

## Sanction Award is Improper Even if Defense Counsel Admitted to Violation of the Court Order

November 28, 2011 by [David J. McMahon](#)

In [Miller v. City of Los Angeles](#), 2011 DJDAR 15764 (9th Cir. 2011), a divided panel of the [United States Court of Appeals for the Ninth Circuit](#) decided an unusual case involving the imposition of sanctions, including attorneys' fees, for a lawyer's alleged violation of an [in limine](#) order at trial. The trial judge imposed sanctions in the sum of \$63,678.50 as compensation to the opponent for the alleged violation of the in limine order.

A man was killed when he was shot by a police officer. His survivors sued the police officer and the police department for wrongful death.

During pre-trial proceedings, the district court issued an in limine order precluding the defendants from arguing or mentioning that the decedent was carrying a gun when he was shot by the policeman. Defense counsel, in closing argument, stated that the police officer thought that the decedent refused to surrender because he may have shot another individual. The lawyer for the plaintiffs objected, arguing that the comment violated the Court's pre-trial in limine order. As a result, the court instructed the jury to ignore the statement.

The jury was unable to reach a verdict and the district court declared a mistrial. Later, the family of the decedent moved for sanctions. Counsel for the defense apparently conceded violating the order and apologized. However, defense counsel did not concede that his conduct was tantamount to bad faith, the prerequisite for sanctions. He argued that the transgression was "inadvertent, fleeting and harmless." The district court granted the sanctions motion and imposed a fee award totaling more than \$60,000.

The Ninth Circuit reversed the sanctions award. The Ninth Circuit stated that it was required to review the trial court's determination that sanctions were proper on the basis of substantial evidence.

The Ninth Circuit concluded that the in limine order did not provide adequate notice that defense counsel was prohibited from arguing how the police officer perceived the situation. Thus, defense counsel was entitled to argue that the officer was acting reasonably in believing that the decedent posed a threat as having just shot another person.

The Ninth Circuit therefore concluded that because the defense lawyer did not violate the order, there was no basis for a sanctions award. The Ninth Circuit reversed on that basis.