**7.2: Improper Advocacy**

*Here’s the last toast of the evening, here’s to those who still believe. All the losers will be winners, all the givers shall receive. Here’s to trouble-free tomorrows, may your sorrows all be small. Here’s to the losers, bless them all.*[[1]](#footnote-0)

*The head on my shoulders is sorta loose, and I ain’t got the sense God gave a goose. Lord, I ain’t crazy, but I'm a nut.*[[2]](#footnote-1)

Federal Rule of Civil Procedure 11 prohibits frivolous pleadings. But Model Rule of Professional Conduct 3.1 goes farther, prohibiting frivolous argument and abusive litigation tactics as well. In other words, under Rule 3.1, litigants must not only ensure that their pleadings are meritorious, but also that their litigation tactics are reasonable. Unsurprisingly, this rule is enforced almost entirely in the breach. Courts are reluctant to sanction attorneys for improper tactics, and when they do, the sanctions are often reversed as improperly imposed.

Nevertheless, good attorneys realize that the court is always watching. And they know that judges tend to reward good behavior and punish bad behavior. Sometimes, those rewards and punishments are explicit. But more often they are implicit, and come in the form of motions granted or denied.

[**Model Rule of Professional Conduct 3.1: Meritorious Claims & Contentions**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_1_meritorious_claims_contentions/)

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

[**Model Rule of Professional Conduct 3.1: Meritorious Claims & Contentions, Comments [1]-[3]**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_1_meritorious_claims_contentions/comment_on_rule_3_1/)

1. The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.
2. The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.
3. The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

[**Model Code of Professional Responsibility, Canon 7: A Lawyer Should Represent**](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_migrated/mcpr.pdf)

[**a Client Zealously Within the Bounds of the Law (1969)**](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_migrated/mcpr.pdf)

EC 7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client

zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

EC 7-2 The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.

EC 7-3 Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

Duty of the Lawyer to a Client

EC 7-4 The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

EC 7-5 A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.

[***In re Snyder*, 472 U.S. 634 (1985)**](https://scholar.google.com/scholar_case?case=15444496403479185276)

**Summary:** Snyder objected to the United States District Court for the District of North Dakota’s treatment of attorneys representing indigent criminal defendants, and refused to apologize for the tone of his objection. The Chief Judge of the district court suspended Snyder for one year for disrespecting the court and the circuit court affirmed. The Supreme Court reversed, holding that Snyder’s conduct was not sanctionable.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review the judgment of the Court of Appeals suspending petitioner from practice in all courts of the Eighth Circuit for six months.

I

In March 1983, petitioner Robert Snyder was appointed by the Federal District Court for the District of North Dakota to represent a defendant under the Criminal Justice Act. After petitioner completed the assignment, he submitted a claim for $1,898.55 for services and expenses. The claim was reduced by the District Court of $1,796.05.

Under the Criminal Justice Act, the Chief Judge of the Court of Appeals was required to review and approve expenditures for compensation in excess of $1,000. Chief Judge Lay found the claim insufficiently documented, and he returned it with a request for additional information. Because of technical problems with his computer software, petitioner could not readily provide the information in the form requested by the Chief Judge. He did, however, file a supplemental application.

The secretary of the Chief Judge of the Circuit again returned the application, stating that the proffered documentation was unacceptable. Petitioner then discussed the matter with Helen Monteith, the District Court Judge’s secretary, who suggested he write a letter expressing his view. Petitioner then wrote the letter that led to this case. The letter, addressed to Ms. Monteith, read in part:

In the first place, I am appalled by the amount of money which the federal court pays for indigent criminal defense work. The reason that so few attorneys in Bismarck accept this work is for that exact reason. We have, up to this point, still accepted the indigent appointments, because of a duty to our profession, and the fact that nobody else will do it.

Now, however, not only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.

Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it.

Thank you for your time and attention.

The District Court Judge viewed this letter as one seeking changes in the process for providing fees, and discussed these concerns with petitioner. The District Court Judge then forwarded the letter to the Chief Judge of the Circuit. The Chief Judge in turn wrote to the District Judge, stating that he considered petitioner’s letter:

totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process and the courts.

The Chief Judge expressed concern both about petitioner’s failure to “follow the guidelines and refusal to cooperate with the court,” and questioned whether, “in view of the letter” petitioner was “worthy of practicing law in the federal courts on any matter.” He stated his intention to issue an order to show cause why petitioner should not be suspended from practicing in any federal court in the Circuit for a period of one year. Subsequently, the Chief Judge wrote to the District Court again, stating that if petitioner apologized the matter would be dropped. At this time, the Chief Judge approved a reduced fee for petitioner’s work of $1,000 plus expenses of $23.25.

After talking with petitioner, the District Court Judge responded to the Chief Judge as follows:

He sees his letter as an expression of an honest opinion, and an exercise of his right of freedom of speech. I, of course, see it as a youthful and exuberant expression of annoyance which has now risen to the level of a cause.

He has decided not to apologize, although he assured me he did not intend the letter as you interpreted it.

The Chief Judge then issued an order for petitioner to show cause why he should not be suspended for his “refusal to carry out his obligations as a practicing lawyer and officer of the court” because of his refusal to accept assignments under the Criminal Justice Act. Nowhere in the order was there any reference to any disrespect in petitioner’s letter of October 6, 1983.

Petitioner requested a hearing on the show cause order. In his response to the order, petitioner focused exclusively on whether he was required to represent indigents under the Criminal Justice Act. He contended that the Act did not compel lawyers to represent indigents, and he noted that many of the lawyers in his District had declined to serve. He also informed the court that prior to his withdrawal from the Criminal Justice Act panel, he and his two partners had taken 15 percent of all the Criminal Justice Act cases in their district.

At the hearing, the Court of Appeals focused on whether petitioner’s letter of October 6, 1983, was disrespectful, an issue not mentioned in the show cause order. At one point, Judge Arnold asked: “I am asking you, sir, if you are prepared to apologize to the court for the tone of your letter?” Petitioner answered: “That is not the basis that I am being brought forth before the court today.” When the issue again arose, petitioner protested: “But, it seems to me we’re getting far afield here. The question is, can I be suspended from this court for my request to be removed from the panel of attorneys.”

Petitioner was again offered an opportunity to apologize for his letter, but he declined. At the conclusion of the hearing, the Chief Judge stated:

I want to make it clear to Mr. Snyder what it is the court is allowing you ten days lapse here, a period for you to consider. One is, that, assuming there is a general requirement for all competent lawyers to do pro bono work that you stand willing and ready to perform such work and will comply with the guidelines of the statute. And secondly, to reconsider your position as Judge Arnold has requested, concerning the tone of your letter of October 6.

Following the hearing, petitioner wrote a letter to the court, agreeing to “enthusiastically obey the mandates” of any new plan for the implementation of the Criminal Justice Act in North Dakota, and to “make every good faith effort possible” to comply with the court’s guidelines regarding compensation under the Act. Petitioner’s letter, however, made no mention of the October 6, 1983, letter.

The Chief Judge then wrote to Snyder, stating among other things:

The court expressed its opinion at the time of the oral hearing that interrelated with our concern and the issuance of the order to show cause was the disrespect that you displayed to the court by way of your letter addressed to Helen Montieth, Judge Van Sickle’s secretary, of October 6, 1983. The court expressly asked if you would be willing to apologize for the tone of the letter and the disrespect displayed. You serve as an officer of the court and, as such, the Canons of Ethics require every lawyer to maintain a respect for the court as an institution.

Before circulating your letter of February 23, I would appreciate your response to Judge Arnold’s specific request, and the court’s request, for you to apologize for the letter that you wrote.

Please let me hear from you by return mail. I am confident that if such a letter is forthcoming that the court will dissolve the order.

Petitioner responded to the Chief Judge:

I cannot, and will never, in justice to my conscience, apologize for what I consider to be telling the truth, albeit in harsh terms.

It is unfortunate that the respective positions in the proceeding have so hardened. However, I consider this to be a matter of principle, and if one stands on a principle, one must be willing to accept the consequences.

After receipt of this letter, petitioner was suspended from the practice of law in the federal courts in the Eighth Circuit for six months. The opinion stated that petitioner “contumaciously refused to retract his previous remarks or apologize to the court.” It continued:

Petitioner’s refusal to show continuing respect for the court and his refusal to demonstrate a sincere retraction of his admittedly “harsh” statements are sufficient to demonstrate to this court that he is not presently fit to practice law in the federal courts. All courts depend on the highest level of integrity and respect not only from the judiciary but from the lawyers who serve in the court as well. Without public display of respect for the judicial branch of government as an institution by lawyers, the law cannot survive. Without hesitation we find Snyder’s disrespectful statements as to this court’s administration of CJA contumacious conduct. We deem this unfortunate.

We find that Robert Snyder shall be suspended from the practice of law in the federal courts of the Eighth Circuit for a period of six months; thereafter, Snyder should make application to both this court and the federal district court of North Dakota to be readmitted.

The opinion specifically stated that petitioner’s offer to serve in Criminal Justice Act cases in the future if the panel was equitably structured had “considerable merit.”

Petitioner moved for rehearing en banc. In support of his motion, he presented an affidavit from the District Judge’s secretary — the addressee of the October 6 letter — stating that she had encouraged him to send the letter. He also submitted an affidavit from the District Judge, which read in part:

I did not view the letter as one of disrespect for the Court, but rather one of somewhat frustrated lawyer hoping that his comments might be viewed as a basis for some changes in the process.

Mr. Snyder has appeared before me on a number of occasions and has always competently represented his client, and has shown the highest respect to the court system and to me.

The petition for rehearing en banc was denied. An opinion for the en banc court stated:

The gravamen of the situation is that Snyder in his letter of October 6, 1983 became harsh and disrespectful to the Court. It is one thing for a lawyer to complain factually to the Court, it is another for counsel to be disrespectful in doing so.

Snyder states that his letter is not disrespectful. We disagree. In our view, the letter speaks for itself.

The en banc court opinion stayed the order of suspension for 10 days, but provided that the stay would be lifted if petitioner failed to apologize. He did not apologize, and the order of suspension took effect.

We granted certiorari. We reverse.

II

A

Petitioner challenges his suspension from practice on the grounds (a) that his October 6, 1983, letter to the District Judge's secretary was protected by the First Amendment, (b) that he was denied due process with respect to the notice of the charge on which he was suspended, and (c) that his challenged letter was not disrespectful or contemptuous. We avoid constitutional issues when resolution of such issues is not necessary for disposition of a case. Accordingly, we consider first whether petitioner’s conduct and expressions warranted his suspension from practice; if they did not, there is no occasion to reach petitioner’s constitutional claims.

Courts have long recognized an inherent authority to suspend or disbar lawyers. This inherent power derives from the lawyer’s role as an officer of the court which granted admission. The standard for disciplining attorneys practicing before the courts of appeals is set forth in Federal Rule of Appellate Procedure 46:

(b) Suspension or Disbarment. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, he will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why he should not be suspended or disbarred. Upon his response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

The phrase “conduct unbecoming a member of the bar” must be read in light of the “complex code of behavior” to which attorneys are subject. Essentially, this reflects the burdens inherent in the attorney's dual obligations to clients and to the system of justice. Justice Cardozo once observed:

Membership in the bar is a privilege burdened with conditions. An attorney is received into that ancient fellowship for something more than private gain. He becomes an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.

As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but also to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.

Read in light of the traditional duties imposed on an attorney, it is clear that “conduct unbecoming a member of the bar” is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and “the lore of the profession,” as embodied in codes of professional conduct.

B

Apparently relying on an attorney’s obligation to avoid conduct that is “prejudicial to the administration of justice,” the Court of Appeals held that the letter of October 6, 1983, and an unspecified “refusal to show continuing respect for the court” demonstrated that petitioner was “not presently fit to practice law in the federal courts.” Its holding was predicated on a specific finding that petitioner’s “disrespectful statements in his letter of October 6, 1983 as to this court's administration of the CJA constituted contumacious conduct.”

We must examine the record in light of Rule 46 to determine whether the Court of Appeals’ action is supported by the evidence. In the letter, petitioner declined to submit further documentation in support of his fee request, refused to accept further assignments under the Criminal Justice Act, and criticized the administration of the Act. Petitioner’s refusal to submit further documentation in support of his fee request could afford a basis for declining to award a fee; however, the submission of adequate documentation was only a prerequisite to the collection of his fee, not an affirmative obligation required by his duties to a client or the court. Nor, as the Court of Appeals ultimately concluded, was petitioner legally obligated under the terms of the local plan to accept Criminal Justice Act cases.

We do not consider a lawyer’s criticism of the administration of the Act or criticism of inequities in assignments under the Act as cause for discipline or suspension. The letter was addressed to a court employee charged with administrative responsibilities, and concerned a practical matter in the administration of the Act. The Court of Appeals acknowledged that petitioner brought to light concerns about the administration of the plan that had “merit,” and the court instituted a study of the administration of the Criminal Justice Act as a result of petitioner’s complaint. Officers of the court may appropriately express criticism on such matters.

The record indicates the Court of Appeals was concerned about the tone of the letter; petitioner concedes that the tone of his letter was “harsh,” and, indeed it can be read as illmannered. All persons involved in the judicial process — judges, litigants, witnesses, and court officers — owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone. However, even assuming that the letter exhibited an unlawyerlike rudeness, a single incident of rudeness or lack of professional courtesy — in this context — does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is “not presently fit to practice law in the federal courts.” Nor does it rise to the level of “conduct unbecoming a member of the bar” warranting suspension from practice.

**Questions:**

1. Why did the district court sanction Snyder? Why did the circuit court affirm? And why did the Supreme Court reverse?
2. When should courts be able to sanction attorneys for disrespectful behavior? When should the discretion of the court be limited?



[***Gadda v. Ashcroft*, 377 F. 3d 934 (9th Cir. 2004)**](https://scholar.google.com/scholar_case?case=8137984315948794501)

**Summary:** The California Bar disbarred Gadda for incompetence, based on his failure to provide competent legal representation to clients in immigration court. The Ninth Circuit also disbarred Gadda, based on the California Bar’s decision. Gadda objected to his disbarment by the 9th Circuit, arguing that the California Bar lacked authority to discipline him for incompetent representation in immigration court. The 9th Circuit disagreed, holding that both the California Bar and the 9th Circuit had the authority to discipline him.

BEEZER, Circuit Judge.

On July 30, 2001, the California State Bar Court found that Miguel Gadda, Esq. repeatedly failed to perform legal services competently. It placed Gadda on involuntary inactive status and recommended that Gadda be disbarred.

This opinion and order relate to two federal proceedings resulting from the State Bar Court’s recommendation. In the first, Gadda appeals an order of the United States District Court for the Northern District of California, which denies Gadda's motion to preliminarily enjoin the Board of Immigration Appeals decision to suspend him from practice based on his suspension by the State Bar Court. Gadda asserts that the State Bar Court cannot affect his right to practice before the BIA. The other proceeding is a disciplinary action initiated by this court after we received notice of Gadda’s suspension from practice by the State Bar Court.

Gadda argues that any reciprocal discipline imposed by the BIA or by this court based on the State Bar Court’s suspension order is invalid because the Supreme Court of California lacked jurisdiction to discipline him. He claims that federal law preempts the states’ authority to regulate attorneys, like him, who practice only in the administration of immigration law and in the federal courts, but not in the state courts. Because both of these proceedings involve the same underlying preemption issue, we consolidate them for opinion purposes only.

We conclude that federal law does not preempt the Supreme Court of California’s authority to suspend or disbar attorneys admitted to practice in California state courts. The Supreme Court of California’s discipline orders may serve as the basis for reciprocal disbarment actions by both the BIA and this court.

We disbar Gadda from the practice of law before the United States Court of Appeals for the Ninth Circuit.

I

Gadda was admitted to the California State Bar in 1975. Thereafter, he was admitted to practice law and became a member of the bar of the United States District Court for the Northern District of California, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States. He was also admitted to practice before the Board of Immigration Appeals and was authorized to appear for clients before the BIA and in all Immigration Courts throughout the United States.

A. California State Court Disciplinary Proceedings

On August 26, 2002, the Review Department of the California State Bar Court affirmed the State Bar Court’s decision recommending Gadda's disbarment and placing him on involuntary inactive status. On January 22, 2003, the Supreme Court of California ordered that Gadda be disbarred from the practice of law in California, effective February 21, 2003.

The Review Department’s opinion surveyed Gadda's history of federal immigration practice, concluding that “disbarment is warranted under the circumstances for the protection of the public, the courts, and the legal profession.” The Review Department cited seventeen acts of misconduct extending over six years and involving eight federal immigration client matters and one client trust account matter. This misconduct included Gadda’s failure to appear at scheduled court conferences and to keep clients apprised of the proceedings and relevant court dates. Five of Gadda's clients were ordered deported in absentia and at least six courts found Gadda to have provided ineffective assistance. The Review Department concluded that Gadda failed “to perform legal services competently, demonstrated indifference toward rectification of or atonement for the consequences of his misconduct, and significantly harmed clients.” The Review Department determined that aggravating factors, including prior discipline for similar misconduct in 1990, outweighed any mitigating factors Gadda presented.

We incorporate by reference that portion of the Review Board’s opinion which inventories Gadda’s incompetence between 1994 and 1999. Of the eight federal immigration client matters which the Review Board describes, that of the Saba family is especially egregious.

The four minor Saba children applied for political asylum. After the INS denied their application, the children retained Gadda to represent them. Gadda advised the children to withdraw their asylum claim; the Immigration Judge ordered that they voluntarily depart from the United States.

Thereafter, the children’s parents became naturalized citizens. The children were eligible for priority consideration of their application for adjustment of status to legal residency or citizenship based on their parents’ naturalization. However, as a result of Gadda’s neglect and incompetence, the children were deprived of an adjustment of their immigration status, and ultimately were placed in deportation proceedings.

Gadda moved for a stay of the children’s deportation. In the course of a hearing on that motion, Gadda left the Saba family unrepresented before an immigration officer. Gadda also directed the children to sign a statement promising they would voluntarily depart once the stay expired. The immigration court granted the stay but the children did not depart as promised. Gadda assured the children that he was appealing the earlier BIA decision.

Because Gadda negligently allowed the time for an appeal from the BIA to this court to lapse, he was forced to seek habeas corpus relief before the district court. Gadda directed William Gardner, an attorney Gadda employed on a contract basis but did not supervise, to file the habeas petition. Before Gardner filed the habeas petition, the IJ ordered the Saba children to be deported on account of their refusal to depart voluntarily at the expiration of the stay. Gadda once again advised the children not to comply with the court's order.

Gardner subsequently filed the habeas petition and the district court ordered a hearing. The district court made a sua sponte finding of ineffective assistance by Gadda and remanded the matter to the immigration court to reopen the deportation hearing. By the time the case was heard, two of the Saba children were no longer minors. Gadda has not refunded the $3,000 the Saba children paid him.

Regarding the Saba matter, the Review Department agreed with the State Bar that Gadda “recklessly and repeatedly failed to perform legal services” and “failed to refund unearned fees promptly upon termination.” Specifically, the Review Department found Gadda’s performance incompetent in the following ways:

(1) by leaving the children alone, unrepresented, in the middle of a hearing before an immigration officer and advising them to sign a voluntary departure form; (2) by failing to advise the Saba children to depart on or before the deadline; (2) by failing to timely move to reopen deportation proceedings; (4) by failing to file a petition for review with the Ninth Circuit; (5) by failing to file for adjustment of status after Mrs. Saba became a naturalized citizen and instead filing for adjustment of status on the children’s last day to depart voluntarily, approximately three months later; and (6) by failing to supervise Gardner in filing a petition for writ of habeas corpus.

B. *Gadda v. Ashcroft* — appeal from BIA disciplinary proceedings

Based on the State Bar Court's order, on October 2, 2001, the BIA suspended Gadda from practice before the BIA, the Immigration Courts, and the Department of Homeland Security. Gadda unsuccessfully sought a preliminary injunction of the BIA’s action in the district court. Gadda appealed the denial of the preliminary injunction to this court. We deferred submission pending the outcome of disciplinary proceedings before the BIA.

Meanwhile, the Office of General Counsel for the Executive Office for Immigration Review initiated disciplinary proceedings and an adjudicatory official suspended Gadda indefinitely from practice on August 22, 2002. On July 8, 2003, the BIA dismissed Gadda’s appeal and ordered him expelled from practice before the BIA, the Immigration Courts, and the DHS.

C. Ninth Circuit Disciplinary Proceedings

On May 29, 2002, we ordered Gadda to resign from the Ninth Circuit’s bar or show cause why he should not be suspended or disbarred based on the California State Bar Court’s order placing him on involuntary inactive status and recommending that he be disbarred. Gadda responded and we referred the case to the Appellate Commissioner. On September 25, 2002, the Appellate Commissioner stayed the disciplinary proceedings pending a decision by the Supreme Court of California on the State Bar Court’s recommendation or a decision by us.

Following the Supreme Court of California’s January 22, 2003 order disbarring Gadda, the Appellate Commissioner again ordered Gadda to resign from the bar of the United States Court of Appeals for the Ninth Circuit or show cause why he should not be suspended or disbarred. Gadda requested a stay, claiming that the Supreme Court of California’s disbarment order was not final and that we should first resolve *Gadda v. Ashcroft*.

The Appellate Commissioner conducted a hearing on March 27, 2003 and filed a report and recommendation on May 22, 2003. The Appellate Commissioner recommends that Gadda be disbarred from the practice of law before the United States Court of Appeals for the Ninth Circuit.

II

“Membership in the bar is a privilege burdened with conditions. An attorney is received into that ancient fellowship for something more than private gain. He becomes an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.” We have both statutory and inherent power to suspend or disbar an attorney who has been admitted to this court’s bar.

Federal Rule of Appellate Procedure 46 regulates attorney conduct, including admission to the bar of the Ninth Circuit and the conditions for suspension and disbarment. FRAP 46 provides that a member of this court's bar is subject to suspension or disbarment if the member either (1) “has been suspended or disbarred from practice in any other court”; or (2) “is guilty of conduct unbecoming a member of the court's bar.”

A. Reciprocal Discipline

In this case, Gadda’s suspension and disbarment from the practice of law in California forms the basis for his disbarment from the BIA and this court.

B. Conduct Unbecoming

Even if the California courts had not acted to disbar Gadda, we have independent authority to suspend or disbar him from practice. Conduct unbecoming a member of the bar of the Ninth Circuit is sufficient cause for disbarment. Unlike some of our sister circuits, the Ninth Circuit has not adopted local rules elaborating on FRAP 46’s “conduct unbecoming” standard. The Supreme Court has held that “conduct unbecoming” is conduct “contrary to professional standards that show an unfitness to discharge continuing obligations to clients or courts, or conduct inimical to the administration of justice.” We have consistently found conduct unbecoming where an attorney failed to prosecute an appeal with due diligence.

Because we have jurisdiction over appeals from the immigration courts, the quality of the practice by attorneys appearing before the immigration courts is crucial to our ability to administer justice and function effectively. The quality of our review is heavily dependent on the record established in administrative immigration hearings, which in turn is dependent on the competence of the attorneys creating that record. Gadda’s incompetence impedes our operations and endangers the rights of his clients.

In the course of one immigration matter, for example, Gadda neglected to introduce crucial documents relating to changed country conditions. Although his client was in possession of such documents, Gadda failed to have the documents translated and offered as evidence. In that same matter, the Review Department found that Gadda failed to elicit persuasive testimony in support of his client's contention of fear of future persecution. Gadda currently represents petitioners in approximately 50 matters pending before this court. We hold that conduct such as his before the immigration courts is sufficient to constitute "conduct unbecoming" a member of the bar of this court.

C. Inherent Power

We hold that we also have inherent authority respecting the suspension and disbarment of attorneys who perform incompetently in federal immigration proceedings. This power derives from an attorney’s role as an officer of the court which granted the attorney admission to the bar; it is necessary to maintain the respectability and harmony of the bar, as well as to protect the public. We exercise this power with restraint and discretion.

“The behavior for which an attorney is disciplined pursuant to our inherent power must have some nexus with the conduct of the litigation before the court.” Such a connection exists in the context of immigration proceedings because, as noted above, we have jurisdiction over appeals from the immigration courts and rely on the records established in those courts.

III

It is ORDERED that Miguel Gadda, Esq. should be and hereby is disbarred from the practice of law before the United States Court of Appeals for the Ninth Circuit and his name shall be stricken from the roll of attorneys.

**Questions:**

1. When should the courts discipline attorneys like Gadda? What kind of discipline should they impose?
2. Why was Gadda disbarred? Is it possible that he provided some of his clients with competent representation?



[***Avista Management vs. Wausau Underwriters Insurance Co.* (M.D. Fl. 2006)**](http://archive.fortune.com/2006/06/07/magazines/fortune/judgerps_fortune/index.htm)

This matter comes before the Court on Plaintiff's Motion to designate location of a Rule 30(b)(6) deposition. Upon consideration of the Motion ñ the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts ñ it is

ORDERED that said Motion is DENIED. Instead, the Court will fashion a new form of alternative dispute resolution, to wit: at 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of “rock, paper, scissors.” The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period July 11-12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006 before the undersigned in Courtroom 3, George C. Young United States Courthouse and Federal Building, 80 North Hughey Avenue, Orlando, Florida 32801.

[**Jan Pudlow, *‘Rock, paper, scissors’ order garners worldwide attention*, Florida Bar News (July 1, 2006)**](https://www.floridabar.org/the-florida-bar-news/rock-paper-scissors-order-garners-worldwide-attention/)

Dutifully following a playful, but pointed, federal court order, Tampa lawyers David Pettinato, of the Merlin Law Group, and D. Lee Craig, of Butler Pappas, will meet June 20 and engage in one game of “rock, paper, scissors” to solve a dispute in the midst of heated litigation.

“We will do it quickly, humbly, and go on about our business,” said a contrite Pettinato, who is amazed about “getting bombarded from news media from all over the country.”

CNN, ABC, The Wall Street Journal, and The New York Times, to name a few.

Make that international news, as London’s The Guardian also did its version of the everybody’s-talking-about-it June 6 order issued by U.S. Middle District Judge Gregory Presnell, who was a member of The Florida Bar Board of Governors from 1989-93.

At issue was the childlike squabbling between the attorneys in *Avista Management, Inc., vs. Wausau Underwriters Insurance Co.*, in litigation over an insurance settlement stemming from 2004’s Hurricane Charley.

Even though the sparring lawyers’ offices are only four floors apart in the same building at 777 S. Harbor Island Blvd. in Tampa, they could not agree on where to hold a deposition. Craig, representing Wausau, wanted to question a witness in his office. Pettinato, representing Avista, was not willing to let Craig have the home-court advantage, and insisted on a neutral setting of a court reporter’s office down the street.

When they took the matter to the court, Presnell let them have it, fed up with “the latest series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts.”

In what the judge called “a new form of alternative dispute resolution,” Presnell ordered that each attorney will be “accompanied by one paralegal who shall act as an attendant and witness,” and “the winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period July 11-12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 a.m. on Friday, July 7, before the undersigned in Courtroom 3.”

That creative order compelled St. Petersburg Times columnist Sue Carlton to nominate Presnell for “Jurist of the Year.”

NO NEED FOR AN APPEAL

On June 8, Pettinato said that he and Craig have resolved the issue. Pettinato said both sides agreed to play rock, paper, scissors, at “an undisclosed location.” Whoever wins will get to hold the deposition in his office.

“We want to do it out of respect for the judge’s order,” said Pettinato, who added, “I have to say I am a little disappointed that we couldn’t resolve our differences without this court order. But it provided us with an eye-opener to resolve our differences in a more amicable way. Since the hurricanes, we have been having huge battles trying to get insurance companies to pay.. . . If you get a little too passionate advocating for your client, it helps to rethink your strategy.”

The matter has been zinging across the state, around the country, and across the ocean, on news Web sites, lawyers’ e-mails, and law blogs.

Orlando lawyer Lynn James Hinson, who called Presnell an excellent lawyer and judge, posted this comment on The Wall Street Journal’s Law Blog: “Many lawyers act like they are in kindergarten, and this order treats them appropriately.”

Craig, who did not return the News ’ request for an interview, may be at a disadvantage. Pettinato has a kindergartner in the house, as the father of a 5-year-old and 9-year-old.

“I play it all the time with them. I can’t say I’m an expert, but I know the rules,” Pettinato said. “Now, my 5-year-old keeps throwing her hand out, saying, ‘Dad, let’s practice.’”

Pettinato said his kids have advised him to open with rock, which he thought was apropos “because my case is solid as a rock.”

But Matti Leshem, co-commissioner of the USA Rock Paper Scissors League, told The New York Times, “I guarantee you right now that both lawyers will open with paper. Lawyers open with paper 67 percent of the time, because they deal with so much paper.”

Leshem agreed to officiate, saying, “What I don’t want is some rogue element of rock-paper-scissors coming down from the bench. When the law takes rock-paper-scissors into its own hands, mayhem can occur.”

While Pettinato said he has greatest respect for the judge and “got the message,” he is willing to laugh at himself, “or else I’ll grow despondent.”

Taking it somewhat seriously is the World Rock Paper Scissors Society.

“This is a landmark case of how RPS should be used to keep the wheels of justice moving forward when dealing with lawyer engaging in posturing tactics,” Doug Walker, managing director of the World RPS Society, told the News.

“Although we take issue with RPS being labeled as a ‘new’ form of dispute resolution, we understand it is not commonly used in courtrooms and applaud Judge Presnell’s wisdom in the matter.”

Noting that Rock, Paper, Scissors dates back to at least the 18th century in Japan, it was used to settle an auction-house dispute in April when “an $18 million art portfolio was acquired by Christie’s due to a cleverly executed throw of paper,” over Sotheby’s rock.

The World Rock Paper Scissors Society, Walker said, plans to invite Judge Presnell to attend the International Rock Paper Scissors Championships in Toronto on September 30, as “chief consultant to Head Referee Brad Fox.”

No word yet on whether the judge will accept the invitation.

**Questions:**

1. Why did the court order Pettinato and Craig to resolve their dispute via a game of [Roshambo](https://www.youtube.com/watch?v=rHliDE1_Hls)?
2. Was the judge’s decision justified and appropriate under the circumstances?

[***Auto-Owners Ins. Co. v. Summit Park Townhome*, 886 F. 3d 863 (10th Cir. 2018)**](https://scholar.google.com/scholar_case?case=2320415020066026636)

**Summary:** Harris and Pettinato represented Summit Park in an action against Auto-Owners. Summit Park was damaged by hail, but the parties disagreed about the amount of damage. The district court ordered them both to obtain independent appraisals. Harris and Pettinato retained Keys as their appraiser, but did not disclose their previous relationship with him. When the district court learned that Keys was not impartial, it sanctioned Harris and Pettinato. They appealed, but the circuit court affirmed.

BACHARACH, Circuit Judge.

Mr. William Harris and Mr. David Pettinato are two attorneys who represented Summit Park Townhome Association. While representing Summit Park against its insurer, the two attorneys were sanctioned for failing to disclose information. In this appeal, the attorneys challenge the sanctions based on five arguments:

1. The district court lacked authority to require the disclosure requirements.
2. The attorneys did not violate the court’s disclosure requirements.
3. The district court awarded attorneys’ fees beyond the scope of an earlier sanctions order.
4. The district court's award of attorneys’ fees resulted in a deprivation of due process.
5. The amount of attorneys’ fees awarded was unreasonable.

We affirm. Regardless of whether the district court had authority to require the disclosures, the attorneys were obligated to comply. They did not, and the district court acted reasonably in issuing sanctions, determining the scope of the sanctions, and calculating the amount of the sanctions.

I. Mr. Harris and Mr. Pettinato were sanctioned for failing to comply with the disclosure order.

This appeal grew out of an insurance dispute. Summit Park sustained hail damage and filed a claim with its insurer, Auto-Owners Insurance Company. The parties agreed that damage had occurred but disagreed on the dollar amount of the damage. Auto-Owners sued for a declaratory judgment to decide the value.

Summit Park retained Mr. Harris and Mr. Pettinato, who successfully moved to compel an appraisal based on the insurance policy. In the event of an appraisal, the insurance policy required:

Each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding.

Based on continuing disputes between the parties, Auto-Owners asked the district court to resolve these disputes by ordering an “appraisal agreement.” The court did so and ordered disclosure of facts potentially bearing on the appraisers' impartiality:

An individual who has a known, direct, and material interest in the outcome of the appraisal proceeding or a known, existing, and substantial relationship with a party may not serve as an appraiser. Each appraiser must, after making a reasonable inquiry, disclose to all parties and any other appraiser any known facts that a reasonable person would consider likely to affect his or her impartiality, including (a) a financial or personal interest in the outcome of the appraisal; and (b) a current or previous relationship with any of the parties (including their counsel or representatives) or with any of the participants in the appraisal proceeding. Each appraiser shall have a continuing obligation to disclose to the parties and to any other appraiser any facts that he or she learns after accepting appointment that a reasonable person would consider likely to affect his or her impartiality.

The court warned: “Notice is given that, if the court finds that the parties and/or their counsel have not complied with this order, the court will impose sanctions against the parties and/or their counsel pursuant to the court's inherent authority.”

Before the court imposed these requirements, Summit Park selected Mr. George Keys as its appraiser. This selection led Auto-Owners to express doubt about Mr. Keys’s impartiality. But Auto-Owners did not object to Mr. Keys or move to compel further disclosures.

Mr. Keys and the court-appointed umpire agreed on an appraisal award of over $10 million, which was 47% higher than Summit Park’s own public adjuster had determined. Auto-Owners then launched an investigation, which culminated in an objection to Mr. Keys. In the objection, Auto-Owners argued that Mr. Keys was not impartial and that Summit Park had failed to disclose evidence bearing on his impartiality. The district court credited these arguments, disqualifying Mr. Keys and vacating the appraisal award.

With vacatur of the appraisal award, Auto-Owners moved for sanctions against Mr. Harris and Mr. Pettinato, seeking attorneys’ fees and expenses based on violation of the disclosure order. The district court granted the motion, assessing sanctions against Mr. Harris and Mr. Pettinato for $354,350.65 in attorneys' fees and expenses.

II. Mr. Harris and Mr. Pettinato were bound by the court’s disclosure order.

Mr. Harris and Mr. Pettinato challenge the district court’s authority to enter the disclosure order. But even if the court had exceeded its authority, Mr. Harris and Mr. Pettinato would still have needed to comply with the disclosure order. If the two attorneys believed that the order had been unauthorized, they could have sought reconsideration or a writ; but they could not violate the order.

There is “impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.” The parties agree that the district court had jurisdiction over the subject matter and parties; thus, the attorneys and parties bore an obligation to comply in the absence of an appellate challenge. In light of the duty to comply, violation of the order could trigger sanctions.

Regardless of whether the district court had authority to issue the disclosure order, Mr. Harris and Mr. Pettinato:

* bore an obligation to comply in the absence of an appellate challenge and
* could be sanctioned for noncompliance.

III. Mr. Harris and Mr. Pettinato violated the disclosure order.

The district court concluded that the two attorneys had violated the disclosure order. Challenging this conclusion, Mr. Harris and Mr. Pettinato make two arguments:

1. The district court misinterpreted the term “impartial.”
2. Mr. Harris and Mr. Pettinato disclosed sufficient information about Mr. Keys.

Both arguments fail.

B. Mr. Harris and Mr. Pettinato failed to disclose information specified in the disclosure order.

The district court required disclosure of:

* the appraiser’s “financial or personal interest in the outcome of the appraisal,”
* Any “current or previous relationship” between the appraiser and Summit Park’s counsel, and
* any other facts subsequently learned that “a reasonable person would consider likely to affect” the appraiser's impartiality.

1. Mr. Harris and Mr. Pettinato did not disclose the extent of their relationships with Mr. Keys.

Regardless of whether the district court had correctly defined “impartial,” the disclosure order itself was clear in what was required. For example, the order expressly required disclosure of the attorneys’ current or previous relationships with the appraiser. The failure to disclose this information constituted a sanctionable violation regardless of the court's interpretation of the word “impartial.”

The district court could reasonably find that the two attorneys had failed to disclose the extent of their relationships with Mr. Keys. For example, the attorneys failed to disclose that

* other attorneys in their law firm (the Merlin Law Group) had worked with Mr. Keys on appraisals for at least 33 clients,
* Merlin attorneys had represented Mr. Keys on various matters for over a decade,
* Merlin’s founder and Mr. Keys had co-founded a Florida lobbying operation, whose “number one goal was to protect policyholders and the public adjusting profession,” and
* Merlin attorneys had served as the incorporator and registered agent for one of Mr. Keys’s companies.

Mr. Harris and Mr. Pettinato argue that their disclosures were sufficient. They made two disclosures:

1. “Mr. Keys does not have any significant prior business relationship with Merlin, Summit Park, or C3 Group. Mr. Keys has acted as a public adjuster and/or appraiser on behalf of policyholders that Merlin has represented in the past, however, this obviously does not affect his ability to act as an appraiser in this matter.”
2. “Mr. Keys has acted as a public adjuster and/or appraiser on behalf of policyholders that Merlin has represented in the past. Mr. Keys has no financial interest in the claim, and has no previous relationship with the policyholder in this matter.”

In addition, Mr. Keys disclosed:

I do not have a material interest in the outcome of the Award and have never acted either for or against Summit Park Townhome Association. My fee agreement is based upon hourly rates plus expenses. I do not have any substantial business relationship or financial interest in Merlin. There have been cases where both Merlin and Keys Claims Consultants acted for the same insured but under separate contracts.

Mr. Harris and Mr. Pettinato make two defenses of their disclosures:

1. They disclosed enough information about Mr. Keys’s impartiality.
2. Mr. Harris and Mr. Pettinato lacked personal knowledge about the undisclosed facts.

These arguments fail.

First, the district court acted within its discretion in concluding that Mr. Harris and Mr. Pettinato had failed to disclose the extent of their relationships with Mr. Keys. The two attorneys disclosed only that Mr. Keys had worked as an appraiser on behalf of Merlin’s clients, and Mr. Keys stated that he lacked a substantial business relationship with Merlin. The district court could reasonably find that these disclosures had failed to provide meaningful information about the extent of the relationships between the two attorneys and Mr. Keys.

Second, Mr. Harris and Mr. Pettinato cannot avoid sanctions based on their asserted lack of knowledge about Mr. Keys’s contacts with other Merlin attorneys. Mr. Harris and Mr. Pettinato knew about some of the contacts, as reflected in Mr. Pettinato's description of his firm’s connection with Mr. Keys: “Both Mr. Keys and his staff have assisted me as well as my firm in resolving an untold number of large multi-million dollar losses to an amicable resolution and settlement to the policyholders’ benefit and satisfaction.” In addition, however, Mr. Harris and Mr. Pettinato bore an obligation to make “a reasonable inquiry.” In light of this obligation, Mr. Harris and Mr. Pettinato could not profess ignorance while failing to inquire about contacts with other Merlin attorneys.

In these circumstances, the district court acted within its discretion in finding a failure to disclose the extent of the relationships between the two attorneys and Mr. Keys.

2. Mr. Harris and Mr. Pettinato distort the effect of the district court’s definition of “impartial.”

The district court required disclosure not only of the appraiser’s relationship with counsel but also of known facts that a reasonable person would consider likely to affect the appraiser's impartiality. This part of the disclosure requirement was tied to the court's definition of the term “impartial.”

Mr. Harris and Mr. Pettinato focus on the court’s definition of “impartial,” arguing that it was wrong and that the court failed to adequately inform Mr. Harris and Mr. Pettinato of the scope of their obligations. But in the disclosure order itself, the court stated what it meant by “impartial”: “An individual who has a known, direct, and material interest in the outcome of the appraisal proceeding or a known, existing, and substantial relationship with a party may not serve as an appraiser.” Because the court stated precisely what it meant by “impartial,” Mr. Harris and Mr. Pettinato knew what was required. And as we have discussed, Mr. Harris and Mr. Pettinato could not disobey the order even if the court had based the disclosure requirements on a misguided definition of “impartial.”

3. The district court reasonably found a violation of the disclosure order tied to this test of “impartial.”

Based on this definition, the district court required disclosure of any facts that a reasonable person would view as likely to affect the appraiser’s impartiality. Mr. Harris and Mr. Pettinato argue that evidence of an appraiser’s advocacy was unlikely to affect the appraiser’s impartiality. For the sake of argument, let’s assume that Mr. Harris and Mr. Pettinato are right. Still, the district court could reasonably view Mr. Keys’s undisclosed prior statements as likely to affect his impartiality based on a known, direct, and material interest in the outcome.

For example, in a presentation to a group of public adjusters in Florida, Mr. Keys taught participants how to “harvest the claim money” from an insurer during an appraisal. And one of Mr. Keys’s companies maintains a website stating: “Our purpose is simple: To shift the balance of power from the insurer to the policy holder.” The district court could reasonably view these undisclosed statements as proof of a material interest in an outcome favoring the policyholder over the insured.

Evidence also suggests that Mr. Harris and Mr. Pettinato were aware of Mr. Keys’s bias. For example, in an advertisement on Mr. Keys’s website, Mr. Pettinato endorsed Mr. Keys, saying: “Both Mr. Keys and his staff have assisted me as well as my firm in resolving an untold number of large multi-million dollar losses to an amicable resolution and settlement to the policyholders’ benefit and satisfaction.” And a profile on Merlin's website reported that Mr. Keys “had dedicated his professional life to being a voice for policyholders in property insurance claims.” In this profile, Mr. Keys stated: “I was taught to always handle a claim as if my momma was the insured.”

In sum, the district court did not abuse its discretion in finding that Mr. Harris and Mr. Pettinato had violated the disclosure order.

C. Waiver

Mr. Harris and Mr. Pettinato contend that Auto-Owners waived its objection to the sufficiency of the disclosures by failing to object despite knowledge of Mr. Keys’s relationship with Merlin and past expressions of bias toward policyholders. We disagree. Auto-Owners had some knowledge about Mr. Keys’s bias but did not know much of what had been withheld. Without full knowledge of the undisclosed information, Auto-Owners did not waive its right to seek sanctions for nondisclosure.

IV. The district court reasonably interpreted the scope of its sanctions order.

In sanctioning the two attorneys, the court invoked 28 U.S.C. § 1927. Under § 1927, an attorney “who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” Applying this statute in the sanctions order, the court found that Mr. Harris and Mr. Pettinato had unreasonably prolonged the proceedings:

I note that Section 1927 indicates a purpose to compensate victims of abusive litigation practices, not to deter and punish offenders. With this purpose in mind, I reject Auto-Owners’ request for fees for proceedings in this Court that relate to conducting the appraisal process and conducting the appraisal process itself because Auto-Owners would have incurred these fees regardless of Harris' and Pettinato's misconduct. I grant the request, however, as to Auto-Owners’ investigation into George Keys and its objections to his participation in the appraisal, as this work would not have taken place in the absence of Harris’ and Pettinato’s misconduct. The award shall be assessed against Harris and Pettinato jointly and severally.

Mr. Harris and Mr. Pettinato challenge the scope of this order. They concede that the award covered Auto-Owners’ objection to Mr. Keys ($186,705.50) and investigation of Mr. Keys ($33,805). But the attorneys disagree with the inclusion of attorneys’ fees for

* Auto-Owners’ preparation of the motion for sanctions ($51,309.50),
* Auto-Owners’ preparation of the application for attorneys’ fees and expenses ($16,960.50), and
* Auto-Owners' other related work ($61,662.50).

According to Mr. Harris and Mr. Pettinato, these activities fell outside of the initial sanctions order. We disagree.

In setting attorneys’ fees following the sanctions order, the district court explained:

Thus, viewed properly in its context, my award encompasses any fees incurred as a result of Harris’ and Pettinato’s misconduct. The fees requested by Auto-Owners for work on the third amended petition, the reservation of rights letter, and other matters described in the detailed billing records would not have been incurred but for Harris’ and Pettinato’s misconduct. I therefore conclude they are within the scope of the award.

We give deference to the district court’s interpretation of its own order.

With such deference, we conclude that the district court reasonably interpreted its prior sanctions order. The sanctions order had noted that § 1927 was designed “to compensate victims of abusive litigation practices.” In light of this purpose, the court interpreted its sanctions order against Mr. Harris and Mr. Pettinato as encompassing all of the attorneys’ fees and expenses resulting from violation of the disclosure order. This interpretation was reasonable.

The sanctions order expressly included the investigation of and objection to Mr. Keys. But the district court could reasonably interpret the sanctions order to go beyond the investigation and objection. If Mr. Harris and Mr. Pettinato had not violated the disclosure order, Auto-Owners would not have had to move for sanctions, seek attorneys’ fees and expenses, and complete other work. As a result, the district court could reasonably consider these litigation expenses as the product of the two attorneys’ misconduct. In these circumstances, it was reasonable for the district court to conclude that the earlier sanctions order had encompassed attorneys’ fees and expenses from the motion for sanctions, application for attorneys’ fees and expenses, and related work involving the motion and application.

V. The district court did not deprive the two attorneys of due process.

Alternatively, Mr. Harris and Mr. Pettinato assert a deprivation of due process based on an inability to respond to the district court’s inclusion of litigation activities outside of the initial sanctions order. We disagree. Auto-Owners filed an application for attorneys’ fees, and Mr. Harris and Mr. Pettinato had an opportunity to respond. In the response, they could have objected to any of the attorneys’ fees being sought. This opportunity supplied due process.

VI. The amount of attorneys' fees awarded was reasonable.

Mr. Harris and Mr. Pettinato also argue that the court awarded an unreasonable amount of attorneys’ fees. We disagree.

The district court closely reviewed the information in Auto-Owners’ request for fees, determining that most of the fee requests were reasonable given

* the circumstances of the case,
* the hourly rates prevailing in the community, and
* the use of billing judgment.

First, the district court concluded that it was reasonable for Auto-Owners’ counsel to spend long hours because “Auto-Owners had over $30 million at stake” and the issues were complex. This conclusion was reasonable.

Second, the court considered the local market, the qualifications of the attorneys, and the contentiousness of the litigation. These considerations led the district court to find that the billing rates had been reasonable. In our view, this finding was permissible under the record.

Third, the court considered the use of billing judgment by Auto-Owners’ counsel through concessions such as staffing with lower-billing attorneys, declining to charge for all hours worked, and discounting hours worked by paralegals and secretaries. The district court acted reasonably in considering these concessions.

For these three reasons, we conclude that the district court did not abuse its discretion in calculating the amount of the sanction ($354,350.65).

VII. Conclusion

The district court did not err in sanctioning Mr. Harris and Mr. Pettinato. Regardless of the validity of the disclosure order, compliance was required in the absence of an appellate challenge. Mr. Harris and Mr. Pettinato violated the order by failing to disclose information bearing on Mr. Keys's impartiality. In light of this violation, the district court had the discretion to sanction Mr. Harris and Mr. Pettinato and set a reasonable amount. We therefore affirm the assessment of sanctions.

**Questions:**

1. Why was it improper for Harris and Pettinato not to disclose their previous relationship with Keys?
2. Could Harris and Pettinato have hired Keys as their expert, if they made the proper disclosures?

**Further Reading:**

* [Benjamin Edwards, *The Professional Prospectus: A Call for Effective Professional Disclosure*, W&L L. Rev. (forthcoming)](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924634)

**Further Listening:**

* [*Benjamin Edwards on Improving the Market for Professional Services*, Ipse Dixit, March 19, 2019](https://shows.pippa.io/ipse-dixit/episodes/benjamin-edwards-on-improving-the-market-for-professional-se)

1. Robert Wells & Jack Segal, *Here’s to the Losers* (1963). [↑](#footnote-ref-0)
2. Leroy Pullins, *I’m a Nut* (1966). [↑](#footnote-ref-1)