

Compendium of Attorney Duties to Clients

Introduction

Law is a regulated industry. Lawyers must earn a licence to practice law because the law is complicated and clients need to be able to trust their lawyers and the justice system. The attorney-client relationship is established by an express or implied contract¹ but the relationship is also governed by the State Bar Act and the Rules of Professional Conduct (**Rule**). These governing principles create four primary duties which all attorneys owe to all clients: 1) the duty of confidentiality; 2) the duty to disclosure; 3) the duty of undivided loyalty; and 4) the duty of competent representation. The integrity of our American system of justice depends upon these duties which direct a lawyer to keep one's mouth shut, teach the client what s/he needs to know, be faithful, and know your craft.

The Duty of Confidentiality

The duty of confidentiality prohibits a lawyer from voluntarily disclosing 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.² Rule 1.6(a) states: "A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent." In turn, the code states: "It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

The Comment to Rule 1.6 provides in part: "A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (Citation) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct."

"[C]onfidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."³

"[T]he purpose and necessities of the relation between a client and his attorney require, in

¹ "[I]t does not matter whether there is a formal retainer agreement between [insurer] and [law firm]. A formal contract is not required to create an attorney-client relationship." (*Bank of America v. Superior Court* (2013) 212 Cal.App.4th 1076, 1091 (*Bank of America*)).

² 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 (*Jordan*), and *United States v. Stepney* (2003 N.D. Cal.) 246 F.Supp.2d 1069, 1073-74.

³ Evid. Code § 952.

many cases, on the part of the client, the fullest and freest disclosure to the attorney of the client's objects, motives, and actions. Thus the protection of confidences and secrets is not a rule of mere professional conduct, but instead involves public policies of paramount importance which are reflected in numerous statutes.⁴ "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."⁵

Dependent counsel and **independent counsel**⁶ may disclose confidential information to a policyholder's liability insurer regarding the merits of a third party liability claim under the joint client without waiving the attorney-client privilege.⁷ Although independent counsel does not have an attorney client relationship with the insurer, revealing the content of confidential information to a liability insurer does not waive the privilege because only the policyholder may waive the privilege and Civil Code § 2860 requires certain disclosures to the insurer.⁸

Dependent counsel may not reveal to a liability insurer confidential information received from a policyholder, including sensitive information that could impact coverage. While defense counsel has a "duty to disclose to the insurer all information concerning the action", there is an express exception to not reveal "privileged materials relevant to coverage disputes."⁹

"[W]here the carrier questions the availability of coverage and provides a defense in the third party action subject to a reservation of rights, a conflict exists - because the insured's goal is coverage, which flies in the face of the insurer's desire to avoid its duty to indemnify. Since it is unavoidable that, in the course of investigating and preparing the insured's defense in the third party action, the insured's attorney will come upon information relevant to a coverage issue, it is impossible for the carrier's attorney to represent the insured (unless, of course, the insured consents)."¹⁰ "Each of these lawyer-client relationships [with the policyholder and the insurer] is endowed with confidentiality. . . . [T]here may be confidences indulged by the insured to the attorney which in turn are not intended for the insurer."¹¹ "The [insurer] is not entitled under a cooperation clause to learn of any and all legal advice obtained by [an insured] with a 'reasonable expectation of confidentiality.'"¹²

The burden of identifying such privileged coverage information must be borne by the lawyer, not the lay client. Rules 1.4, 1.6, and 1.7 place the burdens of disclosure, confidentiality, and undivided loyalty on the lawyer, not on the client.

The Duty of Disclosure

The duty of disclosure requires a lawyer to teach a client sufficiently to empower the client to

⁴ *Jordan, supra*, 7 Cal.3d at 940-41.

⁵ *Anderson v. Eaton* (1930) 211 Cal. 113, 116 (*Anderson*) (citations omitted).

⁶ The phrase **dependent counsel** describes lawyers who are regularly hired by liability insurers who represent both the insurer and the policyholder as clients. **Independent counsel** is selected and directed by the policyholder who does not represent the insurer, and thus is independent of the insurer.

⁷ See, Ev. Code §§ 912, 951, 952.

⁸ *Bank of America, supra*, 212 Cal.App.4th at 1092-93.

⁹ Civ. Code, § 2860(d).

¹⁰ *Rockwell Internat. Corp. v. Superior Court* (1994) 26 Cal.App.4th 1255, 1263-1264 (*Rockwell*) (citation omitted).

¹¹ *American Mut. Liab. Ins. Co. v. Superior Court* (Nork) (1974) 38 Cal.App.3d 579, 592.

¹² *Rockwell, supra*, 26 Cal.App.4th at 1266.

made informed decisions about the purpose of the engagement. Thus, lawyers have “the obligation to render a full and fair disclosure to the [client] of all facts which materially affect his rights and interests.”¹³ “Adequate communication with clients is an integral part of competent professional performance as an attorney.”¹⁴

“A lawyer shall promptly inform the client of any decision or circumstance with respect to which disclosure or the client’s informed consent is required; reasonably consult with the client about the means by which to accomplish the client’s objectives in the representation; keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed; and advise the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”¹⁵

An attorney has the burden to take the initiative to make disclosure to the client. Dependent counsel has “an independent ethical obligation to disclose the conflict to [the clients] and either obtain written waivers of the conflict or withdraw.”¹⁶ In fact, dependent counsel cannot ethically start work without first clearing potential conflicts. “Canons of Ethics impose upon lawyers hired by the insurer an obligation to explain to the insured and the insurer the full implications of joint representation in situations where the insurer has reserved its rights to deny coverage. If the insured does not give an informed consent, counsel must cease to represent both.”¹⁷

“The relation between attorney and client is a fiduciary relation of the very highest character. [An attorney] owes a duty to communicate to his client whatever information he acquires in relation to the subject matter involved in the transaction.”¹⁸ “It is the duty of an attorney to do all of the following: . . . (m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.”¹⁹

When a liability insurer reserves its right to later deny coverage to its policyholder, dependent counsel analyze potential conflicts of interest created by the reservation of rights and make written disclosure to both the policyholder and the insurer. “A lawyer shall not, without informed written consent from each client . . . represent a client if the representation is directly adverse to another client [or] if there is a significant risk the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to or relationships with . . . a third person (such as a liability insurer).”²⁰ “A directly adverse conflict can arise when a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually

¹³ *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188-89 (*Neel*).

¹⁴ *Calvert v. State Bar* (1991) 54 Cal.3d 765, 782.

¹⁵ Rule 1.4 (ellipses omitted).

¹⁶ *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 132.

¹⁷ *San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 375 (*Cumis*).

¹⁸ *Neel, supra*, 6 Cal.3d at 189-190 (citations, ellipses, and quotation marks omitted).

¹⁹ Bus. & Prof. Code § 6068(m); see also, *Neel, supra*, 6 Cal.3d at 188-89.

²⁰ Rule 1.7(a)(b).

conflict.”²¹

“Informed consent” is defined as the client’s “agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.”²² “[T]he existence of a conflict of interest should be identified early in the proceedings so it can be treated effectively before prejudice has occurred to either party.”²³

A proper analysis should include: “(1) what is the exact nature of the claims asserted in the underlying action, (2) what defenses to coverage are asserted by the insurers, and to what extent, if at all, are they logically related to the liability issues raised in the underlying action, (3) what factual questions have to be resolved in order to sustain or defeat such defenses, (4) what is the likely nature of the available evidence, (5) to what extent, if at all, will [the policyholder] suffer prejudice by the enforced discovery of the evidence which tends to support or defeat its claim of coverage or the defenses raised by the insurers and (6) to what extent, if at all, will a confidentiality order realistically protect [the policyholder] from prejudicial disclosure.”²⁴

All attorneys have a duty to promptly communicate settlement offers to their client. “A lawyer shall promptly communicate to the lawyer’s client: . . . all amounts, terms, and conditions of any written offer of settlement made to the client in all other matters. . . . An oral offer of settlement made to the client in a civil matter must also be communicated if it is a ‘significant development’ under rule 1.4.”²⁵ Non-binding offers must be communicated to the client.²⁶ The duty to disclose settlement offers extends to insurers who may extend authority to accept a settlement offer. “As used in this rule, ‘client’ includes a person who possesses the authority to accept an offer of settlement.”²⁷

An attorney may not accept or continue representation of a client without prior disclosure of potential conflicts of interest.²⁸ Appearing in court without the client’s authority to do so may expose the lawyer to discipline or civil liability.²⁹ A lawyer’s failure to make written disclosure and obtain informed written consent may preclude the attorney from receiving payment from one other than the client.³⁰ “[A] lawyer who, while purporting to continue to represent an insured and who devotes himself to the interests of the insurer without notification or disclosure to the

²¹ Rule 1.7, Comment [1].

²² Rule 1.0.1(e).

²³ *Cumis, supra*, 162 Cal.App.3d at 371, fn. 7.

²⁴ *Haskel, Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, 980.

²⁵ Rule 1.4.1(a)(2) and comment.

²⁶ Rule 1.4.1 “does not require that there be an offer in the contract law sense.” (*Matter of Yagman* (Rev. Dept. 1997) 3 Cal. State Bar Ct.Rptr. 788, 795.)

²⁷ Rule 1.4.1(b).

²⁸ To obtain informed written consent, both “the disclosures and the consent required by paragraph (e) must be in writing.” (Rule 1.0.1(e).)

²⁹ “Corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension.” (Bus. & Prof. Code § 6104. See, *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 127; *Spindell v. State Bar* (1975) 13 Cal.3d 253, 260.)

³⁰ “A lawyer shall not accept compensation for representing a client from one other than the client unless . . . the lawyer obtains the client’s informed written consent.” (Rule 1.8.6(c).)

insured, breaches his obligations to the insured and is guilty of negligence.”³¹ The lawyer has “an affirmative obligation to make full disclosure, and the non-disclosure itself is a ‘fraud.’”³²

The Duty of Undivided Loyalty

The primary purpose of the duty of undivided loyalty is to encourage public confidence in the integrity of the legal profession. It requires a lawyer devote “his entire energies to his client’s interests.”³³ It has Biblical roots: “No one can serve two masters. Either you will hate the one and love the other, or you will be devoted to the one and despise the other.”³⁴ “The mandatory rule of disqualification in cases of dual representations involving unrelated matters - analogous to the biblical injunction against ‘serving two masters’ (Matthew 6:24) - is such a self-evident one that there are few published appellate decisions elaborating on it.”³⁵ “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.”³⁶ “[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.”³⁷

“One of the principal obligations which bind an attorney is that of fidelity. . . . 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 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.”³⁸

Rule 1.7 provides in part: “A lawyer shall not, without informed written consent from each client represent a client directly adverse to another client [nor] if the lawyer’s representation will be materially limited by the lawyer’s responsibilities to or relationships with another client, or a third person, or by the lawyer’s own interests. Representation is permitted only if the representation is not prohibited by law; and the representation does not involve the assertion of a claim by one client against another client.”³⁹

The duty of undivided loyalty prohibits an attorney from representing multiple clients one after the other (successive representation) or at the same time (simultaneous representation). “Even though the simultaneous representations may have nothing in common, and there is no

³¹ *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 716.

³² *Neel, supra*, 6 Cal.3d at 189.

³³ *Anderson, supra*, 211 Cal. at 116 (citations omitted.)

³⁴ Matthew 6:24.

³⁵ *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 286 (*Flatt*).

³⁶ *Id.* at 282.

³⁷ Susan P. Shapiro, *Tangled Loyalties: Conflicts of Interest in Legal Practice*, Ann Arbor, MI: University of Michigan Press (2002) at p.4.

³⁸ *Anderson, supra*, 211 Cal. at 116 (citations omitted.)

³⁹ Rule 1.7(a)(b)(d) (ellipses omitted).

risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be required. Indeed, in all but a few instances, the rule of disqualification in simultaneous representation cases is a per se or ‘automatic’ one.”⁴⁰

The duty of loyalty survives termination of the attorney-client relationship to the extent that a lawyer may not act in a manner that will injure the former client with respect to the matter involved in the prior representation (i.e., a lawyer cannot attack his or her prior work).⁴¹

“[M]oney is the root of all evil.”⁴² A California lawyer who represents the interests of multiple parties cannot ethically accept compensation from a liability insurer for the defense of a policyholder without informed written consent. “A lawyer shall not accept compensation for representing a client from one other than the client unless the lawyer obtains the client’s informed written consent.”⁴³

The Duty of Competent Representation

The duty of competent representation requires a lawyer apply diligence, learning, skill and ability to providing legal services. “For purposes of this rule, ‘competence’ in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.”⁴⁴ The ABA has a similar rule: “A lawyer shall provide competent representation to a client.”⁴⁵ The duties owed by a lawyer to a client include acting “with reasonable competence and diligence.”⁴⁶

“The general rule with respect to the liability of an attorney for failure to properly perform his duties to his client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.”⁴⁷

“[T]he 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.”⁴⁸ “An attorney has an obligation to adequately supervise his employees.”⁴⁹

“It is settled in California that an attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility.”⁵⁰

⁴⁰ *Flatt, supra*, 9 Cal.4th at 284.

⁴¹ *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.

⁴² 1 Timothy 6:10.

⁴³ Rule 1.8.6 (ellipses omitted).

⁴⁴ Rule 1.1(b).

⁴⁵ ABA Model Rule 1.1.

⁴⁶ Rest.3d Law Governing Lawyers § 16(2).

⁴⁷ *Lucas v. Hamm* (1961) 56 Cal.2d 583, 591 (citation omitted).

⁴⁸ *Neel, supra* 6 Cal.3d at 188.

⁴⁹ *Layton v. State Bar* (1990) 50 Cal.3d 889, 900.

⁵⁰ *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2016) 244 Cal.App.4th 590, 617.