

# Attorney-Client Relationship

## Introduction

Clients usually hire a lawyer because they do not understand the intricacies of the law nor the judicial process. Lawyers, in turn, are privileged to represent clients only if they are licensed and they adhere to ethical rules. There are two purposes of licensing lawyers: to protect the public and to protect the judicial process. The attorney-client relationship may be well understood as a bundle of other relationships, including a contractual relationship, an agency relationship, and a fiduciary relationship which relationships are collectively imbued with a host of implied powers and duties.

## Regulation of Attorneys

The State Bar Act is “a comprehensive scheme regulating the practice of law. . . . [N]o one but an active member of the State Bar may practice law for another person. . . . The prohibition . . . is designed to ensure that those performing legal services do so competently.”<sup>1</sup> “No person shall practice law in California unless the person is an active member of the State Bar.”<sup>2</sup> “Protection of the public shall be the highest priority for the State Bar of California.”<sup>3</sup> Attorneys must be licensed so that the public is protected from being advised and represented by persons not qualified to practice law.<sup>4</sup> In litigation, unlicensed attorneys threatens the integrity of the judicial process itself.<sup>5</sup> Ethical rules “are intended to regulate professional conduct of members of the State Bar.”<sup>6</sup>

“No one may recover compensation for services as an attorney”, unless they are licensed.<sup>7</sup> Attorneys must also comply with ethical rules promulgated by the California Supreme Court. “The rules of professional conduct . . . are binding upon all members of the State Bar.”<sup>8</sup> Attorneys are “officers of the court” who owe duties to the court and to the administration of justice.<sup>9</sup>

## Formation of Contractual Relationship

“An attorney’s duty to his or her client depends on the existence of an attorney-client relationship. If that relationship does not exist, the fiduciary duty to a client does not arise. . . . [T]he attorney-client relationship is created by some form of contract, express or implied, formal

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<sup>1</sup> *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court* (1998) 17 Cal.4th 119, 127 (*Birbrower*).

<sup>2</sup> Bus. & Prof. Code § 6125.

<sup>3</sup> Bus. & Prof. Code § 6001.1.

<sup>4</sup> *Russell v. Dopp* (1995) 36 Cal.App.4th 765, 773.

<sup>5</sup> *Ibid.*

<sup>6</sup> Rules of Professional Conduct, Rule 1.0(a).

<sup>7</sup> *Birbrower, supra*, 17 Cal.4th at 127.

<sup>8</sup> Bus. & Prof. Code § 6077.

<sup>9</sup> *Kirsch v. Duryea* (1978) 21 Cal.3d 303, 309; see also Rules 3.1, 1.2.1, and 3.3.

or informal.”<sup>10</sup> This contractual relationship may end at any time. “We have concluded that a client should have both the power and the right at any time to discharge his attorney with or without cause.”<sup>11</sup>

“It is elementary that the relationship between a client and his retained counsel arises from a contract, whether written or oral, implied or expressed. An attorney-client relationship can be formed though no retainer is signed or no fees are paid. 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.”<sup>12</sup>

The purpose(s) for which the attorney has been retained may be limited by contract.<sup>13</sup> However, even where the scope of representation is expressly limited, the attorney may still have a duty to alert the client to reasonably apparent legal problems outside the scope of the retention.<sup>14</sup>

### **Agency Relationship**

An attorney is the client’s agent on matters for which the attorney is employed, so that the client may be bound by the attorney’s acts. “An attorney and counselor shall have authority: 1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the Clerk, or entered upon the minutes of the Court, and not otherwise.”<sup>15</sup> However, an attorney may not appear for a client absent the client’s authority. “Corruptly or willfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension.”<sup>16</sup>

### **Fiduciary Relationship**

Attorney and client have a fiduciary relationship of the very highest character, which binds the attorney to the most conscientious fidelity to the client.<sup>17</sup> “One of the principal obligations which bind an attorney is that of fidelity, the maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client. This obligation is a very high and stringent one. It is also an attorney’s duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter’s free and intelligent consent given after full knowledge of all the facts and circumstances. By virtue of this rule an attorney is precluded from

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<sup>10</sup> *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1683-1684 (*Nichols*).

<sup>11</sup> *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790.

<sup>12</sup> *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 126.

<sup>13</sup> *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 940.

<sup>14</sup> *Ibid.*

<sup>15</sup> Code Civ. Proc. § 283. See also, *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403.

<sup>16</sup> Bus. & Prof. Code § 6104.

<sup>17</sup> *Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1167.

assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent." (citations omitted.)<sup>18</sup>

#### **Four Primary Duties**

Attorneys owe four primary duties to their clients. They are: Undivided Loyalty; Full Disclosure; Confidentiality; and Competent Representation.

##### **1. Undivided Loyalty**

All attorneys owe a duty of undivided loyalty to their clients. "An attorney's duty of loyalty to a client is not one that is capable of being divided, at least under circumstances where the ethical obligation to withdraw from further representation of one of the parties is mandatory, rather than subject to disclosure and client consent."<sup>19</sup>

This duty requires the lawyer: (1) to act to advance the client's interest and not the interest of the lawyer or anyone else. "[T]he bedrock principle of fiduciary obligation, the duty of loyalty, requires that trustees be disinterested, that they put the interests of those they act for or represent before their own or that of others"<sup>20</sup>; (2) to exercise independent professional judgment not influenced by the lawyer's interests or any other factors extraneous to the normal attorney-client relationship. See Rule 1.7, which identifies certain personal interests and relationships that might cause a lawyer to have a conflict of interest; (3) to refrain from assuming a role adverse to the client; (4) in joint client situations, to not allow the representation of one client to interfere with the representation of the other; (5) to follow the client's lawful directions on all substantive matters;<sup>21</sup> and (6) to not abandon the client, an attorney's failure to appear at appellate argument violates the attorney's duty of respect for the court as well as being a violation of the duty of undivided loyalty to the client.<sup>22</sup>

##### **2. Full and Fair Disclosure**

All attorneys owe a duty to disclose to their clients all significant facts and developments.<sup>23</sup>

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<sup>18</sup> *Anderson v. Eaton* (1930) 211 Cal. 113, 116.

<sup>19</sup> *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282 (*Flatt*).

<sup>20</sup> Susan P. Shapiro, *Tangled Loyalties: Conflicts of Interest in Legal Practice*, Ann Arbor, MI: University of Michigan Press (2002) at p.4]

<sup>21</sup> See, *People v. Davis* (1957) 48 Cal.2d 241, 256-57 [it amounts to taking a position adverse to the client, and therefore violates the duty of undivided loyalty, for an attorney to surrender any of the client's substantial rights without the client's ". . . free and intelligent consent after full knowledge of all the facts and circumstances. . . ." citing *Anderson v. Eaton* (1930) 211 Cal. 113, 116.

<sup>22</sup> *People v. Massey* (1955) 137 Cal. App.2d 623, 625.

<sup>23</sup> See, *Attorney's Duty of Disclosure* at [DutytoDefend.com](http://DutytoDefend.com).

This duty has four different elements:

**A. Duty to Advise**

“One of an attorney’s basic functions is to advise. Liability can exist because the attorney failed to provide advice. Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client’s objectives.”<sup>24</sup> “The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests.”<sup>25</sup> “[T]he attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention. The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client’s legal needs. The attorney need not represent the client on such matters. Nevertheless, the attorney should inform the client of the limitations of the attorney’s representation and of the possible need for other counsel.”<sup>26</sup>

**B. Duty to Initiate Disclosure**

All attorneys have a duty to disclose significant developments [under Rule 1.4(a)(3) and Bus. & Prof. Code § 6068(m)] and all other information material to the client’s rights and interests “[The dealings between practitioner and client frame a fiduciary relationship. The duty of a fiduciary embrace the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests.”<sup>27</sup>

**C. Duty to Respond to Inquiry**

All attorneys have a duty to promptly comply with reasonable requests for information and document copies when necessary to keep the client informed and to respond promptly to reasonable status inquiries from clients under Rule 1.4(a)(3) and Bus. & Prof. Code § 6068(m).

**D. Duty to Communicate Settlement Opportunities**

All attorneys have a duty to promptly communicate settlement offers to the client under Rule 1.4.1.

**E. Duty of Candor**

Underlying all of these obligations is the duty to speak with candor to the client, that is, the duty to speak frankly and without bias. “Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud.”<sup>28</sup>

**3. Confidentiality**

All attorneys have a duty of confidentiality which is all but absolute. “It is the duty of an attorney to do all of the following: . . . To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”<sup>29</sup> “One of the principal obligations

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<sup>24</sup> *Nichols, supra*, 15 Cal.App.4th at 1684-1685.

<sup>25</sup> *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188-189 (*Neel*). (Citations, ellipses, and quotations marks omitted.)

<sup>26</sup> *Nichols, supra*, 15 Cal.App.4th at 1685.

<sup>27</sup> *Neel, supra*, 6 Cal.3d at 188-89.

<sup>28</sup> *Neel, supra*, 6 Cal.3d at 188-89 (citations omitted).

<sup>29</sup> Bus. & Prof. Code § 6068(e)(1).

which bind an attorney is that of fidelity, the maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client.”<sup>30</sup> A lawyer may not voluntarily disclose any information obtained by the lawyer as a result of a lawyer-client relationship if doing so likely would be harmful or embarrassing to the client, or if the client has directed the lawyer to not disclose the information.<sup>31</sup> “[C]onfidentiality is essential where communication can affect coverage. Thus, the lawyer is forced to walk an ethical tightrope, and not communicate relevant information which is beneficial to one or the other of his clients.”<sup>32</sup>

#### **4. Competent Representation**

All attorneys owe a duty of competence to their clients. “In accepting employment to render legal services, an attorney impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess, and he is subject to liability for damage resulting from failure so to perform.”<sup>33</sup> “In the first place, the special obligation of the professional is exemplified by his duty not merely to perform his work with ordinary care but to use the skill, prudence, and diligence commonly exercised by practitioners of his profession. If he further specializes within the profession, he must meet the standards of knowledge and skill of such specialists.”<sup>34</sup> The duty of competence is the only duty that a client cannot waive in advance.<sup>35</sup>

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<sup>30</sup> *Anderson v. Eaton* (1930) 211 Cal. 113, 116.

<sup>31</sup> See, e.g., State Bar of California Formal Ops. 2004-165, 2003-161, 1999-154, 1993-133, 1981-58 and 1980-52, Los Angeles County Bar Assoc. Formal Ops. 456, 436 and 386, *In re Jordan* (1972) 7 Cal.3d 930, 940-41; and *United States v. Stepney* (2003 N.D. Cal.) 246 F.Supp.2d 1069, 1073-74.

<sup>32</sup> *San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 366 (*Cumis*).

<sup>33</sup> *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 715, citing *Lucas v. Hamm* (1961) 56 Cal.2d 583, 591.

<sup>34</sup> *Neel, supra*, 6 Cal.3d at 188.

<sup>35</sup> See, Rule 1.1; ABA Model Rule 1.8(h); *Charnay v. Cobert* (2006) 145 Cal.App.3d 170, 183.