

Ethical Duties and Challenges of Representing a Public Agency

This CLE focuses on special issues that may arise when your client is a public agency. Pertinent provisions of two applicable Rules of Professional Responsibility, and their interpretative comments, are included below; full copies of these rules and of Business and Professions Code section 6068 are attached.

Note that the Rules themselves recognize that a governmental agency is a specific, and special, type of organization, and that the nature of these clients may trigger more extensive ethical duties for their lawyers. (See Rule 1.13, comment 6.)

Excerpts from Rule 1.13, Organization as Client (adopted 2018) [full copy attached]

“A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, . . . or other constituents overseeing the particular engagement.” (Cal. R. Prof. Conduct 1.13(a), emphases added.)

“If a lawyer representing an organization knows that a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is (i) a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.” (Cal. R. Prof. Conduct 1.13(b).)

“In dealing with an organization’s constituents, a lawyer representing the organization shall explain the identity of the lawyer’s client whenever the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituent(s) with whom the lawyer is dealing.” (Cal. R. Prof. Conduct 1.13(f).)

“A lawyer representing an organization may also represent any of its constituents, subject to the provisions of rules 1.7 [Conflicts of Interest – Current Clients], 1.8.2 [Use of Current Client’s Information], 1.8.6 [Compensation from One Other Than the Client], and 1.8.7 [Aggregate Settlements].” (Cal. R. Prof. Conduct 1.13(g).)

Comments to the Rule

“[1] This rule applies to all forms of private, public and governmental organizations. (See Comment [6].) An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization’s constituents will depend on its form, structure, and chosen terminology. . . . For purposes of this rule, any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization.”

“[2] A lawyer ordinarily must accept decisions an organization’s constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. It is not

within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Business and Professions Code section 6068, subdivision (m) and rule 1.4 [Communication with Clients]. . . . [T]he lawyer may refer to higher authority, including the organization's highest authority, matters that the lawyer reasonably believes are sufficiently important to refer in the best interest of the organization subject to Business and Professions Code section 6068, subdivision (e) and rule 1.6 [Confidential Information of a Client]."

"[6] It is beyond the scope of this rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. . . . In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers, consistent with Business and Professions Code section 6068, subdivision (e) and rule 1.6 [Confidential Information of a Client]. This rule is not intended to limit that authority."

Excerpts from Rule 1.4, Communication with Clients [full copy attached]

(a) A lawyer shall:

[¶]

- (2) reasonably consult with the client about the means by which to accomplish the client's objectives in the representation;
- (3) 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
- (4) 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.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Applying These Ethical Rules When You Represent a California Public Agency

Lawyers who represent public agencies must apply these ethical rules in the context of several laws that are intended to promote transparency, fairness, and good governance. Included amongst these public laws are the Ralph M. Brown Act and both commonlaw and statutes prohibiting conflicts of interest in governmental decision-making. Additionally, public agencies and their

counsel must be mindful of their mission to serve the public and their statutory and constitutional obligations to allow interested persons to speak on matters of public interest or concern.

Key Principles of Governance

The “almost universally accepted common-law rule” is that the governing board takes action through a simple majority vote of at least a quorum of its members. (*Cal. Bldg. Indus. Ass'n v. State Water Res. Control Bd.*, 4 Cal.5th 1032, 1039 (2018), citing *FTC v. Flotill Products* (1967) 389 U.S. 179, 183 & others; see also Civ. Code, § 12; Code Civ. Proc. Code, § 15.) Statutes may set different thresholds, but this is the default rule established by the commonlaw.

Generally, board members who are conflicted are barred from participating in the proceedings. However, when conflicts would preclude the board from being able to establish a quorum, the rule of necessity may apply. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1097.) The rule of necessity permits a government body to act to carry out its essential functions if no other entity is competent to do so. (*Ibid.*) If the withdrawal of conflicted members defeats a quorum, the minimum number of conflicted members necessary to re-establish a quorum may participate. (*Id.*; see also Gov. Code, § 87101 [codifying rule of necessity]; 2 C.C.R. § 18705. [same].) The preferred method of selecting which conflicted member votes under the rule of necessity is drawing lots, although another impartial and equitable method may also be used. (*Eldridge v. Sierra View Local Hosp. Dist.* (1990) 224 Cal. App. 3d 311, 323.)

Key Provisions of the Ralph M. Brown Act

All local agencies must comply with the Ralph M. Brown Act, which requires "all meetings of the legislative body" to be open and public, and mandates that "all persons shall be permitted to attend any meeting of the legislative body of a local agency," except as otherwise provided by the Brown Act. (Gov. Code, § 54953, subd. (a).) The Brown Act “is intended to ensure the public's right to attend the meetings of public agencies, to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies.” (*Ribakoff v. City of Long Beach* (2018) 27 Cal.App.5th 150, 165.)

The Brown Act defines "meeting" to mean "any congregation of a majority of the members of a legislative body at the same time and location, including teleconference location as permitted by Section 54953, to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body." (Gov. Code, § 54952.2, subd. (a).)

The Brown Act explicitly prohibits a majority of the members of a legislative body from using a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business within the subject matter jurisdiction of the legislative body outside of an authorized meeting. (Gov. Code, § 54952.2, subd. (b)(1); see also *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1968) 263 Cal.App.2d 41, 50-51 (private Elks Club meeting attended by the members of a county

board of supervisors, at which the members openly discussed an issue before the board, constituted an illegal “meeting” of the board); *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 103 (a series of telephone calls initiated by legal counsel for a local agency to individual members of the agency's governing board to poll them "for the purpose of obtaining a collective commitment or promise" on an issue before the board violated the Brown Act); *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533, 541-42 (series of emails).)

"Pending litigation" is one authorized exception to the open meeting requirement. This exception authorizes the board to meet in closed session to discuss pending litigation with its attorneys. The board holds an attorney-client privilege that is not abrogated by the Public Records Act or other open government laws. (See Gov. Code, § 54956.9.)

Any person who attends a closed session authorized under the Brown Act is prohibited from disclosing confidential information that has been acquired in the closed session to a person not entitled to receive it, unless the legislative body authorizes the disclosure. (Gov. Code, § 54963, subd. (a).)

The Brown Act explicitly requires public agencies to "provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item." (Gov. Code, § 54954.3, subd. (a).) To that end, the Brown Act prohibits the board from banning public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. (Gov. Code, § 54954.3, subd. (c).) However, the Brown Act also authorizes the board to "adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker." (Gov. Code, § 54954.3, subd. (b)(1).)

Key First Amendment Principles

Courts have repeatedly reaffirmed that "citizens have an enormous First Amendment interest in directing speech about public issues to those who govern their city." (*Ribakoff v. City of Long Beach, supra*, 27 Cal.App.5th at p. 174.) Indeed, the First Amendment expressly protects the right "to petition government for the redress of grievances." (*Miller v. Bonta* (S.D. Cal. 2022) 646 F. Supp. 3d 1218, 1227.)

Public meetings are considered "public forums, albeit limited ones." (*Ribakoff*, 27 Cal.App.5th at 174; *White v. Norwalk* (9th Cir. 1990) 900 F.2d 1421, 1425 (same).) The governing board can adopt rules to regulate “not only the time, place, and manner of speech in a limited public forum, but also the content of speech—as long as content-based regulations are viewpoint neutral and enforced that way.” (*Norse v. City of Santa Cruz* (9th Cir. 2010) 629 F.3d 966, 975.) However, a board cannot, “in effect, close an open meeting by declaring that the public has no First Amendment right whatsoever once the public comment period has closed.” (*Ibid.*)

Courts have recognized the special balancing that occurs at a public meeting where an agency is trying to transact its business with public participation:

[A] City Council meeting is still just that, a governmental process with a governmental purpose. The Council has an agenda to be addressed and dealt with. Public forum or not, the usual First Amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact. In the first place, in dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the subject at hand. While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, it certainly may stop him if his speech becomes irrelevant or repetitious.

Similarly, the nature of a Council meeting means that a speaker can become 'disruptive' in ways that would not meet the test of actual breach of the peace, or of 'fighting words' likely to provoke immediate combat. A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner. Indeed, such conduct may interfere with the rights of other speakers.

Of course the point at which speech becomes unduly repetitious or largely irrelevant is not mathematically determinable. The role of a moderator involves a great deal of discretion. Undoubtedly, abuses can occur, as when a moderator rules speech out of order simply because he disagrees with it, or because it employs words he does not like.

(*Ibid.* at 174-175.)

Key Rules Prohibiting Conflicts of Interest

Board members and employees of an agency are subject to conflict of interest rules under the commonlaw, the Political Reform Act, and Government Code section 1090. Other statutes, as well as the agencies' own codes and policies, may also apply.

In *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, the Court of Appeal explained the conflict of interest standard that applies to public officials under the commonlaw:

"A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public [¶] . . . [¶] Actual injury is not the principle the law proceeds on. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case that comes within its reason (*Noble v. City of Palo Alto* (1928) 89 Cal. App. 47, 51,

citations omitted.) The common law doctrine against conflicts of interest . . . prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties." (64 Ops.Cal.Atty.Gen. 795, 797 (1981); accord, 70 Ops.Cal.Atty.Gen. 45, 47 (1987).)

(*Clark*, 48 Cal.App.4th at 1170-71.)

"The Political Reform Act is the principal California law governing conflicts of interest in the making of all government decisions." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1091.) The Act establishes statutory rules for disqualification when a public official has a financial interest in a proceeding. Government Code § 87100 prohibits a public official from making or participating in, or in any way attempting to use their official position to influence, a governmental decision in which the official knows or has reason to know they have a financial interest.

Under the Political Reform Act, a public official is considered to have a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on: (1) the official, (2) a member of the official's immediate family, or (3) any one of the following: (a) any business entity in which the public official has a direct or indirect investment worth \$2,000 or more; (b) any real property in which the public official has a direct or indirect interest worth \$2,000 or more; (c) any source of income aggregating \$500 or more in value provided or promised to, or received by, the public official within 12 months prior to the decision; (d) any business entity in which the public official holds any position of management or is a director, officer, partner, trustee, or employee; or (e) any donor of a gift or gifts aggregating \$250 or more in value provided or promised to, or received by, the public official within 12 months prior to the time when the decision is made. (Gov. Code, § 87103.) Note that regulations adopted by the Fair Political Practices Commission provide further guidance on the implementation of these provisions of the Political Reform Act.

Upon identifying the conflict of interest (or potential conflict of interest), and immediately prior to the consideration of the matter, the public official must do all of the following:

- (1) Publicly identify the financial interest that gives rise to the conflict of interest or potential conflict of interest in detail sufficient to be understood by the public, except that disclosure of the exact street address of a residence is not required.
- (2) Recuse himself or herself from discussing and voting on the matter, or otherwise acting in violation of Section 87100.
- (3) Leave the room until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter has been placed on the portion of the agenda reserved for uncontested matters.

- (4) Notwithstanding paragraph (3), a public official described in subdivision (a) may speak on the issue during the time that the general public speaks on the issue.

(Gov. Code, § 87105.)

“[Government Code] Section 1090 is the principal California statute governing conflicts of interest in the making of government contracts.” (*Lexin v. Superior Court*, *supra*, 47 Cal.4th at p. 1091.) Section 1090 prohibits officers or employees of all California governmental agencies from: (1) approving, in their official capacity, any contract in which they are financially interested, or (2) purchasing at any sale or selling at any purchase made by them in their official capacity. (Gov. Code, § 1090.)

Courts have held that “financially interested,” as used in section 1090, “cannot be interpreted in a restricted and technical manner.” (*Cal.-American Water Co. v. Marina Coast Water Dist.* (2016) 2 Cal.App.5th 748, 764-65.) Thus, Section 1090 has an expansive sweep. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1330.) “The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official's loyalties and compromise the undivided representation of the public interests the official is charged with protecting.” (*Cal.-American Water Co.*, *supra*, 2 Cal.App.5th at 764-65, citing *Lexin v. Superior Court*, *supra*, 47 Cal.4th at p. 1075.)

Where a prohibited interest is found, the affected contract is void (*Lexin*, *supra*, at p. 1073) and the official who engaged in its making is subject to a host of civil and (if the violation was willful) criminal penalties, including imprisonment. (Gov. Code, § 1097; see *People v. Honig* (1996) 48 Cal.App.4th 289, 333–338.)



The State Bar of California

Rule 1.13 Organization as Client (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.
- (b) If a lawyer representing an organization knows* that a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows* or reasonably should know* is (i) a violation of a legal obligation to the organization or a violation of law reasonably* imputable to the organization, and (ii) likely to result in substantial* injury to the organization, the lawyer shall proceed as is reasonably* necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes* that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) In taking any action pursuant to paragraph (b), the lawyer shall not reveal information protected by Business and Professions Code section 6068, subdivision (e).
- (d) If, despite the lawyer's actions in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably* imputable to the organization, and is likely to result in substantial* injury to the organization, the lawyer shall continue to proceed as is reasonably* necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rule 1.16.
- (e) A lawyer who reasonably believes* that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes* necessary to assure that the organization's highest authority is informed of the lawyer's discharge, resignation, or withdrawal.
- (f) In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows* or reasonably should know* that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its constituents, subject to the provisions of rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by any of these rules, the consent

shall be given by an appropriate official, constituent, or body of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] This rule applies to all forms of private, public and governmental organizations. (See Comment [6].) An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. For purposes of this rule, any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization.

[2] A lawyer ordinarily must accept decisions an organization's constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Business and Professions Code section 6068, subdivision (m) and rule 1.4. Even when a lawyer is not obligated to proceed in accordance with paragraph (b), the lawyer may refer to higher authority, including the organization's highest authority, matters that the lawyer reasonably believes* are sufficiently important to refer in the best interest of the organization subject to Business and Professions Code section 6068, subdivision (e) and rule 1.6.

[3] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows* of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows* or reasonably should know* that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably* imputable to the organization, and (ii) likely to result in substantial* injury to the organization.

[4] In determining how to proceed under paragraph (b), the lawyer should consider the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person* involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, the lawyer may ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably* conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the

organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. For the responsibility of a subordinate lawyer in representing an organization, see rule 5.2.

[5] In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

Governmental Organizations

[6] It is beyond the scope of this rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person* to serve as the designated recipient of whistle-blower reports from the organization's lawyers, consistent with Business and Professions Code section 6068, subdivision (e) and rule 1.6. This rule is not intended to limit that authority.

Rule 1.4 Communication with Clients
(Rule Approved by the Supreme Court, Effective January 1, 2023)

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act;
 - (2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;
 - (3) 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
 - (4) 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.
- (b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.
- (d) A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

Comment

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, subd. (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances. For example, a lawyer's receipt of funds on behalf of a client requires communication with the client pursuant to rule 1.15, paragraphs (d)(1) and (d)(4) and ordinarily is also a significant development requiring communication with the client pursuant to this rule.

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation. (See rule 1.16(e)(1).)

[4] This rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

[Cal Bus & Prof Code § 6068](#)

Deering's California Codes are current through the 2024 Regular Session Ch 210

Deering's California Codes Annotated > BUSINESS & PROFESSIONS CODE (§§ 1 — 30047) > Division 3 Professions and Vocations Generally (Chs. 1 — 21.5) > Chapter 4 Attorneys (Arts. 1 — 16) > Article 4 Admission to the Practice of Law (§§ 6060 — 6069.5)

§ 6068. Duties as an 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.
 - (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
- (f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.
- (g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.
- (h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.
- (i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the [Fifth Amendment to the Constitution of the United States](#), or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.
- (j) To comply with the requirements of [Section 6002.1](#).
- (k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

- (l) To keep all agreements made in lieu of disciplinary prosecution with the State Bar.
- (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.
- (n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.
- (o) To report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of any of the following:
 - (1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.
 - (2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.
 - (3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).
 - (4) The bringing of an indictment or information charging a felony against the attorney.
 - (5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.
 - (6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.
 - (7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.
 - (8) As used in this subdivision, "against the attorney" includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney's knowledge already been reported by the law firm or corporation.
 - (9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.
 - (10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.

History

Added Stats 1939 ch 34 § 1. Amended Stats 1985 ch 453 § 11; Stats 1986 ch 475 § 2; [Stats 1988 ch 1159 § 5](#); [Stats 1990 ch 1639 § 4 \(AB 3991\)](#); [Stats 1999 ch 221 § 1 \(SB 143\)](#), ch 342 § 2 (SB 144); [Stats 2001 ch 24 § 4 \(SB 352\)](#); [Stats 2003 ch 765 § 1 \(AB 1101\)](#), operative July 1, 2004; [Stats 2018 ch 659 § 50 \(AB 3249\)](#), effective January 1, 2019.

Annotations

Notes

Hypotheticals

1. For several years, the board of Happy Valley Irrigation District has been litigating to defend a Proposition 218 challenge to a rate hike brought by a group of local landowners known as Fighting Unjust Stuff and Services (FUSS). The rate hike was unpopular with Happy Valley voters. In the last election, a candidate, Ms. Gladys Gadfly, campaigned and was elected to a board seat on a platform that called for ending the litigation. FUSS is a party to the litigation, but Ms. Gadfly is not a member of FUSS' litigation committee nor is she an individual plaintiff in the lawsuit. At the appropriate meeting following the certification of the election results, the new board member is seated and you, as general counsel, have provided Member Gadfly with instructions on basic Brown Act and ethics rules applicable to public officers. A few months later, you ask the Chair to set a closed session meeting for you to discuss a settlement offer received from FUSS. The Board deliberates, discusses a procedural weakness in the case that the plaintiffs do not appear to know about (caused by the consultant who failed to consult you, grr!), and authorizes you to make a counter-offer to FUSS.
 - a. The General Manager asks you whether Member Gadfly can attend the closed session. What do you advise?
 - b. What if Member Gadfly were one of the named Plaintiffs in the litigation?
 - c. Following the closed session, the leader of FUSS contacts the General Manager and states that the District "would be wise to accept our settlement offer, given the procedural problem that you all know about." How do you handle the apparent disclosure of this attorney-client privileged information that was shared only in closed session?
 - d. BONUS question: What if FUSS and the District work out settlement deal points that would require the District to issue water rate refunds to ratepayers going back several years? All five of the District directors are ratepayers. Two stand to receive a significant (\$5,000+) refund if the settlement is approved. Three directors, including Gadfly, stand to receive no refunds. Who can vote on approval of the proposed settlement?
2. The Mar Pacifico Water District has a longtime board member, Pedro Viejo, who has been serving for more than 20 years. Over the years, Member Viejo has served a couple of terms as President of the Board, and you, as general counsel, have developed a very good relationship with him. When his partner retires, they decide to buy a house in the foothills on Lake Pleasant, which is outside the District's service area. In the summer of the last year of his current term, Member Viejo casually mentions to you that he and his partner intend to move and live full-time in Lake Pleasant.
 - a. How do you react to Member Viejo's disclosure about the anticipated change of address?
 - b. If Member Viejo then seeks your advice on running for re-election, what do you do?

3. General Manager Mimi Nguyen's three-year contract term will expire at the end of this year. Unbeknownst to you, Ms. Nguyen has been negotiating the terms of her contract extension directly with the Board members via a series of emails.
 - a. When you discover this, what do you advise?
 - b. Ms. Nguyen has prepared the staff report to present her contract extension to the Board. You receive this as part of the agenda packet for your review and approval with only a few hours before the deadline to distribute it. What do you do?
 - c. BONUS question: You discover Ms. Nguyen's negotiations have been conducted with only two of the five Board members, the Board President and Vice President. The Board President tells you the Board thinks the world of Ms. Nguyen and Ms. Nguyen is a finalist for a higher-paying General Manager position at a neighboring district. The Board President strongly believes Ms. Nguyen's contract extension needs to be approved *tonight* to make sure she does not leave. What do you advise the District to do at tonight's meeting? How about when Ms. Nguyen's contract extension next comes up?
4. In your county, a group known as Citizens Against Virtually Everything (CAVE) has a strong presence. CAVE is anti-government in all its forms and has recently been promoting candidates to "drain the swamp" from within. CAVE's candidates successfully defeat two longtime board members in the election, creating a 3-2 split on the board. Since she can get along with all the factions, the new board chair installs veteran board member Dulce Sereno as President. President Sereno is a very calm and even-tempered person with a strong belief in the value of free speech and the First Amendment. This is her first term as President of the Board. After being installed, President Sereno immediately takes over as Chair and calls for the next agenda item, public comment. Members of CAVE then begin to speak critically of District staff.
 - a. The first speaker criticizes the District's new labor contracts and calls General Manager John Goodman, the District's lead negotiator, "a crook." The second speaker agrees and accuses Mr. Goodman of "lining his own pockets" at taxpayer expense because "we all know he's going to get the same raise he gives the employees." The third speaker angrily shouts expletives at Mr. Goodman and the board "who let this happen." The fourth speaker, visibly red in the face, says "I'm so mad about this! How can you do this to us poor taxpayers? You'd better hope you don't see me in the parking lot later, I'll show you just how mad I am!" As the District's counsel, when and how do you address any of these public comments?
 - b. Encouraged by their fellow CAVE members, the new board members begin to speak. One CAVE-affiliated board member says she "doesn't understand how Mr. Goodman still has a job here." The other CAVE-affiliated board member states, "Everyone knows Mr. Goodman is a dirty rotten scoundrel." When one of the board members not affiliated with CAVE starts to defend Mr. Goodman, the CAVE-affiliated board member replies, "I'm not going to listen to you defend your boyfriend – we all know you are having an affair!" As the District's counsel, when and how do you address any of these Board member comments?