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*presents*

**14<sup>th</sup> Annual Advanced Wage and Hour Conference**

Civility, Bias & the Legal Profession – Oh My!

Thursday, July 18, 2024  
1:15 p.m. – 2:15 p.m.

Speakers:

Beth W. Mora

Guillermo Escobedo

***Conference Reference Materials***

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# Civility, Bias & the Legal Profession – *Oh My!*

Beth W. Mora and Guillermo A. Escobedo

## **Beth W. Mora (she/her)**

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Beth W. Mora of Mora Employment Law is a passionate and accomplished advocate for employees facing a wide range of employment law issues.

Beth currently serves on the California Lawyers Association (CLA), Labor & Employment Law Section as well as is a member of CLA's Governmental Affairs Committee. Beth's current volunteer duties also include, Co-Lead of Legal Aid At Work's Workers' Rights Clinic in Antioch and California Employment Lawyers Association's (CELA) Legislative Committee.

Beth is often invited to speak, has published numerous articles as well as has been quoted in legal journals on issues impacting employees and the legal community. Due to her advocacy and volunteerism, Beth has received numerous accolades including the Joe Posner Award, the Justice James J. Marchiano Distinguished Service Award, Best Lawyers in America, as well as Top 50 Women and Top 100 Attorneys in Northern California Super Lawyers.



## Guillermo A. Escobedo (he/him)

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Guillermo Escobedo is an employment defense attorney, focusing on claims of harassment, discrimination, retaliation, breach of contract and defamation claims. Guillermo also devotes a substantial portion of his litigation practice on wage-and-hour claims, including class action and PAGA claims. Guillermo also provides advice-and-counsel and conducts training seminars on a wide range of workplace issues.

Guillermo is a Board Member and Vice Chair of the Chicano Federation of San Diego County, is the Endorsements Committee Chair and Judicial Reception Chair for San Diego La Raza Lawyers Association, and volunteers for Casa Cornelia on asylum cases.



# AGENDA

- Background on Terminology
- Implicit Association / Bias Test
- Bias-Driven Incivility
- CA State Bar Diversity Report
- Obligations of the Court, Counsel, Colleagues
- Real Life Examples



## Relevant Vocabulary

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**Stereotypes** – a set idea that people have about what someone or something is like, especially an idea that is wrong or overly generalized.

**Bias** – as set forth in Black’s Law Dictionary, bias is defined as “[i]nclination; bent; prepossession: a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction”

**Explicit Bias** – something that is deliberately thought about and reported, conscience preference (aka the more traditional conceptualization of bias) where individuals are aware of their own prejudices and attitudes towards a certain group(s)

**Implicit or Unconscious Bias** – something that is relatively inaccessible to conscious awareness, an automatic preference based on subconscious thoughts

# Understanding Your Own Biases

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## Project Implicit Implicit Association/Bias Test

### [Implicit Association Test](#)

Assesses subconscious associations and implicit stereotypes, including racial groups, gender, sexuality, age and religion.



## BIAS-DRIVEN INCIVILITY – WHAT IS IT?





# What is Bias-Driven Incivility??

**Bias-driven incivility** is uncivil conduct resulting from expressions of implicit and explicit biases including unconscious expression of an internal bias or a covert manifestation of a discriminatory preference.

See **Beyond the Oath: Recommendations for Improving Civility** [Initial Report of the California Civility Task Force, A joint project of the California Lawyers Association and the California Judges Association, September 2021](#) See pages 174-180



# History of the New Bias-Driven Incivility MCLE Requirement

- In 2019, [AB 242](#) (Kamlager-Dove) was introduced to address problems of bias in the judicial system by establishing an implicit bias training requirement for attorneys, judges and court staff. As noted in the [Assembly Committee on Judiciary report](#):

*Bias has a cost to our legal system and goes beyond undermining the rights of those whom our justice system is intended to serve. It can also have a profound corrosive effect on practitioners and the judiciary. Upholding the essential dignity of people is a core value in our system of justice, and given the critical importance of fairness and equality in the justice system, practitioners and the judiciary are duty-bound to ensure that our halls of justice provide equal justice to all who are in need, and thus, should be particularly concerned about living up to these principles.*

- [California Lawyers Association](#)'s November 29, 2021 comment on the Initial Report of the California Civility Task Force. Though CLA was in support of the proposal, they correctly cautioned that similar rules “could be harmful to and have a disproportionate impact on these same attorneys [aka diverse persons] when used against them by others making claims of incivility based on conduct perceived as “inappropriate” or “too aggressive” or “out of line.””

## History of the New Bias-Driven Incivility MCLE Requirement

- In 2020, AB 242 amended Cal. Bus. & Prof. Code section 6070.5, which directed the California State Bar to update the MCLE requirements for lawyers to include “*training on implicit bias and the promotion of bias-reducing strategies . . .*”
- In 2021, the Bar increased its MCLE hours requirement for implicit bias from 1 to 2 hours
- AB 242 also amended Section 68088 of the Govt Code, relating to implicit bias, wherein it directed the California Judicial Counsel to develop training on implicit bias for all court staff who interact with the public to complete 2 hours of training every 2 years

## Examples of Bias-Driven Incivility

As noted in the [Beyond the Oath](#) report:

- **Bias-driven incivility may occur between opposing counsel or colleagues at a firm, at work, or at social functions.** A correlation exists between bias-driven incivility and power dynamics, with people in positions of authority more likely to engage in bias-driven incivility, though some forms of bias-driven incivility are more common between peers.
- **Common acts of incivility**, such as interrupting one's opposing counsel during an oral argument or a negotiation, may constitute bias-driven incivility in certain circumstances.
- **Bias-driven incivility can occur through microaggressions.** Microaggressions are “the everyday verbal, nonverbal, and environmental slights, snubs, or insults, whether intentional or unintentional, which communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership.”
- **Bias-driven incivility has profound effects on individual attorneys as well as on the legal profession. Bias-driven incivility is uniquely harmful for attorneys who experience it.**

# Why Addressing Bias-Driven Incivility is Important

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The [Beyond the Oath](#) report notes that Bias-driven incivility has profound negative effects on individual attorneys as well as on the legal profession:

- Bias-driven incivility is uniquely harmful for attorneys who experience it, and those who do **are more likely to leave the profession.**
- Uncivil behavior has caused **a loss of “stature and public respect” for the legal profession.**
- **The legal profession remains one of the least diverse professions in the nation.**

# STATE BAR DIVERSITY REPORT

- California State Bar Population
- Diversity (or lack thereof) in Big Law
- Diversity (or lack thereof) for Partners
- Legal Duties of Judicial Officers and Colleagues



# Who are we??

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## California State Bar Population

As of June 12, 2024, the State Bar of California has 293,326 [members](#):

- 197,477 Active Members, average age 50
- 75,706 Inactive Members, average age 67
- 2,266 Judges, average age 61
- 17,877 Not Eligible to practice law in California, average age 68



## State Bar Diversity Report Card

[2023 Report Card on the Diversity of California's Legal Profession](#) Key Findings about **current status of diversity** include:

- Since 2019, several groups of attorneys have seen a significant increase in their representation in California, including Asian, multiracial, people of color, men of color, women of color, Asian women, LGBTQIA+, veterans, and attorneys with disabilities.
- In 2023, women accounted for 56 percent of newly admitted attorneys to the State Bar, while people of color represented 55 percent—a record high for this population's representation.
- In 1990, men and women of color comprised just 9 and 8 percent of newly admitted attorneys, respectively. Over time, the representation of women of color exceeded that of men of color; by 2023, women of color comprised 33 percent of newly admitted attorneys, while men of color comprised 21 percent. Women of color now constitute the largest group of newly admitted attorneys, a trend that started in 2021. Among women of color, the most substantial growth has been among Asian and multiracial women.



## State Bar Diversity Report Card

[2023 Report Card on the Diversity of California's Legal Profession](#) Key Findings about **attrition** *include*:

- Approximately 4,600 attorneys on average transition to inactive status each year in California, effectively relinquishing their ability to practice law.
- With the exception of Black men and women, attorneys of color tend to be younger than their white counterparts when they transfer to inactive status. Notably, Asian, Eastern/North African, and Native Hawaiian/Other Pacific Islander women are among the youngest in this group.
- The most frequently cited factor influencing the decision to transition to inactive status in 2023 was “alternative work schedules/flexible hours,” chosen by attorneys across gender and racial lines. However, “diverse colleagues/networks” was the most cited factor for Black attorneys. Other reasons described by all attorneys include practicing law in different states, leaving the legal profession altogether, seeking a career change, and personal reasons related to family and health.

## Legal Duty

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Officers of the Court have a Legal Duty to refrain from engaging in bias-driven incivility, as well as address and prevent bias-driven incivility.



# Civility with the Court

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- Canons of Judicial Ethics, include:
  - canon 3D(1) and (2)
  - canon 3C(1)
  - see also CJEO Formal Opinion 2022-15
- [California Rules of Court 10.20](#) (for court participants)
- CACI Jury Instructions:
  - [Pretrial 113. Bias](#) (recently revised)
  - [Concluding Instructions 5030. Implicit or Unconscious Bias](#) (recently added/new)
- [Rule 3.3 Candor Toward the Tribunal](#)

# Civility with Opposing Counsel

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- [Rule 3.4 Fairness to Opposing Party and Counsel](#)
- [Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges](#)
- [Rule 4.1 Truthfulness in Statements to Others](#)
- [Rule 8.3 Reporting Professional Misconduct](#)
  - [The State Bar of California, Rule 8.3 Required Reporting](#)
- [Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation](#)

## Civility In Fee Shifting Litigation

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In *Snoeck v. ExakTime Innovations, Inc.*, 2023 WL 7014096 (Cal. Ct. App. 2023), the Court of Appeals held that because civility is itself a measure of attorney skill, a lawyer's lack of civility can warrant significantly reducing a prevailing party's attorneys' fees award.

In *Snoeck*, the plaintiff prevailed at trial on one of his six claims against his former employer. Plaintiff was awarded \$130,088 in damages on his claims and \$1.14 million in attorney fees. The trial court reduced the attorney fees awarded by a 0.4 negative multiplier to account for plaintiff's attorney's "lack of civility throughout the entire course of the litigation."

The Court of Appeal affirmed the judgment, noting that plaintiff's attorney had acted uncivilly towards opposing counsel and as a result also the trial court when plaintiff's attorney accused the employer's attorney of telling the court "lies", committing "fraud", and engaged in a "brazen con" and "sleazy" and "cringeworthy" conduct. The Court of Appeal also found plaintiff's attorney's tone toward the trial court was "belittling and antagonistic" and "verged on the contemptuous."

## Civility at Work

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- [California State Bar Rule 8.4.1](#) (for attorneys)  
*Comment 1: Conduct that violates this rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal...*
- [California Rules of Court 10.351](#) (employees of the Court)

## The Civility Balancing Act

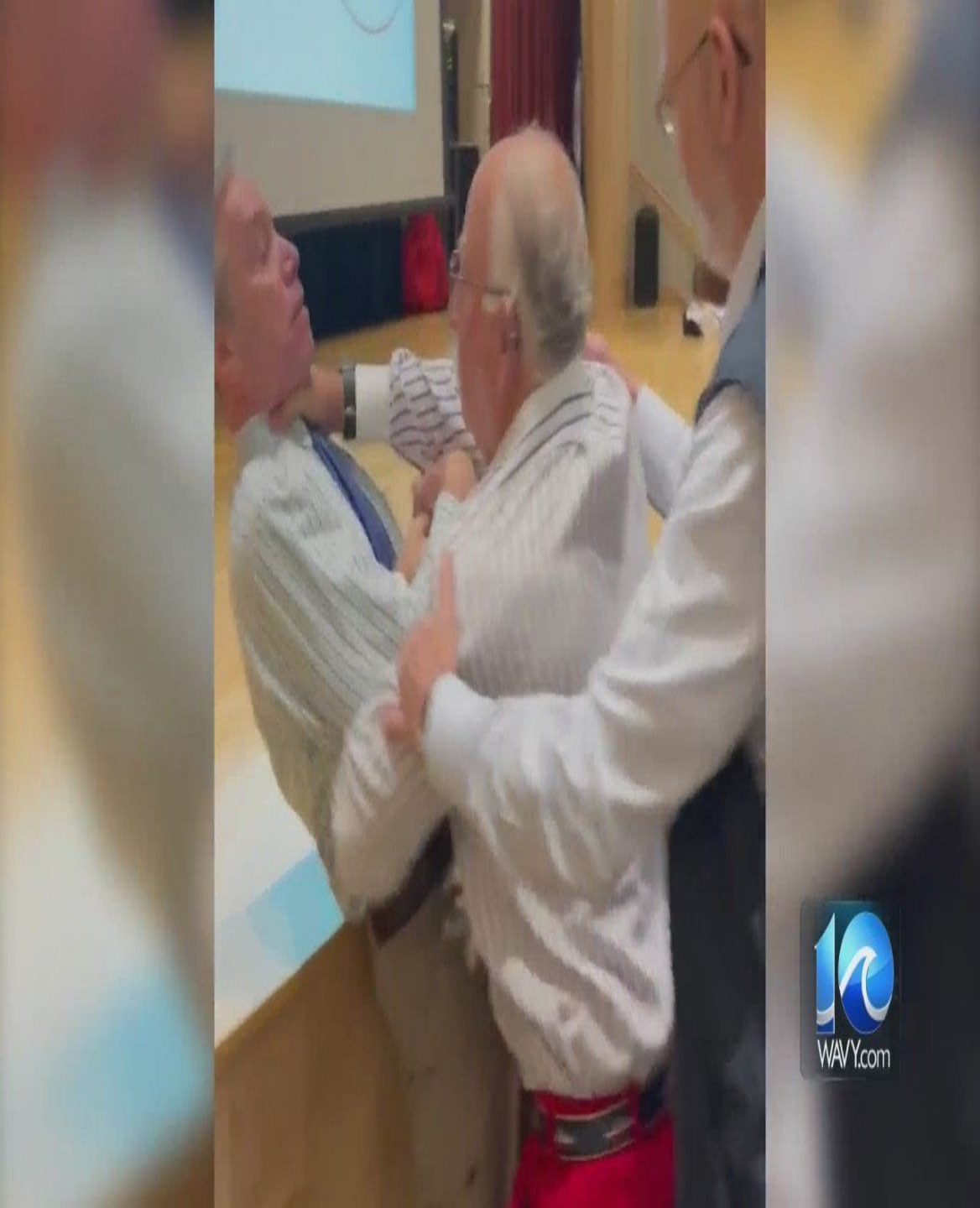
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Predict the Legal Community will face struggles balancing:

- Incivility v. Discrimination
- Incivility v. Free Speech

See [\*A Tale of Two Protests: UVA v. Berkeley Law, What's the most effective way for law students to fight injustice?\*](#) David Lat, Original Jurisdiction, April 11, 2024

# REAL LIFE EXAMPLES AND ENGAGEMENTS





# Real Life Engagement

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Research shows that bias can be reduced through the very process of discussing them and recognizing them for what they are:

- Acknowledge
- Management
- Control How Bias will impact Behavior

Research also shows that negative bias towards a particular group can be reduced through “Counter-Stereotyping”

See [Understanding Bias: A Resource Guide](#), U.S. Department of Justice



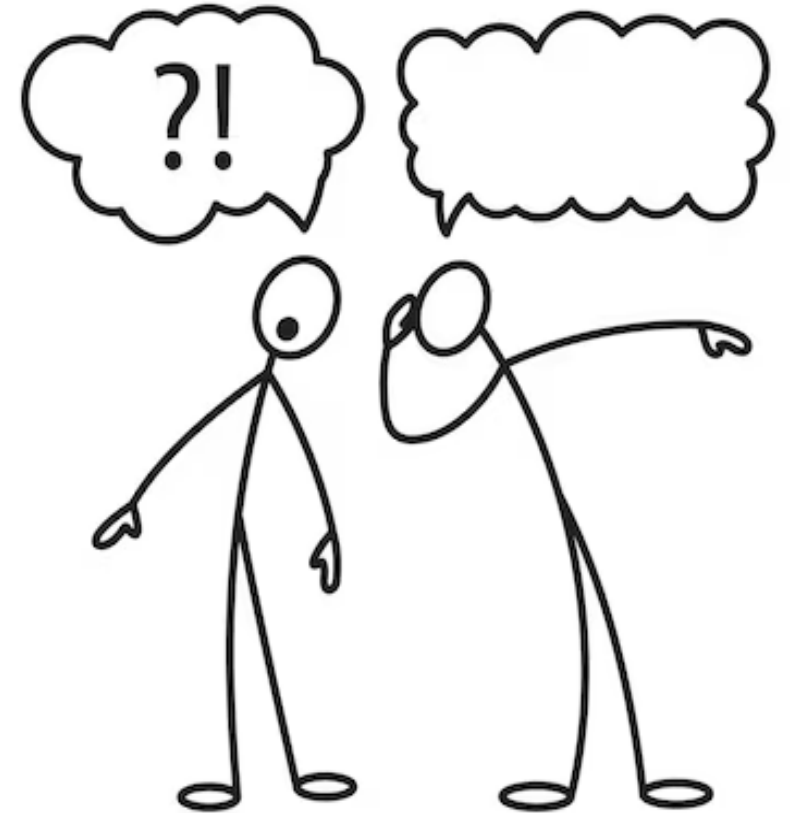
## Real Life Example 1

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Counsel A (Caucasian Male over 40) contacts Counsel B (Female of Color under 40), discussion about a discovery dispute begins. When Counsel A becomes frustrated, he cuts off Counsel B mid-sentence several times and asks to speak to the Lead Trial Attorney on the case.

**Was Counsel A's conduct Zealous Advocacy or Bias-Driven Incivility?**

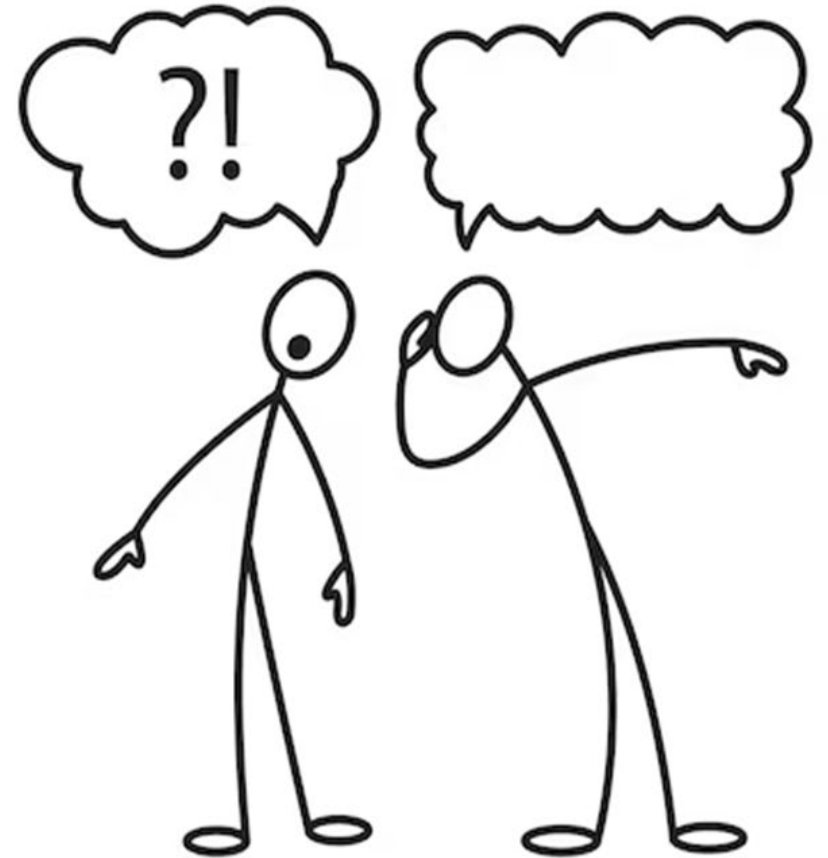
See [Bias Interrupters: Tools for Meetings](#), Center for Worklife Law, 2021



## Real Life Example 2

Counsel A (Male) contacts Counsel B (Female), to discuss trial calendar wherein Counsel A advises he has a disability requiring surgery. Counsel A seeks an accommodation of a trial continuance for the surgery. Counsel B advises she will not grant the request, suggests Counsel A find someone else to take over the case for his client as well as notes the timing of the surgery is extremely frustrating.

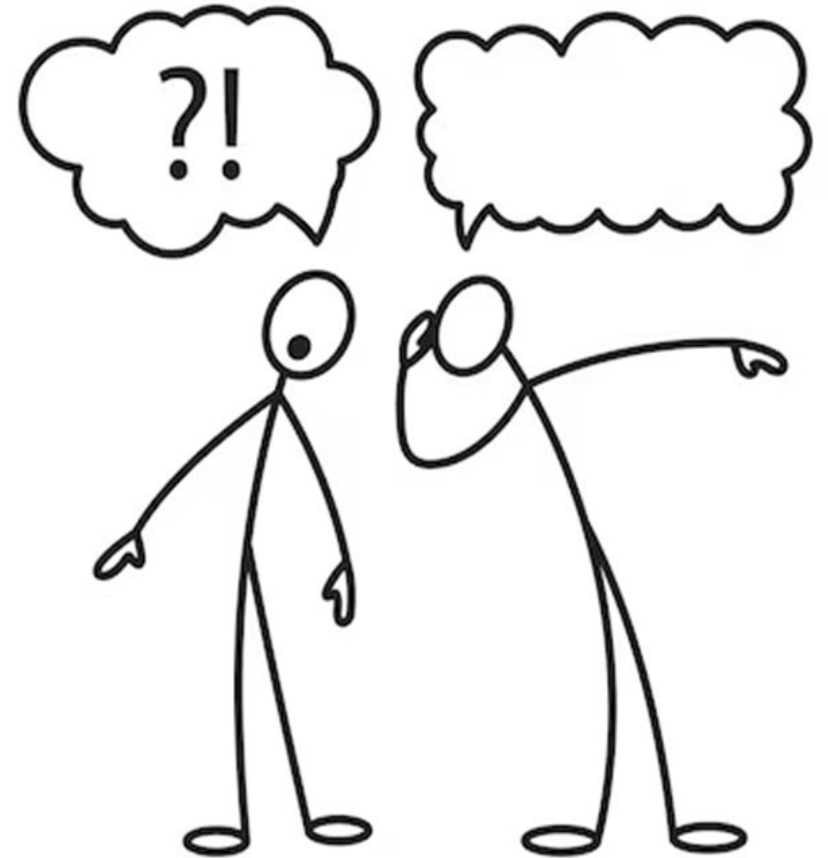
**Was Counsel B's conduct Zealous Advocacy or Bias-Driven Incivility?**



## Real Life Example 3

Counsel A (Jewish Female) contacts Counsel B (Non-Jewish Person), in response to deposition notice advising the date conflicts with the Jewish Holiday of Yom Kippur, thus seeks to reschedule. Counsel B advises they will be proceeding forward as noticed, states that Yom Kippur is not a Court or State Holiday and makes derogatory comments about international politics.

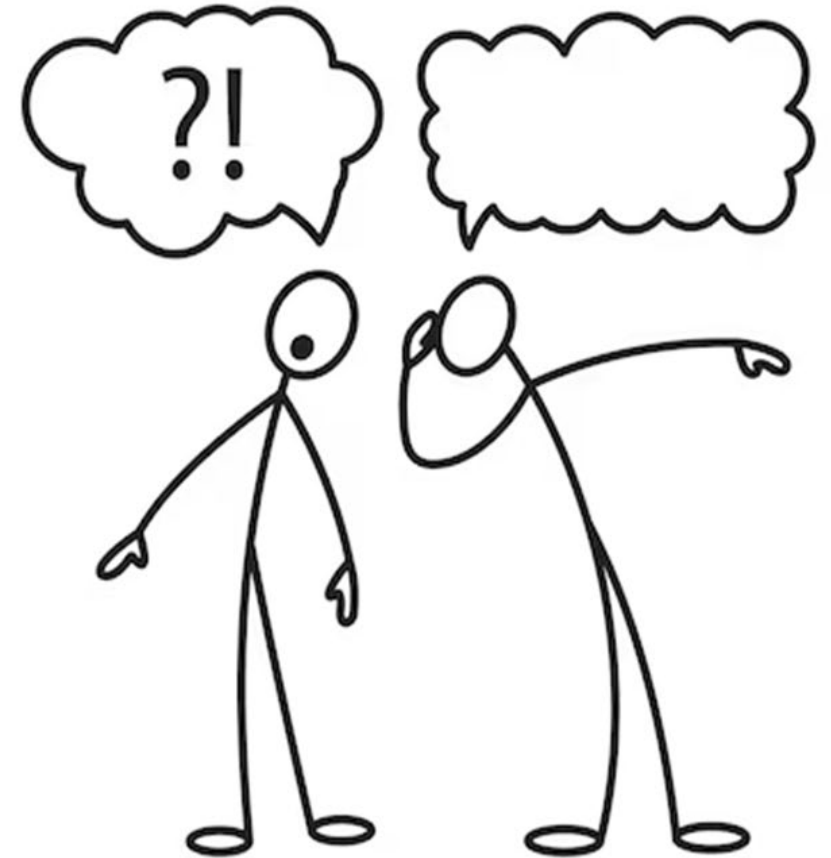
**Was Counsel B's conduct Zealous Advocacy or Bias-Driven Incivility?**



## Real Life Example 4

Counsel A (Managing Partner at Law Firm) advises Counsel B (Female Senior Associate at Law Firm) upon return from her honeymoon, that they want to talk to Counsel B about firm management issues. Counsel A proceeds to ask Counsel B since she is now married if Counsel B intends to have children and if so, if Counsel B will be cutting back her hours?

**Was Counsel A's conduct Acceptable Firm Management or Bias-Driven Incivility?**



# Questions

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**Thank you for attending.**

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**Beth W. Mora of Mora Employment Law** represents victimized employees. She is a dedicated, passionate, and accomplished advocate for those facing a wide range of employment law issues. Beth's commitment to social justice and volunteerism is deeply rooted in her personal values.

Beth currently serves on the California Lawyers Association (CLA), Labor & Employment Law Section, Executive Board where she is Editor-in-Chief for Law Review and Co-Chair of the Law Review Committee as well as Governmental Affairs Liaison to CLA. Beth's other current volunteer duties include, Co-Lead of Legal Aid At Work's Workers' Rights Clinic in Antioch and California Employment Lawyers Association's (CELA) Legislative Committee.

Beth is often invited to speak, has published numerous articles on issues impacting employees and the legal community. Recently, Beth spoke and published several articles including: *New California Employment Laws for 2024*, California Labor & Employment Law, Law Review, January 2024; *Defamation, The Backlash, 2024 New Developments in Gender Discrimination, Harassment and Violence in Employment*, Berkely Law, Berkeley Center on Comparative Equality and Anti-Discrimination Law, January 5, 2024; *New Employment Laws for 2024*, Know Your Legal Rights, KALW Radio Show, January 17, 2024; *Six Years Since the Advent of #MeToo: Changes to the Legal Landscape*, Practice Law Institute, September 12, 2023; *Thinking Settlement Agreements from the Start*, California Employment Lawyers Association, September 29, 2023; and, *A Social Movement: #MeToo's Impact on Legislation*, California Labor & Employment Law, Law Review, July 2023.

Due to her advocacy, Beth has received numerous accolades including the Joe Posner Award from CELA, the Justice James J. Marchiano Distinguished Service Award from the Contra Costa County Bar Association, as well as has been named Best Lawyers in America, Top 50 Women and Top 100 Attorneys in Northern California by Super Lawyers. Beth is also a proud member of the International Women's Forum of Northern California.

From the courthouse to the boardroom, Beth is a committed advocate for her clients and community.

*\*Please see [www.moraemploymentlaw.com](http://www.moraemploymentlaw.com) or inquire for a full list of articles, radio shows, media, honors, speaking engagements, bar admissions, associations, and volunteer activities.*



**Guillermo A. Escobedo** is a principal and office litigation manager of Jackson Lewis P.C. His practice focuses on counseling and defending companies in workplace-related matters. Guillermo's litigation experience includes wage-and-hour class action and PAGA matters, and wrongful termination, discrimination and harassment claims. Guillermo serves on numerous non-profit boards dedicated to assisting the underserved, was named Attorney of the Year by the San Diego La Raza Lawyers' Association, and was recognized by the San Diego Business Journal as a Leader in the Law – Labor & Employment.