

**Avoiding Ethical Pitfalls for New Attorneys**  
By William K. Mills and David B. Parker

California's ethical rules confound even the most experienced attorney.

Therefore, new attorneys should approach their ethical duties seriously – as though their professional lives depend on it, because in many ways they do.

*California Rules of Professional Conduct* (“CRPC”) principally govern the ethical responsibility of all California attorneys. Failing to conform to CRPC and related rules may have significant and avoidable consequences, leading to a wide range of State Bar discipline, including public reproof, suspension and disbarment, not to mention other serious repercussions such as civil liability,<sup>1</sup> non-insurability and damage to reputation. Thus, with so much at stake, it is important that new attorneys be familiar with California's ethics rules, including rules beyond the CRPC, and its footnotes, called “Official Discussion,” that are not nearly so obvious or easy to locate.

The CRPC must be understood against the backdrop of the State Bar Act,<sup>2</sup> and other statutes such as the following: *Business & Professions Code* (“Bus. & Prof. Code”), *Code of Civil Procedure* (“Civ. Proc. Code”),<sup>3</sup> *Evidence Code*,<sup>4</sup> the *Probate Code* (“Prob. Code”),<sup>5</sup> the *California Rules of Court*.<sup>6</sup> In addition, new attorneys should become familiar with judicially crafted rules,<sup>7</sup> judicial decisions, and published opinions by bar association ethics committees.<sup>8</sup>

Consideration of these various resources is important because of the varied way in which the rules of the CPRC and the others governing lawyers are interpreted. Thus, new attorneys must stay within the boundaries set by the CPRC as they drive toward their most critical professional priority— *servicing the interests of their client*. To ease that difficult task, every new attorney is well advised to consider several simple concepts:

Although excellence is the standard of any conscientious attorney, competence is the legally required standard for all attorneys. “Competence” in providing legal services means to “apply the 1) diligence, 2) learning and skill, and 3) mental, emotional and physical ability reasonably necessary for the performance of such service.”<sup>9</sup> Especially with new attorneys, who may lack sufficient experience or knowledge to identify potential pitfalls let alone have a chance to avoid them, competence requires that they be selective in choosing clients and in limiting the areas of representation to those within their competence safety zone. A new attorney first establishes a safety zone by applying common sense, then frequently uses a simple smell test for trouble. Common sense and instinct may be the only initial protection available to new attorneys from common, but often professionally disastrous mistakes.

For example, if a new and unknown client seeks to retain a new attorney, agrees to the financial terms, but refuses to sign a retainer agreement and seeks to pay cash from a brown paper bag, alarms should be ringing. Though such an example is overly simplistic, an attorney’s natural ability to sense trouble should be the attorney’s first line of defense.

Unfortunately, a new attorney's intrinsic senses are hardly infallible, often wrong, and should never be relied upon exclusively. Every new attorney (actually every attorney) should carefully investigate the facts, including the relevant background of a new prospective client, research the law, and obtain whatever information, or knowledge is available through discussions with colleagues, appropriate legal research, MCLE training and practice guides (or other up to date and reasonably reliable publications).

If possible, and while acknowledging the lack of available mentoring resources, new attorneys should focus on developing collegial relationships with other lawyers of greater experience in their primary areas of practice. Those more experienced attorneys can be utilized, especially informally, as a sounding board for legal questions, and strategies; some consider that access to other lawyers to be an important benefit of formal practice with other lawyers. Consulting with other lawyers can aid the new attorney in providing the quality and depth of service to which a client is entitled. Whether over coffee or based on a formal consulting relationship, such cooperative arrangements can be an extremely valuable and useful in enhancing the legal training and capability of even the most seasoned attorney, and should not be undervalued at the outset of a legal career.

Ethics rules govern the manner of practice in several important ways that a new attorney should not overlook, and which should help avoid practical, and ethical

problems later. CRPC speaks directly to the process by which attorneys maintain client relationships, from finding clients<sup>10</sup> to signing them up<sup>11</sup> to getting paid<sup>12</sup> to terminating the client relationship.<sup>13</sup>

Though much has been made in the past about solicitation and advertising by attorneys, it is not nearly as controversial presently. Nevertheless, a new attorney should remember that while soliciting “ambulance chasing” must be avoided and advertising must be truthful. In addition, clients are often found and signed up by attorneys who co-venture or simply refer clients or cases to other attorneys, but it is important to remember that a fee splitting arrangement must be disclosed to and approved in writing by the client.

Conflicts of interest<sup>14</sup> must always be checked and cleared, which may require that the client be informed of a potential or actual conflict and “informed written consent” obtained before the representation can commence or continue.<sup>15</sup> Written fee agreements are always recommended and generally required.<sup>16</sup> When available malpractice insurance is also important to protect the lawyer and the client.

A new attorney must always remember that one of the immutable foundations of the profession is the obligation to maintain the clients confidentiality. That literally includes information protected from disclosure by the attorney-client privilege,<sup>17</sup> in addition to the broader category of information that the client intends to keep confidential (i.e., the client’s secrets). That obligation extends beyond the term of the

attorney-client relationship, and is not limited to whether the client fulfills its obligations to cooperate with the lawyer. Moreover, an attorney's duty to keep its client's secrets exists whether the attorney is formally retained and regardless of whether the attorney is actually paid.

The over-riding presumption that an attorney works for the client often serves as an important foundation from which blooms the necessary recognition of and appreciation for the complex rules that govern the relationship between attorney and client. Conforming to those rules is essential can highlight the practical potholes and ultimately save an attorney's professional life.

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<sup>1</sup>The CRPC represents the definitive standard of conduct for lawyers in such matters as conflicts of interest. While a violation of the CPRC is not *per se* actionable, the CPRC can form the basis for tort liability, for malpractice or breach of fiduciary duty. See *Stanley v. Richmond*, 35 Cal.App.4<sup>th</sup> 1070, 1086 (1995); *Mirabito v. Liccardo*, 4 Cal.App.4<sup>th</sup> 41 (1992); *Day v. Rosenthal*, 170 Cal.App.3d 1125 (1985).

<sup>2</sup> *BUS. & PROF. CODE* §§ 6000, *et seq.*; §§ 6147-48 (fee agreements); §§ 6200-6206 (fee disputes); §6068 ("Duties of Attorney").

<sup>3</sup> The *CIV. PROC. CODE* makes clear that lawyers cannot shield work product in a State Bar proceeding or a legal malpractice action. §2018(e), (f) and governs the authority of litigation attorneys, substitutions and motions to withdraw (§283, *et seq.*).

<sup>4</sup> *EVID. CODE* §§950, *et seq.*

<sup>5</sup> *Probate Code* § 16000, *et. seq.*, deals with the fiduciary duties of trustees and has been held to apply broadly to any fiduciary relationship, including attorney-client relationships. Specifically, providing that the burden of proof on undue influence shifts to the fiduciary. *PROB. CODE* §16004.

<sup>6</sup> *CPRC* §§950-962 deal with State Bar disciplinary procedures.

<sup>7</sup> For example, in *WPS v. State Compensation Fund*, 70 Cal.App.4<sup>th</sup> 644, 656 (1999), the court held that an attorney has an ethical duty to return documents protected by the attorney client privilege. Such concept does not appear in any Rule or statute. However, attorneys are charged with following it and can be disciplined for their failure to do so.

<sup>8</sup> Some of the finest scholarship in the law of ethics is found in the published ethics opinions of the State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC), and LACBA's own

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Professional Responsibility and Ethics Committee (PREC). These opinions are often cited and relied upon by the Courts.

<sup>9</sup> *CPRC 3-110.*

<sup>10</sup> *CPRC 1-400.*

<sup>11</sup> *CPRC 2-200.*

<sup>12</sup> *CPRC 3-100.*

<sup>13</sup> *CPRC 2-700.*

<sup>14</sup> *CPRC 3-300, et seq.*

<sup>15</sup> *See CPRC 3-310.*

<sup>16</sup> *Bus. & Prof. Code §6147.*

<sup>17</sup> *EVID. CODE §§950, et seq.*