

STICKS AND STONES MAY BREAK YOUR BONES,
BUT YOUR OWN WORDS (AND CONDUCT)
MIGHT *REALLY* HURT YOU

- Hon. Lawrence H. Cho: Judge, Superior Court of Los Angeles County
- Hon. Holly Fujie: Judge, Superior Court of Los Angeles County; Former President, State Bar of California
- Ellen Pansky: Partner, Pansky Markle Ham LLP, South Pasadena, epansky@panskymarkle.com
- Wendy Wen Yun Chang: Co-Moderator; Vice Chair, Committee on Professional Responsibility and Conduct; Partner, Hinshaw & Culbertson, LLP, Los Angeles, wchang@hinshawlaw.com
- Alison Buchanan: Co-Moderator; Member, Committee on Professional Responsibility and Conduct; Shareholder, Hoge, Fenton, Jones & Appel, Inc., San Jose, APB@hogefenton.com

some lawyers practice like this



“Civility is not a sign of
weakness”

- John F. Kennedy

People v. Chong

(1999) 76 Cal. App. 4th 232, 243

“... it is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law. In order to instill public confidence in the legal profession and our judicial system, an attorney must be an example of lawfulness, not lawlessness.”

People v. Chong (cont.)

(1999) 76 Cal. App. 4th 232, 243

“Accordingly, an attorney ‘however zealous in his client’s behalf, has, as an officer of the court, a paramount obligation to the due and orderly administration of justice...’ [citation.] An attorney must not willfully disobey a court’s order and must maintain a respectful attitude toward the court. [Citations.]”

Former Business & Professions Code 6068(f)

It is the duty of an attorney to “abstain from all offensive personality.”

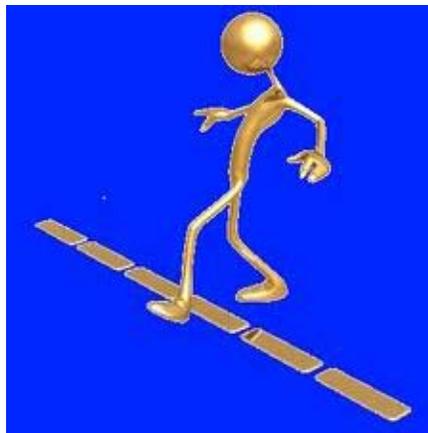
Current Business & Professions Code 6068(f)

It is the duty of an attorney “(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.”

California Attorney Guidelines of Civility and Professionalism, Adopted July 20, 2007

- “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.”

Zealousness or Misconduct?



“Aspirational goals are nice,
but my clients want me to win!”



“It is time to stop talking about the problem and act on
it.” Acting P.J. Bedsworth in *Kim v. Westmoore*



Recent Appellate Decisions



Overturing the Ruling

Ahanchian v. Xenon Pictures, Inc.,
624 F.3d 1253 (9th Cir. 2010)

- Defense MSJ filed in a way that left only 5 business days for Opposition.
- Plaintiff counsel asks to move proceedings out 1 week. Defense denies request.
- Plaintiff's counsel moves to extend dates 1 week; Court denies extension, denies Motion to Accept Late Opposition, which was filed 3 days late, and grants the defense MSJ.
- Ninth Circuit reverses.

- “Such uncompromising behavior is not only inconsistent with general principles of professional conduct, but also undermines the truth-seeking function of our adversarial system.”
- “Our adversarial system relies on attorneys to treat each other with a high degree of civility and respect.”

Monetary Sanctions

Scott C. Moody, Inc. v. Staar Surgical Co.
(2011) 195 Cal. App. 4th 1043

- Counsel violated court order not to question witness about a subject .
- \$1500 sanctions affirmed.
- Court of Appeal held Attorney made a calculated decision to violate the Court's order, and took his chances that an apology would cure his violation.

In Re Marriage of Davenport
(2011) 194 Cal. App. 4th 1507

- Family law appeal of Family Code 271 award; award affirmed.
- Abusive, rude, hostile, and/or disrespectful language in correspondence; scorched earth litigation tactics.
- Family Code 271 sanctions of \$100,000 ordered payable from Petitioner to Respondent.
- Respondent awarded \$307,387.00 in attorneys fees.

November 22, 2006 letter

- "Regarding your client's failure to appear once again for his continued deposition, we too regret that your client chose not to appear....Once again, you offer the same tired, old, and shopworn excuse. Your continued blustering about mutually agreeable dates, efficiency and promptness, and convenience is pathetic when your client's actions negate any semblance of cooperation. Talk is cheap. Actions speak louder than words. Your credibility is at stake here."

March 13, 2007 letter

- "Enough already with the delays."
- "We don't accept your implication that you didn't already have [the Request to Inspect].... Perhaps you didn't look hard enough..."
- "This seems like a case of the `pot calling the kettle black."
- "In your last paragraph, your first suggestion is illusory...."
- "Your last paragraph rings hollow."

Counsel Was Unrepentant at Oral Argument

- "These are not attorneys not able to do lawyering because of unpleasant letters from a baby lawyer on the other side."
- Explained his behavior as merely intemperate, justified by his youth as an attorney, and by his frustration in "searching truth."
- Charged that if Appellate Court affirmed with published decision, it would have a chilling effect on family law advocacy.

Violation of duty to both client and opposing party

- “With no background in either civil or family law litigation, Mr. Andrew Watters admitted to the Court that he was taught to litigate this case with unbridled aggression. These uncooperative and uncivil courses of action have caused Mrs. Davenport unnecessary delays and unnecessary attorney fees and costs. Both Mr. and Mrs. Davenport deserve justice and fairness in the Court.”

Kim v. Westmoore Partners Inc. (2011) 201 Cal. App. 4th 267

- Extension of time to file appellate brief sought under false pretences.
- Brief later filed was boilerplate and a virtual copy of a brief counsel had filed in another case before the same court, which had included a boilerplate accusation of misconduct and boilerplate request for sanctions. (Appellants asserted the differences in the two briefs were only 15 words.)

\$10,000 Non-Discovery Sanctions = Referral to State Bar

- Counsel's response to notice of potential sanctions was "truculent and dismissive," and asserted Court of Appeal must have issued notice in error.
- Counsel sent another in his place to sanctions hearing who did not know sanctions were being considered.

Violation of Rules of Court

- False Statements in the Request for Extension
- "Boilerplate" requests for sanctions improper
 - A request for sanctions can never be so lightly considered as to be copied word for word from another brief.
 - A request for sanctions should be reserved for serious violations of the standard of practice, not used as a bullying tactic.

“Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy.”

“It is time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions.”

“We are loath to act in a way that would seem to encourage courts to impose sanctions for mistakes or missteps. But for serious and significant departures from the standard of practice, for departures such as dishonesty and bullying, such steps are necessary... It is time to make it clear that there is a price to pay for cynical practices.”

Referral to the State Bar

People v. Whitus (2012) 209 Cal. App.
4th Supp. 1

- Appeal from \$750 sanctions order issued for counsel's repeated failure to appear at trial readiness conference.
- Sanctions affirmed.
- Court of Appeal went on to refer the Opinion to the State Bar .

"Appellant's oral argument...a parade
of insults and affronts"

- Repeated disparagement of trial and appellate judges.
- Rude behavior.
- Counsel referred to Court of Appeal as "fox [watching] the hen house."
- Confrontational, accusatory and disdainful tone.

- When asked about the record, “I don’t need to give you the universe of evidence in the proceedings... You don’t need a transcript.”
- When asked about a case citation, “It must have been a while since you read the brief.”

Demanded disclosure from each appellate justice if the judge has discussed the case with the trial judge

Counsel said:

“But it’s common knowledge in the legal community, and you would be insulting me if you suggested otherwise, for us to believe that you judges don’t talk like women in a sewing circle about us lawyers. You do. I know you do.”

Repeatedly referred to trial judge by first name

Counsel said: “OK. Well, hereinafter, I will honor your request [not to address trial judge by first name]. But before I proceed to honor your request, I’ll tell you that in the 33 years that I’ve practiced law, I’ve appeared in front of many great men and women judges, including you three. And I’ve appeared in front of a few who are an embarrassment to our profession and [trial judge] is one of those people.”

Veiled threats

- Counsel stated in oral argument “a human mind is a lot like a parachute. If it doesn’t open, it will get you killed someday.”

Why the Court rejected additional monetary sanctions in favor of bar referral

- “Something more therapeutic needs to be done.”
- No place for this type of argument in court.
- Demeans profession.
- Lowers public respect.
- *Conveys the impression that it is acceptable behavior, perhaps even effective advocacy.*

Lawyer’s Prerogative?

Impact on Clients

Enforcement

Client's Prerogative?

Anecdotes

Trends

Thank you for attending.

Judge Cho, Judge Fujie,
Ellen, Alison, and Wendy