

# REAL PROPERTY LAW



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## **2024 Real Property Law Retreat**

Top Ten Ethical Mistakes: A Guide to Avoiding Civil Liability

Saturday, March 9, 2024  
2:15pm - 3:15pm

Speakers: Suzanne Burke Spencer

### **Conference Reference Materials**

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**2024 Real Property Law Retreat**

**March 9, 2024 2:15 pm to 3:15 pm**

**Top Ten Ethical Mistakes: A Guide to Avoiding Civil Liability**

Panelists: Suzanne Burke Spencer  
Sall Spencer Callas & Krueger

**1. Poorly Drafted Engagement Letter**

- Bus. & Prof. Code § 6148: requirements for hourly fee agreements if fees will exceed \$1,000
- Bus. & Prof. Code § 6147: requirements for contingency fee agreements
- Best practices: Always use fee agreement, even with corporations
- Properly define scope of engagement – **and stick to it.**

*Nichols v. Keller*, 15 Cal. App. 4<sup>th</sup> 1672 (1993)

Limited scope engagements [CPRC 1.2(b)]

**2. Staying Within the Scope of Engagement. – Client and Scope**

- Performing legal services may create attorney-client relationship regardless of what fee agreement says

As our Supreme Court said in *Perkins v. West Coast Lumber Co.* (1900) 129 Cal. 427, 429, 62 P. 57: ‘When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established prima facie.’ The absence of an agreement with respect to the fee to be charged does not prevent the relationship from arising.”

*Miller v. Metzinger*, 91 Cal. App. 3d 31, 38 (1979)

- Consider carefully who the client is and define it
  - Third party beneficiaries

**3. No Termination Letter**

- No ethical rule requires a termination letter.
- Best practices: Send termination letter.

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- Avoid uncertainty about whether and when representation concludes.
  - Expectation of client?
  - Objective test: No reasonable expectation that the attorney will provide further legal services.
- Statute of limitations (CCP §340.6) – continuous representation tolling

**4. Fee Collection and Negotiation**

- Mishandling Trust Funds
  - Flat fees and “nonrefundable” retainers [Rule 1.5 and 1.15]
  - CTAPP notification and disbursement requirements [Rule 1.15]
- Withdrawing funds after a dispute arises with client
  - Cannot disburse disputed funds [Rule 1.15]

*In re Lazarus*, 1 Cal. State Bar Ct. Rptr. 387 (Review Dep’t 1991)

*In re Davis*, No. 11-O-14764, 2013 WL 3293661, June 14, 2013 (State Bar Court)

*Cain v. State Bar*, 25 Cal. 3d 956 (1980)

- Modification of fee arrangements with existing clients
  - Cal. State Bar Interim Opn. 05–0001 – REJECTED
  - Probate Code § 16004 and common law presumption
- Collection efforts after dispute arises
  - Liens (Cal. State Bar Formal Opn. No. 2009-177  
[<https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2009-177.pdf>])
  - Settlement (Rule 1.8.8; Cal. State Bar Formal Opn. No. 2009-178  
[<https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2009-178.pdf>])

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- CLA Ethics Opinion (Use of Confidential Client Information to Collect a Fee)

[<https://calawyers.org/california-lawyers-association/formal-opinion-no-2022-1/>]

- CCP § 340.6 – Statute of limitations

## 5. Conflicts of Interest

- Rules 1.7, 1.9, 1.10
- Current Clients – duty of loyalty
- Former Clients – duty of confidentiality (“substantial relationship” test)
- Other common potential conflicts
  - Employer-employee
  - Husband-wife
  - Family members
  - Partners
  - Corporation and corporate officer/directors
  - Parent-Subsidiary
- Ineffective screens
  - CLA Ethics Opinion 2021-1 (Elements of Effective Ethical Screens)  
[<https://calawyers.org/california-lawyers-association/formal-opinion-no-2021-1/>]
  - Rules 1.10, 1.11, 1.18
- Ineffective consent
  - Consent must be “informed”
  - Who may consent? Disinterested constituents (Rule 1.13)
  - Advance consent (Rule 1.7, comment [9])

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**6. Technological Snafus**

- Duty of competence (Rule 1.1, comment [1])
- E-Discovery Snags
  - Cal. State Bar Formal Opn. 2015-193
  - Inadvertent production
- Generative AI
  - COPRAC, Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law, November 17, 2023  
  
[<https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>]
  - Check your citations!

**7. Poor Client Selection**

- The Principled Client
- The Great Expectations Client
- The Emergency Client
- The Coy Communicator
- The Control Freak
- The Client with Cognition Issues
- The Client Who Cannot Handle It
- The “Paralawyer” Client
- The “Favor” Client

**8. Poor Communication and Underestimating Risk**

- Rules 1.4 and 1.4.1 – Communication with Client
- Rule 1.2 – Scope of Representation and Allocation of Authority

Judgmental immunity for all strategy decisions?

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- Duty of competence
- *Moua v. Pittullo, Howington, Baker, Abernathy, LLP*, 228 Cal. App. 4th 107 (2014)
- The risk of the other side's attorney' fees

Contract  
Statute  
998 Cost shifting

**9. Inadequate Supervision**

- Rule 5.1 (lawyers) and 5.3 (nonlawyers)  
Includes co-counsel and contractors
- Unauthorized practice of law

**10. Diligence and Abandonment**

- Rule 1.3 (Diligence)
- Rule 1.4 (Communication)
- Rule 1.15 (Declining or Terminating Representation)