



Appellate Defenders, Inc.

Ethical Issues In Court-Appointed Appellate Representations


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COPRAC (Standing Committee on Professional Responsibility and Conduct)

- Serves by appointment of the Bar's Board of Trustees
 - Works under the Bar's Office of Professional Competence
 - Issues member-requested advisory ethics opinions
 - Advises the State Bar Board of Trustees on the substantive aspects of proposals to amend rules and other laws governing attorney conduct
 - Participates in state-wide outreach efforts
 - Publishes ethics-related articles for self-study MCLE credit in the California Bar Journal
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<http://ethics.calbar.ca.gov/>

THE STATE BAR OF CALIFORNIA

HOME ETHICS PUBLICATIONS COMMITTEES

Home > Ethics

ETHICS INFORMATION

The Ethics Information area serves as a hub for ethics-related resources, education programs and research tools.


It also serves as a convenient bookmark for direct links to legal ethics authorities posted on the State Bar's website, searchable full text resources, proposed ethics opinions and proposed new or amended Rules of Professional Conduct. As the Ethics Information area develops, original content, external links and other resources will be added.

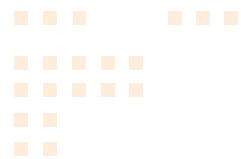
Professional Responsibility

- California Rules of Professional Conduct
- The State Bar Act - Business & Professions Code §§ 6000 et seq. (See Div. 3, Chapter 4 Attorneys)
- Selected Statutes Regarding Professional Conduct, Discipline of Attorneys, and Duties of The SBC
- Attorney Civility and Professionalism
- Supreme Court Order S158605 Regarding the State Bar IOLTA Program
- Rules and Regulations Pertaining to Lawyer Referral Services
- Out-of-State Attorney Arbitration Counsel Program (OSAAC)
- Mandatory Fee Arbitration



The Ethics Hotline

- Confidential Research Service for California Attorneys with Ethics Questions
 - Monday – Friday 9:00 A.M. – 5:00 P.M.
 - 1-800-2-ETHICS (238-4427)
 - Only state-wide service of its kind
 - Regularly handles 20,000 calls each year
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LIMITED SCOPE AND THIRD PARTY PAYERS





Necessary Disclosures for Consent to Limited Scope

- Did you fully explain :
 - The nature of limited scope
 - What adverse consequence may result from the limited scope
 - *Nichols v. Keller*, 15 Cal. App. 4th 1672 (1993)
 - Third Party Payer:
 - No interference with exercise of independent judgment (RPC 3-310(F)(1))
 - Maintain confidentiality (RPC 3-310(F)(2))
 - Informed Written Consent (RPC 3-310(F)(3))
 - Informed Consent from diminished capacity client
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Confidentiality v. Privilege






Rule 3-100

Confidential Information of a Client

- (A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.
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Business & Professions Code 6068

- IT IS THE DUTY OF AN ATTORNEY TO DO ALL OF THE FOLLOWING:
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 - (E) (1) TO MAINTAIN INVIOATE THE CONFIDENCE, AND AT EVERY PERIL TO HIMSELF OR HERSELF TO PRESERVE THE SECRETS, OF HIS OR HER CLIENT.
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“Secrets” defined

- ANYTHING THAT THE CLIENT REQUESTS BE KEPT CONFIDENTIAL OR WOULD BE EMBARRASSING OR DETRIMENTAL TO A CLIENT
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Evidence Code 952 – "Confidential Communication"

- information transmitted between attorney and client
 - in the course of that relationship
 - in confidence
 - by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present
 - to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted
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Confidentiality is broader than privilege

- California has one of the strictest duties of confidentiality in the nation
 - *SINGLE exception* for where the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death or substantial bodily harm.
 - Not mandatory duty
 - Disclosure limited to no more than is necessary to prevent the criminal act
 - Includes even publicly available information
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Confidentiality – Practical Applications


- COPRAC Proposed Formal Interim Opinion 13-0005
 - Baltimore Attorney Suspension – *In re Larry J. Feldman* (D.C. Court of Appeals No. 14-BG-108)
 - Attorney “wrongfully and improperly concluded that he was authorized to speak” with alleged co-conspirator about client’s case
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Social Media






Rules of Professional Conduct Rule 1-400

- Regulates any “communication” – a message or offer made by or on behalf of lawyers concerning the availability for professional employment directed to any former, present, or potential client
 - Cannot be false or misleading
 - Must indicate clearly, expressly, or by context that it is a communication
 - Presumption of violation if communication includes guarantees or testimonials
 - Must retain a copy or recording for two years
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Proposed Formal Opinion No. 12-0006

- Attorney blogging is subject to the requirements and restrictions of the Rules of Professional Conduct and the State Bar Act if the blog expresses the attorney's availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly through its description of the attorney's legal services.
 - A blog that is a part of an attorney's or law firm's professional website will be subject to the rules regulating attorney advertising to the same extent as the website of which it is a part.
 - A stand-alone blog by an attorney that does not relate to the practice of law or otherwise express the attorney's availability for professional employment is not a communication under the Rules.
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When Duties to the Court Conflict with Duties to the Client




Duty of Candor






Rule 5-200: Trial Conduct

- In presenting a matter to a tribunal, a member:
 - (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
 - (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;
 - (C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;
 - (D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and
 - (E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.
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State Bar Act – Business & Professions Code


- To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense. (§ 6068(c).)
 - To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law. (§ 6068(d).)
 - To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged. (§ 6068(f).)
 - The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension. (§ 6106.)
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Duty of Loyalty






Established by Case Law

- 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. (*People v. McKenzie* (1983) 34 Cal.3d 616, 631.)
 - Although California does not require zealous advocacy, it is expected that a lawyer will perform any service for a client that is appropriate for the advancement of the client's legal rights so long as it does not violate the law. (See generally *People v. Crawford* (1968) 259 Cal.App.2d 874.)
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Scenarios where these duties may collide


- No non-frivolous appellate issues (*Wende* brief)
 - Discovery that record is inaccurate (i.e., contains false information)
 - State Bar of California Formal Opinion No. 2015-192 re: withdrawal
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Difficult clients





Difficult Clients

- the very needy client
 - the combative client
 - the lying client
 - the perjurious client
 - the fraudulent client
 - the disappearing client
 - the diminished capacity client
 - client does not take advice of counsel
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Duty to Communicate – CPRC 3-500

Document your advice and client decisions



Educate your client




Civility





As appellate justices have observed . . .

“it is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law.” (*People v. Chong* (1999) 76 Cal.App.4th 232, 243); *In Re S.C.* (2006) 138 Cal.App.4th 396, 412.






Attorney Guidelines of Civility and Professionalism


- The Attorney Guidelines of Civility and Professionalism provide best practices of civility in the practice of law and are offered to promote both the effectiveness and the enjoyment of the practice of law and economical client representation.
- Designed to fill the void since Business & Professions Code, section 6068, subdivision (f), declared unconstitutional. It admonished attorneys “to abstain from all offensive personality.”
- Rule 9.4 of the California Rules of Court, effective May 27, 2014, was adopted to supplement the attorney oath for new lawyers. Rule 9.4 states:

In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: “As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity.”





Attorney Guidelines of Civility and Professionalism

- Section 1 reminds attorneys of their responsibility to the justice system that mandate dignity, decorum and courtesy.
 - Section 2 covers an attorney's responsibility to the public and the profession, including mentoring new attorneys.
 - Section 3 covers responsibility to clients and client representation – explain to client will not be an “attack dog.”
 - Section 4 requires civility in written work, including avoiding hostile, demeaning, or humiliating words
 - Section 5 requires punctuality
 - Section 6 tells attorneys to discuss need for civility up front and to remind them it will result in a more efficient representation.
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The SDCBA Attorney Code of Conduct


I. GENERAL

- Lawyers should honor their commitments.
- Lawyers should not compromise their integrity for the sake of a client, case or cause.

II. DUTIES OWED IN PROCEEDINGS BEFORE THE COURT


- Lawyers should always be courteous and respectful to the court.
- Lawyers should always be candid with the court.
- Lawyers should be prepared for all court appearances.
- Lawyers should discourage and decline to participate in litigation that is without merit or is designed primarily to harass or drain the financial resources of the opposing party.
- Lawyers should avoid any communication, direct or indirect, about a pending case with a judge except as permitted by court rules or otherwise authorized by law.

III. DUTIES OWED TO MEMBERS OF THE BAR

- Lawyers must remember that conflicts with opposing counsel are professional and not personal; vigorous advocacy is not inconsistent with professional courtesy.
 - Lawyers should not be influenced by ill feelings or anger between clients in their conduct, attitude or demeanor toward opposing counsel.
 - Lawyers should not intentionally make any misrepresentation to an opponent.
 - Lawyers should not attribute to an opponent a position not clearly taken by the opponent.
 - Lawyers should not seek sanctions against another lawyer to obtain a tactical advantage or for any other improper purpose.
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Civility is . . .

- Not the same as agreement
 - Not the absence of criticism
 - A code of decency
 - A condition of attorney licensure (good moral character)
 - Reconcilable with zealous advocacy:
 - A lawyer is not bound, however, to press for every advantage that might be realized for a client. . . . The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect. (Model Rule 1.3, Cmt. 1)
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Thanks for Listening!

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