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The Duty of Every Attorney



To be respectful to the court and participants

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3

Binding Authority Governing Attorney Conduct

- California Rules of Professional Conduct (State Bar) – 3.1-3.10
- California Business and Professions Code §§6067 Oath of Office & 6068 Duties of Attorney
- Rules of Court and Appendices – rule 9.7
- State Bar Ethics Opinions -
<https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Opinions>



4

4

Nonbinding Authority

- Ventura Superior Court Local Rules - Standards of Professional Conduct – Appendix 1
- ABA Model Rules of Professional Conduct - https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/
- Out-of-State ethics opinions
- Local and State Bar Civility Codes



5

5

Resources

- State Bar website – www.calbar.ca.gov
- State Bar Ethics Hotline 1-800-238-4427 (CA) or 1-415-538-2150, M-F 9 am - 4:30 pm
- Online form – www.calbar.ca.gov/forms/Ethics_Hotline - allow 1-2 business days
- VCBA website - www.vcba.org



6

6

Oath of Office

➤ Support the Constitutions and faithfully discharge the duties to the best of knowledge and ability. *Business & Professions Code §§ 6067 & 6068(a)*

➤ **California Rules of Court, rule 9.7** – adds language: “conduct myself at all times with dignity, courtesy and integrity.”



7

7

Ethical Duties in the Courtroom

➤ *Business & Professions Code* – provide what attorneys shall do.

➤ *California Rules of Professional Conduct* – provide what attorneys shall not do.

➤ Code & Rules overlap in addressing conduct



8

8

Officers of the Court

“It is a time-honored custom to call attorneys at law “officers of the court” even though strictly speaking the designation conveys the mistaken impression that attorneys are public officers. In practice, an attorney is an officer of the court only in the sense that, in addition to the attorney’s duty of fidelity to the client, the attorney also owes the duty of good faith and honorable dealing to the judicial tribunals before whom the attorney practices.” 7 Cal. Jur. 3d Attorneys at Law § 5, (Citations Omitted.)



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Behavior Found Not Consistent With Honoring Oath

“These cautions [Bus. & Prof. Code §6067 & California Rules of Court, rule 9.7] are designed to remind counsel that when in the heat of a contentious trial, counsel’s zeal to protect and advance the interest of the client must be tempered by the professional and ethical constraints the legal profession demands.” *Yeager v. Anka* (2019) 31 Cal.App.5th 1115, 1117.

Attorney sanctioned \$50,000 for intentionally disclosing a confidential child custody evaluation report..” *Id. at 1117.*



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Advocating Your Client's Cause

A lawyer shall:

- Bring actions, proceedings or defenses that are legal & just B. & P.C. 6068(c).
- Maintain causes only by means that are consistent with truth B. & P.C. 6068(d).
- Not encourage either the commencement or continuance of action or proceeding from corrupt motive, passion or interest B. & P.C. 6068(g).



11

11

Advocating Your Client's Cause

A lawyer shall not:

- Bring or continue an action, defense, assert a position or take an appeal without probable cause and for the purpose of harassing or maliciously injuring any person. **California Rules of Prof. Conduct, rule 3.1(a)(1).**
- Present a claim or defense that is not warranted under existing law, unless good faith argument for an extension, modification or reversal. **California Rules of Prof. Conduct, rule 3.1(a)(2.)**



12

12

Losing Sight of Ethical Boundaries

“Zealous advocacy does not equate with ‘attack dog’ or ‘scorched earth’; nor does it mean lack of civility.”

“We close this discussion with a reminder to counsel—all counsel, regardless of practice, regardless of age—that zealous advocacy does not equate with “attack dog” or “scorched earth”; nor does it mean lack of civility. (See, e.g., McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings* (1996) 164 F.R.D. 283; Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse* (1996) 96 Colum.L.Rev. 1618, 1619 [describing the litigation climate as one “where over-aggressiveness is equated with zealous advocacy, and attorneys are expected to win at all costs”]; and Garth, *From Civil Litigation to Private Justice: Legal Practice at War With the Profession and Its Values* (1993) 59 Brook.L.Rev. 931.) Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive.

(Party repeatedly frustrated the policy to promote settlement and cooperation in family law litigation.)

In re Marriage of Davenport (2011) 194 Cal.App.4th 1507, 1536-37.

13

13

Losing Sight of Ethical Boundaries

- “It is sufficient for our purposes to remind counsel that, when representing a client with a history of avoiding his obligations, it is important to remember that ‘[a]n attorney in a civil case is not a hired gun required to carry out every direction given by the client.’”

(Attorney advocated client’s stopping further child support payment under his marital settlement agreement, on the basis that trial judge’s enforcement order stating “current” child support obligations excused husband from paying additional child support sums that accrued between hearing and the date the order was filed.) *In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 521.



14

14

Losing Sight of Ethical Boundaries

- “Sanctions are necessary for the “serious and significant departures from the standard of practice, for departures such as dishonesty and bullying...”

(Attorney sanctioned by the trial court for failing to appear at readiness conferences and sanctioned by the Superior Court Appellate Division for unacceptable oral advocacy.) *People v. Whitus* (2012) 209 Cal.App.4th Supp. 1, 13-15.)

- “A charge of judicial misconduct unsupported by facts constitutes a groundless attack upon the integrity of a judicial officer, and is on its face contemptuous.”

(Attorney had filed 9 meritless CCP 170.1 challenges.) *Fine v. Superior Court* (2002) 97 Cal.App.4th 651, 671.



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Losing Sight of Ethical Boundaries

- Filing a frivolous action violates attorney’s ethical duties.

(Attorney involved in a billing dispute with court reporter over a \$94.00 fee for transcript, filed action against reporter for fraud and deceit. State Bar found that the attorney’s actions were motivated by spite and vindictiveness.) *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044-45.



16

16

Duty to Not Delay Litigation

“A lawyer shall not use” means that:

- Have no substantial purpose other than to delay or prolong the proceeding; or
- Cause needless expense **California Rules of Court, rule 3.2**

Misdemeanor for an attorney to willfully delay a client's suit with a view for own gain. **B & P § 6128**

DELAYED

17

17

Candor and Respect Towards the Court

Lawyer shall:

- Maintain the respect due to the courts of justice and judicial officers. **Bus. & Prof. Code §6068(b)**
- Never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law. **Bus. & Prof. Code §6068(d)**



18

18

Candor and Respect Towards the Court

Lawyer shall not:

- Knowingly make a false statement of fact or law or fail to correct a false statement of material fact or law previously made. **Rules of Professional Conduct, rule 3.3(a)(1)**
- Fail to disclose legal controlling authority that is directly adverse to the client's position and not disclosed by opposing counsel or to misquote to a tribunal. **Rules of Professional Conduct, rule 3.3(a)(2)**
- Offer false evidence or if comes to know shall take reasonable remedial measures. **Rules of Professional Conduct, rule 3.3(a)(3)**



19

19

Candor and Respect Towards the Court

The Lawyer shall:

- take reasonable remedial measures if knows a person intends to engage in criminal or fraudulent conduct to the extent allowed under **Bus. & Prof. Code §6068(e)** (exception to confidentiality, if disclosure necessary to prevent a criminal act that attorney reasonably believes will result in death or substantial bodily harm.) **California Rules of Professional Conduct, rule 3.3(b)**

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Candor and Respect Towards the Court

The Lawyer shall:

- In an Ex Parte proceeding, if notice not required or given and the opposing party is not present, inform the court of material facts known whether adverse to the client that will allow the “tribunal” to make an informed decision. *California Rules of Professional Conduct, rule 3.3(d)*



21

21

“Failure to cite or even acknowledge the seminal cases directly on point and counter to the argument in the plaintiff’s opening brief violates counsel’s duty to the court.” (Plaintiffs were challenging mandatory vaccines for public schools.) *Love v. Superior Court (2018) 29 Cal.App. 5th 980, 990-91.”*



22

22

Fairness to the Opposing Party and Counsel

Lawyer shall not:

- Unlawfully obstruct another party's access to evidence, alter, destroy or conceal a document or counsel or assist another person to do so. **California Rules of Professional Conduct rule 3.4(a)**
- Suppress evidence that have a legal obligation to reveal or produce. **Rule 3.4(b)**
- Falsify evidence, assist a witness to testify falsely or offer an inducement to a witness. **Rule 3.4(c)**



23

23

Fairness to the Opposing Party and Counsel

Lawyer shall not:

- Cause a person to hide or leave the jurisdiction to be "unavailable" as a witness. **Rule 3.4(e)**
- Knowingly disobey an obligation under the rules of a tribunal – unless no valid obligation exists. **Rule 3.4(f)**
- Assert personal knowledge of the facts in trial or state a personal opinion as to the guilt or innocence of an accused. **Rule 3.4(g)**
- Pay a witness contingent upon the content of the witness' testimony or the outcome of the case. **Rule 3.4(d)**

24

24

VCBA Code of Civility: Preamble

- VCBA is “enthusiastically” committed to highest standards
- Guidelines not exhaustive
- Guidelines apply when “practicing or appearing” in Ventura County
- Guidelines apply “regardless of reciprocity”



25

25

VCBA Code of Civility, section 1: Scheduling

- Applies to meetings, hearings and discovery
- Civility and courtesy expected, “not equated with weakness”
- Not inconsistent with zealous representation of clients



26

26

VCBA Code of Civility, section 2: Continuances and extensions of time

- Reasonable first requests should be granted
 - Even if opponent previously refused a similar request
 - Conditions should be reasonable, not infringe substantive rights
- Responding to additional requests depend on totality of circumstances
 - Including opponent's reciprocity
 - Requests must not be for delay or harassment



27

27

VCBA Code of Civility, section 3: Service of papers

- Timing, manner must not disadvantage opponent
- Account for vacations, secular and religious holidays
- Serve electronically or personally when mail would prejudice opponent



28

28

VCBA Code of Civility, section 4: Punctuality

- Arrive early
- Timely notify all participants of late arrival



29

29

VCBA Code of Civility, section 5: Communications

- Pleadings should be factual, concise, accurate
- No ad hominem attacks against opposing party or counsel
- All communications should be civil, courteous, respectful and accurate
- Promptly respond to calls, letters, emails
- Avoid ex parte communications with the court



30

VCBA Code of Civility, section 6: Discovery

- Not for harassment, delay, increasing costs or obtaining advantage
- Respond as professionally as if in a courtroom
- Meet and confer in good faith regarding disputes



31

31

VCBA Code of Civility, section 7: Motion practice

- Moving party should file as last resort, after good faith effort to resolve
- Opposing party should refrain from forcing a motion in bad faith



Motion
Practice

32

32

VCBA Code of Civility, section 8: Communicating with non-party witnesses

- Be courteous and respectful
- Educate witness on need to appear
- Accommodate witness's schedule and keep witness informed



33

33

VCBA Code of Civility, section 9: Ex parte contact with judge/hearing officer

- Avoid addressing substance or merits unless lawful to do so
- Advance notice to opposing party or counsel
- Accommodate schedule of opposing party or counsel



34

34

VCBA Code of Civility, section 10: Candor

- “Respect and abide by the spirit and letter of all rulings”
- Pleadings should be factual, concise, accurate
- No ad hominem attacks against opposing party or counsel
- Draft proposed orders promptly and accurately
- Respond to proposed orders promptly, confer in good faith



35

35

VCBA Code of Civility, section 11: Settlement and ADR

- Inform client of strengths and weaknesses
- Inform client of advantages of settlement and availability of ADR
- If client consents, explore settlement/ADR options as early as possible
- Do not engage in settlement talks for a bad faith purpose



36

36

VCBA Code of Civility, section 12: Trials and hearings

- Be punctual and prepared
- Demonstrate respect for the profession and the judicial process
- Be courteous and civil to all participants
- Make only good faith objections
- Without compromising tactics, agree to stipulations/efficiencies



37

37

VCBA Code of Civility, section 13: Privacy

- Respect the privacy and confidentiality of all participants
- Do not threaten to invade privacy to gain an unfair advantage
- Where relevant, use private information only to extent necessary



38

38

VCBA Code of Civility, section 14: Diversity

- Actively support tolerance and respect for diverse cultures and opinions
- Help expand opportunities for minorities
- Apply rules of civility without discrimination



39

39

VCBA Code of Civility, section 15: The Courts

- Act so as to inspire confidence in the judicial system and legal profession
- Show respect for the institution and all who work in it



40

40

California Attorney Guidelines of Civility and Professionalism (2007)

- Aka “State Bar Civility Code”
- Twenty-one different sections, somewhat broader in scope than VCBA code
- Following slides will note areas not specifically mentioned in the VCBA code



41

41

State Bar Civility Code: Introduction

- Officer of the court, even regarding matters outside the courtroom
- Civility, integrity, candor etc. essential to fair administration of justice
- Promote effectiveness, enjoyment and economical client representation
- Civility Code exceeds minimum required by Professional Conduct rules
- Civility Code not basis for attorney discipline or malpractice
- Attorneys are encouraged to comply with letter and spirit of Civility Code



42

42

State Bar Civility Code: Selected Provisions

2. Attorneys should devote time to improving justice system and pro bono work for needy clients
3. Advise clients attorney will not engage in abusive or unprofessional behavior, even to gain an advantage
9. Attorneys should meet and confer early to explore voluntary discovery
15. Give notice before taking a default



43

43

State Bar Civility Code: More Selected Provisions

16. Avoid appearance of bias by disclosing close relationships with judicial officers, arbitrators, mediators and appointed expert witnesses
18. With client's consent, cooperate in negotiating and concluding written agreements, even where no court is involved
19. In family law matters, seek to reduce tension, encourage cooperation and act in the best interest of any involved children
20. In criminal matters, be committed to unique duties of prosecutors and defense counsel
21. Judges encouraged to be aware of and support Civility Code

44

44

Ventura Superior Court, Local Rules, Appendix I (VSC Local Appendix)

- “Standards of Professional Conduct”
- Applicable unless otherwise ordered
- Decorum in the courtroom



45

45

VSC Local Appendix: Preamble

- Foster orderly proceedings
- Respect for the Constitution and statutes
- Respect for the court as an institution



46

46

VSC Local Appendix

- Section A: opening of court
- Section B: **B&P 6068(b)**, i.e., respect courts and judicial officers
 - Be familiar with all applicable standards
 - Inform clients, witnesses and attendees of proper decorum



47

47

VSC Local Appendix Section C: Addressing the court

- Stand, except for objection or other brief statement
- Behind podium or counsel table
- Interrupt only when absolutely necessary to protect client rights
- Accept rulings without visible reaction or comment
- Do not ask for clarification in front of jury



48

48

VSC Local Appendix Section D: Objections

- Do not crowd the box
- Do not speak loudly or in undignified manner
- Do not be overly familiar
- Do not address jurors by name except during jury selection or mid-trial inquiry of juror



49

49

VSC Local Appendix Section F: Witnesses and parties

- Do not exhibit familiarity or use first names (except young children)
- Question from behind lectern or counsel table (unless court allows otherwise)
- Inform witnesses of any applicable ruling or order
- Advise witnesses to be responsive but stop answering when objection made
- Do not admonish witnesses, ask court to do so
- Do not made approving or disapproving comments regarding answers



50

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VSC Local Appendix Section G: Matters that should occur outside presence of jury

- Arguments in support of or in opposition to an objection
- Offers of proof
- Offers to stipulate without a previous agreement
- Discovery requests



51

51

VSC Local Appendix Section H: Conduct which should not occur when court is in session

- Offensive or distracting attire
- Eating, drinking, gum chewing or reading newspapers
- Conversing in a distracting manner
- Visibly or audibly expressing approval or disapproval with any ruling, testimony or statement
- Traversing the area between the bench and counsel table (the "well"), except with court approval



52

52

VSC Local Appendix Section I: Exhibits

- Should be pre-marked and shared in advance with opposing counsel (except good faith impeachment)
- Should be quickly available for use during trial
- Should be briefly identified upon first reference during trial (but do not reveal contents)
- Once marked, must remain in possession of the court clerk when not in use
- When being shown (“published”) to the jury:
 - Bailiff should hand hard copies to jury
 - Electronic projections require stipulation or permission from the court



53

53