

Ethical Lawyering Outline

CA Business and Professions Code, § 6068

Duties of an Attorney:

1. support Constitution
2. respect judiciary + its officers
3. counsel legal/just cases - no frivolous claims
4. don't encourage or participate in cases w corrupt motives
5. be truthful, don't mislead
6. confidentiality (w exceptions)
7. respect reputation + honor of parties/witnesses
8. never reject defenseless or oppressed
9. cooperate w discipline investigation and comply with discipline
10. maintain records: office address, contact info, certified specialties and jdx, discipline
11. keep client informed
12. report stuff and yourself

Duties of Self-Reporting: must report in writing w/in 30 days of L acquiring knowledge of:

1. 3 or more malpractice/wrong conduct lawsuits in 12 months
2. judgment against L for fraud, misrepresentation, or gross negligence
3. sanction for more than \$1,000 (unless related to discovery)
4. accused of felony
5. charged with felony or misdemeanor when practicing law, or where C was a victim, or where element of felony involves crime of moral turpitude (dishonesty)
6. discipline by prof discipline agency
7. case outcome gets reversed bc of L misconduct, incompetency, or willful misrepresentation
8. FAILURE TO REPORT any of these can be a basis for discipline

I. Admission to the Bar

A. CA Requirements: must be 18 yrs old, good moral character, pass Bar + MPRE, law school or certain time/experience in law study, NO residency requirement

B. Discipline

1. Disbarment = permanent removal of law license
CA allows reapplication every 5 yrs with proof of rehabilitation
2. Suspension = temporary prohibition on practicing; may require retake MPRE
3. Reprimand = public or private "slap on the wrist"
4. Malpractice = lawsuit for wrongful conduct/representation, but are only coming after money, cannot take away license (plus lawyers have malpractice insurance)
5. ABA discipline = can reprimand, sanction, suspend, or disbar

C. Upon disbarment, suspension, or resignation, L must:

1. Notify all clients
2. Notify all counsel + courts
3. Provide proof of compliance with State Bar
4. **CA Employment of Disbarred Member:** an attorney shall not professionally associate with/employ a disbarred member to give any legal advice or rep, but can employ disbarred member to do research and clerical work.

D. Active vs. Inactive Members

If inactive, cannot be practicing or give legal advice or consult as a lawyer, but it's an option in lieu of resigning if not practicing... To become active again, all you have to do is pay the Bar fee.

E. Reporting to the Bar

MR: YES duty to report known (*not just suspected*) conduct of another L's violation of the rules relating to L's honesty or fitness as a lawyer

Exception: when conduct was learned via confidential communication

CA: NO duty to report known conduct of another L's violation of the rules
YES duty to self-report (also see notes on 6068 above):

- 3 or more malpractice suits in 12 mo
- judgment for fraud, misrep, breach, gross neg
- sanction for \$1,000 (unless discovery)
- accusation/indictment for felony

II. Unauthorized Practice + Multi-JDX Practice

Pro hac vice = allows courts to permit an out-of-state L to rep C in particular matter in that court's jurisdiction (where L is not licensed)

CA: Unauthorized Practice

Cannot practice in jdx where to do so would violate the rules of that jdx.

MR: Unauthorized + Multi-JDX

1. Cannot practice in jdx where to do so would violate the rules of that jdx.
2. Cannot establish office or hold out to the public that L is admitted to practice in a jdx where L is unlicensed

Exception: L may practice temporarily in unlicensed jdx if:

- L works with an L who is licensed in the host state
- L services related to proceeding in that jdx and L is authorized or expected to be there
- L services related to mediation, arbitration or alternative dispute resolution in that jdx
- L services are related to L's practice in licensed jdx

III. Client-Lawyer Relationship

A. Formation: main factor is C's reasonable belief relationship was formed, i.e. confidential info share, payment, retainer agreement (see notes on Fees and Retainers)

B. Duty of Diligence

MR: L must act w reasonable diligence and competence in representing C

CA: same as duty of competence

C. Duty of Competence

MR: L must provide competent rep and service to C, requiring

- thoroughness (aka diligence)
- legal knowledge and skill
- preparation necessary for representation
- IF L NOT competent, L has a duty to not take the case, depending also on firm size, financial resources, personal biases, etc.

CA: L cannot intentionally, recklessly, or repeatedly fail to give competent legal service to C, requiring:

- diligence (aka thoroughness)
- legal knowledge and skill
- mental, emotional, and physical ability necessary for representation
- IF L NOT competent, may (1) associate w L that does, or (2) acquire sufficient knowledge and skill

Note: lack of competency is not a defense for making a mistake in calculating fees/charging less, as fees are not dispositive of duties.

D. Duty of Communication

MR (+ CA except for consulting): L must

- promptly inform C of decisions requiring C's consent,
- consult C about goals and strategy,
- update C on case status
- comply w reasonable requests for info
- consult C on limitations of L's conduct
- explain enough so C can make informed decisions

MR (only): Attorney as an Advisor

L must exercise independent prof judgment and render candid advice.

1. Communication of Settlement offers

MR: L must abide by C's decision to settle in civil and criminal matters

Question: but is there a duty to *communicate* settlement offers? No, but you *should*.

CA: L MUST communicate to C all settlement terms + conditions of:

- any *written* offer in a *civil* matter
- any offer in a *criminal* matter

2. Communication of Prof Liability Insurance

CA (only): If L doesn't have insurance, required to disclose to C

- In writing at time of employment, if potential C's need for representation will exceed 4 hours, or
- In writing w/in 30 days of discovering no insurance, if L finds out after employment/during C's representation

Question: so under MR, when must you have/communicate liability ins?

E. Duty of Confidentiality

MR: L cannot reveal confidential info unless C consents, or it is impliedly authorized in order to carry out rep of C, or an exception applies.

Exceptions: L may reveal confidential info if:

- prevent an act that will cause death or substantial bodily harm
- prevent C from committing crime/fraud
- prevent C from injuring financial/property interests of another
- L seeking ethical advice
- L establishing claim/defense in C/L dispute
- required to comply with law

CA: L cannot reveal confidential info unless C consents, or an exception applies.

Exceptions: L may reveal confidential info if:

- prevent a *criminal* act that will cause death or substantial bodily harm

- BUT before revealing, CA requires L to (1) make a good faith effort to persuade C not to do act, and (2) inform C of L's ability to reveal
- Note: CA is much more strict on confidentiality

F. Duty of Loyalty

1. Prevents L from acting adversely to present or past client in matters substantially related to the representation
2. Extends beyond termination of the client-lawyer relationship
3. See notes on Conflict of Interest...

IV. FEES

MR + CA: Cannot charge collect an unreasonable/unconscionable, or illegal fee.

A. Reasonableness - *Wheeler* Factors

Note: even if not enough facts for all the factors, just list factors and say where there are facts and where there are not enough.

MR: When setting fees, must consider:

1. TIME
 - time + labor
 - time limits
 - taking of case precludes another
2. MONEY
 - customary fee - similar services, same area
 - contingent or fixed fee
 - typical award
3. CLIENT
 - results for client v. money involved
 - relationship w client - nature + length
4. CASE
 - desirability of case
 - difficulty of issues
5. ATTORNEY
 - skill required
 - attorney's EAR - experience, ability, reputation

CA: same, and adds:

- *proportionality* of fee to services
- *sophistication* of attorney and client
- *informed consent* by client

Note on excess billing:

- Premium billing = charging for work you didn't do - can't do it
- Double billing = working on one case while at court for another case and charging time for both - can't do it

B. Retainer Agreements/Written Fee Requirements

MR: Fees preferably (*not required*) in writing, and communicated to C before or within reasonable time of representation.

Exception: when charging a regularly represented client

CA: Fees for over \$1,000 *required* to be in writing/retainer, which contains the bases for the fee, nature of services, and responsibilities of client and lawyer.

Exceptions:

- when charging regularly represented client
- for emergency services
- client is a corporation
- client states in writing that retainer is not required

C. Contingency Fees

1. Requirements

MR: Contingency fee agreements must ALWAYS be in WRITING and

- signed by client (CA: client and lawyer)
- state method of calculating fee (CA: and that fees can be negotiated)
- state litigation and other deductions + when they will be made (CA: same)
- **notify C of expenses they will be responsible for regardless of outcome

CA: *Doesn't require writing of contingency fee for workers' comp recovery*

2. Prohibited Contingency Fees

MR: (1) Family law/domestic relations when contingent on divorce, alimony, or property, and (2) Criminal cases

CA: disfavors what MR prohibits, but no equivalent prohibition

D. Fee Splitting

MR: Can split w lawyer NOT in same firm if:

- each gets paid for services individually OR each assumes joint responsibility
- C gives written consent to terms of division/allocation of payment, and
- total fee is reasonable

CA: Can split w lawyer NOT in same firm if:

- C gives written consent to terms of division/allocation of payment,
- total fee is not unconscionable (basically same as unreasonable), and
- total fee is *not increased by division*
- ALSO, cannot comp/give/promise anything to another L for recommendation (this safeguards from L's padding fee agreements to repay another L)

Hypo - put work into case, charged client, then realized this is not the case for you and you refer it out > this isn't really fee splitting

****Sharing fees/fee splitting with non-lawyers is a different analysis** - requirements that it can't be an exclusive arrangement/relationship (i.e. one therapist always recommending one lawyer for divorce), for a definite period of time, and client needs to be made aware.

****Referral fee** - typically have to do with lawyer to lawyer - CA ok if in writing, total fee not increased, and C consents - public policy in CA is if you're not competent and give away case, we want to give you incentive

V. Conflict of Interest

Two types: (1) when attorney has personal stake in matter, bc something else matter besides relationship with client, and (2) when more than one party/client involved

Note: when conflict of interest is at issue, the analysis is very fact heavy and is about duty of loyalty - think about if there's a former client, unfair advantage, etc...

A. Loaning Clients Money

MR: can only loan money to client for litigation expenses (can probably argue that metro/train ticket and travel expenses are tied to litigation... but harder argument for things like therapy or rent, but could maybe argue therapy.)

CA: after attorney is hired, can loan client money for litigation expenses and pretty much anything so long as it's **in writing**

B. Third Party Paying Fees

MR: cannot accept payment for C's representation from third party unless:

- C consents
- no interference w L's independent prof judgement (duty as advisor)
- no interference w client-layer relationship
- confidential info is protected

CA: pretty much the same except don't have to disclose/get C's consent if paid for by public services agency - Fees not dispositive of duties

C. Business Transactions

1. With Clients

MR + CA: L cannot enter bus trans or acquire ownership adverse to C unless:

- terms fully disclosed in writing, fair and reasonable
- C advised to seek outside counsel re transaction
- C consents to transaction

2. With Persons Other than Client

MR: Truthfulness - when representing C, L shall not knowingly:

- make a false statement to a third person
- fail to disclose a material fact when disclosure is necessary to avoid assisting C with criminal or fraudulent act

3. Communication with Persons Represented by Counsel

MR + CA: when representing C, L shall not communicate about subject of rep with person L knows is represented by another L in the matter unless other L gives consent.

D. Proprietary Interest

MR: cannot acquire interest in litigation, but L may:

- acquire lien/mortgage to secure L's fees
- contract w C for reasonable contingency fee

CA - specific to CA - can't buy client home going through foreclosure

E. Testamentary Gift

MR + CA: cannot solicit or induce substantial gift (movie tickets probably not a problem, but a trip to Europe or a house would be) from C to L or L's relatives unless L is related to C/donee (i.e. you could make a will for a family member that gives you something, but not a neighbor.)

F. Media and Literary Rights

MR (only): cannot acquire media or literary rights to a portrayal/account relating to representation of C until rep is complete.

G. Sexual Relations w Client

MR + CA (Same now): prohibited unless a consensual sexual relationship existed when the client-lawyer relationship began.

H. Liability for Malpractice

MR + CA: cannot settle malpractice liability claim and cannot enter an agreement limiting L's liability to C for malpractice unless C is represented by counsel

I. Use of Info

1. Current/Former Clients

MR: cannot use info regarding rep of C to disadvantage C, and

- cannot rep new C in same/related matter of former C where new C's interests are adverse to former C
- cannot rep new C in same/related matter of former C represented by L's former firm, where the new C's interests are adverse to the former C AND L has confidential info relevant to the new representation

CA: cannot rep C with adverse interest to current C or former C where L has obtained confidential info relevant to the new representation

2. Prospective Clients

MR: even if no client-lawyer relationship ensues, info in consultation is confidential and bc it's confidential, L cannot rep C with adverse interest to prospective C if L got info from prospective C that could be harmful, unless:

- L made efforts to avoid any more info
- L is timely screened
- both Cs consent

3. Corporation/Organization as Client

MR: L reps org by communicating w control group/authorized constituents, and is required to act in the best interest of the org, thus:

- if L knows person associated w the org
- and that person is violating the law
- and org may be charged/suffer injury bc of it
- L must refer matter to higher authority
- BUT if higher authority fails, L may REVEAL confidential info to protect org, and/or L may WITHDRAW

CA: differs on last point re confidentiality; cannot reveal info, but L can

- urge org to reconsider case and explain consequences
- refer matter to higher authority
- AND if higher authority fails, L CANNOT REVEAL, but L may WITHDRAW (again, CA strict on confid)

J. Joint Representation + Adverse Interests

1. Imputation of Conflicts

MR: Ls in same firm cannot jointly rep C if one L would be prohibited, unless:

- the prohibition is based on a personal interest and wouldn't limit other Ls' representation of C, or C consents

2. Representing Multiple Clients/Joint Rep

MR: L shall not rep C if

- **Cs' CONFLICTING INTEREST:** L's rep of one C conflicts w interest or rep of another C
- **L's PERSONAL INTEREST:** L's rep would be limited bc of L's personal interest in matter, including:
 - (1) L's responsibilities to current C
 - (2) L's responsibilities to former C

- (3) L's responsibilities to 3rd person
- UNLESS C consents, L can competently and diligently rep all, AND L is not representing both sides of same matter

CA: L shall not rep C if

- **Cs' CONFLICTING INTEREST:** L's rep of one C (*potentially or actually*) conflicts w interest or rep of another C
 - Or rep C in new matter, at the same time in a separate matter... (?)
 - UNLESS C gives **informed written consent via WAIVER**
 - **Note:** Waiver could still be subject to scrutiny later, standard is if a reasonable lawyer would have continued with representation
- **L's PERSONAL INTEREST:** L's rep would be limited bc L has personal interest in the matter, including:
 - (1) L has or had relationship with party or witness in the *same* matter, or
 - (2) with person who L knows would be affected by the matter's outcome
 - UNLESS L provides **written disclosure** to C

3. Aggregate Settlements

MR + CA: when repping two or more Cs, L cannot make aggregate settlement of the Cs' claims unless each C is told the existence and nature of the claims and each C consents

V. Attorney as Advocate

A. CANDOR Toward the Tribunal = Duty to Tell the Truth

MR: when presenting to the court, L **shall**

- not knowingly make a false statement to the court
- not fail to disclose legal authority adverse to C's case
- **not offer evidence L knows is false**
- not have criminal or fraudulent intentions relating to case
- ****NOT ASSERT PERSONAL KNOWLEDGE OF FACTS AT ISSUE, except when testifying as a witness**

CA: when presenting to the court, L **shall**

- employ means only consistent with the truth
- **not mislead judge or jury by false artifice/evidence or statement**
- not intentionally mis-quote the law or legal decision
- not cite invalid authority (i.r. overturned case, invalid case law)
- ****NOT ASSERT PERSONAL KNOWLEDGE OF FACTS AT ISSUE, except when testifying as a witness**

NOTES: candor sometimes conflicts with confidentiality duties; CA case where consequence was prison, and prison was not held to be substantial bodily injury so no excuse to reveal confidential info

- If facts say case is OVER and finds out falsity or dishonesty after, no analysis
- **HYPOTHESIS:** what if client is going to lie on the stand? this is where difference in MR and CA rules comes in... both say to try to talk C into doing the right thing, then you can attempt to withdraw...
 - **MR:** if you cant withdraw, you tell the court
 - **CA:** you don't tell the court, but you put the client on a "narrative fashion" where defense attorney plays a passive role and lets client talk without

questions > CA says this is the best compromise between candor and confidentiality

B. Fairness to Opposing Party + Counsel

MR: L shall not

- obstruct access to evidence or destroy/conceal doc
- falsify evidence, assist with false testimony (would this go to candor?)
- knowingly disobey court rules
- make frivolous discovery request or fail to comply w discovery request

C. Lawyers as a Witness

MR: L shall not act as a witness unless:

- relates to an uncontested issue
- relates to nature and value of legal services in case
- not allowing L as witness would create substantial hardship to C

CA: similar and C must consent to L testifying

D. Evidence + Expediting Litigation

CA: L shall not suppress any evidence that L or C has a legal obligation to reveal or produce

MR: L shall make effort to expedite litigation consistent with interests of C

E. Meritorious Claims and Contentions

MR: shall not bring or defend issue unless there is BASIS in LAW + FACT, OR it's a claim that is not frivolous, and includes a good faith argument for extension/modification of existing law.

CA: almost same, but also shall not bring/defend an issue just to harass person

F. Threatening Criminal, Administrative, or Disciplinary Action

CA: L shall not threaten to present these charges in order to obtain an advantage in a civil case.