AMERICAN BANKRUPTCY INSTITUTE

2018 Annual Spring Meeting

CONCURRENT SESSION

ABC Program: Professionalism! Competence! Featuring Judges on Best Practices

Craig M. Geno, Co-Moderator
Craig M. Geno, PLLC; Ridgeland, Miss.

J. Scott Bovitz, Co-Moderator
Bovitz & Spitzer; Los Angeles

Hon. James M. Carr
U.S. Bankruptcy Court (S.D. Ind.); Indianapolis

Hon. David W. Hercher
U.S. Bankruptcy Court (D. Or.); Portland

Hon. Jerry C. Oldshue, Jr.
U.S. Bankruptcy Court (S.D. Ala.); Mobile

Hon. James J. Tancredi
U.S. Bankruptcy Court (D. Conn.); Hartford

Hon. Mary F. Walrath
U.S. Bankruptcy Court (D. Del.); Wilmington

2018

Professionalism! Competence! Certification! Best Practices! Bankruptcy Judges Sound Off on the Best (and Worst) Behavior of our Bankruptcy Brothers and Sisters

v 8

April 21, 2018, 4:00 p.m.

American Bankruptcy Institute, 2018 Annual Spring Meeting, Washington, D.C.

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Patricia Fugée, Producer
FisherBroyles; Perrysburg, OH
Secretary, The American Board of Certification

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On deck: ABC beer and wine reception

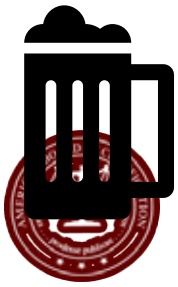
The American Board of Certification is celebrating its 25th year.

The American Board of Certification is the nation's premier legal specialty certification organization (abcworld.org). The ABC certifies specialists in business bankruptcy, consumer bankruptcy, and creditors' rights.

After the program, join us for a glass of beer or wine in the lobby.

All of your panelists were board certified.

Proper use of ABC coaster



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Start here: Competence

Client-Lawyer Relationship -- Rule 1.1 Competence
https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html:

A lawyer shall provide competent representation to a client.

Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Geno: Obviously!

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California Rule of Professional Conduct 3-110

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the (1) diligence, (2) learning and skill, and (3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by (1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or (2) by acquiring sufficient learning and skill before performance is required.

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Defining lawyer competence

http://omnilearn.net/ethics/pdfs/lawyer_competence.pdf:

During the 1980's, an ALI-ABA Committee on Continuing Professional Responsibility issued a report that defined legal competence in the following manner: "Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she practices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) properly prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically capable. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities."

The ALI-ABA Committee further identified ten specific criteria to be used in measuring "competency." They included: "information gathering, legal analysis, strategy formation, strategy execution, following through, practice management, professional responsibility, practice evaluation, training and supervising support personnel, and continuing attorney self-education."

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Competence = knowledge + more

Wendy L. Patrick, **Key to Competence: Be Mindful of Your Mind,** California Lawyer (January 7, 2016), http://www.callawyer.com/2016/01/key-to-competence-be-mindful-of-your-mind:

The practice of law requires not only the physical ability to handle a case, but a sound mind. While this should be self-evident, some lawyers underestimate problems that flow from practicing law without the requisite mental foundation. Whether due to an inadequate grasp of the law, failure to prepare, or cognitive difficulties due to mental impairment or substance abuse, there is a broad spectrum of potential consequences that flow from incompetent representation, stemming from laws and ethical rules that govern a lawyer´s behavior—both in and out of the courtroom.

In many cases, incompetent representation may be hard to detect. A silver tongue can mask a lawyer´s rusty knowledge of the laws and legal principles of which he or she so eloquently speaks. Other times, legal knowledge is up to date, but information retrieval is compromised by cognitive impairment. In either situation, there are laws and ethical rules with which both the impaired lawyer and his or her colleagues should be familiar.

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Wendy L. Patrick, **Key to Competence: Be Mindful of Your Mind,** California Lawyer (January 7, 2016), http://www.callawyer.com/2016/01/key-to-competence-be-mindful-of-your-mind:

The California Business and Professions Code requires a lawyer "faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability." (See Cal. Bus & Prof. Code § 6067.) Can a lawyer fulfill this obligation while struggling with mental impairment or substance abuse? Sometimes the answer changes over the years, depending on age, mental deterioration, or increasing entanglement with alcohol or drug addiction.

Competence is one of the main areas commonly impacted by substance abuse.

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http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules/Rule-3-110

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents [Geno/Bovitz: appearance attorneys; junior lawyers]. (See, e.g., Waysman v. State Bar (1986) 41 Cal.3d 452; Trousil v. State Bar (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; Palomo v. State Bar (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; Crane v. State Bar (1981) 30 Cal.3d 117, 122; Black v. State Bar (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; Vaughn v. State Bar (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; Moore v. State Bar (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

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Court competence conundrums (say that phrase out loud, three times in a row)

What should/can a judge do about incompetent behavior in the courtroom?

Is it the judge's job to help a client when that client's lawyer is incompetent or misses an important point?

As a judge, do you have the power to deal with unprofessional behavior and "mere" incompetence?

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Pro-per help *from the court itself?!*

http://www.cacb.uscourts.gov/electronic-self-representation-esr-bankruptcy-petition-preparation-system-chapter-7:

…to learn more about this new online tool. … **eSR** is an online tool to help individuals complete a chapter 7 bankruptcy petition when they have decided to file bankruptcy without an attorney.

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Examples of competence in your courtroom

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Incompetence in your courtroom (war stories)

Is civility on the decline? If so, why?

Prof. David A. Grenardo, St. Mary's University School of Law, ***Enforcing Civility: Holding Attorneys to a Higher Standard of Conduct***, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/39th_conf_session14_enforcing_civility_holding_attorneys_to_a_higher_standard_of_conduct.authcheckdam.pdf:

The following are some of the major potential causes that should be studied to determine their relationship, if any, with uncivil behavior:

the increase in the size of the bar – i.e., the number of attorneys – and whether that, in turn, increases incivility;

poor or nonexistent education in law school on civility;

clients who request or desire uncivil behavior from their attorneys;

individual lawyers' poor moral character;

and the "decline of face-to-face interactions among lawyers due to the increase of interaction via technology, such as email."

Drafting civility rules

U.S. District Court, Central District of California, www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines:

In its purest form, law is simply a societal mechanism for achieving justice. As officers of the court, judges and lawyers have a duty to use the law for this purpose, for the good of the people. Even though "justice" is a lofty goal, one which is not always reached, when an individual becomes a member of the legal profession, he or she is bound to strive towards this end.

Unfortunately, many do not perceive that achieving justice is the function of law in society today. Among members of the public and lawyers themselves, there is a growing sense that lawyers regard their livelihood as a business, rather than a profession. Viewed in this manner, the lawyer may define his or her ultimate goal as "winning" any given case, by whatever means possible, at any cost, with little sense of whether justice is being served. This attitude manifests itself in an array of obstinate discovery tactics, refusals to accommodate the reasonable requests of opposing counsel re: dates, times, and places, and other needless, time-consuming conflicts between and among adversaries.This type of behavior tends to increase costs of litigation and often leads to the denial of justice.

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U.S. District Court, Central District of California, www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines:

The Central District recognizes that, while the majority of lawyers do not behave in the above described manner, in recent years there has been a discernible erosion of civility and professionalism in our courts. This disturbing trend may have severe consequences if we do not act to reverse its course. Uncivil behavior does not constitute effective advocacy; rather, it serves to increase litigation costs and fails to advance the client's lawful interests. Perhaps just as importantly, this type of behavior causes the public to lose faith in the legal profession and its ability to benefit society. For these reasons, we find that civility and professionalism among advocates, between lawyer and client, and between bench and bar are essential to the administration of justice.

The following guidelines are designed to encourage us, the members of the bench and bar, to act towards each other, our clients, and the public with the dignity and civility that our profession demands. In formulating these guidelines, we have borrowed heavily from the efforts of others who have written similar codes for this same purpose. The Los Angeles County Bar Association Litigation Guidelines, guidelines issued by other county bar associations within the Central District, the Standards for Professional Conduct within the Seventh Federal Judicial Circuit, and the Texas Lawyer's Creed all provide excellent models for professional behavior in the law.

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U.S. District Court, Central District of California, www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines:

We expect that judges and lawyers will voluntarily adhere to these standards as part of a mutual commitment to the elevation of the level of practice in our courts. These guidelines shall not be used as a basis for litigation or for sanctions or penalties.

Nothing in these guidelines supersedes or modifies the existing Local Rules of the Central District, nor do they alter existing standards of conduct wherein lawyer negligence may be determined and/or examined.

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Northern District of California guidelines for professional conduct

U.S. District Court, Northern District of California, http://www.cand.uscourts.gov/professional_conduct_guidelines:

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

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Responsibilities to the Public

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

Responsibilities to the Client

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

Scheduling

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

Writings Submitted to the Court

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

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Redlining

Geno/Bovitz: How about running "compare documents" in Word?

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

Dealing with Nonparty Witnesses

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

Settlement and Alternative Dispute Resolution

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

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Discovery

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

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

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

A lawyer should take depositions only (a) where actually needed to learn facts or information, or (b) to preserve testimony. … A lawyer should avoid repetitive or argumentative questions or those asked solely for purposes of harassment … A lawyer representing a deponent or another party should limit objections to those that are well founded and necessary for the protection of his or her client's interest. A lawyer should remember that most objections are preserved and need be made only when the form of a question is defective or privileged information is sought.

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Should you suggest to counsel that she needs to take the SAGE test?

https://wexnermedical.osu.edu/brain-spine-neuro/memory-disorders/sage

The Self-Administered Gerocognitive Exam (SAGE) is designed to detect early signs of cognitive, memory or thinking impairments.

Memory loss -- Misplacing items and forgetting recently learned information, conversations, names, etc.

Language problems -- Trouble finding words

Disorientation to time -- Forgetting the day of the week or the date

Impaired sense of direction -- Getting lost in a familiar place

Changes in personality or mood

Executive impairment -- Difficulties with decision making, using poor judgment or impaired organizational skills

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Geno: Bovitz is ready for the SAGE test

Bovitz: So stipulated.

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Is it possible to enforce civility?

Prof. David A. Grenardo, St. Mary's University School of Law, ***Enforcing Civility: Holding Attorneys to a Higher Standard of Conduct***, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/39th_conf_session14_enforcing_civility_holding_attorneys_to_a_higher_standard_of_conduct.authcheckdam.pdf:

As the former United States Supreme Court Justice Sandra Day O'Connor said, "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers." …

Enforcing civility requires that attorneys' uncivil behavior can be punished or sanctioned. …

Each state bar could regulate civility in the same manner it regulates its ethics rules (i.e., its rules of professional conduct). State bars could add civility rules to their rules of professional conduct, just as Michigan did, or state bars could incorporate civility rules through their attorney oaths or other rules. The civility rules should also be state specific based on the norms in each state. The disciplinary mechanisms already in place in each state that investigate, adjudicate and impose sanctions based on violations of the rules of professional conduct for each state, could also enforce civility. In some cases, the sanction for incivility could be a private reprimand, while in other cases suspension may be warranted.

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Prof. David A. Grenardo, St. Mary's University School of Law, ***Enforcing Civility: Holding Attorneys to a Higher Standard of Conduct***, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/39th_conf_session14_enforcing_civility_holding_attorneys_to_a_higher_standard_of_conduct.authcheckdam.pdf:

The opponents of mandatory civility argue that the following are the major disadvantages of requiring civility from attorneys: (1) enforcement of civility would be too subjective; (2) mandatory civility would inhibit zealous advocacy; (3) civility rules inhibit First and Fourteenth Amendment rights; and (4) civility would be too costly to enforce. …

…if states adopt specific, straightforward civility rules, then judges should be able to enforce them. Second, that judges cannot enforce legal rules consistently and properly, then the entire judicial system would be completely unreliable and ineffective. …

…not only are civility and zealous advocacy compatible, but civility can enhance zealous advocacy. For example, attorneys oftentimes serve as the primary negotiators for their clients during settlement negotiations. If the attorneys are personally attacking each other, then it may take more time to settle the case, and it will likely be more difficult to settle, which means higher costs for the clients to pay for the additional time spent negotiating. Also, a judge or jury may find an attorney exhibiting uncivil behavior as less credible, which may negatively affect the outcome of the client's case. … Personal attacks against opposing counsel, including attacks based on someone's gender, race, or ethnicity, are not necessary to advocate zealously on behalf of a client. …

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Prof. David A. Grenardo, St. Mary's University School of Law, ***Enforcing Civility: Holding Attorneys to a Higher Standard of Conduct***, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/39th_conf_session14_enforcing_civility_holding_attorneys_to_a_higher_standard_of_conduct.authcheckdam.pdf:

Opponents of civility argue that another major disadvantage of mandatory civility would be that it inhibits constitutionally protected rights, including free speech under the First Amendment because mandatory civility is overbroad, and due process and fair notice under the Fourteenth Amendment because it is vague. … The oath in South Carolina states, in pertinent part, "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications…" In Anonymous, the attorney accused of uncivil behavior (the "Respondent") represented the mother and opposing counsel represented the father in a contentious domestic matter. … The Court held that attorneys attacking each other personally in the manner that Respondent did [Geno/Bovitz: by accusing the attorney on the other side of letting his teenage daughter purchase cocaine and heroin] "compromises the integrity of the judicial process" and "undermines a lawyer's ability to objectively represent his or her client." Thus, there was not any substantial amount of protected free speech condemned in relation to the state's interest concerning the regulation of the legal profession. …

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Prof. David A. Grenardo, St. Mary's University School of Law, ***Enforcing Civility: Holding Attorneys to a Higher Standard of Conduct***, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/39th_conf_session14_enforcing_civility_holding_attorneys_to_a_higher_standard_of_conduct.authcheckdam.pdf:

Provided state bars enforce civility just as they do the rules of professional conduct, then the costs of enforcing civility may not rise at all. … Another disadvantage regarding the cost of mandatory civility, opponents may argue, would include some attorneys making baseless civility complaints against opposing counsel to harass opposing counsel. This argument fails as well. … Also, the threat of using rules to harass opposing counsel already exists with ethical complaints, but potential misuse of ethical rules do not warrant the removal of ethical rules – this reasoning similarly applies to civility rules.

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Should we bring unprofessional discovery behavior to the court's attention?

J. Scott Bovitz, ***Memorable Legal Insults***, ABI Journal, October 2014:

After 34 years in the courtroom, I have concluded that it is only human nature for litigators to trade insults with the other side in correspondence and pleadings. After all, we share DNA with our warring Neanderthal ancestors. However, you may want to follow a few simple rules:

• In a deposition, counsel should not refer to the other side's client as "goofy," a "dimwit," a "dingbat" or (my favorite) a "duffus" (dufus?);

• A lawyer should not insult an inexperienced lawyer by stating that it is "despicable to be so new to the profession"; and

• A lawyer should not engage in "a pattern of intemperate, disparaging, demeaning, insulting, threatening, uncomplimentary, and unprofessional use of language" or refer to her opponent as "eternal lying scum" or a "dumb b***h."

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What should a judge do about incivility?

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Civil Litigation Management Manual

Civil Litigation Management Manual, Second Edition, https://www.fjc.gov/sites/default/files/2012/CivLit2D.pdf:

[Judges should] consider

… having attorneys report via letter or teleconference at crucial case junctures on the status of documents, depositions, and settlement prospects.

…holding a brief (ten- to fifteen-minute) scheduling teleconference in all cases—even if you do not have time to hold a comprehensive Rule 16 conference, it is valuable to touch base with counsel at the beginning of the case.

…Ask the plaintiff, for example, at the Rule 16 conference, "What can we get without traditional discovery? What do you want from the other party? List it." With this approach you can usually get the parties to exchange more relevant information than required under Federal Rule of Civil Procedure 26(a) without further discussion.

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Civil Litigation Management Manual, Second Edition, https://www.fjc.gov/sites/default/files/2012/CivLit2D.pdf:

Footnote 163 … Additional useful sources for court staff and judges include Committee to Increase Access to the Courts, Proposed Protocol to be Used by Idaho Judges During Hearings Involving Self-Represented Litigants (Idaho Court Assistance Offices Project 2002); Proposed Best Practices for Cases Involving Self-Represented Litigants (Am. Judicature Soc'y 2005); Cynthia Gray, Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants (Am. Judicature Soc'y 2005); and Honorable Beverly W. Snukals & Glen H. Sturtevant, Jr., Pro Se Litigation: Best Practices from a Judge's Perspective, 42 U. Rich. L. Rev. 93 (2007).

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Australia has an anti-bullying commission

Michael Byrnes, Sadaat Cheema, ***Stop that! Fair Work Commission makes second stop bullying order***, https://www.claytonutz.com/knowledge/2015/august/stop-that-fair-work-commission-makes-second-stop-bullying-order:

Since the anti-bullying provisions in the Fair Work Act 2009 (Cth) were introduced on 1 January 2014, there has been much speculation about the specific orders that the Fair Work Commission might make to stop and prevent a worker from being bullied at work. … Under section 789FD of the FW Act, bullying is defined as when: a worker behaves unreasonably towards another worker or group of workers; and the behaviour creates a risk to health and safety. On the facts, Ms. ED's conduct was alleged to include: belittling conduct; swearing, yelling and use of otherwise inappropriate language; daily interfering and undermining the applicants' work; physical intimidation and slamming of objects on the applicants' desks; attempts to incite the applicants to victimise other staff members; and threats of violence.

What sort of anti-bullying order is appropriate in this case?
Section 789FF(1) of FW Act gives the Fair Work Commission a power, where the threshold requirements are met, to "make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work".

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Michael Byrnes, Sadaat Cheema, ***Stop that! Fair Work Commission makes second stop bullying order***, https://www.claytonutz.com/knowledge/2015/august/stop-that-fair-work-commission-makes-second-stop-bullying-order:

The Act is silent as to the kinds of orders to be made, so it confers great latitude upon the Commission. In the circumstances, the Commission made orders lasting 24 months:

1. that the applicants and Ms ED not approach each other and that they not attend each other's premises. The FWC conceded that an order of this kind might not be appropriate in some cases, such as where the employer operates from a single premises, because it would be difficult to co-ordinate the movement of employees so as to prevent one approaching the other. However, in this case, Ms ED was no longer based at the same location as the applicants, making an order in these terms suitable; and

2. that the employer: (a) establish and implement appropriate anti-bullying policies, procedures and training, to (amongst other things) confirm "appropriate future conduct and behaviour"; and (b) clarify reporting arrangements.

In contrast to the first order, the second was directed at the employer rather than the individual employees. Order two aimed to cultivate a culture within the workplace at large, to discourage and [award sanctions for] bullying. Ultimately, both orders had the consent of all parties.

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Professionalism: More than competence + civility

Thomas E. Spahn, McGuire Woods, LLP, ***Professionalism for the Ethical Lawyer***, American Bar Association, http://media.mcguirewoods.com/publications/Ethics-Programs/29084419.pdf:

Every state's ethics rules represent a balance between lawyers' primary duty to diligently represent their clients, and some countervailing duty to others within the justice system (or sometimes, to the system itself). In many situations, lawyers following the ethics rules might have to take steps that the public could consider unprofessional. For example, lawyers often must maintain client confidences when the public might think they should speak up -- disclosing a client's past crime, warning the victim of some possible future crime, etc. In less dramatic contexts, lawyers generally must remain silent if their adversary's lawyer misses some important legal argument or defense, etc. Thus, **ethics principles focus on lawyers' duties to their clients**, and the limited ways in which those duties can be 'trumped' by duties to others. In contrast, professionalism has a much more modest focus. **Professionalism speaks to lawyers' day-to-day interaction with other lawyers, with clients, with courts, and with others**. Professionalism involves courtesy, civility, and the Golden Rule. When the ethics rules require lawyers to disagree with adversaries or their lawyers, professionalism calls for lawyers to do so without being personally disagreeable."

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Spahn's checklist of professionalism

Thomas E. Spahn, McGuire Woods, LLP, ***Professionalism for the Ethical Lawyer***, American Bar Association, http://media.mcguirewoods.com/publications/Ethics-Programs/29084419.pdf (from the table of contents):

Avoiding discrimination and bigotry. [Geno/Bovitz: Add gender bias.]
Offering candid advice.
Advising clients of the benefits of courtesy.
Withdrawal in the face of a client's desire to pursue offensive conduct.
Returning phone calls and e-mails.
Avoiding nasty communications.
Treating nonlawyer staff with respect.
Scheduling hearings, depositions, etc.
Responding to requests for extensions.
Dealing with an adversary's lawyer's discourteous deposition conduct.
Avoiding actions that needlessly embarrass an adversary or third party.
Advising clients to act courteously with the court and its personnel.
[Not] offering evidence a lawyer reasonably believes to be false.
No need to press for every advantage.
Requesting that clients forego inappropriate actions.

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Examples of professionalism in your courtroom

Professionalism by attorneys, expert witness, parties, and the judiciary.

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Tools to control behavior and proceedings

Conduct conference calls with counsel (informal judicial intervention).

Make comments from the bench – gentle or maybe not.

Publish district procedures on civility.

Publish "local-local" procedures on a judge's official web site.

Seize a ringing cell phone.

Issue discovery sanctions.

Issue Federal Rule of Bankruptcy Procedure 9011 sanctions.

Issue procedural orders (e.g., strike a pleading).

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Refer a lawyer to the U.S. Trustee.

Refer a lawyer to the state bar.

Deny a request for pro hac vice admission.

Reduce a fee award.

Publish an opinion with the inglorious details of attorney misbehavior.

Issue an order limiting an attorney's electronic filing privileges.

Issue an order barring an attorney from appearing in a judge's courtroom.

Issue an order barring an attorney from practicing in the district's bankruptcy courts.

Award attorneys' fees to the other side.

Order attorney to take classes in ethics or substantive law.

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Scheduling orders.

Written tentative rulings before the hearing.

Mediation programs.

Dismiss litigation for unclean hands (Judge Wallace decision on “arrested mediation”).

Dismiss a bankruptcy case.

Regular bench/bar activities and programs (tell the lawyers what you expect).

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Special circumstances

High profile bankruptcy matters.

Mega bankruptcy cases.

Security issues (angry parties, crowds).

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Rule 9011, overview

10-9011 Collier on Bankruptcy P 9011.04 (16th 2017)

Rule 9011 places an affirmative duty on attorneys and litigants to make a reasonable (under the circumstances) investigation of the facts and the law before signing and submitting any petition, pleading, motion or other paper.

Attorneys and parties are required to "think first and file later"; to "look before leaping." They may not file suit hoping that discovery will later show that a claim was proper or "drop papers into the hopper and insist that the court or opposing counsel undertake bothersome factual and legal investigation." However, an attorney is entitled to make reasonable inferences from the available facts. The scope of reasonable inquiry in any given factual setting may be subject to dispute.

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Federal Rule of Bankruptcy Procedure 9011

(b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

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(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. …

(d) Inapplicability To Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

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Inherent power to sanction

Nguyen v. Golden (In re Pham), 2017 Bankr. LEXIS 3844 (B.A.P. 9th Cir. Nov. 6, 2017)

This is the second appeal arising from the bankruptcy court's award of sanctions for discovery abuses. …

Federal courts, including bankruptcy courts, have inherent power to impose sanctions for a broad range of willful or improper litigation conduct. In re Dyer, 322 F.3d at 1196. This inherent power includes the authority to sanction the conduct of a nonparty who participates in abusive litigation practices or whose actions or omissions cause the parties to incur additional expenses. Corder v. Howard Johnson & Co., 53 F.3d 225, 232 (9th Cir. 1994). … Before imposing inherent power sanctions on a nonparty, the court must make an explicit finding of bad faith or improper purpose.

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Taylor v. Nutter (inherent power)

Taylor v. Nutter (In re Taylor), 2017 Bankr. LEXIS 2233. *16-18, *26 (B.A.P. 9th Cir. Aug. 9, 2017)

Did the bankruptcy court err when it sanctioned the plaintiffs and Resnik under its inherent power? …

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Federal courts, including bankruptcy courts, have inherent power to impose sanctions for a broad range of willful or improper litigation conduct. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1196 (9th Cir. 2003); Fink v. Gomez, 239 F.3d 989, 992-94 (9th Cir. 2001). Before imposing such sanctions, however, the court must explicitly find bad faith or conduct tantamount to bad faith. Fink, 239 F.3d at 993; Primus Auto. Fin. Servs. v. Batarse, 115 F.3d 644, 650 (9th Cir. 1997).

Something more than mere negligence or recklessness is required. Rodriguez v. U.S., 542 F.3d 704, 709 (9th Cir. 2008) (citing Fink, 239 F.3d at 993-94). A finding that the litigant engaged in litigation for an improper purpose will suffice, even if the litigant advanced claims or objections that were colorable on their face. See id.; Fink, 239 F.3d at 992 (quoting In re Itel Sec. Litig., 791 F.2d 672, 675 (9th Cir. 1986)). For instance, when the litigant pursues litigation to harass the adverse party, or to increase its costs or to delay the resolution of other litigation, such motivations have been held to be improper for purposes of imposing inherent power sanctions. See Fink, 239 F.3d at 994; Primus Auto. Fin. Servs., 115 F.3d at 649. …

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One form of sanction the court may impose under its inherent power is an award of the opposing party's legal fees. Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1186, 197 L. Ed. 2d 585 (2017); Chambers, 501 U.S. at 45. These awards are a well-recognized exception to the "American rule" which generally requires each litigant to bear its own legal fees. Chambers, 501 U.S. at 45; Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975).

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Something more than poor quality, invective and repetitive arguments is required before inherent power sanctions can or should be awarded. See Rodriguez, 542 F.3d at 709 (citing Fink, 239 F.3d at 993-94). A higher standard is essential to ensure that inherent power sanctions are imposed only with caution and restraint. See Chambers, 501 U.S. at 50; In re Snowden, 769 F.3d at 660.

To hold otherwise would not give enough weight to the dire consequences significant inherent power sanctions potentially can have on litigants and their counsel. As the Ninth Circuit has explained, "'[s]anctions not only may have a severe effect on the individual attorney sanctioned,' potentially damaging the attorney's career, reputation and livelihood, but they 'also may deter future parties from pursuing colorable claims.'" Mendez, 540 F.3d at 1133 (quoting Primus Auto. Fin. Servs., 115 F.3d at 650).

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Inherent power to sanction (Price)

Price v. Lehtinen (In re Lehtinen), 564 F.3d 1052, 1058, 1062 (9th Cir. 2009)

Bankruptcy courts generally have the power to sanction attorneys pursuant to (1) their civil contempt authority under 11 U.S.C. § 105(a); and (2) their inherent sanction authority. *Dyer*, 322 F.3d at 1192-93, 1196. …

A bankruptcy court's inherent power allows it to sanction "bad faith" or "willful misconduct," even in the absence of express statutory authority to do so. *Id*. at 1196. It also "allows a bankruptcy court to deter and provide compensation for a broad range of improper litigation tactics." *Id*. (citing *Fink v. Gomez*, 239 F.3d 989, 992-93 (9th Cir. 2001)). …

"In the federal system there is no uniform procedure for disciplinary proceedings. The individual judicial districts are free to define the rules to be followed and the grounds for punishment." *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1198 (9th Cir. 1999) …

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Inherent power (Pryor)

In re Pryor, 2014 Bankr. LEXIS 5300 (Bankr. C.D. Cal. July 7, 2014)

At the conclusion of the hearing, the Court ruled, among other things, that Danny Wayne Prior "is a vexatious litigant, and [the debtor] is prohibited in this case from filing any further documents without first filing a motion and obtaining a court order for approval to file any additional documents."

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Inherent power to sanction (Knupfer)

Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1182, 1192, 1193, 1196-1197 (9th Cir. 2003)

Does the sanction authority granted to bankruptcy courts under 11 U.S.C. § 105(a) permit punitive sanctions? … We conclude that significant punitive sanctions are not available under either the civil contempt authority of 11 U.S.C. § 105(a) or the bankruptcy court's inherent sanction authority. … We have never authorized punitive (*i.e.* criminal) sanctions under the contempt authority of § 105(a). …

Section 105(a) contains no explicit grant of authority to award punitive damages. Rather, the language of § 105(a) authorizes only those remedies "necessary" to enforce the bankruptcy code. *Walls*, 276 F.3d at 507. The sanctions associated with civil contempt -- that is, compensatory damages, attorney fees, and the offending creditor's compliance -- adequately meet that goal, *id.* at 507, rendering serious punitive sanctions unnecessary.

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Finally, we address the bankruptcy court's attempt to justify the sanction award under its inherent sanction authority. Chambers v. NASCO, Inc., 501 U.S. 32, 42-47, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991), held that Article III courts have an "inherent authority" to sanction "bad faith" or "willful misconduct," even in the absence of express statutory authority to do so. In Caldwell v. United Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir. 1996), we held that bankruptcy courts, like district courts, also possess that inherent power. …

Civil contempt authority allows a court to remedy a violation of a specific order (including "automatic" orders, such as the automatic stay or discharge injunction). The inherent sanction authority allows a bankruptcy court to deter and provide compensation for a broad range of improper litigation tactics. *Fink v. Gomez,* 239 F.3d 989, 992-93 (9th Cir. 2001).

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Revocation of filing privileges

http://www.cacb.uscourts.gov/sites/cacb/files/documents/Enjoined.pdf:

…list of enjoined petition preparers in the Central District of California. … "Fortune Enterprises and/or Mia Gonzalez … Gonzalez [as] well as her associates, employees, and/or assignees, shall be permanently enjoined from further acting as BPP's and/or providing petition preparer services, whether directly or indirectly, whether compensated or not, within the Central District of CA."

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Fourth Amended General Order 96-05, Central District of California

http://www.cacb.uscourts.gov/sites/cacb/files/documents/general-orders/Fourth_Amended_GO96-05.pdf
(September 15, 2011)

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. …

…Referring Judge…shall prepare and file … a written Statement of Cause … recommending discipline and a description of the discipline …

The clerk shall … select three bankruptcy judges … to serve on the Hearing Panel …

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Attorney discipline cases, Central District of California

http://www.cacb.uscourts.gov/attorney-disciplinary-actions

The Fourth Amended General Order 96-05 requires attorney discipline matters to be published on the Court's website.

55

What kind of trouble will result in a Statement of Cause?

http://www.cacb.uscourts.gov/sites/cacb/files/documents/attorney-discipline/Memorandum%20of%20Decision_Benjamin%20B%20Wasson.pdf

Attorney “filed the bankruptcy petition…and about 100 other bankruptcy petitions while not being admitted to practice in this district.” Held: Suspended for one year from filing petitions in the bankruptcy court and ordered to take 10 hours of MCLE.

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http://www.cacb.uscourts.gov/sites/cacb/files/documents/attorney-discipline/Memorandum%20of%20Decision_Amended_Phillip_E_Koebel.pdf

Attorney "engaged in a pattern of repeated abuse of the bankruptcy system and that his filing of this chapter 13 bankruptcy case [while a chapter 7 case was pending], after repeated attempts to convert or dismiss the chapter 7 case … [which] amply demonstrate bad faith and grounds for a bar against filing another bankruptcy case. … [and pursued] frivolous legal arguments regarding Debtor's homestead exemption …"

Attorney "violated the following ethical rules: … Rule 3-110 of the California Rules of Professional Conduct … 'A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence' meaning that an attorney must 'apply [the] diligence, learning and skill, and mental, emotional, and physical ability reasonably necessary for the performance of such service."

Attorney engaged in a "pattern of litigation" that was "clearly frivolous and vexatious." Attorney engaged in improper use of removal power.

Held: Suspended from practice in bankruptcy court for six months, with 4 1/2 year probation. A fine. Four hours of ethics classes.

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You just can't make this stuff up

http://www.calbar.ca.gov/About-Us/News-Events/California-Bar-Journal/Attorney-Discipline/ArtMID/10275/ArticleID/397/Lawyer-disbarred-for-planting-drugs (September 1, 2017)

A Southern California attorney was disbarred after he was found guilty of false imprisonment for planting drugs in the car of a PTA volunteer and enlisting the police, based on fraud and deceit, to detain her. His disbarment — and, earlier, that of his attorney wife for the same offense — demonstrate that a felony conviction, the fact and circumstances of which involve moral turpitude, can lead to an attorney's ouster from the profession even where unrelated to the practice of law. …

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The disbarment followed his conviction by an Orange County Superior Court jury on a charge of false imprisonment by violence, fraud or deceit, an act involving moral turpitude. The court case followed an incident in 2011 in which Easter and his wife planted drugs in the car of a school PTA volunteer, Kelli Peters, whom they accused of mistreating their son.

Kent Easter stipulated that following the couple's unsuccessful campaign to have Peters removed as an after school volunteer for having allegedly failed to properly supervise their six-year-old, Easter and his wife, Jill Easter, filed a civil suit against Peters and filed for a temporary restraining order against her. They eventually called police using an assumed name and reported seeing Peters with drugs in her car and driving erratically. Police found pills, marijuana and a marijuana pipe in Peters' car. They detained Peters and questioned her for nearly two hours in the school parking lot visible to everyone.

The Easters were arrested and convicted after Kent Easter's DNA was found on one set of the pills and the marijuana pipe and it was determined the Easters had planted the drugs and the pipe, and they did not belong to Peters.

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Does mediation or alternative dispute resolution play an important role in your court?

http://www.cacb.uscourts.gov/mediation-program ("The United States Bankruptcy Court for the Central District of California recognizes that formal litigation of disputes in bankruptcy cases and adversary proceedings frequently imposes significant economic burdens on parties and often delays resolution of those disputes. Therefore, the Court established a Mediation Program to provide litigants with the means to resolve their disputes more quickly, at less cost, and often without the stress and pressure of litigation.").

Bovitz: About 2/3 of the matters assigned to mediation in the Central District of California are settled!

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But not every mediation is successful…

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Baek v. Halvorson, 15-1391
(Bankr. C.D. Cal. Feb. 14, 2018, Hon. Mark Wallace)

After learning facts suggesting the possibility that parties to a mediation ordered by this Court – a mediation conducted in a federal courthouse before federal judge Meredith A. Jury – had intentionally sabotaged the mediation by arranging for the arrest during the mediation of another party to the mediation, namely, the debtor in this case, John O. Halvorson ("Mr. Halvorson"), the Court *sua sponte* ordered a bifurcated trial, the first phase of which was limited solely to the issue of whether such sabotage had actually occurred and, if it did, whether the equitable doctrine of unclean hands would bar the guilty parties from obtaining any relief. …the Court concludes that equity's unclean hands doctrine squarely applies and requires this Court to shut its doors against the guilty parties, and to refuse to interfere on their behalf, to acknowledge their right or to award them any remedy in these adversary proceedings.

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Trial of this case commenced on Monday, October 30, 2017 and ran through Friday, November 3, 2017. Twenty-five minutes after trial commenced, at 9:25 a.m. on October 30, 2017, the Baeks filed an Emergency Motion to Recuse Bankruptcy Judge Mark Wallace Under 28 U.S.C. § 455 (the "Recusal Motion") in this Court. On November 17, 2017, the Baeks filed a Motion to Withdraw the Reference in the 1391 Action and 1454 Action (the "Reference Withdrawal Motion") in the District Court.

The Recusal Motion was heard by the Honorable Theodor C. Albert, United States Bankruptcy Judge, on January 9, 2018 and denied by order entered January 23, 2018. The Reference Withdrawal Motion was denied by the Honorable James V. Selna, United States District Judge, on January 29, 2018.

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Bad acts by a plaintiff occurring after the filing of the complaint and during the litigation can be taken into account in determining whether equity's unclean hands doctrine applies and bars the plaintiff from obtaining any relief at all in the case. It is well settled that one who comes into equity must come with clean hands and keep those hands clean throughout the litigation.

The landmark case so holding would appear to be *Hall v. Wright,* 240 F.2d 787 (9th Cir. 1957), where the United States Court of Appeals for the Ninth Circuit affirmed a district court decision finding unclean hands on the part of both the plaintiffs and the defendants based upon actions those parties had taken "[b]efore and during the pendency of this litigation." 240 F.2d at 795.

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Many of the judges in eleventh and twelfth century England were churchmen because these were often the only people otherwise available and suitable who were literate. The custom of appointing churchmen to high places in the judiciary seems to have persisted far longer in the courts of equity than it did in the courts of common law. Some of the Lord Chancellors in the late fifteenth century were the following: John Alcock, Bishop of Rochester (1475); Thomas Rotheram, Bishop of Lincoln (1475-1483); John Russell, Bishop of Lincoln (1483-1485); Thomas Rotheram, Archbishop of York (1485); John Alcock, Bishop of Worcester (1485-1486); John Morton, Archbishop of Canterbury (1486-1500). It is perhaps because of the ecclesiastical background of the Lord Chancellors that the Court of Chancery became recognized as a "court of conscience."

By the middle of the eighteenth century, as Blackstone shows, a bankruptcy case could be commenced by filing a petition with the Lord Chancellor, whereupon commissioners in bankruptcy (the analog of today's bankruptcy judges) would be appointed who would then supervise the election of the assignee (the analog of today's chapter 7 trustee) and administer the bankrupt's estate. Upon an affirmative vote of 80 percent or more of the creditors by number and value and a certificate to that effect authenticated by the commissioners, the Lord Chancellor could grant the debtor a discharge. Thus, bankruptcy as an institution developed solely on the equity side, and not the common law side, of English jurisprudence.

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The Supreme Court of the United States has emphasized that courts of equity, such as this Court, apply the maxim of unclean hands "not by way of punishment for extraneous transgressions, but upon considerations that make for the advancement of right and justice. *They are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion*." *Keystone Driller Co. v. General Excavator Co.*, *supra,* 290 U.S. at 245-246, 54 S. Ct. at 148 [italics added by this Court].

Time and time again the courts have emphasized that the unclean hands doctrine is wide-ranging and unconfined. *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.,* 324 U.S. 806, 814-815, 65 S. Ct. 993, 997 (1945); *Norton Co. v. Carborundum Co.*, 530 F.2d 435, 442 (1st Cir. 1976); *Goldstein v. Delgratia Mining Corp.*, 176 F.R.D. 454, 458 (S.D. N.Y. 1997). …

The purpose of the unclean hands doctrine is not to protect the defendant – it is to protect the court from becoming an aider and abettor of iniquity.

66

The authorities are agreed that it is entirely proper for a court to raise the doctrine *sua sponte*. *Saudi Basic Indus. Corp. v. ExxonMobil Corp*, 401 F. Supp. 2d 383, 392-393 (D.N.J. 2005). Judge Learned Hand seems to have stated these rules best:

> The doctrine (of unclean hands) is confessedly derived from the unwillingness of a court, originally and still nominally one of conscience, to give its peculiar relief to a suitor who in the very controversy has so conducted himself as to shock the moral sensibilities of the judge. It has nothing to do with the rights or liabilities of the parties; indeed the defendant who invokes it need not be damaged, and the court may even raise it sua sponte.

Art Metal Works, Inc. v. Abraham & Straus, Inc., 70 F.2d 641, 646 (2d Cir. 1934) (Hand, J., dissenting).

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In short, the Baeks' conduct shocks the moral sensibilities of this Court because it (1) was undertaken for the express purpose and with the specific intention of humiliating and embarrassing Mr. Halvorson in front of his family, his attorneys and the Trustee's attorneys, (2) substantially prejudiced the cases in this Court of the Trustee, Mr. Halvorson, Ms. Randall and Dan, (3) adversely affects the public interest in encouraging mediation, and (4) fatally undermined the Mediation Order of this Court. Subject to the balancing considerations discussed below, this is a clear case where "He that hath committed iniquity shall not have equity."

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Duties of judges(?!) to the system

U.S. District Court, Central District of California, www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines:

Judge's Duties to Others

We will be courteous, respectful, and civil to the attorneys, parties, and witnesses who appear before us. Furthermore, we will use our authority to ensure that all of the attorneys, parties, and witnesses appearing in our courtrooms conduct themselves in a civil manner.

We will do our best to ensure that court personnel act civilly toward attorneys, parties and witnesses.

We will not employ abusive, demeaning, or humiliating language in opinions or in written or oral communications with attorneys, parties, or witnesses.

We will be punctual in convening all hearings, meetings, and conferences.

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We will make reasonable efforts to decide promptly all matters presented to us for decision.

While endeavoring to resolve disputes efficiently, we will be aware of the time constraints and pressures imposed on attorneys by the exigencies of litigation practice.

Above all, we will remember that the court is the servant of the people, and we will approach our duties in this fashion.

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Best practices in judiciary

What did you admire about your favorite judge when you were an attorney?

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Closing remarks – the role of legal specialization

The primary role of legal specialization is to help consumers, lawyers, and the press find competent lawyers in a given location and field of law.

A secondary role is to encourage lawyers to continue with their professional growth.

Certified specialists have demonstrated their ethics, experience, and capabilities. Congress recognized this in 11 U.S.C. §330(a)(3)(C) ("In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including … with respect to a professional person, whether the person is ***board certified*** or otherwise has demonstrated skill and experience in the bankruptcy field … ").

Certified specialists are enthusiastic volunteers on legal and certification matters – leaders of the bar (and now leaders on the bench).

How has legal specialization helped our panelists in their careers? (About 35 sitting judges were or are board certified by The American Board of Certification – about 10% of all authorized judgeships.)

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