



**Federal Bar
Association**
San Diego Chapter



presents:

NINTH ANNUAL ALL-DAY ETHICS, COMPETENCE, AND ELIMINATION OF BIAS MCLE EVENT

January 25, 2023, from 9:00 a.m. to 3:35 p.m.

Cost (per course): San Diego FBA & ICLA Members – FREE
FBA National Members – \$10.00
Non-FBA Members – \$40.00

Location: Webinar (Zoom)

MCLE: 4.0 hours Ethics; 1 hour Competence; 1 hour Elimination of Bias

The San Diego FBA invites you to attend its ninth annual all-day California MCLE event.

California MCLE credits are available separately for each of the sessions listed below. The meeting link and written materials will be sent to all participants one day prior to the event.

9:00 a.m. – 10:00 a.m.: [*Duties to Current, Former and Prospective Clients, Including with Regard to the Safekeeping of Funds \(Ethics 1 of 4\)*](#)

Anne Rudolph and Eric Deitz
San Diego County Bar Association Ethics Committee

10:05 a.m. – 11:05 a.m.: [*Lawyers, Substance Use Disorders and Wellbeing \(Competence\)*](#)
Greg Dorst, The Other Bar

11:15 a.m. – 12:15 p.m.: [*Engagement Agreements, Candor in Mediation, and More \(Ethics 2 of 4\)*](#)

Deborah Wolfe and Charles Berwanger
San Diego County Bar Association Ethics Committee

12:20 p.m. – 1:20 p.m.: [*Communications with Represented and Unrepresented Persons \(Ethics 3 of 4\)*](#)

Michael Crowley and Richard Hendlin
San Diego County Bar Association Ethics Committee

1:30 p.m. – 2:30 p.m.: [*Civility and Candor \(Ethics 4 of 4\)*](#)

Irean Swan and Andrew Servais
San Diego County Bar Association Ethics Committee

2:35 p.m. – 3:35 p.m.: [*Microaggressions \(Elimination of Bias\)*](#)

Carolina Bravo-Karimi, Wilson Turner Kosmo LLP



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Some Thoughts on Engagement Agreements; and Candor in Mediation

Presented to the Federal Bar Association on January 25, 2023

By Charles V. Berwanger

Rule 1.2.1 Advising or Assisting the Violation of Law

- (a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal.*
- (b) Notwithstanding paragraph (a), a lawyer may:
- (1) discuss the legal consequences of any proposed course of conduct with a client; and
 - (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.*

Rule 1.7 Conflict of Interest: Current Clients

- (a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.
 - (b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.
- [9] This rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably* understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. (See rule 1.8.8.)

Rule 3.3 Candor Toward the Tribunal*

(a) A lawyer shall not:

(1) knowingly* make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;

(2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly* misquote to a tribunal* the language of a book, statute, decision or other authority; or

(3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer shall, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:*

- (a) make a false statement of material fact or law to a third person;* or
- (b) fail to disclose a material fact to a third person* when disclosure is necessary to avoid assisting a criminal or fraudulent* act by a client, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e)(1) or rule 1.6.

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person* that the lawyer knows* is false. However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this rule, lawyers remain bound by Business and Professions Code section 6106 and rule 8.4.

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.*

[8] Paragraphs (a), (b), and (c) create independent bases for discipline. This rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this rule and rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,* associate or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer's conduct is beyond the scope of these rules.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate these rules or the State Bar Act, knowingly* assist, solicit, or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official, or to achieve results by means that violate these rules, the State Bar Act, or other law; or

Comment

- [1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

§6068 Duties of Attorney

It is the duty of an attorney to do all of the following:

- (a) To support the Constitution and laws of the United States and of this state.
- (b) To maintain the respect due to the courts of justice and judicial officers.
- (c) 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.
- (d) 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.
- (e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

Section 6106 Moral Turpitude, Dishonesty or Corruption Irrespective of Criminal Conviction

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.

§ 1129. Confidentiality restrictions; client disclosure and acknowledgment requirements; requirements for printed disclosure; form; effect of noncompliance

- (a) Except in the case of a class or representative action, an attorney representing a client participating in a mediation or a mediation consultation shall, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, provide that client with a printed disclosure containing the confidentiality restrictions described in Section 1119 and obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 6090.8 is added to the Business and Professions Code, to read:

6090.8. (a) A licensee of the State Bar who knows that another licensee has engaged in professional misconduct that raises a substantial question as to that licensee's honesty, trustworthiness, or fitness as an attorney in other respects, shall inform the State Bar.

(b) This section does not require disclosure of information otherwise protected by the attorney-client privilege or information gained by a licensee while participating in the Attorney Diversion and Assistance Program.

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