

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. 4th 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)

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Top Ten Ethical Mistakes: A Guide to Avoiding Civil Liability

Suzanne Burke Spencer
March 9, 2024

Introduction and Overview

Whose Top Ten is this anyway?

Overview

- 1 Engagement Agreements
- 2 Scope of Engagement
- 3 Termination Letters
- 4 Attorney Fees and Liens
- 5 Conflicts of Interest
- 6 Technology
- 7 Client Selection
- 8 Communication
- 9 Supervision
- 10 Diligence and Abandonment

1. Poorly Drafted Agreements

- Bus. & Prof. Code § 6147: contingency fee agreements
- Bus. & Prof. Code § 6148: all other agreements if fees will exceed \$1,000
 - Scope of corporation exception
- **Best practices:** Always use fee agreement, even with corporations

Consequences of failure to comply:

- Quantum meruit
- Potentially compromise lien or other contract rights

2. Exceeding the Scope of Engagement

Clearly define – **and stick to it** –

(1) Scope of engagement

Nichols v. Keller, 15 Cal. App. 4th 1672 (1993)

Limited scope engagements [CPRC 1.2(b)]

(2) Client identity

- Third party beneficiaries



‘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) (quoting *Perkins v. West Coast Lumber Co.*, 129 Cal. 427, 429 (1900))

3. No Termination Letter

- No rule requires a termination letter.
- Statute of limitations (CCP §340.6) – Continuous representation tolling

Best practices: Send termination letter.

Avoid uncertainty about whether and when representation concludes.

Expectation of client?

Objective test: No reasonable expectation that the attorney will provide further legal services.

4. Fee Negotiation and Collection

Rule 1.5 – Unconscionability

Unreasonable fees?

- *Pech v. Morgan*, 61 Cal.App.5th 841, 846 (2021)

Modification of fee arrangements

- Cal. State Bar Interim Opn. 05–0001 – REJECTED
- Probate Code § 16004 and common law presumption

4. Fee Negotiation and Collection (con'd)

- Mishandling Trust Funds
 - Flat fees and “nonrefundable” retainers [Rule 1.5 and 1.15]
 - CTAPP notification and disbursement requirements [Rule 1.15]



4. Fee Negotiation and Collection (con'd)

- Withdrawing funds after a dispute arises with client
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 - *In re Davis*, No. 11-O-14764, 2013 WL 3293661, June 14, 2013 (State Bar Court)
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 - CLA Ethics Opinion (Use of Confidential Client Information to Collect a Fee)
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5. Conflicts of Interest

Rules 1.7, 1.9 and 1.18

Common potential conflicts

- Employer-employee

- Husband-wife

- Family members

- Partners

- Corporation and corporate officer/directors

- Parent-Subsidiary

5. Conflicts of Interest (con'd)

- Ineffective screens
 - CLA Ethics Opinion 2021-1 (Elements of Effective Ethical Screens)
 - Rules 1.10, 1.11, 1.18
- Ineffective consent
 - Consent must be “informed” (1.0.1(e) and (e-1))
 - Who may consent? Disinterested constituents (Rule 1.13)
 - Advance consent (Rule 1.7, comment [9])

6. Technological Snafus

Duty of competence (Rule 1.1, comment [1])

E-Discovery Snags

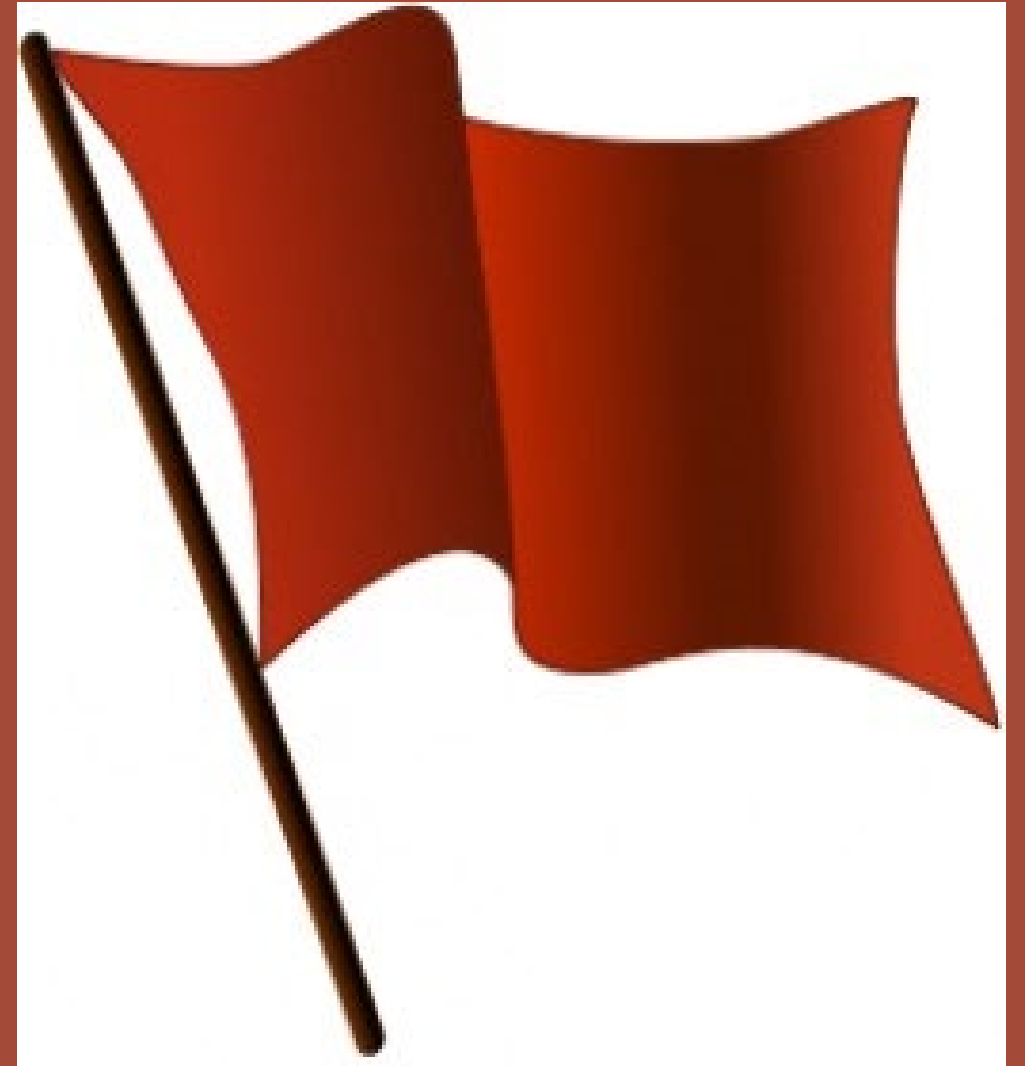
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- Rule 5.1 (lawyers) and 5.3 (nonlawyers)

Includes co-counsel and contractors

Matter of Kaplan, 2 Cal. State Bar Ct. Rptr. 509 (1993)

- Unauthorized practice of law



10. Diligence and Abandonment

- Rule 1.3 (Diligence)
- Rule 1.4 (Communication)
- Rule 1.15 (Declining or Terminating Representation)
- Abandonment may result in fee forfeiture