Francisco Superior Court Complex Litigation Department. He presently presides over a civil trial department. He also served as a justice in the Appellate Division of the Superior Court for three years and as a Justice Pro Tem in the Court of Appeal. Judge Kramer has been an Adjunct Professor of Law at the University of California, Hastings College of the Law.

Before becoming a judge, Kramer was a commercial trial lawyer at Steefel, Levitt & Weiss in San Francisco.

THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS, INC.

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.

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.

CIVILITY TOOLBOX

The State Bar California
180 Howard Street
San Francisco, CA 94105

July 17, 2009

**California Attorney
Guidelines of Civility and Professionalism**



**The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639**

**Adopted by the Board of Governors on
July 20, 2007**

**CALIFORNIA ATTORNEY
GUIDELINES OF CIVILITY AND PROFESSIONALISM**
(Adopted July 20, 2007)

INTRODUCTION

As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.

These are guidelines for civility. The Guidelines are offered because civility in the practice of law promotes both the effectiveness and the enjoyment of the practice and economical client representation. The legal profession must strive for the highest standards of attorney behavior to elevate and enhance our service to justice. Uncivil or unprofessional conduct not only disservices the individual involved, it demeans the profession as a whole and our system of justice.

These voluntary Guidelines foster a level of civility and professionalism that exceed the minimum requirements of the mandated Rules of Professional Conduct as the best practices of civility in the practice of law in California. The Guidelines are not intended to supplant these or any other rules or laws that govern attorney conduct. Since the Guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence.

The Guidelines are intended to complement codes of professionalism adopted by bar associations in California. Individual attorneys are encouraged to make these guidelines their personal standards by taking the pledge that appears at the end. The Guidelines can be applicable to all lawyers regardless of practice area. Attorneys are encouraged to comply with both the spirit and letter of these guidelines, recognizing that complying with these guidelines does not in any way denigrate the attorney's duty of zealous representation.

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**SECTION 1
RESPONSIBILITIES TO THE JUSTICE SYSTEM**

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.

**SECTION 2
RESPONSIBILITIES TO THE PUBLIC AND THE PROFESSION**

An attorney should be mindful that, as individual circumstances permit, the goals of the profession include improving the administration of justice and contributing time to persons and organizations that cannot afford legal assistance.

An attorney should encourage new members of the bar to adopt these guidelines of civility and professionalism and mentor them in applying the guidelines.

**SECTION 3
RESPONSIBILITIES TO THE CLIENT AND CLIENT REPRESENTATION**

An attorney should treat clients with courtesy and respect, and represent them in a civil and professional manner. An attorney should advise current and potential clients that it is not acceptable for an attorney to engage in abusive behavior or other conduct unbecoming a member of the bar and an officer of the court.

As an officer of the court, an attorney should not allow clients to prevail upon the attorney to engage in uncivil behavior.

An attorney should not compromise the guidelines of civility and professionalism to achieve an advantage.

**SECTION 4
COMMUNICATIONS**

An attorney's communications about the legal system should at all times reflect civility, professional integrity, personal dignity, and respect for the legal system. An attorney should not engage in conduct that is unbecoming a member of the Bar and an officer of the court.

For example, in communications about the legal system and with adversaries:

- a. An attorney's conduct should be consistent with high respect and esteem for the civil and criminal justice systems.
- b. This guideline does not prohibit an attorney's good faith expression of dissent or criticism made in public or private discussions for the purpose of improving the legal system or profession.

- c. An attorney should not disparage the intelligence, integrity, ethics, morals or behavior of the court or other counsel, parties or participants when those characteristics are not at issue.
- d. Respecting cultural diversity, an attorney should not disparage another's personal characteristics.
- e. An attorney should not make exaggerated, false, or misleading statements to the media while representing a party in a pending matter.
- f. An attorney should avoid hostile, demeaning or humiliating words.
- g. An attorney should not create a false or misleading record of events or attribute to an opposing counsel a position not taken.
- h. An attorney should agree to reasonable requests in the interests of efficiency and economy, including agreeing to a waiver of procedural formalities where appropriate.
- i. Unless specifically permitted or invited by the court or authorized by law, an attorney should not correspond directly with the court regarding a case.

Nothing above shall be construed as discouraging the reporting of conduct that fails to comply with the Rules of Professional Conduct.

SECTION 5 PUNCTUALITY

An attorney should be punctual in appearing at trials, hearings, meetings, depositions and other scheduled appearances.

For example:

- a. An attorney should arrive sufficiently in advance to resolve preliminary matters.
- b. An attorney should timely notify participants when the attorney will be late or is aware that a participant will be late.

SECTION 6 SCHEDULING, CONTINUANCES AND EXTENSIONS OF TIME

An attorney should advise clients that civility and courtesy in scheduling meetings, hearings and discovery are expected as professional conduct.

For example:

- a. An attorney should consider the scheduling interests of the court, other counsel or party, and other participants, should schedule by agreement whenever possible, and should send formal notice after agreement is reached.

- b. An attorney should not arbitrarily or unreasonably withhold consent to a request for scheduling accommodations or engage in delay tactics.
- c. An attorney should promptly notify the court and other counsel of problems with key participants' availability.
- d. An attorney should promptly notify other counsel and, if appropriate, the court, when scheduled meetings, hearings or depositions must be cancelled or rescheduled, and provide alternate dates when possible.

In considering requests for an extension of time, an attorney should consider the client's interests and need to promptly resolve matters, the schedules and willingness of others to grant reciprocal extensions, the time needed for a task, and other relevant factors.

Consistent with existing law and court orders, an attorney should agree to reasonable requests for extensions of time that are not adverse to a client's interests.

For example:

- a. Unless time is of the essence, an attorney should agree to an extension without requiring motions or other formalities, regardless of whether the requesting counsel previously refused to grant an extension.
- b. An attorney should agree to an appropriate continuance when new counsel substitutes in.
- c. An attorney should advise clients that failing to agree with reasonable requests for time extensions is inappropriate.
- d. An attorney should not use extensions or continuances for harassment or to extend litigation.
- e. An attorney should place conditions on an agreement to an extension only if they are fair and essential or if the attorney is entitled to impose them, for instance to preserve rights or seek reciprocal scheduling concessions.
- f. If an attorney intends that a request for or agreement to an extension shall cut off a party's substantive rights or procedural options, the attorney should disclose that intent at the time of the request or agreement.

SECTION 7 SERVICE OF PAPERS

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

For example:

- a. An attorney should serve papers on the attorney who is responsible for the matter at his or her principal place of work.
- b. If possible, papers should be served upon counsel at a time agreed upon in advance.
- c. When serving papers, an attorney should allow sufficient time for opposing counsel to prepare for a court appearance or to respond to the papers.
- d. An attorney should not serve papers to take advantage of an opponent's absence or to inconvenience the opponent, for instance by serving papers late on Friday afternoon or the day preceding a holiday.
- e. When it is likely that service by mail will prejudice an opposing party, an attorney should serve the papers by other permissible means.

SECTION 8
WRITINGS SUBMITTED TO THE COURT, COUNSEL OR OTHER PARTIES

Written materials directed to counsel, third parties or a court should be factual and concise and focused on the issue to be decided.

For example:

- a. An attorney should not make ad hominem attacks on opposing counsel.
- b. Unless at issue or relevant in a particular proceeding, an attorney should avoid degrading the intelligence, ethics, morals, integrity, or personal behavior of others.
- c. An attorney should clearly identify all revisions in a document previously submitted to the court or other counsel.

SECTION 9
DISCOVERY

Attorneys are encouraged to meet and confer early in order to explore voluntary disclosure, which includes identification of issues, identification of persons with knowledge of such issues, and exchange of documents.

Attorneys are encouraged to propound and respond to formal discovery in a manner designed to fully implement the purposes of the Civil Discovery Act.

An attorney should not use discovery to harass an opposing counsel, parties, or witnesses. An attorney should not use discovery to delay the resolution of a dispute.

For example:

- a. As to Depositions:

1. When another party notices a deposition for the near future, absent unusual circumstances, an attorney should not schedule another deposition in the same case for an earlier date without opposing counsel's agreement.
 2. An attorney should delay a scheduled deposition only when necessary to address scheduling problems and not in bad faith.
 3. An attorney should treat other counsel and participants with courtesy and civility, and should not engage in conduct that would be inappropriate in the presence of a judicial officer.
 4. An attorney should remember that vigorous advocacy can be consistent with professional courtesy, and that arguments or conflicts with other counsel should not be personal.
 5. An attorney questioning a deponent should provide other counsel present with a copy of any documents shown to the deponent before or contemporaneously with showing the document to the deponent.
 6. Once a question is asked, an attorney should not interrupt a deposition or make an objection for the purpose of coaching a deponent or suggesting answers.
 7. An attorney should not direct a deponent to refuse to answer a question or end the deposition without a legal basis for doing so.
 8. An attorney should refrain from self-serving speeches and speaking objections.
- b. As to Document Demands:
1. Document requests should be used only to seek those documents that are reasonably needed to prosecute or defend an action.
 2. An attorney should not make demands to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.
 3. If an attorney inadvertently receives a privileged document, the attorney should promptly notify the producing party that the document has been received.
 4. In responding to a document demand, an attorney should not intentionally misconstrue a request in such a way as to avoid disclosure or withhold a document on the grounds of privilege.
 5. An attorney should not produce disorganized or unintelligible documents, or produce documents in a way that hides or obscures the existence of particular documents.
 6. An attorney should not delay in producing a document in order to prevent opposing counsel from inspecting the document prior to or during a scheduled deposition or for some other tactical reason.

- c. As to Interrogatories:
 - 1. An attorney should narrowly tailor special interrogatories and not use them to harass or impose an undue burden or expense on an opposing party.
 - 2. An attorney should not intentionally misconstrue or respond to interrogatories in a manner that is not truly responsive.
 - 3. When an attorney lacks a good faith belief in the merit of an objection, the attorney should not object to an interrogatory. If an interrogatory is objectionable in part, an attorney should answer the unobjectionable part.

SECTION 10 MOTION PRACTICE

An attorney should consider whether, before filing or pursuing a motion, to contact opposing counsel to attempt to informally resolve or limit the dispute.

For example:

- a. Before filing demurrers, motions to strike, motions to transfer venue, and motions for judgment on the pleadings, an attorney should engage in more than a pro forma effort to resolve the issue.
- b. In complying with any meet and confer requirement in the California Code of Civil Procedure, an attorney should speak personally with opposing counsel and engage in a good faith effort to resolve or informally limit an issue.
- c. An attorney should not engage in conduct that forces an opposing counsel to file a motion and then not oppose the motion.
- d. An attorney who has no reasonable objection to a proposed motion should promptly make this position known to opposing counsel, who then may file an unopposed motion or avoid filing a motion.
- e. After opposing a motion, if an attorney recognizes that the movant's position is correct, the attorney should promptly advise the movant and the court of this change in position.
- f. Because requests for monetary sanctions, even if statutorily authorized, can lead to the destruction of a productive relationship between counsel or parties, monetary sanctions should not be sought unless fully justified by the circumstances and necessary to protect a client's legitimate interests and then only after a good faith effort to resolve the issue informally among counsel.

**SECTION 11
DEALING WITH NONPARTY WITNESSES**

It is important to promote high regard for the profession and the legal system among those who are neither attorneys nor litigants. An attorney's conduct in dealings with nonparty witnesses should exhibit the highest standards of civility.

For example:

- a. An attorney should be courteous and respectful in communications with nonparty witnesses.
- b. Upon request, an attorney should extend professional courtesies and grant reasonable accommodations, unless to do so would materially prejudice the client's lawful objectives.
- c. An attorney 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. An attorney 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 an attorney knows that a previously scheduled deposition will or will not, in fact, go forward as scheduled, the attorney should notify all counsel.
- f. An attorney 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.

**SECTION 12
EX PARTE COMMUNICATION WITH THE COURT**

In a social setting or otherwise, an attorney should not communicate ex parte with a judicial officer on the substance of a case pending before the court, unless permitted by law.

**SECTION 13
SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION**

An attorney should raise and explore with the client and, if the client consents, with opposing counsel, the possibility of settlement and alternative dispute resolution in every matter as soon as possible and, when appropriate, during the course of litigation.

For example:

- a. An attorney should advise a client at the outset of the relationship of the availability of informal or alternative dispute resolution.
- b. An attorney should attempt to evaluate a matter objectively and to de-escalate any controversy or dispute in an effort to resolve or limit the controversy or dispute.

- c. An attorney should consider whether alternative dispute resolution would adequately serve a client's interest and dispose of the controversy expeditiously and economically.
- d. An attorney should honor a client's desire to settle the dispute quickly and in a cost-effective manner.
- e. An attorney should use an alternative dispute resolution process for purposes of settlement and not for delay or other improper purposes, such as discovery.
- f. An attorney should participate in good faith, and assist the alternative dispute officer by providing pertinent and accurate facts, law, theories, opinions and arguments in an attempt to resolve a dispute.
- g. An attorney should not falsely hold out the possibility of settlement as a means for terminating discovery or delaying trial.

SECTION 14 CONDUCT IN COURT

To promote a positive image of the profession, an attorney should always act respectfully and with dignity in court and assist the court in proper handling of a case.

For example:

- a. An attorney should be punctual and prepared.
- b. An attorney's conduct should avoid disorder or disruption and preserve the right to a fair trial.
- c. An attorney should maintain respect for and confidence in a judicial office by displaying courtesy, dignity and respect toward the court and courtroom personnel.
- d. An attorney should refrain from conduct that inappropriately demeans another person.
- e. Before appearing in court, an attorney should advise a client of the kind of behavior expected of the client and endeavor to prevent the client from creating disorder or disruption in the courtroom.
- f. An attorney should make objections for legitimate and good faith reasons, and not for the purpose of harassment or delay.
- g. An attorney should honor an opposing counsel's requests that do not materially prejudice the rights of the attorney's client or sacrifice tactical advantage.
- h. While appearing before the court, an attorney should address all arguments, objections and requests to the court, rather than directly to opposing counsel.

- i. While appearing in court, an attorney should demonstrate sensitivity to any party, witness or attorney who has requested, or may need, accommodation as a person with physical or mental impairment, so as to foster full and fair access of all persons to the court.

SECTION 15 DEFAULT

An attorney should not take the default of an opposing party known to be represented by counsel without giving the party advance warning.

For example an attorney should not race opposing counsel to the courthouse to knowingly enter a default before a responsive pleading can be filed. This guideline is intended to apply only to taking a default when there is a failure to timely respond to complaints, cross-complaints, and amended pleadings.

SECTION 16 SOCIAL RELATIONSHIPS WITH JUDICIAL OFFICERS, NEUTRALS AND COURT APPOINTED EXPERTS

An attorney should avoid even the appearance of bias by notifying opposing counsel or an unrepresented opposing party of any close, personal relationships between the attorney and a judicial officer, arbitrator, mediator or court-appointed expert and allowing a reasonable opportunity to object.

SECTION 17 PRIVACY

An attorney should respect the privacy rights of parties and nonparties.

For example:

- a. An attorney should not inquire into, attempt or threaten to use, private facts concerning any party or other individuals for the purpose of gaining an advantage in a case. This guideline does not preclude inquiry into sensitive matters relevant to an issue, as long as the inquiry is pursued as narrowly as possible.
- b. If an attorney must inquire into an individual's private affairs, the attorney should cooperate in arranging for protective measures, including stipulating to an appropriate protective order, designed to assure that the information revealed is disclosed only for purposes relevant to the pending litigation.
- c. Nothing herein shall be construed as authorizing the withholding of information in violation of applicable law.

SECTION 18 NEGOTIATION OF WRITTEN AGREEMENTS

An attorney should negotiate and conclude written agreements in a cooperative manner and with informed authority of the client.

For example:

- a. An attorney should use boilerplate provisions only if they apply to the subject of the agreement.
- b. If an attorney modifies a document, the attorney should clearly identify the change and bring it to the attention of other counsel.
- c. An attorney should avoid negotiating tactics that are abusive; that are not made in good faith; that threaten inappropriate legal action; that are not true; that set arbitrary deadlines; that are intended solely to gain an unfair advantage or take unfair advantage of a superior bargaining position; or that do not accurately reflect the client's wishes or previous oral agreements.
- d. An attorney should not participate in an action or the preparation of a document that is intended to circumvent or violate applicable laws or rules.

In addition to other applicable Sections of these Guidelines, attorneys engaged in a transactional practice have unique responsibilities because much of the practice is conducted without judicial supervision.

For example:

- a. Attorneys should be mindful that their primary goals are to negotiate in a manner that accurately represents their client and the purpose for which they were retained.
- b. Attorneys should successfully and timely conclude a transaction in a manner that accurately represents the parties' intentions and has the least likely potential for litigation.
- c. With client approval, attorneys should consider giving each party permission to contact the employees of the other party for the purpose of promptly and efficiently obtaining necessary information and documents.

SECTION 19 ADDITIONAL PROVISION FOR FAMILY LAW PRACTITIONERS

In addition to other applicable Sections of these Guidelines, in family law proceedings an attorney should seek to reduce emotional tension and trauma and encourage the parties and attorneys to interact in a cooperative atmosphere, and keep the best interest of the children in mind.

For example:

California Attorney Guidelines of Civility and Professionalism

(Abbreviated Without Examples)



The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Adopted by the Board of Governors on
July 20, 2007

- a. An attorney should discourage and should not abet vindictive conduct.
- b. An attorney should treat all participants with courtesy and respect in order to minimize the emotional intensity of a family dispute.
- c. An attorney representing a parent should consider the welfare of a minor child and seek to minimize the adverse impact of the family law proceeding on the child.

**SECTION 20
ADDITIONAL PROVISION FOR CRIMINAL LAW PRACTITIONERS**

In addition to other applicable Sections of these Guidelines, criminal law practitioners have unique responsibilities. Prosecutors are charged with seeking justice, while defenders must zealously represent their clients even in the face of seemingly overwhelming evidence of guilt. In practicing criminal law, an attorney should appreciate these roles.

For example:

- a. A prosecutor should not question the propriety of defending a person accused of a crime.
- b. Appellate counsel and trial counsel should communicate openly, civilly and without rancor, endeavoring to keep the proceedings on a professional level.

**SECTION 21
COURT PROCEEDINGS**

Judges are encouraged to become familiar with these Guidelines and to support and promote them where appropriate in court proceedings.

California Attorney Guidelines of Civility and Professionalism (Abbreviated, adopted July 20, 2007)

INTRODUCTION. As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.

These are guidelines for civility. The Guidelines are offered because civility in the practice of law promotes both the effectiveness and the enjoyment of the practice and economical client representation. The legal profession must strive for the highest standards of attorney behavior to elevate and enhance our service to justice. Uncivil or unprofessional conduct not only disserves the individual involved, it demeans the profession as a whole and our system of justice.

These voluntary Guidelines foster a level of civility and professionalism that exceed the minimum requirements of the mandated Rules of Professional Conduct as the best practices of civility in the practice of law in California. The Guidelines are not intended to supplant these or any other rules or laws that govern attorney conduct. Since the Guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence.

The Guidelines are intended to complement codes of professionalism adopted by bar associations in California. Individual attorneys are encouraged to make these guidelines their personal standards by taking the pledge that appears at the end. The Guidelines can be applicable to all lawyers regardless of practice area. Attorneys are encouraged to comply with both the spirit and letter of these guidelines, recognizing that complying with these guidelines does not in any way denigrate the attorney's duty of zealous representation.

SECTION 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.

SECTION 2. An attorney should be mindful that, as individual circumstances permit, the goals of the profession include improving the administration of justice and contributing time to persons and organizations that cannot afford legal assistance.

An attorney should encourage new members of the bar to adopt these guidelines of civility and professionalism and mentor them in applying the guidelines.

SECTION 3. An attorney should treat clients with courtesy and respect, and represent them in a civil and professional manner. An attorney should advise current and potential clients that it is not acceptable for an attorney to engage in abusive behavior or other conduct unbecoming a member of the bar and an officer of the court.

As an officer of the court, an attorney should not allow clients to prevail upon the attorney to engage in uncivil behavior.

An attorney should not compromise the guidelines of civility and professionalism to achieve an advantage.

SECTION 4. An attorney's communications about the legal system should at all times reflect civility, professional integrity, personal dignity, and respect for the legal system. An attorney should not engage in conduct that is unbecoming a member of the Bar and an officer of the court.

Nothing above shall be construed as discouraging the reporting of conduct that fails to comply with the Rules of Professional Conduct.

SECTION 5. An attorney should be punctual in appearing at trials, hearings, meetings, depositions and other scheduled appearances.

SECTION 6. An attorney should advise clients that civility and courtesy in scheduling meetings, hearings and discovery are expected as professional conduct.

In considering requests for an extension of time, an attorney should consider the client's interests and need to promptly resolve matters, the schedules and willingness of others to grant reciprocal extensions, the time needed for a task, and other relevant factors.

Consistent with existing law and court orders, an attorney should agree to reasonable requests for extensions of time that are not adverse to a client's interests.

SECTION 7. The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

SECTION 8. Written materials directed to counsel, third parties or a court should be factual and concise and focused on the issue to be decided.

SECTION 9. Attorneys are encouraged to meet and confer early in order to explore voluntary disclosure, which includes identification of issues, identification of persons with knowledge of such issues, and exchange of documents.

Attorneys are encouraged to propound and respond to formal discovery in a manner designed to fully implement the purposes of the California Discovery Act.

An attorney should not use discovery to harass an opposing counsel, parties or witnesses. An attorney should not use discovery to delay the resolution of a dispute.

SECTION 10. An attorney should consider whether, before filing or pursuing a motion, to contact opposing counsel to attempt to informally resolve or limit the dispute.

SECTION 11. It is important to promote high regard for the profession and the legal system among those who are neither attorneys nor litigants. An attorney's conduct in dealings with nonparty witnesses should exhibit the highest standards of civility.

SECTION 12. In a social setting or otherwise, an attorney should not communicate ex parte with a judicial officer on the substance of a case pending before the court, unless permitted by law.

SECTION 13. An attorney should raise and explore with the client and, if the client consents, with opposing counsel, the possibility of settlement and alternative dispute resolution in every case as soon possible and, when appropriate, during the course of litigation.

SECTION 14. To promote a positive image of the profession, an attorney should always act respectfully and with dignity in court and assist the court in proper handling of a case.

SECTION 15. An attorney should not take the default of an opposing party known to be represented by counsel without giving the party advance warning.

SECTION 16. An attorney should avoid even the appearance of bias by notifying opposing counsel or an unrepresented opposing party of any close, personal relationships between the attorney and a judicial officer, arbitrator, mediator or court-appointed expert and allowing a reasonable opportunity to object.

SECTION 17. An attorney should respect the privacy rights of parties and non-parties.

SECTION 18. An attorney should negotiate and conclude written agreements in a cooperative manner and with informed authority of the client.

In addition to other applicable Sections of these Guidelines, attorneys engaged in a transactional practice have unique responsibilities because much of the practice is conducted without judicial supervision.

SECTION 19. In addition to other applicable Sections of these Guidelines, in family law proceedings an attorney should seek to reduce emotional tension and trauma and encourage the parties and attorneys to interact in a cooperative atmosphere, and keep the best interests of the children in mind.

SECTION 20. In addition to other applicable Sections of these Guidelines, criminal law practitioners have unique responsibilities. Prosecutors are charged with seeking justice, while defenders must zealously represent their clients even in the face of seemingly overwhelming evidence of guilt. In practicing criminal law, an attorney should appreciate these roles.

SECTION 21. Judges are encouraged to become familiar with these Guidelines and to support and promote them where appropriate in court proceedings.

ATTORNEY'S PLEDGE. I commit to these Guidelines of Civility and Professionalism and will be guided by a sense of integrity, cooperation and fair play.

I will abstain from rude, disruptive, disrespectful, and abusive behavior, and will act with dignity, decency, courtesy, and candor with opposing counsel, the courts and the public.

As part of my responsibility for the fair administration of justice, I will inform my clients of this commitment and, in an effort to help promote the responsible practice of law, I will encourage other attorneys to observe these Guidelines.

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(Signature)

(Date)

(Print Name)

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Ethics and Civility – The Importance of Professionalism and Respect

By WENDY L. PATRICK



Patrick

You file a meritorious motion to continue the jury trial for a month. Despite your documented best efforts, you have been unable to procure the information you need to be ready to try the case. Although she acknowledges your showing of due diligence with respect to the information sought, your opposing counsel objects to your request for a continuance. Despite the fact that neither she nor her client will be inconvenienced or prejudiced in any way by the delay, she tells you that she is objecting simply "because she can." You wonder whether or not her conduct in exercising her right to object without reason violates any applicable ethics rules. At the very least, you recognize her conduct as blatantly uncivil. But is there any remedy?

This article will discuss some of the law and ethical rules that may apply to behavior from opposing counsel that is uncivil and unprofessional. It will discuss the California Rules of Professional Conduct, the California Business and Professions Code, and relevant case law.

Deceiving Opposing Counsel

Case law addresses the issue of whether an attorney is permitted to deceive his or her opposing counsel. In *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, the court held that an attorney, negotiating at arm's length with an adversary in a merger transaction, was not immune from liability to opposing party for fraud for not disclosing "toxic stock" provision. "A fraud claim against a lawyer is no different from a fraud claim against anyone else." (*Id.* at 291.) "Accordingly, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient." (*Ibid.*, citation omitted.) The court stated that while a "casual expression of belief" that the form of financing was "standard" and was not actionable, active concealment of material facts, such as the existence of a "toxic stock" provision, is actionable fraud. (*Id.* at 291-294.)

Cicone v. URS Corp. (1986) 183 Cal.App.3d 194, 203 held an attorney liable to opposing counsel for making a false statement to induce the closure of a transaction. In *Monroe v. State Bar of Cal.* (1961) 55 Cal.2d 145, 152, the court stated that "Intentionally deceiving opposing counsel is ground for disciplinary action." In *Coviello v. State Bar of Cal.* (1955) 45 Cal.2d 57, 65, the court held that the State Bar may impose discipline on an attorney for intentionally deceiving opposing counsel. "It is not necessary that actual harm result to merit disciplinary action where actual deception is intended and shown."

Some lawyers are genuinely unaware of the existence of ethical duties that implicate their conduct toward opposing counsel. To this end, lawyers should be familiar with California Rule of Professional Conduct 3-110, Failing to Act Competently, which states that a lawyer "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." "Competence" is described in subsection (B) as "to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service." Misconduct when handling a case may result in circumstances that result in an allegation of incompetent representation. An attorney may be subject to State Bar discipline for violating the California Rules of Professional Conduct. (RPC 1-100(A)).

Duty of Candor

In addition to case law, California lawyers are also bound by rules regarding the duty of candor found in the California Business and Professions code as well as the California Rules of Professional Conduct. California Business and Professions Code Section 6106 states that, "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."



MCLE SELF-ASSESSMENT TEST

June 2012

SAMPLE TEST QUESTIONS

BELOW ARE SAMPLE QUESTIONS FROM THIS MONTH'S MCLE SELF-ASSESSMENT TEST.

1. A lawyer may face criminal liability for conduct tending to interrupt court proceedings.

True False

2. A fraud claim may be a valid cause of action against a lawyer who deceives other parties in the case.

True False

3. An attorney may be liable to the opposing attorney as a result of making false statements.

True False

To complete the test, you must pay a \$25 fee online. Click the button below and follow the onscreen instructions.

TAKE MCLE TEST

California Business and Professions Code Section 6068 subsection (d) mandates the duty of candor by stating that it is the duty of an attorney to "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge . . . by an artifice or false statement of fact or law." Lest these duties be taken lightly, California Business and Professions Code Section 6103 explains that a violation of a lawyer's duties as an attorney may constitute cause for suspension or disbarment.

While California has a rule regarding candor in the courtroom (California Rule of Professional conduct 5-200), there is no specific rule of professional conduct governing candor to opposing counsel. When the California Rules are silent on a particular issue, we look to the ABA Model Rules for ethical guidance, although ABA Rules and Opinions are not binding authority in California. Regarding ABA formal opinions, case law holds that while an ABA formal opinion "does not establish an obligatory standard of conduct imposed on California lawyers," the ABA Model Rules may be considered as a "collateral source" where there is no direct ethical authority in California. [1]

An attorney's statements to opposing counsel are covered by the ABA Rule that discusses a lawyer's duty of candor generally. Model Rule 4.1, Truthfulness in Statements to Others, also covers the duty of candor. Rule 4.1 states that: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

Regarding the issue of affirmative misrepresentation versus passive failure to correct misinformation, Rule 4.1 Comment [1] states that while an attorney must be truthful in his or her dealings with others in representing a client, he or she "generally has no affirmative duty to inform an opposing party of relevant facts." The Comment goes on, however, to state that "[a] misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

Comment [2] clarifies that Rule 4.1 applies to statements of fact. Regarding criminal or fraudulent behavior by the client, Rule 4.1 Comment [3] reminds lawyers that "[u]nder Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6."

ABA Rule 3.4, Fairness To Opposing Party And Counsel, in pertinent part prevents a lawyer from (a) unlawfully obstructing the access of another party to evidence or from unlawfully destroying, concealing, or altering an item which has potential evidentiary value. It also prevents a lawyer from (b) falsifying evidence, or assisting or counseling a witness to provide false testimony. It also prevents a lawyer from offering a witness any type of inducement that is legally prohibited. Relevant to the client who may be in possession of relevant admissible evidence, the rule also prohibits a lawyer from (f) requesting that a person who is not a client "refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."

Model Rule 8.4, Misconduct, also includes several provisions relating to a lawyer's duty of candor. Relevant provisions state that it is professional misconduct for a lawyer to "(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, or (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

The ABA also includes a remedy for the misconduct of other lawyers. Rule 8.3, Reporting Professional Misconduct mandates lawyers to report professional misconduct of both judges and other lawyers. The Rule in paragraph (a) provides that a lawyer "who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

Interference with the Administration of Justice

Even the most zealous of attorneys is an officer of the court and has "a paramount obligation to the due and orderly administration of justice." (*Chula v. Superior Court In and For Orange County* (1952) 109 Cal.App.2d 24, 39. If opposing counsel's unprofessional behavior occurs in the courtroom, he or she may be subject to sanctions by the judge.

California Code of Civil Procedure 128 states in pertinent part "that (a) Every court shall have the power to do all of the following: (1) To preserve and enforce order in its immediate presence; (2) To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority; (3) To provide for the orderly conduct of proceedings before it, or its officers; (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein; (5) To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.

In-court uncivil behavior may rise to the level of conduct actionable by a court's power of contempt if it is severe enough. **California Code of Civil Procedure 1209 lists among the acts or omissions that constitute contempt:** "Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding" and "A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding."

Another relevant section is Penal Code Section 166, which describes criminal liability for contempt of court. Several relevant sections describe actions which constitute contempt of court violations that are punishable as misdemeanors. These include: "(1) Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in the immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due to its authority; (2) Behavior as specified in paragraph (1) committed in the presence of any referee, while actually engaged in any trial or hearing, pursuant to the order of any court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceedings authorized by law; (3) Any breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of any court."

Conclusion

In summary, while lawyers can and should vigorously represent their clients, they may face ethical sanctions if they do so at the expense of misleading opposing counsel or behaving imprudently in court. Knowledge of the applicable ethical and legal rules governing the proper relationships between lawyers will permit the savvy lawyer to represent their client effectively, as well as ethically.

* Disclaimer: the information in this column is intended to be informational only and does not constitute legal advice. Please shepardize all case law before using.

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Wendy L. Patrick is Chair of the California State Bar Committee on Professional Responsibility and Conduct (COPRAC) and immediate past Chair of the San Diego County Bar Association Ethics Committee. She has had her own ethics column in the San Diego Daily Transcript for over a decade and writes and lectures on ethics nationally and internationally. Ms. Patrick is also a San Diego County Deputy District Attorney in the Sex Crimes and Stalking Division named by her peers as one of the Top Ten criminal attorneys in San Diego by the San Diego Daily Transcript and a 2010 Superlawyer.

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[1] *State Compensation Insurance Fund v. WPS Inc. (State Fund)* (1999) 70 Cal.App.4th 644, 656.

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The College of Labor and Employment Lawyers and the National Academy of Arbitrators'
Panel on Civility: Questions for our Panel of Judges

1. Is compliance with the Rules of Civil Procedure and the Rules of Professional Conduct enough, or do you expect some higher level of conduct and civility from the lawyers who appear before you?
2. How do civility and professionalism impact the pre-trial motion practice in your court?
3. How does civility and professionalism impact the operation of your court room and the results achieved by litigants?
4. What is the most important thing attorneys can do to increase civility and professionalism in your court?
5. Why is civility and professionalism important?
6. What are some of the biggest breaches of civility you have observed and how did you handle these cases?
7. Do you refer ethical breaches to the Bar or address them otherwise?
8. What advice do you have for younger lawyers regarding civility and professionalism?
9. We often hear that the other lawyers are bullies or unethical or are bending the rules, so what advice do you have for lawyers for whether to maintain civility in the face of such misconduct and if so, how?