

Kennedy Inn Live:

**Supervising Attorney Responsibility, Undue Attention,
and the Right Outcome**

The Anthony M. Kennedy American Inn of Court
Team 1
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List of Authorities

Sketch 1: Diversity and Inclusion

***All rules are from California Rules of Professional Responsibility Unless Otherwise Noted*

Anti-Discrimination

American Bar Association Anti-Discrimination Model Rule 8.4(g): Maintaining The Integrity Of The Profession

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

CA Professional Conduct Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

- (1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or
- (2) unlawfully retaliate against persons.*

(b) In relation to a law firm's operations, a lawyer shall not:

- (1) on the basis of any protected characteristic,
 - (i) unlawfully discriminate or knowingly* permit unlawful discrimination;
 - (ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or
 - (iii) unlawfully refuse to hire or employ a person*, or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment; or
- (2) unlawfully retaliate against persons.*

(c) For purposes of this rule:

- (1) "protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;
- (2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);

(3) “unlawfully” and “unlawful” shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and DFEH has an online portal for attorneys to submit notices of certain State Bar disciplinary charges (rule 8.4.1(e)).

(4) “retaliate” means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this rule.

(d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.

(e) Upon being issued a notice of a disciplinary charge under this rule, a lawyer shall:

(1) if the notice is of a disciplinary charge under paragraph (a) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section; or

(2) if the notice is of a disciplinary charge under paragraph (b) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.

(f) This rule shall not preclude a lawyer from:

(1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;

(2) declining or withdrawing from a representation as required or permitted by rule 1.16; or

(3) providing advice and engaging in advocacy as otherwise required or permitted by these rules and the State Bar Act.

Supervising Attorney Ethics Duties:

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers

(a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that all lawyers in the firm* comply with these rules and the State Bar Act.

(b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,* shall make reasonable* efforts to ensure that the other lawyer complies with these rules and the State Bar Act.

(c) A lawyer shall be responsible for another lawyer’s violation of these rules and the State Bar Act if:

(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or

(2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm,* and knows* of the conduct at a time when its

consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Rule 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.*

(b) A subordinate lawyer does not violate these rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable* resolution of an arguable question of professional duty.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm,* shall make reasonable* efforts to ensure that the person's* conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person* that would be a violation of these rules or the State Bar Act if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or

(2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the person* is employed, or has direct supervisory authority over the person,* whether or not an employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Additional Resources and Citations:

Trousil v. State Bar (1985) 38 Cal.3d 337 (referred to in the commentary in Rule 5.1)

Palomo v. State Bar (1984) 36 Cal.3d 785 (referred to in the commentary in Rule 5.1)

Crane v. State Bar (1981) 30 Cal.3d 117 (referred to in the commentary in Rule 5.1)

Safekeeping Client Funds:

Rule 1.15 - Safekeeping Funds and Property of Clients and Other Persons

(a) All funds received or held by a lawyer or law firm* for the benefit of a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account" or words of similar import, maintained in the State of California, or, with written* consent of the client, in any other jurisdiction where there is a substantial* relationship between the client or the client's business and the other jurisdiction.

(b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:

- (1) the lawyer or law firm* discloses to the client in writing* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and

(2) if the flat fee exceeds \$1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client.

(c) Funds belonging to the lawyer or the law firm* shall not be deposited or otherwise commingled with funds held in a trust account except:

(1) funds reasonably* sufficient to pay bank charges; and
(2) funds belonging in part to a client or other person* and in part presently or potentially to the lawyer or the law firm,* in which case the portion belonging to the lawyer or law firm* must be withdrawn at the earliest reasonable* time after the lawyer or law firm's interest in that portion becomes fixed. However, if a client or other person* disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(d) A lawyer shall:

(1) promptly notify a client or other person* of the receipt of funds, securities, or other property in which the lawyer knows* or reasonably should know* the client or other person* has an interest;
(2) identify and label securities and properties of a client or other person* promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;
(3) maintain complete records of all funds, securities, and other property of a client or other person* coming into the possession of the lawyer or law firm;*
(4) promptly account in writing* to the client or other person* for whom the lawyer holds funds or property;
(5) preserve records of all funds and property held by a lawyer or law firm* under this rule for a period of no less than five years after final appropriate distribution of such funds or property;
(6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar; and
(7) promptly distribute, as requested by the client or other person,* any undisputed funds or property in the possession of the lawyer or law firm* that the client or other person* is entitled to receive.

(e) The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers and law firms* in accordance with subparagraph (d)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Kelly v. State Bar (1988) 45 Cal. 3d 649, 656 ("Misappropriation of client funds has long been viewed as a particularly serious ethical violation. [Citations.] It breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. [Citations.] Although there is no 'fixed' disciplinary formula [citation], misappropriation generally warrants disbarment unless 'clearly extenuating circumstances' are present. [Citation.]")

Jackson v. State Bar (1979) 25 Cal. 3d 398, 403 ("The fact that the balance in an attorney's trust account has fallen below the amount due his client will support a finding of wilful misappropriation.")

Lawyer Advertising:

Rule 7.1 Communications Concerning a Lawyer's Services

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.

(b) The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers

Rule 7.2 Advertising

(a) Subject to the requirements of rules 7.1 and 7.3, a lawyer may advertise services through any written,* recorded or electronic means of communication, including public media.

(b) A lawyer shall not compensate, promise or give anything of value to a person* for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm,* except that a lawyer may:

- (1) pay the reasonable* costs of advertisements or communications permitted by this rule;
- (2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California;
- (3) pay for a law practice in accordance with rule 1.17;
- (4) refer clients to another lawyer or a nonlawyer professional pursuant to an arrangement not otherwise prohibited under these Rules or the State Bar Act that provides for the other person* to refer clients or customers to the lawyer, if:
 - (i) the reciprocal referral arrangement is not exclusive; and
 - (ii) the client is informed of the existence and nature of the arrangement;
- (5) offer or give a gift or gratuity to a person* having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm,* provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

(c) Any communication made pursuant to this rule shall include the name and address of at least one lawyer or law firm* responsible for its content.

Substance Abuse Issues:

Why is substance abuse such prolific among lawyers?

Two particular areas account for this. First, lawyers share many common personality traits that make them susceptible to alcohol and drug addiction. These traits include, among other things: judgmental, controlling, driven, pessimistic, argumentative, anxious, compulsive. (See, e.g., <https://www.cccba.org/article/competence-substance-abuse-in-the-legal-profession-bad-and-getting-worse/>). Moreover, traditional law school models reward and exacerbate these traits. What this means is that lawyers who are predisposed to these traits are more susceptible to addiction.

Second, the business model of lawyers is high stress and creates a perception that there is never enough time. Lawyers generally bill by the hour; in increments of 6 minutes. Lawyers are also demanding, and receiving, more money. This means that lawyers have to justify their salaries with more time. This creates a perception that there is never enough time and shortcuts become attractive: a stimulant can substitute a nap; a drink for meditation; etc. (See id.)

Sketch 2: Ethics of Media Relations

California Rules of Professional Conduct 3.6 - Trial Publicity

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will

- (1) be disseminated by means of public communication and
- (2) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter

Sketch 3: Law v. Justice

"The Rule of Law (Summary of Handbook section 1:33)

Actions and decisions in court must be within the law. Judges are not in courtrooms to make up the rules as they go along. Observing the rule of law involves the fair application of the constitutions, statutes, case law, rules of court, the Code of Judicial Ethics, and other laws, ensuring the constitutional rights of all before the court, including self-represented persons. The rule of law is the foundation of modern social order, replacing force and despotic whim. In administering justice, judges must respect and comply with the law. (Cal. Code Jud. Ethics, canons 2A, 3B(2).)

Judicial independence does not mean freedom from constraints of the law, but is a basis for our confidence that judicial decisions are not influenced by political considerations, public opinion, the need to be popular, fear of losing an election, or the desire to curry favor with the powerful. Judicial independence requires that judges have the courage to do what is right regardless of these pressures, as well as the courage to stand between abuse of power by the state and the individual before the court. Public confidence in the judicial institution is necessary to preserve the rule of law. We need not be reminded of the fragility of the rule of law when public confidence is shaken, or of the degree to which public confidence in public institutions has deteriorated in recent times. Articulation of the moral principles and values to which the judicial institution binds itself should serve to encourage public confidence in that institution, and respect for its decisions."

California Judicial Conduct Handbook (4th ed. 2017): Section 1:1

The eight pillars of being a judge. (Pillar III – The Rule of Law: Actions and decisions in court must be within the law.)

On the Connection Between Law and Justice, by Anthony D'Amato, 26 U. C. Davis L. Rev. 527-582 (1992-93)

What does it mean to assert that judges should decide cases according to justice and not according to the law?

In the Matter Concerning Judge Frank Roesch, 2020 Cal. Comm. Jud. Perform. LEXIS 3.

Having attorneys agree to something the law does not permit does not obviate the judge's duty to respect and comply with the law.

BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166-67 (1921)

Judge Cardozo's opinions made it appear that an impersonal rule of law hovered and presided over everything, determining with power and certainty the results he reached. Yet in his major book, he confessed that he knew better than that. The "solution" to this conflict was to say that the judge acts as a mini-legislator, filling in gaps in the law.