

BILL AND TED'S ATTORNEY ADVENTURE:

Exploring the Psychology of a
Hyper-Competitive,
Highly-Skeptical, Mentally Exhausted Profession



**ANTHONY M. KENNEDY INN OF COURT
TEAM 2
OCTOBER 2023**

The Anthony M. Kennedy American Inn of Court
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I. California Rules of Professional Conduct

California Rules of Prof. Conduct, Rule 1.1 Competence:

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, 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 (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.

California Rules of Prof. Conduct, Rule 1.1 Competence – Comment:

- (1) Model Rule 1.1 states “a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
- (2) Unlike the Model Rule, the California Rule defines competence as a negative, not a positive. The intent of the rule is to remove “simple” negligence from the ambit of possible discipline, consistent with California’s long standing approach since 1928 that the Rules of Professional Conduct are primarily, if not exclusively, govern the discipline process, and do not provide prophylactic guidance for lawyers.

California Rules of Prof. Conduct, Rule 1.3 Diligence:

- (a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.
- (b) For purposes of this rule, ‘reasonable diligence’ shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

California Rules of Prof. Conduct, Rule 1.4 Duty to Communicate:

- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client’s informed consent* is required by these rules or the State Bar Act;

- (2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;
 - (3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and
 - (4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.
 - (c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.
 - (d) A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

California Rules of Prof. Conduct, Rule 1.4 Communication – Comment:

- (1) Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.
- (2) Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

California Rules of Prof. Conduct, Rule 1.16(a)(2) Declining or Terminating Representation:

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (2) the lawyer knows* or reasonably should know* that the representation will result in violation of these rules or of the State Bar Act;

California Rules of Prof. Conduct, Rule 1.16(a)(3) Declining or Terminating Representation:

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (3) the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively;

California Rules of Prof. Conduct, Rule 8.4(c) Misconduct:

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud*, deceit, or reckless or intentional misrepresentation;

California Rules of Prof. Conduct, Rule 8.4(c) Misconduct – Comment:

- (1) A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

II. California Code of Judicial Ethics

Canon 3:

A judge shall perform the duties of judicial office impartially, competently, and diligently.

Canon 3B(2):

A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law.

III. Articles of Interest

[Navigating the Difficult Personalities You Will Encounter in Your Legal Career](#) by Alice F. Douglas, Esquire, and Nicole R. Moshang, Esquire. *The Bench*, July/August 2023.

[The Unique Psychological World of Lawyers](#) by Ronda Muir, Esq. LawPeopleManagement.com

[A Review of Empirical Research on Attorney Attributes Bearing on Professionalism](#) by Susan Daicoff, 1997.

[The Lawyer Types](#) by Dr. Larry Richard. *ABA Journal*, July 1993.

[Eight Tips for Dealing with Difficult Opposing Counsel](#) by Pari Karim and Jennifer Ballard. Women's Bar Association of Illinois (WBAI), [WBAI Winter 2016 Newsletter](#).

Dealing with High-Conflict Counsel: An Interview with Bill Eddy by Deborah Bayus, President North County Bar Association. Excerpts from "President's Perspective," *North County Lawyer*, The Magazine of the North County Bar Association, Vol. 25, No. 10, October 2008.

Q. How can we determine if opposing counsel's lack of civility is fostered by their own high-conflict personality, as opposed to zealous representation? In other words, in practice, what kind of behavior, or series of behaviors, should we view as "red flags?"

The biggest sign is whether they can turn their aggressive behavior on and off to appropriately fit the circumstances. If they are always aggressive—even when it hurts their client or themselves—that is a sign they can't stop themselves. It's this lack of self-awareness that's key; e.g., if you can't even talk to them reasonably on the phone; if they always make it personal with personal attacks or public rebukes of you or your client; if they have emotional outbursts they can't control; when they can't even make a settlement proposal or respond to one; if they "project" their own behavior onto you and blame you for acting in ways that they are really acting; or if they tell the judge that you're

being uncooperative or not communicating. These are all signs of a high-conflict personality and predictive of future uncivil behavior.

Q. How do we effectively deal with opposing counsel when we are faced with this situation?

I believe there are at least four key points:

1. Don't take it personally. This high-conflict behavior isn't about you. It's about the high-conflict person, the HCP. If you get emotionally hooked, you are likely to feed the conflict and look like an HCP yourself. Don't respond to every inappropriate challenge of high-conflict opposing counsel. You don't have to defend yourself. You will become exhausted.
2. Don't counter-attack in the same aggressive manner because, if you do, they will use it against you. HCPs are far more clever at blaming people than most reasonable people are. And, for a while, you will look bad to your client, to the court, and perhaps to other professionals (especially if they don't know you). The key, I believe, is in staying reasonable and unaffected even when the HCP is pushing your buttons. Display calm confidence in the face of the HCP's histrionics.
3. Instead, be very assertive in the case. Keep the pressure on for settlement. Keep preparing for court, if necessary. Keep writing settlement letters and preparing court documents. Let opposing counsel know that you are not going to back down based on dramatics. Know more about your case than anyone else. Stay focused on the facts and who needs to hear them. Do your homework and keep the information pressure on. Then, you retain your credibility in front of your client, in front of the court, and in front of the opposing party. Be the one who stays focused on information rather than emotion.
4. Don't pressure your client to settle just to get the case over with. Keep informing your client of the realities of the situation and let the client decide what to do. Don't feel that you have to prove anything to your client or to opposing counsel. It's not about you. Let your client know that you are dealing with opposing counsel with a reputation for being "difficult." But don't go into greater detail or you risk being considered uncivil yourself. Many cases with high-conflict opposing counsel never settle, so be prepared from the start to go to court.

IV. Additional Resources

American Inns of Court MCLE course, "[High Conflict Personalities](#)"

- Review related brain research and learn dos and don'ts for working with these types of clients. While managing people with high conflict personalities (HCPs) often involves skills that are the opposite of what we feel like doing, the program will provide techniques to ensure your practice is not overwhelmed or your case thrown off course.