

Hang Loose:
Nuts-and-Bolts of
Civility, Stipulations, and
Professional Courtesies

California Bankruptcy Forum
May 17, 2024 (3:15 to 4:15 p.m.)
Ritz-Carlton Bacara, Santa Barbara

Hon. Neil W. Bason, U.S. Bankruptcy Court, Central District of California
Peter Fear, Fear Waddell, P.C. (Fresno)
J. Scott Bovitz, Bovitz & Spitzer (Los Angeles)
Brent Meyer, Meyer Law Group LLP (San Francisco), producer
Yian Chen, FTI Consulting, producer

Hon. Neil W. Bason

Boston University School of Law, J.D. Magna Cum Laude (1988)

Law Clerk, Chief Justice Paul J. Liacos, Massachusetts Supreme Judicial Court (1988-1989)

Law Clerk, Hon. Dennis Montali (U.S. Bankruptcy Court, Northern District of California, and Bankruptcy Appellate Panel of the Ninth Circuit) (2000-2008)

Private commercial bankruptcy and insolvency practice, including a focus on secured creditor representation and substantial representation of trustees, receivers, debtors/borrowers, guarantors, unsecured creditors, prospective purchasers of assets out of bankruptcy, parties to executory contracts and unexpired leases, equity holders, and other parties in interest (1989-2000, 2008-2011)

United States Bankruptcy Judge, Central District of California, Los Angeles (2011-present)

Commuted from Los Angeles to San Diego (on a road bike) to attend a CBF conference

Peter Fear, Fear Waddell, P.C.

Peter L. Fear represents individuals, businesses, farmers, consumers, creditors, trustees, and parties in interest in bankruptcy matters. Mr. Fear serves as a chapter 7 bankruptcy trustee in the Fresno area. Fear is a top-rated attorney on Super Lawyers and has been certified by the California Board of Legal Specialization in Bankruptcy Law since 2014.

California Bankruptcy Forum: Treasurer (2011); Secretary (2012); Vice President (2013); and Past President (2014-2015)

Lawyer Representative to the Ninth Circuit Judicial Conference (2015-2019)

San Joaquin Valley Chapter of the Federal Bar Association: Treasurer (2013-2014), Vice President (2015), and President (2016)

Central California Bankruptcy Association: Second Vice President (2007); First Vice President/Institute Chair (2008); and President (2009)

J. Scott Bovitz, Bovitz & Spitzer

Board Certified -- Business Bankruptcy Law -- The American Board of Certification
(former chair)

Certified Specialist -- Bankruptcy Law -- State Bar of California Board of Legal Specialization
(former chair)

Rated "AV Preeminent" by Martindale-Hubbell

Southern California "Super Lawyer" in Bankruptcy & Creditor/Debtor Rights

Fellow, American College of Bankruptcy

Former Adjunct Professor: California Western School of Law; University of Nevada, Las Vegas, William S. Boyd School of Law; and Loyola Law School

California Bankruptcy Forum: co-education chair (2001); co-conference chair (2004)

It is an honor to be an attorney, remember?



https://commons.wikimedia.org/wiki/File:Helena_Normanton.jpg

Helena Florence Normanton (1882-1957) was the second woman to be called to the Bar of England and Wales, and the first woman to practice as a barrister in England.

Your adversary is (probably) bright and ethical

Prof. Nancy Rapoport, University of Nevada, Las Vegas, William S. Boyd School of Law,
Training Law Students to Maintain Civility, 98 N.C. L. REV. 1143, 1145 (2020)

Instead of seeking first to understand—or even to imagine a world in which intelligent people’s opinions could differ from our own—we assume that those who hold different views are uneducated, stupid, delusional, or evil.

That’s a harsh worldview, and it’s destined to perpetuate the discord that so many of us are experiencing. It’s also destined to make the practice of law miserable.

If we imagine that our adversaries are lunatics, idiots, cheats, or boors, the choices that we’ll make when we deal with them are vastly different from the choices that we’d make if we assumed that they were just as bright and just as ethical as we are.

Your optimistic opponent (and the judge) are working for a living (just like you)

Optimistic Overconfidence: A Study Of Law Student Academic Predictions,

Sam Barder, Jennifer K. Robbennolt, University Of Illinois Law Review Online, 2023 U. Ill. L. Rev. Online 106

Humans tend to be both optimistic and overconfident. ...successful law students tend to be pessimistic and that a healthy dose of pessimism can be useful for practicing lawyers ... Professionals, across a wide variety of fields, have a tendency toward overconfidence. For example, a study of investment fund managers found that 74% believed they were above average at their jobs; most of the rest thought they were at least average. ... **Lawyers have a professional responsibility to “[d]evelop[] a realistic sense of the limits of [their] own skills and knowledge.”** Lawyers may, therefore, be “among those in particular need of knowledge about where their expertise ends and the need for caution, advice, or research begins.”

Lawyers can be (should be) civil, courteous, and good persons

Prof. Nancy Rapoport, University of Nevada, Las Vegas, William S. Boyd School of Law,
Training Law Students to Model Civility When Social Media Makes Civility Harder to Maintain (2023 working draft)

I defined civility as “a behavior [that] demonstrates respect for others’ views—for maintaining courtesy in the face of deep disagreement.” ... Good lawyers craft careful arguments after considering the other’s side’s best points, and **good lawyers find ways to work with (or across the table from) those with whom they don’t agree, or don’t even like.** We do our students no favors when we shy away from teaching—and modeling—those skills.

Get to know the attorneys in your local area

Go to local bar association functions – in person.

Lawyers are well educated, travel to fun places, and like to eat out (just like you).

Sit next to people you don't know (yet). Learn about their interests and hobbies.

These people are or will become your adversaries. It will be hard(er) for your friends to be discourteous to you when they end up on the other side in a contested matter or adversary proceeding.

“Thanks for asking. I’m a musician.”



We all know, litigation is contentious

Snoeck v. Exaktime Innovations, Inc., 96 Cal. App. 5th 908, 925, 314 Cal. Rptr. 3d 569, 584 (2023), reh'g denied (Oct. 25, 2023), review denied (Jan. 24, 2024)

Litigation by its nature is contentious; the parties are in court because they do not agree. One side's frustration with the other side's legal theory is understandable. Certainly, attorneys must advocate for their clients' positions, point out the flaws in opposing counsel's argument, and express disagreement with the court.

But Snoeck's **counsel's frustration did not give him a license to personally attack defense counsel and belittle the trial court. Smith's incivility does not reflect persuasive advocacy.** A reasonable attorney would not believe that communicating with opposing counsel in such a way would “bring them around,” so to speak. **Nor does antagonizing the trial court help further one's client's cause.** In short, Smith's beratement of opposing counsel and belittling of the trial court were unnecessary to advocate zealously on Snoeck's behalf.

Civility: a lawyer's duty to her client

Patrick Kelly, *Civility: The time has come for civility to be added to our attorney oath*, <https://www.calbarjournal.com/July2013/Opinion/FromthePresident.aspx> (2013)

Civility is not only important as a part of our reputation; it is part of our duty to our clients. Why do I say that? It's simple. **Not being civil results in contentious situations that not only challenge our psyche, they burn up time and waste our clients' assets – and our clients' time as well.** Therefore, I suggest that incivility is jeopardizing our professional responsibility to our clients. Civility does not require that we communicate weakness or "roll over" to the whim of our opponent. You can stand your ground where necessary in a courteous and professional way. ... Unfortunately, as a litigator, I have all too often witnessed attorneys who claim to be zealously representing their clients but who in fact cross the civility line. Such activities include **needless and ineffective histrionics during depositions, refusal to grant the other side an extension of time for no good reason, confirming in writing positions that were never taken and even trying to bully the judge in his or her own courtroom.**

ABA on what civility is (not)

https://www.americanbar.org/groups/business_law/resources/business-law-today/2014-september/civility-as-the-core-of-professionalism/ (2014)

Civility *is not the same as agreement*. The presence of civility does not mean the absence of disagreement. In fact, underlying the codes of civility is the assumption that people will disagree. The democratic process thrives on dialogue and dialogue requires disagreement. Professor Stephen Carter of Yale Law School has stated, in one of his many writings on civility, “[a] nation where everybody agrees is not a nation of civility but a nation without diversity, waiting to die.”

Civility *is not the absence of criticism*. Respect for the other person or party may in fact call for criticism. For example, a law firm partner who fails to point out an error in a young lawyer’s brief isn’t being civil – that partner isn’t doing his or her job.

https://www.americanbar.org/groups/business_law/resources/business-law-today/2014-september/civility-as-the-core-of-professionalism/ (2014)

Civility *is not the same as liking someone*. It is a myth that civility is more possible in small communities where everyone knows each other. Knowing or liking the other person is not a prerequisite for civility. Civility compels us to show respect even for strangers who may be sharing our space, whether in the public square, in the office, in the courtroom, or in cyberspace.

Civility *should not be equated with politeness or manners alone*. Although impoliteness is almost always uncivil, good manners alone are not a mark of civility. Politely refusing to serve someone at a lunch counter on the basis of skin color, or cordially informing a law graduate that the firm does not hire women, is not civil behavior.

Nevada's Creed of Professionalism and Civility (i)

<https://nvbar.org/for-lawyers/ethics-discipline/creed-of-professionalism-and-civility/>
(Revised June 21, 2023)

In fulfilling our duty to represent a client vigorously as lawyers, we will honor our obligations to the administration of justice in a rational, peaceful, and efficient manner. We remain committed to the rule of law as the foundation for a just and peaceful society.

Lawyers should exhibit courtesy, candor, and cooperation when participating in the legal system and dealing with the public. In addition, **lawyers should demonstrate civility, professional integrity, personal dignity, and respect because these qualities are essential to the fair administration of justice and conflict resolution.**

Nevada's Creed of Professionalism and Civility (ii)

<https://nvbar.org/for-lawyers/ethics-discipline/creed-of-professionalism-and-civility/>
(Revised June 21, 2023)

We will treat **all participants of the legal system in a civil and courteous manner**, not only in court, but also in all other written and oral communications, refraining from disparaging personal remarks or acrimony.

We will not, absent good cause, **attribute bad motives or improper conduct to other counsel nor bring the profession into disrepute by unfounded accusations of impropriety.**

We will **stipulate to undisputed matters** unless we have a good-faith basis not to stipulate.

Nevada's Creed of Professionalism and Civility (iii)

<https://nvbar.org/for-lawyers/ethics-discipline/creed-of-professionalism-and-civility/>
(Revised June 21, 2023)

We will **explain to our clients that cooperation is the professional norm**. We will explain how procedural agreements do not compromise the clients' interests.

Lawyer's duties to the (district) court (part i)

Central District of California, *Civility and Professionalism Guidelines*,
<https://www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines> (January 10, 2022)

We will **speak and write civilly and respectfully** in all communications with the court.

We will **act and speak civilly to court marshals, court clerks, court reporters, secretaries, and law clerks** with an awareness that they, too, are an integral part of the judicial system. [Bovitz: I can't imagine why you would be rude to these folks.]

In civil actions, **we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.**

Lawyer's duties to the (district) court (part ii)

Central District of California, ***Civility and Professionalism Guidelines***,
<https://www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines> (January 10, 2022)

Unless directly and necessarily in issue, **we will not disparage the intelligence, morals, integrity, or personal behavior of our adversaries** before the court, either in written submissions or oral presentations.

We will not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.

Lawyer's duties to the (district) court (part iii)

Central District of California, ***Civility and Professionalism Guidelines***,
<https://www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines> (January 10, 2022)

We will not write letters for the purpose of ascribing to opposing counsel a position he or she has not taken, or to create "a record" of events that have not occurred. [Bovitz: This one made me laugh out loud.]

We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, **vacations, seminars, or other functions that produce good faith calendar conflicts** on the part of other counsel, where it is possible to do so without prejudicing the client's rights.

Los Angeles County Superior Court

Appendix 3.A

<https://www.lacourt.org/courtrules/CurrentRulesAppendixPDF/Chap3Appendix3A.PD>

Guidelines For Civility In Litigation. ...

(a)(2) Continuances...After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.

(b)(3) Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.

Vacations are important to Bovitz (and you)



Borobudur, Indonesia
(bovitz.com)

Hon. Barry Russell's courtroom guidelines

Notice Of Judge Barry Russell's Procedures For Hearings,

<https://www.cacb.uscourts.gov/judges/honorable-barry-russell> (September 28, 2023)

All participants (whether attending in person or remotely) must observe the formalities of the courtroom, **exercise civility**, and otherwise conduct themselves in a manner consistent with the dignity of the Court.

Civility? Zealous representation?

Snoeck v. Exaktime Innovations, Inc., 96 Cal. App. 5th 908, 922 [footnote 9], 314 Cal. Rptr. 3d 569, 582 (2023), reh'g denied (Oct. 25, 2023), review denied (Jan. 24, 2024)

The California Civility Task Force's (CCTF) initial September 2021 report recommended the State Bar amend its disciplinary rules to prohibit “**repeated incivility and clarify[] that civility is not inconsistent with zealous representation.**” Cal. Civility Task Force, *Beyond the Oath: Recommendations for Improving Civility* (Sept. 2021) ... After receiving public comment on such a proposed rule, the Office of Professional Competence asked the State Bar Board of Trustees to approve, among other amendments, adding rule 8.4.2 to the Rules of Professional Conduct, which would prohibit a lawyer from engaging in incivility in the practice of law.

Civility is a component of professionalism

Karton v. Ari Design & Constr., Inc., 61 Cal. App. 5th 734, 747, 276 Cal. Rptr. 3d 46, 55 (2021), as modified on denial of reh'g (Mar. 29, 2021)

Attorney skill is a traditional touchstone for deciding whether **to adjust a lodestar**. ... Civility is an aspect of skill. Excellent lawyers deserve higher fees, and excellent lawyers are civil. Sound logic and bitter experience support these points. **Civility is an ethical component of professionalism.** Civility is desirable in litigation, not only because it is ethically required for its own sake, but also because it is socially advantageous: it lowers the costs of dispute resolution. **The American legal profession exists to help people resolve disputes cheaply, swiftly, fairly, and justly.** Incivility between counsel is sand in the gears. Incivility can rankle relations and thereby increase the friction, extent, and cost of litigation. Calling opposing counsel a liar, for instance, can invite destructive reciprocity and generate needless controversies. Seasoning a disagreement with avoidable irritants can turn a minor conflict into a costly and protracted war. All those human hours, which could have been put to socially productive uses, instead are devoted to the unnecessary war and are lost forever. **All sides lose, as does the justice system, which must supervise the hostilities.**

CLA and CJA report

Initial Report of the California Civility Task Force

A joint project of the California Lawyers Association and the California Judges Association

<https://caljudges.org/docs/PDF/California%20Civility%20Task%20Force%20Report%209.10.21.pdf> (September 2021)

Bullying, intimidation, and nastiness have too often replaced discussion, negotiation and skillful, hard-fought advocacy. We have reached the point where it has become increasingly necessary to remind some of our number that “Objectifying or demeaning a member of the profession, especially when based on gender, race, sexual preference, gender identity, or other such characteristics, is uncivil and unacceptable.” (*Briganti v. Chow* (2019) 42 Cal.App.5th 504.)

“The timbre of our time has become unfortunately aggressive and disrespectful. Language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse. This isn’t who we are.” (*In re Mahoney* (2021) 65 Cal.App.5th 376.) We are professionals. **We are officers of the court.** We are governed by Rules of Professional Conduct, or in the case of judges, Canons of Ethics. We are not just vendors or suppliers who come into the court to do business; we are justice’s lifeblood. The judicial system is not a collection of buildings, it’s a collection of people and principles. And we have been entrusted with its safekeeping.

Of course, leave the stun guns at home

Crawford v. JPMorgan Chase Bank, N.A., 242 Cal. App. 4th 1265, 1266-1267, 195 Cal. Rptr. 3d 868, 870 (2015), as modified on denial of reh'g (Jan. 4, 2016)

The practice of law can be abundantly rewarding, but also stressful. The **absence of civility displayed by some practitioners heightens stress and debases the legal profession**. Those attorneys who allow their personal animosity for an opposing counsel or an opposing party to infect a case damage their reputations and blemish the dignity of the profession they have taken an oath to uphold. ...

Here the practice of law became more than stressful; it was dangerous. An **attorney representing himself threatened defendants' counsel with pepper spray and a stun gun at a deposition**. When defendants moved for terminating sanctions, plaintiff filed an opposition that was **openly contemptuous of the trial court**. Such conduct can have consequences. (See *In re Koven* (2005) 134 Cal.App.4th 262, 35 Cal.Rptr.3d 917.) The trial court granted defendants' motion for terminating sanctions. Plaintiff appeals the ensuing judgment. We affirm.

Remember that opposing counsel is not the opposing party.

It is not YOUR case; it is your client's case.

Incivility can increase litigation costs

Karton v. Ari Design & Constr., Inc., 61 Cal. App. 5th 734, 738, 741-742, 276 Cal. Rptr. 3d 46, 49 (2021), as modified on denial of reh'g (Mar. 29, 2021)

Trial judges deciding motions for attorney fees properly may consider whether the attorney seeking the fee has become personally embroiled and has, therefore, overlitigated the case. Similarly, judges permissibly may consider whether an attorney's incivility in litigation has affected the litigation costs. ...

The trial court commented on the Kartons' lack of civility in their briefing. "The briefing filed by [the Kartons'] counsel was replete with attacks on defense counsel such as that defense counsel filed 'knowingly false claims of witness tampering,' 'her comments were frivolous,' something was 'typical of the improper tactics employed by defendants and their counsel'. [¶] It was really offensive to me, the attacks made in this case."

Do not interrupt the judge

Karton v. Ari Design & Constr., Inc., 61 Cal. App. 5th 734, 742, 276 Cal. Rptr. 3d 46, 52 (2021), as modified on denial of reh'g (Mar. 29, 2021)

The court asked Karton, “Can you not interrupt me? I would appreciate your letting me finish my sentence.” Karton apologized.

Don't waste the judge's time on small stuff

2:20-cv-00756-RDP-HNJ Document 140 Filed 01/13/23

“Tomorrow and tomorrow and tomorrow,” writes our language’s finest craftsman, **“creeps in this petty pace from day to day.”** William Shakespeare, *The Tragedy of MacBeth*, Act V, Scene V (1623). These are the words the Bard penned centuries ago in this play set in the cavernous stone hallways of Inverness Castle. “Tomorrow” and “petty.” ... And, in the context of this case, “petty” hardly does justice to counsels’ behavior. Although **counsel have been admonished repeatedly over the course of this litigation to behave in a manner befitting their profession**, it seems that every time chambers receives a phone call or filing from them, the bar manages to be lowered further – and further. ... In the Motion, **Defendants seek to strike Plaintiff’s opposition brief because -- and the court is not making this up -- it was filed fifteen minutes late. It was due to be filed by 5:00 p.m. It was not filed until 5:15 p.m.** Fifteen minutes. It seems like such a short time interval. ... Defendants’ Motion to Strike ... is **DENIED**.

Does rude behavior help your client?

John Sean Doyle, ***Creating a Culture of Civility in the Practice of Law***,
<https://www.lawpracticetoday.org/article/culture-civility-practice-law/> (January 19, 2019)

Rude and uncivil behavior is not always the product of mindlessness. Some attorneys see it as part of their job to use whatever they can to zealously represent their client, even if it means creating unwarranted delays, undermining or frustrating opposing counsel, or even insulting or threatening behavior. A creative, unscrupulous lawyer can do any number of uncivil and unprofessional things without triggering disciplinary action. **Sometimes these strategies work.** However, it would be disingenuous to say these types of behaviors are necessary for effective advocacy. Research has shown that business people who treat one another with respect and in good faith do better most of the time. After surveying data across over 3,500 business units, Wharton psychologist Adam Grant found that most of the time, these “givers,” those who contribute to others without seeking anything in return, get the best results. **Contrary to the words of Michael Corleone, acting like a jerk in the practice of law is not “strictly business.”** It is personal. It reflects who we are as a person.

Michael Corleone

https://en.wikipedia.org/wiki/Michael_Corleone

Michael Corleone is a fictional character and the protagonist of Mario Puzo's 1969 novel *The Godfather*. In the three *Godfather* films, directed by Francis Ford Coppola, Michael was portrayed by Al Pacino, for which he was twice-nominated for Academy Awards. Michael is the youngest son of Vito Corleone, a Sicilian immigrant who builds a Mafia empire. Upon his father's death, Michael succeeds him as the don of the Corleone crime family.



Why would you ever insult the judge?

Snoeck v. Exaktime Innovations, Inc., 96 Cal. App. 5th 908 [footnote 12], 924, 314 Cal. Rptr. 3d 569, 584 (2023), reh'g denied (Oct. 25, 2023), review denied (Jan. 24, 2024)

We also take issue with Snoeck's accusation that this court has “sat on” and is “slow-playing this appeal” in his petition to transfer filed with the California Supreme Court. Snoeck initially missed the deadline to file his opening brief. The case was not fully briefed until April. This court set the matter for argument on the first date available considering other pending matters and court business.

How is this diatribe going to help plaintiff's case (here or on appeal)?

[The Court's order provides, in 2:23-ap-01093-BR]

It is obvious that [plaintiff, representing herself] has a habit of vilifying anyone with whom she disagrees, both in her pleadings as well in Court hearings.

... in her unilateral status report regarding her § 523(a)(6) complaint, Ms. Doe makes more of her outrageous personal attacks on the defendant, this Court, this Court's Courtroom Deputy and the Clerk's Office staff. ...

[The Court finds that plaintiff has filed the following:]

The **dementia-addled, cognitively-impaired** individual acting as judge must be removed. He has no credibility; he is **just taking up space** and interfering [sp.] in a case. ...

Any **first year law student** who is ethical and intelligent **could do 100% better.** ...

With 13 judges in 10 cases, creditor has never seen such **a clown show** as this judge and his clerk with her cohorts at the filing window; endless **incompetence and corruption, bias and inanity.**

They willfully interfere in the case, obstruct creditor's statutory rights, are **completely unprofessional**, and fail to even veil their efforts to prejudice creditor.

A reasonable person would say this judge suffers **cognitive-impairment insanity, is biased, corrupt**, and because of that allows corruption to fester all around him; he **should be imprisoned** for interfering [sp.] in creditor's 14th Amendment equal protection constitutional rights.

Negative multiplier to lodestar (fee award)

Snoeck v. Exaktime Innovations, Inc., 96 Cal. App. 5th 908, 926-927, 314 Cal. Rptr. 3d 569, 585-586 (2023), reh'g denied (Oct. 25, 2023), review denied (Jan. 24, 2024)

The record supports the trial court's implied finding that **Smith's “repeated and apparently intentional lack of civility throughout the entire course of this litigation” —and seeming personal embroilment in the matter—resulted in inefficient, fractious, and thus more costly, litigation.** ... we do not agree with Snoeck that the trial court had no authority to reduce the lodestar based on incivility unless the incivility caused an increase in specific costs. As the court in *Karton* noted, **“Civility is an aspect of skill.”** (*Karton*, *supra*, 61 Cal.App.5th at p. 747, 276 Cal.Rptr.3d 46.) Smith seems to ignore this point—that his incivility reflects on his skill as a professional—a factor our high court has stated may be considered in adjusting the lodestar. (*Ketchum*, *supra*, 24 Cal.4th at p. 1132, 104 Cal.Rptr.2d 377, 17 P.3d 735 [trial court may adjust the lodestar based on “the skill displayed in presenting” the legal issues]; *Karton*, at p. 747, 276 Cal.Rptr.3d 46 [noting “[a]ttorney skill is a traditional touchstone for deciding whether to adjust a lodestar,” which includes civility].)

Snoeck v. Exaktime Innovations, Inc., 96 Cal. App. 5th 908, 928, 314 Cal. Rptr. 3d 569, 587 (2023), reh'g denied (Oct. 25, 2023), review denied (Jan. 24, 2024)

The evidence also supports the trial court's implied finding that plaintiff's counsel presented the issues with less skill—through his incivility—than would be expected of comparably experienced attorneys charging \$750 per hour who conducted themselves with civility. Under *Ketchum* and *Karton*, the **trial court thus had discretion to reduce the lodestar figure based on counsel's skill reflected by his incivility**. And, as we discussed, the record supports the court's implied finding that **an attorney of similar experience would not have believed making personal attacks on opposing counsel, and repeating those accusations to the court, would be an effective strategy to persuade opposing counsel its position was wrong or to persuade the court his client's position was right.**

Is the court in the best position to “clamp down”?

Hon. Scott Clarkson, *27 Articles for Bankruptcy Judges*, p. 25, American Bankruptcy Institute (2024)

Suggest early meet-and-confer sessions between counsels and remind them that status reports are not adversarial; there is room for alternative positions in all reports. Invite the counsels to (follow the rules and) create discovery dispute stipulations. Demand that they visit and **come to terms early with undisputed facts and law, and informal discovery**. Even suggest that random acts of incivility may be costly.

A point on incivility: Clamp down. Don't permit it in your court or in pleadings; stop it in its tracks. Call offenders out, and explain that **interruptions during opposing counsel's arguments**, sexism, racism, bullying and *ad hominem* attacks will not be tolerated.

Contempt authority of bankruptcy court

In re Markus, No. 21-2238, 2023 WL 5597434, at *5 (2d Cir. Aug. 30, 2023)

The issue of whether a bankruptcy court has inherent authority to impose sanctions in the context presented here -- non-nominal civil contempt sanctions -- is one of first impression in our Circuit.

But “we do not write on a blank slate.” *Rosellini v. U.S. Bankr. Ct. (In re Sanchez)*, 941 F.3d 625, 627 (2d Cir. 2019) (per curiam) (“*Sanchez*”). Indeed, as explained below, **a bankruptcy court's inherent civil contempt authority is well-supported by existing precedent** in analogous contexts, and, in this case, the bankruptcy court made the requisite findings to warrant the imposition of civil contempt sanctions pursuant to its inherent authority.

In re Markus, No. 21-2238, 2023 WL 5597434, at *5 (2d Cir. Aug. 30, 2023)

Sanctions may be imposed for civil or criminal contempt -- that is, for a contemnor's clear violation or failure to comply with a court's order. *See King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995). **Civil contempt aims either to “coerce the contemnor into future compliance** with the court's order or to compensate the complainant for losses resulting from the contemnor's past noncompliance.” *Id.* at 1062 (citation omitted).

Criminal contempt, by contrast, is meant to “punish the contemnor and vindicate the authority of the court.” *New York State Nat'l Org. for Women v. Terry*, 159 F.3d 86, 93 (2d Cir. 1998). Therefore, “a civil contempt sanction must only be compensatory or coercive, and may not be punitive.” *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 144 (2d Cir. 2014).

Sanctions, of course, may also be imposed in **non-contempt situations**, such as to police “**other conduct which interferes with the court's power to manage its calendar and the courtroom.**” *United States v. Seltzer*, 227 F.3d 36, 42 (2d Cir. 2000).

Sixth Amended General Order 96-05 (Central District of California)

These procedures shall apply when any judge of this court wishes to **challenge the right of an attorney to practice before this court** or recommends the imposition of attorney discipline intended to apply in all bankruptcy cases in this court. Nothing in this general order is intended to limit or restrict the authority of any judge to impose sanctions on any attorney in any case or cases assigned to that judge. **If a bankruptcy judge wishes to initiate disciplinary proceedings under this general order, that judge (the “Referring Judge”) shall prepare and file with the Clerk of Court a written Statement of Cause setting forth the judge’s basis for recommending discipline and a description of the discipline the referring judge believes is appropriate.** The clerk shall open a case file, assign a miscellaneous case number, and initiate a docket for the file. ... The clerk shall then select three bankruptcy judges of this district at random (excluding the judge who filed the Statement of Cause and any judge who sent an additional statement) to serve on the Hearing Panel.

The attorney may appear at the Disciplinary Hearing with legal counsel and may present evidence ... The Federal Rules of Evidence shall apply to the presentation of evidence at the Disciplinary Hearing, and an official record of the proceedings shall be maintained as though the Disciplinary Hearing were a contested matter as that term is defined in the Federal Rules of Bankruptcy Procedure. ... **If an attorney's practice privileges have been revoked, modified, or suspended by final order of a Panel, the attorney may not appear before any of the judges of this court representing any other persons or entities except in compliance with the terms of the Discipline Order.**

What type of errant behavior will land an attorney before a bankruptcy court disciplinary panel in the Central District?

https://www.cacb.uscourts.gov/sites/cacb/files/documents/attorney-discipline/Memorandum%20of%20Decision_Sтивен%20E%20Smith.pdf

(“failure to adequately represent clients, to adequately communicate with clients and other parties in interest, and to comply with the Bankruptcy Code, Bankruptcy Rules, Local Bankruptcy Rules, Rules of Professional Conduct or California Business and Professions Code”).

https://www.cacb.uscourts.gov/sites/cacb/files/documents/attorney-discipline/Discipline%20Order_Greenfield.pdf

(“not complying with orders of this court, **being sanctioned, and then failing to pay the sanctions** ... harassing another attorney...by **faxing them thousands of pages of documents**...facsimiles included numerous copies of the same document...”).

https://www.cacb.uscourts.gov/sites/cacb/files/documents/attorney-discipline/MemorandumofDecision_ThomasEKent.pdf

(“failure to maintain adequate funds in his **client trust account**...converted the Settlement Funds to his own account and uses without Court authority...).

https://www.cacb.uscourts.gov/sites/cacb/files/documents/attorney-discipline/Memorandum%20of%20Decision_Eric%20D%20Johnson.pdf

(“knowingly **partnering with a paralegal firm** to provide bankruptcy services in violation of the Rules of Professional Conduct of the State Bar of California”).

A 2023 matter before the disciplinary panel

2:23-mp-00101-VK, Memorandum of Decision, Docket #16

“ ... [A] licensed attorney in the State of California engaged in ‘**a persistent pattern of abusive filings’ for an improper purpose of hindering or delaying creditors’ enforcement actions relating to his personal residence**”). This case involved ten bankruptcy filings by the debtor or his special purpose corporation to stop a foreclosure on the attorney’s property. The attorney was “suspended from practicing before the United States Bankruptcy Court for the Central District of California, for a period of two (2) years ... [and] ordered to complete ten (10) hours of continuing legal education in ethics...”.

State Bar resources on Attorney Civility and Professionalism

<https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Attorney-Civility-and-Professionalism>

Civility toolbox (“a model set of guidelines for members, voluntary bar associations, and courts to use and implement in a way that is effective for the legal community”).

...

Rule 9.7 of the California Rules of Court ... the attorney oath for new lawyers. Rule 9.7 states: In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: ‘As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity.’ ...

Bovitz/Fear – how to lower the temperature

Stipulate to continue a hearing to accommodate conflicts, including personal (vacation, graduation) conflicts.

Stipulate to admit most of the exhibits at trial; contest the ones that count -- why bother with the rest?

Stipulate to facts that are not mission critical to your client's case.

Only assert meaningful claims for relief/affirmative defenses.

Respond to a nasty-gram with: "We received your email of 11:54 p.m. last night. Respectfully, we disagree with your conclusions and decline to respond to your demands."

Acknowledge good legal work by your adversaries. Shake the hand of your opposing counsel after she confirms a chapter 11 plan over your client's objection.

Bring donuts and sandwiches to the mediation session.

Judge Bason's “hang loose” tips

When the other side is screaming: Don't rise to the bait. If you stay calm you won't give them ammunition (and it'll drive them crazy).

If you're the one screaming: You're probably telegraphing to anyone who's paying attention that you don't have much confidence in the strength of your arguments or facts. (Remember the old saying: “When the law's against you, pound on the facts; when the facts are against you, pound on the law; and when both are against you, pound on the table!”)

Concede your weak points: It makes your strong points even stronger.

But be a zealous advocate: When trying to show the judge or opposing side how honest you are, don't throw your client under the bus ("Your Honor, My client wants me to argue...."). You're a highly trained, smart professional. You can do better than that.

Apologize: On rare occasions, when you behave badly, write a draft apology ... put it aside ... then take a fresh look and decide whether to say it or write it. (If it showed up as "Exhibit A" to some angry or underhanded motion by the other side, would it still make you and your client look good?)

Final thoughts from the panel

