The Orange County Bar Association
Covid-19 Task Force Presents

DON'T LET COVID INFECT YOUR ETHICS AND CIVILITY

Friday, March 27, 2020

Speakers

Joseph L. Chairez, Esq.
Baker and Hostetler LLP

Todd G. Friedland, Esq.
Stephens Friedland LLP

Suzanne Burke Spencer, Esq.
Sall Spencer Callas & Krueger, APC

Speaker Biographies

BakerHostetler

Joseph L. Chairez

Partner

Costa Mesa
T +1.714.966.8822
F +1.714.754.6611

jchairez@bakerlaw.com

Overview

Joseph Chairez is a business trial lawyer who has litigated numerous complex business, products/technology, employment and construction defect matters. He also maintains a national insurance coverage practice, litigating coverage on behalf of corporate policyholders, which has produced millions of dollars of insurance policy benefits for his clients. Joseph is the Litigation Group Coordinator for the BakerHostetler Costa Mesa office. Additionally, he speaks on a variety of trial, ethics and litigation topics at CLE seminars.

Experience

Products/Technology

- Lead counsel in an aviation products case involving printed circuit board and related technology. Represented a printed board assembler.
- Lead counsel in a guidance system product and testing case. Represented a high-tech testing company.
- Lead counsel in a major toxic tort litigation against multiple manufacturers, and distributors of automobiles and related products; obtained a dismissal on behalf of the client manufacturer of plastic products.
- Lead in toxic tort claims brought by the plaintiff against multiple manufacturers of wood treatment products; obtained dismissal of the manufacturer of product constituent.
- Counsel in a construction defect case against a manufacturer of homes and related housing construction products, and obtained dismissal on behalf of the client manufacturer.
- Represented clients in a variety of other litigation involving products, including an LPG burn case involving valves, a case involving home appliance products, a severe elevator injury matter, a case involving thermal paper used for prescriptions and a complex coverage matter involving satellite solar arrays.

Employment

- Lead defense trial counsel on a multiplaintiff federal court discrimination case for a national freight company seeking millions of dollars. The three-week jury trial resulted in an outright defense as to two plaintiffs, and a favorable defense verdict as to the remaining plaintiffs.
- Lead defense trial counsel on a federal employment age discrimination, misclassification and unfair business practice case where the plaintiff sought $1.1 million plus punitive damages. The plaintiff waived jury on the eve of trial, and at close of the bench trial a defense verdict was awarded on all causes of action.

Insurance

- Lead coverage counsel for a subprime lender against a failing national non-admitted carrier. Obtained an $11.5 million bond from the carrier to protect the client's claim resulting in the subprime lender being one of the few insureds in California to have its claims paid. As reported in the *Los Angeles Daily Journal*, the general counsel commented, "That was worth its weight in platinum."

- Represented a global company in defense against a carrier's reimbursement claim on an underlying matter involving aerospace products related to multiple satellites. Obtained a favorable summary judgment ruling, removing approximately $12 million from the carrier's claims, with the matter settling shortly thereafter.
- Represented officer/general counsel in a coverage dispute with various carriers involving an underlying corporate mismanagement case. Litigated various layers of coverage and as to one carrier, after a favorable summary judgment ruling, obtained its $10 million policy and payment of all fees and costs to obtain coverage.

Recognitions and Memberships

Recognitions

- Hon. Francisco Briseno Lifetime Achievement Award, Hispanic Bar Association of Orange County (2018)
- Southern California "Super Lawyer" (2004 to 2018)
- *Orange County Metro Magazine*: Top Litigators in Orange County (2009, 2011 to 2015)
- Orange County Top 50 Lawyers (2013, 2014)
- Martindale-Hubbell: AV Preeminent
- 10/10 Superb rating as an attorney by AVVO.com (2012 to 2018)
- Hispanic Bar Association: Attorney of the Year (2007)
- United Way: Hispanic Influential (2008)

Memberships

- Orange County Bar Association: President (2007)
- Board of Governors of the State Bar of California: Vice President (2011)
- Orange County Hispanic Bar Association: President (1997)
- Celtic Bar Association: President (2001 to 2002)
- California Supreme Court Historical Society: Board Member (2014 to 2018)
- American Bar Foundation: Fellow (2011 to 2018)
- Public Law Center: Board Member (2018)

News

- 12/28/2016
  150 BakerHostetler Attorneys Named 2016 Super Lawyers; 91 Named Rising Stars
- 10/29/2015
  160 BakerHostetler Attorneys Named 2015 Super Lawyers; 112 Named Rising Stars
- 12/7/2012
  118 BakerHostetler Attorneys Named 2012 Super Lawyers; 55 Named Rising Stars
- 8/21/2012
  Chairez Named Top Attorney in OC Metro Magazine
- 12/31/2011
  2011 Super Lawyers Announced
- 9/26/2011
  Chairez Named Top Attorney in *OC Metro Magazine*
- 10/14/2010
  2010 "Super Lawyers" Announced
- 7/23/2010
  Los Angeles Daily Journal: State Bar to Consider a Slew of New Discipline Rules This Weekend
- 10/5/2009
  2009 "Super Lawyers" Announced
- 9/4/2009
  Chairez Named "Top Five Litigator"
- 9/29/2008
  2008 "Super Lawyers" Announced

- 8/14/2008
  Chairez Elected to California Bar Board of Governors
- 12/5/2007
  Orange County Lawyer: An Adventurous Spirit
- 10/24/2007
  2007 Super Lawyers Announced
- 10/2/2007
  Chairez to Speak with Chief Justice of California Supreme Court
- 10/1/2007
  Chairez Addresses State Bar of California's Annual Meeting
- 10/1/2007
  Time Warner Cable's "Local Edition": Lawyers Helping Our Students
- 5/31/2007
  KOCE-TV: Call-A-Lawyer Night
- 4/10/2007
  OrangeCoast magazine: Help! I Need a Lawyer!
- 1/19/2007
  Los Angeles Daily Journal: New Chief's a Natural for the O.C.
- 1/2/2007
  Chairez to Receive "Attorney of the Year" Award
- 10/13/2006
  Chairez to Address Association of Business Trial Lawyers
- 10/2/2006
  Chairez to Address State Bar of California
- 9/26/2006
  New 2006 Super Lawyers Announced
- 4/21/2006
  Los Angeles Daily Journal: Civil Litigants Not Fluent in English Fare Poorly
- 1/5/2005
  2005 Super Lawyers - Southern California
- 8/5/2002
  Joseph L. Chairez Joins Firm

Press Releases

- 2/2/2015
  163 Attorneys Named to "Super Lawyer" Lists, 123 Ranked as "Rising Stars"
- 1/16/2014
  152 Attorneys Named 2013 Super Lawyers; 74 Named Rising Stars

Alerts

- 3/13/2007
  International Team Newsletter—March 2007

Articles

- 3/29/2010
  Los Angeles Daily Journal: Mind the Gap

Community

- California Commission on Access to Justice: Co-Chair (2008)
- El Viento Foundation: Co-Chair of Advisory Committee (2013 to 2014)
- Hispanic Education Endowment Fund: Board Member (1997 to 2007)

- Public Law Center: Board of Directors (2002 to 2004)

Services

- Commercial Litigation
- Product Liability and Toxic Tort
- Employment Litigation

Industries

- Aerospace, Defense and Government Services
- Investment Funds

Admissions

- U.S. Court of Appeals, Ninth Circuit, 1987
- U.S. District Court, Eastern District of California, 2006
- U.S. District Court, Northern District of California, 2003
- U.S. District Court, Central District of California, 1987
- U.S. District Court, Southern District of California, 1987
- High Court Trust Territory of the Pacific Islands, 1986
- California, 1981
- Republic of Palau, 1986

Education

- J.D., University of California, Davis School of Law, Published Member of *U.C. Davis Law Review*
- B.S., University of California, Berkeley

Languages

- Spanish

StephensFriedland LLP

Todd G. Friedland

Mr. Friedland's practice at Stephens Friedland LLP focuses on commercial litigation and strategic counseling including complex contract disputes, derivative actions, class action defense, unfair business practices, trade secrets, business torts, intellectual property and real estate matters.

Prior to forming Stephens Friedland LLP, Mr. Friedland practiced with the multi-national law firm of Pillsbury Winthrop Shaw Pittman. Mr. Friedland served as a Judicial Law Clerk to the Honorable Paul Boland and the Honorable Alexander H. Williams of the Los Angeles Superior Court, and a Judicial Extern to the Honorable Alicemarie H. Stotler, U.S. District Court, Central District of California. Prior to practicing law, Mr. Friedland was engaged in the communications, entertainment and marketing industries.

Mr. Friedland is a Past President of the Orange County Bar Association, Co-Chair of the Civility Task Force, Past President of the Constitutional Rights Foundation Orange County, Vice-President of Project Youth OCBF, President of the Association of Business Trial Lawyers Orange County, and Past President of the Orange County Bar Association Charitable Fund. Mr. Friedland is Martindale-Hubbell "AV Preeminent" rated, has been named a California "Super Lawyer" from 2011-2020 including being named an Orange County Top 50, is listed in U.S. News "Best Lawyers" and is AVVO Rated 10.0.

Mr. Friedland believes that untoward tactics, ethical lapses and decreased professionalism will not serve lawyers or their clients well in negotiations, transactions or litigation. As President of the OCBA, Mr. Friedland directed formation of the Civility Task Force to draft and disseminate Civility Guidelines.

To help improve the Orange County community, Mr. Friedland established the Civic Center Homeless Task Force to focus on access to justice issues in the Santa Ana Civic Center. In conjunction with his "Hey Todd" outreach campaign, Mr. Friedland sought to increase diversity in the OCBA's membership, opinions and outreach and also worked to increase the ranks of the OCBA's affiliate bar. Mr. Friedland also recognized that outreach must occur to future lawyers in law school to help them with questions about our profession, and to teach them professionalism. To that end, Mr. Friedland created the 1L Kickstart Program which allowed first year law students in Orange County to meet and have candid conversations with practicing attorneys.

Mr. Friedland received his B.A. in Radio/TV/Film from CSU Long Beach, his M.A. in Communications Management from USC, and is J.D. from the USC Gould School of Law. Mr. Friedland resides in Huntington Beach with his wife and three kids. Mr. Friedland is a terrible golfer and instead enjoys surfing, scuba diving, flowboarding and wakeboarding.

Stephens Friedland LLP
575 Anton Blvd. Suite 750, Costa Mesa, CA 92626
949.468.3200 todd@sf-lawyers.com

SALL SPENCER
CALLAS & KRUEGER
A LAW CORPORATION

32351 Coast Highway
Laguna Beach, California 92651
Tel: 949-499-2942
Fax: 949-499-7403

Suzanne Burke Spencer

Managing Shareholder, Sall Spencer Callas & Krueger, APC

sspencer@sallspencer.com

Suzanne Burke Spencer is the managing shareholder of Sall Spencer Callas & Krueger, a business litigation firm in Laguna Beach, California. She practices in the areas of professional malpractice and attorney ethics as well as complex business and real estate litigation, including legal malpractice, partnership and business disputes, real estate and foreclosure, derivative actions, unfair business practices, contract disputes, and attorney fee and lien disputes. Ms. Burke Spencer has authored or contributed to numerous articles relating to professional responsibility and attorney ethics. Ms. Burke Spencer has frequently lectured on attorney fees disputes, legal ethics and risk management in public and private seminars.

Ms. Burke Spencer was appointed to the California State Bar's Committee on Professional Rules and Conduct (COPRAC) commencing October 2012, and served as Chair from 2016-17. She is also co-chair of the Orange County Bar Association's Professionalism and Ethics Committee, a member of the OCBA Civility Task Force, and a member of the California Lawyers Association Ethics Committee and of the California Lawyers Association inaugural Ethics Committee. Ms. Burke Spencer is also a member of the Standing Committee on Discipline for the United Stated District Court, Central District of California. Among the articles Ms. Burke Spencer has authored are *Ethical Enforcement of Attorney's Liens – Avoiding Traps for the Unwary*, California Bar Journal, July 2013; *Who is entitled to fee-based sanctions awards in contingent fee cases – lawyer or client?,* California Bar Journal, March 2014; *The price of withdrawal: Contingency fee attorneys may forfeit certain fees*, California Bar Journal, April 2015; *How Will California's New Rule Permitting Ethical Screening Impact Law Firm Disqualification?* Orange County Lawyer, July 2018, Vol. 60 No. 7 and *Proposed Rule 4.1: A New Disciplinary Rule Prohibiting Attorney Misrepresentations to Third Parties,* Daily Journal, April 22, 2018.

Ms. Burke Spencer is an undergraduate of Georgetown University, Washington, D.C. and received her J.D. from Fordham Law School, New York, New York, where she served as a staff member and an Associate Editor of the *Fordham Law Review*. She is admitted to practice before all state and federal courts in California, New York, Connecticut and Massachusetts. She is native of New Jersey who relocated to California in 1995 and has lived and worked here ever since.

Seminar Materials

DON'T LET COVID INFECT YOUR ETHICS AND CIVILITY

BY SUZANNE BURKE SPENCER, JOE CHAIREZ AND TODD G. FRIEDLAND

I. **Introduction.**

- Civility and Professionalism.
- Ethical obligations.

II. **Ethics Considerations.**

A. **Competence in an Emergency**:

- Rules of Professional Conduct, rule 1.1
- Keep apprised of court orders and changes (E.g., http://www.ocbar.org/covid-19)

B. **Duties of Confidentiality Are Not Relaxed**

- Rules of Professional Conduct, 1.6

C. **Communication with Clients**

- Rules of Professional Conduct, rule 1.4

D. **Supervision & Delegation**:

- Rules of Professional Conduct, rules 5.1 to 5.3
- Potential for liability for another's ethical violations under certain circumstances (Rule 5.1(c) and 5.3(c))

E. **Safekeeping of Client Funds**

- Rules of Professional Conduct, 1.15

F. **Soliciting Clients ("Ambulance Chasing")**:

- Rules of Professional Conduct, rule 7.3
- San Diego County Bar Ethics Opinion 2018-1 (May a lawyer market legal services to mass disaster victims through targeted advertisements connected with the use of social media?)

III. **Maintaining Civility in a Covid Impacted Legal World**

A. **Civility and the OCBA.**

- Civility Initiatives
- ABOTA, ABTL and OCBA Civility Guidelines.

B. **Incivility: Lawyers behaving badly.**

- Unicorns are not an emergency.
- It is not ok to send opposing counsel vulgar, profane, homophobic emails.
- It is not Business as usual.

C. **Covid-ized Hypotheticals and Discussion.**

IV. **Conclusion.**

Additional Resources Regarding Potentially Relevant Ethical Issues:

Virtual Law Office and Technological Competence: The Committee on Professional Responsibility and Conduct of the California State Bar ("COPRAC"), Formal Opinion 2010-179

Outsourcing of Legal Services: The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association ("PREC"), Ethics Opinion 518

Ethics Obligations Related to Disasters: ABA Formal Opinion 482

LOS ANGELES COUNTY BAR ASSOCIATION

PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 518

June 19, 2006

ETHICAL CONSIDERATIONS IN OUTSOURCING OF LEGAL SERVICES

SUMMARY

An attorney in a civil case who charges an hourly rate may contract with an out-of-state company to draft a brief provided the attorney is competent to review the work, remains ultimately responsible for the final work product filed with the court by the attorney on behalf of the client, the attorney does not charge an unconscionable fee, client confidences and secrets are protected, and there is no conflict of interest between the client and the contracting entity. The attorney may be required to inform the client of the nature and scope of the contract between attorney and out-of-state company if the brief provided is a significant development in the representation or if the work is a cost which must be disclosed to the client under California law. Any refund of charges by the out-of-state company to the attorney should be passed through to the client if the client was separately charged for the service.

AUTHORITIES CITED

Statutes:

California Business and Professions Code § 6068

California Business and Professions Code § 6125

California Business and Professions Code § 6126

Cases:

Bushman v. State Bar (1974) 11 Cal.3d 558

Crawford v. State Bar (1960) 54 Cal.2d 659

Farnham v. State Bar (1976) 17 Cal.3d 605

Jones v. State Bar (1989) 49 Cal.3d 273

Simmons v. State Bar (1970) 2 Cal.3d 719

California Rules of Professional Conduct:

Rule 1-100

Rule 1-120

Rule 1-310

Rule 1-320

Rule 1-400

Rule 2-200

Rule 3-110

Rule 3-310

Rule 3-500

Rule 5-200

Opinions:

COPRAC Formal Opinions 1994-138

COPRAC Formal Opinions 2004-165

LACBA Formal Opinions 374

LACBA Formal Opinions 423

LACBA Formal Opinions 473

FACTS

An attorney licensed to practice law in California has filed a notice of appeal in a civil case on the client's behalf. The attorney charges an hourly rate for the appellate services. Shortly thereafter, the attorney receives a solicitation from a legal research and brief writing company to draft the appellant's opening brief for a comparatively low hourly fee. The legal research and brief writing company ("Company") is not located in California, and employs both lawyers (none of whom are licensed to practice law in California) and non-lawyers. Company promises to deliver a ready to file brief, to be signed by the California attorney. Company also promises to refund all fees paid to Company for the brief if the appeal is unsuccessful.

The attorney decides to hire Company to write the brief, but has not decided yet whether to pass the charge through to the client, or to treat payment for the work as an internal cost.

DISCUSSION

In this opinion, we address two fundamental issues. First, is it ethically permissible for a California attorney, in a civil case, to hire an out-of-state legal research and brief writing company to conduct legal research and/or draft legal briefs for the attorney's use in connection with the attorney's representation of the client? Second, if such arrangements are permissible, what must the attorney do to comply with the ethical issues presented by such arrangements? This opinion is not intended to apply to criminal cases, nor does it apply to any case or any matter where the attorney has been appointed by the court.

We conclude that such arrangements may be ethically permissible, with some limitations depending on the specific terms and conditions of the arrangement, and provided that the attorney complies with several ethical requirements. Specifically, the Committee is of the

opinion that the attorney may ethically enter into the arrangement with Company provided that the attorney at all times retains and exercises independent professional judgment in connection with the performance of the attorney's legal services for the client. The attorney must sign the brief and in so doing adopts the work and is ultimately responsible for the accuracy of brief to both the court and to the client. Depending on the facts and circumstances, the attorney may have a duty to disclose to the client the nature and specifics of the contract with Company. The attorney is responsible for determining, and for ensuring, that there is no violation of client confidences or secrets, and that there is no conflict of interest created for the client by the attorney's contracting with Company. Finally, any refund of costs paid by Company to the attorney should be refunded to the client if the client is charged for the cost of the service.

Ethical Issues Involving Financial Arrangements With Company

Several rules address financial arrangements among lawyers, and between members and non-members of the State Bar of California.

California Rule of Professional Conduct [hereinafter "Rule" or "rule"] 1-310 states that a "member[1] shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership constitute the practice of law." A partnership generally involves a joint ownership and can be evidenced by firm name, declarations of co-ownership, or sharing of profits. (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 667.) In this instance, the attorney has not formed a partnership with Company since the attorney has merely purchased services at a specified rate. Therefore, the restrictions contained in rule 1-310 are inapplicable.

Rule 2-200 prohibits the division of "a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member" unless the client has consented in

[1] A "member" for purposes of the California Rules of Professional Conduct "means a member of the State Bar of California." (Rule 1-100 (B)(2).)

writing after full disclosure, and the total fee charged by all lawyers is not increased by reason of the provision for division of the fees, and is not unconscionable as defined in rule 4-200. Rule 2-200 is inapplicable here because Company charges the attorney a specific amount for its service and the contract between Company and the attorney does not involve the division of a legal fee paid by the client.[2]

The work being performed by Company is indistinguishable from other types of services that an attorney might purchase, such as hourly paralegal assistance, research clerk assistance, computer research, graphics illustrations, or other services. Thus, even if the attorney passes the cost directly on to the Client, the arrangement does not violate Rule 2-200.

Rule 1-320 provides that "[n]either a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer." This rule is also inapplicable to the facts presented in this inquiry since the attorney has contracted for services, at an hourly rate, from Company.

Aiding and Abetting in the Unlawful Practice of Law

Business and Professions Code section 6125, which is part of the State Bar Act, states that "[n]o person shall practice law in California unless the person is an active member of the State Bar."[3] Rule 1-120 states that "[a] member shall not knowingly assist in, solicit, or induce any violation of these rules [of Professional Conduct] or the State Bar Act." The practice of law includes giving legal advice and counsel and the preparation of legal instruments. (*Farnham v.*

---

[2] Several ethics opinions discuss when a payment constitutes a division of a fee. *See, e.g.*, LACBA Formal Opinion 457 (discussing fee arrangements with non-lawyers) and State Bar of California Standing Committee on Professional Responsibility and Conduct ["COPRAC"] Formal Opinion 1994-138. COPRAC Formal Opinion 1994-138 concluded that the criteria to determine whether there is a division of fees is whether: (1) the amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the law office is paid by the client; (2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client; and (3) the outside lawyer has no expectation of receiving a percentage fee. If all three criteria are met, there is no division of fees. See also *Chambers v. Kay* (2002) 29 Cal.4th 142, 154.

State Bar (1976) 17 Cal.3d 605, 612; *Crawford v. State Bar* (1960) 54 Cal.2d 659, 667-668.) The Committee is of the opinion that attorneys who contract for services which assist the attorneys in representation of their clients do not assist in a violation of Bus. and Prof. Code § 6125, so long as the attorney remains ultimately responsible for the final work product provided to or on behalf of the client.[4]

Duty to Inform the Client

Both Rule 3-500 and Business and Professions Code section 6068, subdivision (m), require that an attorney keep the client reasonably informed of significant developments relating to the employment or the representation.[5] COPRAC Formal Opinion 2004-165 states that a member of the State Bar of California who uses an outside contract lawyer to make appearances on behalf of the member's client must disclose to the client the fact of the arrangement between the member and the outside lawyer when the use of the outside lawyer constitutes a significant development. Whether use of an outside lawyer constitutes a "significant development" is based upon the circumstances of each case. The opinion states that if, at the outset of the engagement, the member anticipates using outside lawyers to make appearances on the member's behalf for the client, that situation should be addressed in the written fee agreement which would also

---

[3] It a misdemeanor to hold oneself out as practicing or entitled to practice law or otherwise practicing law when not an active member of the State Bar of California. (Bus. and Prof. Code § 6126.)

[4] Attorneys continually contract for assistance in legal research, preparation of documents, and expertise, be it from lawyers or non-lawyers, in furtherance of the representation of the client. It is the opinion of the Committee that where an attorney contracts for these types of services, it does not involve the unlawful practice of law. The same would apply under this inquiry.

[5] The language of rule 3-500, and the language of Business and Professions Code section 6068, subdivision (m), are slightly different. However, the disclosure requirements to the client under both provisions are the same. Rule 3-500 states: "[a] member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." Business and Professions Code section 6068, subdivision (m), states that it is the duty of an attorney "[t]o 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."

include specifying any costs of the appearance relationship which are billed to the client. That COPRAC opinion quotes relevant language in COPRAC Formal Opinion, 1994-138:

> Depending on the circumstances, rule 3-500 and Business and Professions Code section 6068 (m) will generally require the law office to inform the client that an outside lawyer is involved in the client's representation if the outside lawyer's involvement is a significant development. In general, a client is entitled to know who or what entity is handing the client's representation. However, whether use of an outside lawyer constitutes a significant development for purposes of rule 3-500 and Business and Professions Code section 6068 (m) depends on the circumstances of the particular case. Relevant factors, any of which may be sufficient to require disclosure, include the following: (i) whether responsibility for overseeing the client's matter is being changed, (ii) whether the new attorney will be performing a significant portion or aspect of the work, or (iii) whether staffing of the matter has been changed from what was specifically represented to or agreed with the client. (See L.A. Cty. Bar Assn. Formal Opn. No. 473.) The listed factors are not intended to be exhaustive, but are identified to provide guidance.

The relationship with Company may be a "significant development" within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m), and, if a "significant development," the client must be informed of the specifics of the agreement between the attorney and Company.[6] If possible, and where disclosure is required, disclosure of the nature and extent of the attorney/Company relationship should be made in the written retainer

---

[6] In most instances, the filing of an appellate brief will be a "significant development."

agreement. (COPRAC Formal Opinion 2004-265.[7] See also LACBA Formal Opinion 473 which requires disclosure to the client where the expectation of the client is that the retained attorney alone will be acting as attorney for the client.)

Duty of Competence and Duty to Exercise Independent Judgment

An attorney has a duty to act competently in any representation. Rule 3-110 (A) - (C). "If the member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." Rule 3-110 (C). Since the instant arrangement does not involve associating with or professionally consulting another lawyer, this arrangement cannot be the basis of the member's competence in this representation.

The discussion to rule 3-110 states that compliance with that rule "include[s] the duty to supervise the work of subordinate attorney and non-attorney agents. [Citations omitted.]"[8] Therefore, the attorney must review the brief or other work provided by Company and

---

[7] The following language, found in COPRAC Formal Opinion 2004-165, is applicable to this inquiry:

> ["[T]he attorney bears the responsibility to be reasonably aware of the client's expectations regarding counsel working on client's matter because the responsibility can be readily discharged by the attorney through a standard written retainer agreement or disclosure before or during the course of the representation."]; compare Cal. State Bar Formal Opn. No 1994-138 at fn.8 ["it would be prudent for the law firm to include the disclosure to the client in the attorney's initial retainer letter or make that disclosure as soon thereafter as the decision to hire is made."]. If Lawyer charges [contract lawyer's] fees and costs to the client as a disbursement, Business and Professions Code sections 6147 and 6148 require Lawyer to state the client's obligations for those charges in the written fee agreement, if contemplated at the time of the initial fee agreement, to the same extent as other costs charged to the client."]

[8] Rule 1-100, subdivision (C), states with respect to the purpose of "Discussions" to the rules: "Because it is a practical impossibility to convey in black letter form all of the nuances of the disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them."

independently verify that it is accurate, relevant, and complete, and the attorney must revise the brief, if necessary, before submitting it to the appellate court.

In addition to being competent, an attorney must also exercise independent professional judgment on behalf of the client at all times. (*Beck v. Wecht* (2002) 28 Cal.4th 289, 295 (fundamental duty of undivided loyalty cannot be diluted by a duty owed to some other person, which would be inconsistent with lawyer's duty to exercise independent professional judgment); *Dynamic Concepts Inc. v. Truck Insurance Exchange* (1998) 61 Cal.App.4th 999, 1009 (imposition of restrictions by third party on attorney's decisions may interfere with lawyer's duty to exercise independent professional judgment); *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 (holding that "[a]n attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority").) Therefore, in performing services for the client, the attorney must remain ultimately responsible for any work product on behalf of the client and cannot delegate to Company any authority over legal strategy, questions of judgment, or the final content of any product delivered to the client or filed with the court.

It follows that if a term of the agreement between the attorney and Company delegates to Company a decision-making function that is non-delegable, then the attorney may be assisting Company in the unauthorized practice of law or violating the ethical duties of competence and obligation to exercise independent professional judgment. An improper delegation might also affect the application of rule 1-310 (prohibition against forming partnerships with non-lawyers), rule 1-320 (sharing of legal fees with a non-lawyer) and rule 2-200 (division of legal fees). For example, if Company contractually required the attorney to accept and use any work product delivered "as is" and without change, then the attorney might be improperly delegating the attorney's fundamental obligation to exercise independent professional judgment on behalf of the

client. In this case, Company has promised a full refund of its fees if the appeal is unsuccessful. If a condition of that guarantee is that the attorney must accept and use the work product (for example, a legal brief) as written, or obtain Company's approval of any changes to the work product, then the attorney might be put into the position of having to elect between employing independent professional judgment on behalf of the client and losing a contractual guaranteed right which the attorney values. The Committee is of the view that provisions of a guarantee which have the possibility of creating such a dilemma for the attorney could be considered a violation of the duty to exercise independent professional judgment on behalf of the client. Thus, the attorney should ensure that no contractual provision in the agreement gives Company control over the final work product produced for the client.

Ethical Duties to the Court

An attorney is responsible for all of the attorney's submissions to the court. Any inaccuracies in the materials submitted to the court could not only be a violation of rule 3-110, but also could be a violation of rule 5-200(A) and (B),[9] and a violation of Business and Professions Code section 6068, subdivision (d).[10]

Charging the Cost to the Client

The attorney may elect simply to pay Company for the cost of the legal research or brief without passing on any of the cost to the client. In such a case, the Committee believes that the attorney could keep any refund that might be received from Company under any otherwise

---

[9] Rule 5-200(A) and (B) state: "In presenting a matter to a tribunal, a member

(A) Shall employ, for the purposes of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law."

[10] Business and Professions Code section 6068, subdivision (d), states that it is the duty of an attorney "[t]o employ, for 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."

ethical guarantee provision. However, the attorney may also elect to: (a) pass the cost directly on to the client for payment; (b) mark up the cost and pass the marked up cost on to the client or (c) charge the client a flat fee. These scenarios have different consequences.

Sections of the California Business and Professions Code address an attorney's duty to advise a client about costs. Section 6147(a)(2) requires an attorney with a contingency fee agreement to disclose how disbursements and costs incurred in connection with the prosecution or settlement of the client will affect the contingency fee and the client's recovery. Section 6148 addresses many fee agreements not coming within the scope of section 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars. Under section 6148(a)(1), the attorney must disclose any basis of compensation, including standard rates, fees, and charges applicable to the case. The attorney must also render bills that clearly identify the costs and expenses incurred and the amount of the costs and expenses. (See Bus. and Prof. Code §6148(b).)

Whether or not there is a written fee agreement between the attorney and the client, disclosure of the arrangement with Company may be required. See rule 3-500 and Bus. and Prof. Code § 6068, subdivision (m), which require that the client be kept reasonably informed about significant developments relating to the representation and in regard to which the attorney has agreed to provide legal services. The Committee is of the opinion that if the client pays both the attorney's fees and costs of the contract with Company, the contract is a "significant development" within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m), since the client has hired the attorney to prepare and submit the appellate brief.

The Committee believes that the attorney must accurately disclose the basis upon which any cost is passed on to the client. If the cost of Company's services is simply passed through to the client, the client should be so informed. The client should also be informed of the possibility of a refund of the cost if offered by the Company. If the attorney marks up the cost of Company's services, the attorney must disclose the mark-up. (Rule 3-500, Bus. and Prof. Code § 6068 (m).)

Illegal or Unconscionable Fee

Rule 4-200 subdivision (A) states that "[a] member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee." Rule 4-200 explains that "[u]nconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events." Factors relevant to this inquiry in determining the conscionability of a fee include, but are not limited to:

"(1) The amount of the fee in proportion to the value of the services performed.

(10) The time and labor required.

(11) The informed consent of the client to the fee."[11]

A fee which "shocks the conscience" is unconscionable. (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 564.) Charging a fee and not providing substantial services has been determined to be grounds for discipline. (*Jones v. State Bar* (1989) 49 Cal.3d 273, 284.) Therefore, whether there is a violation of rule 4-200 depends on the facts and circumstance of each specific situation as determined at the time the fee agreement is initiated. (Rule 4-200(A) and (B).)

[11] See rule 4-200(B) for the entire list of eleven "factors to be considered, where appropriate, in determining the conscionability of a fee . . . ."

The ethical issue presented here is whether the attorney's fee to the client could be deemed unconscionable because of the attorney's reliance on the work of the Company. The Committee believes that the amount paid by the attorney for Company's work is not determinative on the question of whether a fee is unconscionable. (*Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993 (in legal malpractice action, the amount of money paid to a contract attorney by a law firm was found irrelevant to the question of whether law firm had charged client an unconscionable fee; nothing in rule 4-200 suggests that the attorney's profit margin is relevant to the issue. What is relevant to the issue of conscionability is the fee which the client paid to the law firm as measured by the factors listed in rule 4-200).)

Duty to Preserve Client Confidences and Secrets

COPRAC Formal Opinion 2004-165 explains the duty to preserve inviolate client confidences and secrets:

> Business and Professions Code section 6068(e) states: "It is the duty of an attorney [t]o . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The scope of the protection of client confidential information under Section 6068(e) has been liberally applied. (See *People v. Singh* (1932) 123 Cal.App. 365 [11 P.2d 73].) The duty to preserve a client's confidential information is broader than the protection afforded by the lawyer-client privilege. Confidential information for purpose of section 6068 (e) includes any information gained in the engagement which the client does not want disclosed or the disclosure of which is likely to be embarrassing or detrimental to the client. (Cal. State Bar Formal Opn. No. 1993-133.) The duty has been applied

even when the facts are already part of the public record or where there are other sources of information. (See L.A. Cty. Bar Assn. Formal Opn. Nos. 267 & 386.)

Confidential information can be disclosed to outside contractors so long as the outside contractors agree to keep the client confidences and secrets inviolate. (See LACBA Formal Opinions 374, 423 (use of centralized computer billing requires compliance with Business and Professions Code section 6068, subdivision (e)).) It is incumbent upon the attorney to ensure that client confidences and secrets are protected, both by the attorney and by Company, throughout and subsequent to the attorney's contract relationship with Company. (Rule 3-310, "Discussion"; LACBA Formal Opinion 374.)

Conflicts of Interest

Company may be working on other matters which conflict with and are potentially or actually adverse to the attorney's client. Rule 3-110, subdivision (A), imposes upon an attorney a duty to supervise the work of legal assistants, which includes the duty to "'give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment. . . .'" (*Hu v. Fang* (2002) 104 Cal.App.4th 61, 64, quoting ABA Model Rules Prof. Conduct, rule 5.3, com.) Therefore, the attorney should satisfy himself that no conflicts exist that would preclude the representation. See, e.g., Rule 3-310. The attorney must also recognize that he or she could be held responsible for any conflict of interest that may be created by the hiring of Company and which could arise from relationships that Company develops with others during the attorney's relationship with Company.

Rule 1-400 and Standard (1)

Rule 1-400 is directed to disciplinary restrictions on attorney advertising and solicitation.[12] Standard (1) of the rule creates a presumption of a violation of rule 1-400 where a "communication" contains a guarantee or warranty regarding the result of the representation.[13] A "communication" within the meaning of rule 1-400 is "[a]ny unsolicited correspondence from a member [of the State Bar of California] or law firm directed to any person or entity." (Rule 1-400 (A)(4).) Company offers to refund to the attorney all its charges if the appeal is not successful. Since the representation of a contingent refund is made by Company to the attorney, it is not a "communication" within the meaning of rule 1-400 (A)(4) as defined above since Company is not a member of the State Bar of California, nor is Company a law firm.[14] However, the attorney must consider the unconscionability of accepting any refund from Company which is not paid over to the client. (See discussion of rule 4-200, supra.)

This opinion is advisory only. The committee acts on specific questions submitted ex parte, and its opinion is based on the facts set forth in the inquiry submitted.

---

[12] "The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline." (Rule 1-100, "Discussion.")

[13] Standard (1) of rule 1-400, for which there is a presumption of impropriety in violation of that rule, "Advertising and Solicitation," states: "[a] 'communication' which contains guarantees, warranties, or predictions regarding the result of the representation."

[14] Were Company a "law firm," then the Standard would apply if the communication respecting the refund was deemed to be a guarantee or warranty regarding the result of the representation. However, that would be a concern of Company, and not the attorney to whom the communication was made unless the attorney was also to communicate the same representation to the client. It is assumed that is not the case under the facts of this inquiry. Since the focus of this opinion is solely upon the ethical obligations of the attorney, the application of the Standard to Company is not addressed.

ORANGE COUNTY BAR ASSOCIATION
CIVILITY GUIDELINES

PREAMBLE

The practice of law is a noble, time-honored profession requiring and inspiring trust and confidence. Lawyers rightly take pride in seeking mutual cooperation and maintaining personal dignity. Lawyers practicing in Orange County share a commitment to civility and recognize their obligation to be professional with clients, other parties and counsel, the courts, and the public.

Courts expect lawyers to show others respect. Lawyers are officers of the court. Each lawyer's conduct should reflect well on the judicial system, the profession, and the fair administration of justice. Judicial resources are limited and wisely conserved when lawyers avoid frivolous disputes.

Lawyers should inspire public regard for the profession and for the judicial system. Rudeness, distrust, or abusive tactics by lawyers do not reflect well on the legal profession or inspire the public's confidence.

Civility allows for zealous representation, reduces clients' costs, better advances clients' interests, reduces stress, increases professional satisfaction, and promotes effective conflict resolution. These guidelines foster the civility and professionalism that are hallmarks of the best traditions of the legal profession.

All OCBA members are encouraged to adopt these guidelines as their personal standards. The guidelines exceed the Rules of Professional Conduct; do not replace any statute or rule; and are not intended as an independent basis for sanctions, discipline, or more litigation. Rather, the guidelines remind us that law is best practiced with civility and that clients, courts, the public, and the fair administration of justice are best served thereby.

GUIDELINES

1. Counsel shall show civility to other counsel and self-represented litigants.

a. Communicate in a professional, businesslike manner. Respond to communications within a reasonable time, using reasonable means. Provide accurate redlines and note significant changes when exchanging drafts. Avoid personal attacks, demeaning comments, and misleading characterizations of the other side's positions, both in private communications and in court. Act civilly toward opposing counsel's staff members.

b. Extend professional courtesies. Agree to reasonable requests, including those regarding service of papers or extensions of time, whenever possible without prejudicing the client's interests or violating a court's scheduling order. Honor commitments.

c. Advise clients about the need for civility. Assure clients you will zealously represent them while still treating others with civility. Resist client requests to engage in abusive or disrespectful behavior.

2. Counsel shall show civility during discovery.

a. Work together to make discovery self-executing. Meet and confer in good faith to try to limit and expedite discovery – and to resolve disputes without motions. Cooperate to make discovery reasonably convenient: e.g., provide written discovery requests in electronic format, discuss search terms for electronic discovery in advance, produce written responses and responsive documents in a user-friendly manner. Avoid pursuing discovery only to harass adversaries or increase litigation costs. Respond forthrightly and timely to non-objectionable requests.

b. Schedule depositions reasonably. Respond to inquiries for dates within a reasonable time and on reasonable terms. Make good-faith efforts to accommodate the schedules of other parties, counsel, and witnesses. Delay or cancel depositions only with good cause and as much notice as practicable.

c. Behave professionally at depositions. Avoid abusive or rude behavior, mischaracterizations of anyone's conduct, baseless instructions not to answer, and questions asked only to embarrass the witness. Make reasonable use of the allotted time, without needlessly running out the clock or requiring an additional day.

3. Counsel shall show civility to the courts.

a. Respect the court's time. Make good-faith efforts to avoid or narrow issues before raising them with the court. Plan to make witnesses available while minimizing their wait time – consider on-call agreements. Notify the court as soon as possible if a matter resolves.

b. Communicate respectfully with the court. Treat the court and its personnel with dignity. Avoid personal attacks, disrespectful familiarity, the appearance of impropriety, and improper ex parte communications.

c. Conduct yourself professionally in court. Be punctual and prepared for every appearance. Wait for your matter respectfully. Let others speak, without interrupting. Accept responsibility for your handling of the case without blaming subordinates.

d. Show this civility to all bench officers (judges, commissioners, temporary judges, referees), arbitrators, mediators, other dispute resolution providers, and their staffs.

American Board of Trial Advocates
Principles of Civility, Integrity, and Professionalism

PREAMBLE

These Principles supplement the precepts set forth in ABOTA's Code of Professionalism and are a guide to the proper conduct of litigation. Civility, integrity, and professionalism are the hallmarks of our learned calling, dedicated to the administration of justice for all. Counsel adhering to these principles will further the truth-seeking process so that disputes will be resolved in a just, dignified, courteous, and efficient manner.

These principles are not intended to inhibit vigorous advocacy or detract from an attorney's duty to represent a client's cause with faithful dedication to the best of counsel's ability. Rather, they are intended to discourage conduct that demeans, hampers, or obstructs our system of justice.

These Principles apply to attorneys and judges, who have mutual obligations to one another to enhance and preserve the dignity and integrity of our system of justice. As lawyers must practice these Principles when appearing in court, it is not presumptuous of them to expect judges to observe them in kind. The Principles as to the conduct of judges set forth herein are derived from judiciary codes and standards.

These Principles are not intended to be a basis for imposing sanctions, penalties, or liability, nor can they supersede or detract from the professional, ethical, or disciplinary codes of conduct adopted by regulatory boards.

AS A MEMBER OF THE AMERICAN BOARD OF TRIAL ADVOCATES, I WILL ADHERE TO THE FOLLOWING PRINCIPLES:

1. Advance the legitimate interests of my clients, without reflecting any ill will they may have for their adversaries, even if called on to do so, and treat all other counsel, parties, and witnesses in a courteous manner.
2. Never encourage or knowingly authorize a person under my direction or supervision to engage in conduct proscribed by these principles.
3. Never, without good cause, attribute to other counsel bad motives or improprieties.
4. Never seek court sanctions unless they are fully justified by the circumstances and necessary to protect a client's legitimate interests and then only after a good faith effort to informally resolve the issue with counsel.
5. Adhere to all express promises and agreements, whether oral or written, and, in good faith, to all commitments implied by the circumstances or local custom.

6. When called on to do so, commit oral understandings to writing accurately and completely, provide other counsel with a copy for review, and never include matters on which there has been no agreement without explicitly advising other counsel.
7. Timely confer with other counsel to explore settlement possibilities and never falsely hold out the potential of settlement for the purpose of foreclosing discovery or delaying trial.
8. Always stipulate to undisputed relevant matters when it is obvious that they can be proved and where there is no good faith basis for not doing so.
9. Never initiate communication with a judge without the knowledge or presence of opposing counsel concerning a matter at issue before the court.
10. Never use any form of discovery scheduling as a means of harassment.
11. Make good faith efforts to resolve disputes concerning pleadings and discovery.
12. Never file or serve motions or pleadings at a time calculated to unfairly limit opposing counsel's opportunity to respond.
13. Never request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.
14. Consult other counsel on scheduling matters in a good faith effort to avoid conflicts.
15. When calendar conflicts occur, accommodate counsel by rescheduling dates for hearings, depositions, meetings, and other events.
16. When hearings, depositions, meetings, or other events are to be canceled or postponed, notify as early as possible other counsel, the court, or other persons as appropriate, so as to avoid unnecessary inconvenience, wasted time and expense, and to enable the court to use previously reserved time for other matters.
17. Agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect my client's legitimate rights.
18. Never cause the entry of a default or dismissal without first notifying opposing counsel, unless material prejudice has been suffered by my client.
19. Never take depositions for the purpose of harassment or to burden an opponent with increased litigation expenses.
20. During a deposition, never engage in conduct which would not be appropriate in the presence of a judge.
21. During a deposition, never obstruct the interrogator or object to questions unless reasonably necessary to preserve an objection or privilege for resolution by the court.
22. During depositions, ask only those questions reasonably necessary for the prosecution or defense of an action.
23. Draft document production requests and interrogatories limited to those reasonably necessary for the prosecution or defense of an action, and never design them to place an undue burden or expense on a party.

24. Make reasonable responses to document requests and interrogatories and not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and nonprivileged documents.
25. Never produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.
26. Base discovery objections on a good faith belief in their merit, and not for the purpose of withholding or delaying the disclosure of relevant and nonprivileged information.
27. When called on, draft orders that accurately and completely reflect a court's ruling, submit them to other counsel for review, and attempt to reconcile any differences before presenting them to the court.
28. During argument, never attribute to other counsel a position or claim not taken, or seek to create such an unjustified inference.
29. Unless specifically permitted or invited, never send to the court copies of correspondence between counsel.

WHEN IN COURT I WILL:

1. Always uphold the dignity of the court and never be disrespectful.
2. Never publicly criticize a judge for his or her rulings or a jury for its verdict. Criticism should be reserved for appellate court briefs.
3. Be punctual and prepared for all court appearances, and, if unavoidably delayed, notify the court and counsel as soon as possible
4. Never engage in conduct that brings disorder or disruption to the courtroom.
5. Advise clients and witnesses of the proper courtroom conduct expected and required.
6. Never misrepresent or misquote facts or authorities.
7. Verify the availability of clients and witnesses, if possible, before dates for hearings or trials are scheduled, or immediately thereafter, and promptly notify the court and counsel if their attendance cannot be assured.
8. Be respectful and courteous to court marshals or bailiffs, clerks, reporters, secretaries, and law clerks.

CONDUCT EXPECTED OF JUDGES

A LAWYER IS ENTITLED TO EXPECT JUDGES TO OBSERVE THE FOLLOWING PRINCIPLES:

1. Be courteous and respectful to lawyers, parties, witnesses, and court personnel.
2. Control courtroom decorum and proceedings so as to ensure that all litigation is conducted in a civil and efficient manner.
3. Abstain from hostile, demeaning, or humiliating language in written opinions or oral communications with lawyers, parties, or witnesses.

4. Be punctual in convening all hearings and conferences, and, if unavoidably delayed, notify counsel, if possible.
5. Be considerate of time schedules of lawyers, parties, and witnesses in setting dates for hearings, meetings, and conferences. When possible, avoid scheduling matters for a time that conflicts with counsel's required appearance before another judge.

ABA GUIDELINES FOR CIVILITY

PREAMBLE

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.

A judge's conduct should be characterized at all times by courtesy and patience toward all participants. As judges we owe to all participants in a legal proceeding respect, diligence, punctuality, and protection against unjust and improper criticism or attack.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

The following Guidelines are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which, are hallmarks of a learned profession dedicated to public service.

We encourage judges, lawyers and clients to make a mutual and firm commitment to these Guidelines.

We support the principles espoused in the following Guidelines, but under no circumstances should these Guidelines be used as a basis for litigation or for sanctions or penalties.

LAWYERS' DUTIES TO OTHER COUNSEL

1. We will practice our profession with a continuing awareness that our role is to zealously advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications. We will refrain from acting upon or manifesting bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status toward any participant in the legal process.
2. We will not, even when called upon by a client to do so, abuse or indulge in offensive conduct directed to other counsel, parties, or witnesses. We will abstain from disparaging personal remarks or acrimony toward other counsel, parties, or witnesses. We will treat adverse witnesses and parties with fair consideration.

3. We will not encourage or knowingly authorize any person under our contralto engage in conduct that would be improper if we were to engage in such conduct.
4. We will not, absent good cause, attribute bad motives or improper conduct to other counsel.
5. We will not lightly seek court sanctions.
6. We will in good faith adhere to all express promises and to agreements with other counsel, whether oral or in writing, and to all agreements implied by the circumstances or local customs.
7. When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely. The drafter will provide other counsel the opportunity to review the writing. As drafts are exchanged between or among counsel, changes from prior drafts will be identified in the draft or otherwise explicitly brought to other counsel's attention. We will not include in a draft matters to which there has been no agreement without explicitly advising other counsel in writing of the addition.
8. We will endeavor to confer early with other counsel to assess settlement possibilities. We will not falsely hold out the possibility of settlement to obtain unfair advantage.
9. In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.
10. We will not use any form of discovery or discovery scheduling as a means of harassment.
11. Whenever circumstances allow, we will make good faith efforts to resolve by agreement objections before presenting them to the court.
12. We will not time the filing or service of motions or pleadings in any way that unfairly limits another party's opportunity to respond.
13. We will not request an extension of time solely for the purpose of unjustified delay or to obtain unfair advantage.
14. We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.
15. We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars, or other functions that produce good faith calendar conflicts on the part of other counsel.
16. We will promptly notify other counsel and, if appropriate, the court or other persons, when hearings, depositions, meetings, or conferences are to be canceled or postponed.
17. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.
18. We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity, unless the rules provide otherwise.

19. We will take depositions only when actually needed. We will not take depositions for the purposes of harassment or other improper purpose.
20. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
21. We will not obstruct questioning during a deposition or object to deposition questions unless permitted under applicable law.
22. During depositions we will ask only those questions we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action.
23. We will carefully craft document production requests so they are limited to those documents we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action. We will not design production requests to place an undue burden or expense on a party, or for any other improper purpose.
24. We will respond to document requests reasonably and not strain to interpret requests in an artificially restrictive manner to avoid disclosure of relevant and nonprivileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents, or to accomplish any other improper purpose.
25. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action, and we will not design them to place an undue burden or expense on a party, or for any other improper purpose.
26. We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and on-privileged information, or for any other improper purpose.
27. We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information, or for any other improper purpose.
28. When a draft order is to be prepared by counsel to reflect a court ruling, we will draft an order that accurately and completely reflects the court's ruling. We will promptly prepare and submit a proposed order to other counsel and attempt to reconcile any differences before the draft order is presented to the court.
29. We will not ascribe a position to another counsel that counsel has not taken.
30. Unless permitted or invited by the court, we will not send copies of correspondence between counsel to the court.
31. Nothing contained in these Guidelines is intended or shall be construed to inhibit vigorous advocacy, including vigorous cross-examination.

LAWYERS' DUTIES TO THE COURT

1. We will speak and write civilly and respectfully in all communications with the court.
2. We will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time; if delayed, we will notify the court and counsel, if possible.
3. We will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.
4. We will not engage in any conduct that brings disorder or disruption to the courtroom. We will advise our clients and witnesses appearing in court of the proper conduct expected and required there and, to the best of our ability, prevent our clients and witnesses from creating disorder or disruption.
5. Weill not knowingly misrepresent, mischaracterize, misquote, or mis-cite facts or authorities in any oral or written communication to the court.
6. We will notwrite letters to the court in connection with a pending action, unless invitedor permitted by the court.
7. Before dates for hearings or trials are set, or ifthat is not feasible, immediately after such date has been set, we will attemptto verify the availability of necessary participants and witnesses so we canpromptly notify the court of any likely problems.
8. We will act and speak civilly to court marshals, clerks, court reporters, secretaries, and law clerks withan awareness that they, too, are an integral part of the judicial system.

COURTS' DUTIES TO LAWYERS

1. We will be courteous, respectful, and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to insure that all litigation proceedings are conducted in a civil manner.
2. We will not employ hostile, demeaning, or humiliating words in opinions Orin written or oral communications with lawyers, parties, or witnesses.
3. We will be punctual in convening all hearings, meetings, and conferences; if delayed, we will notify counsel, if possible.
4. In scheduling all hearings, meetings and conferences we will be considerate of time schedules of lawyers, parties, and witnesses.
5. We will make all reasonable efforts to decide promptly all matters presented to us for decision.
6. We will give the issues in controversy deliberate, impartial, and studied analysis and consideration.

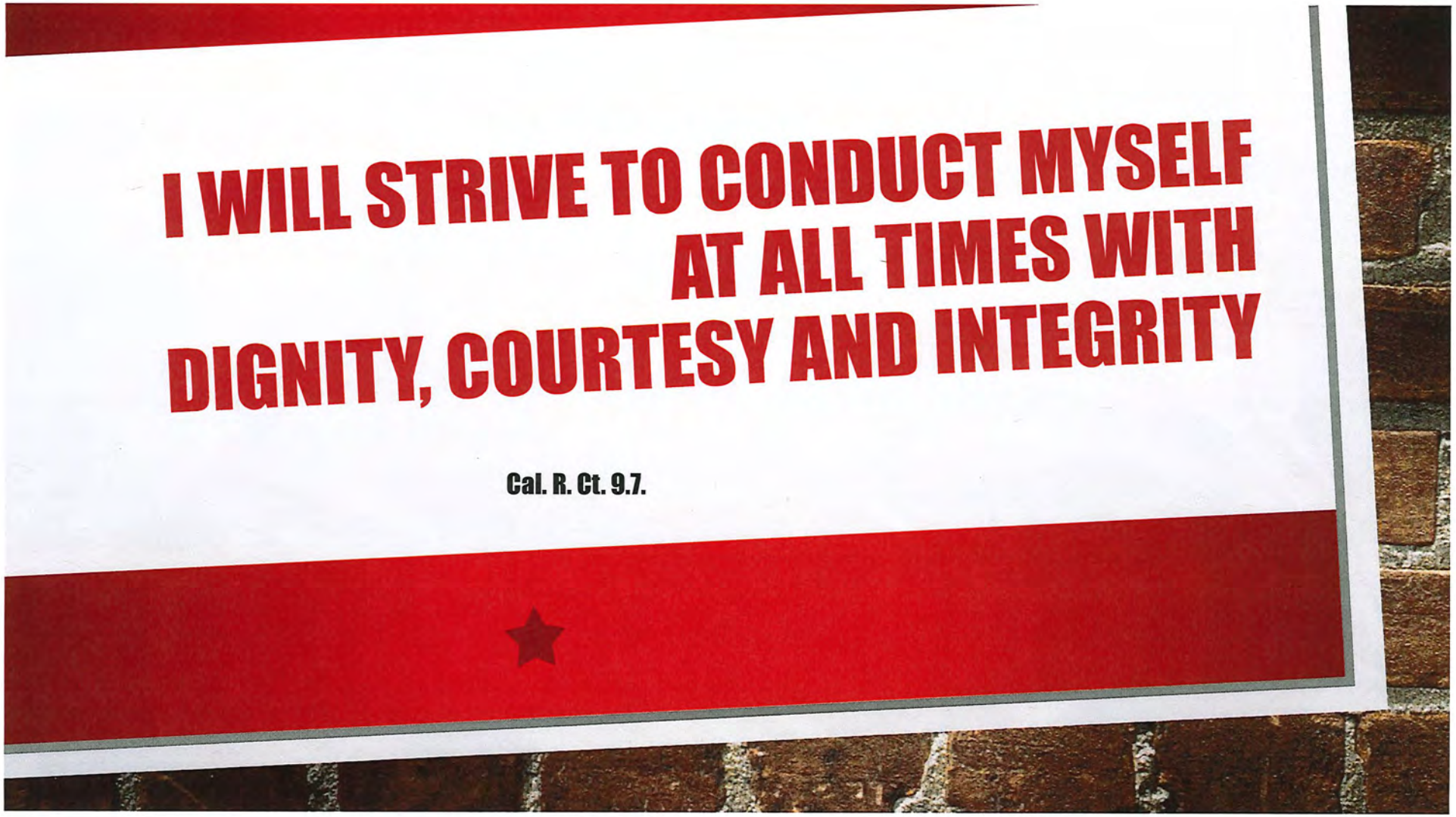
7. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice.
8. We recognize that a lawyer has a right and a duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.
9. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.
10. We will do our best to insure that court personnel act civilly toward lawyers, parties, and witnesses.
11. We will not adopt procedures that needlessly increase litigation expense.
12. We will bring to lawyers' attention uncivil conduct which we observe.

JUDGES' DUTIES TO EACH OTHER

1. We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.
2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.
3. We will endeavor to work with other judges in an effort to foster spirit of cooperation in our mutual goal of enhancing the administration of justice.

I WILL STRIVE TO CONDUCT MYSELF AT ALL TIMES WITH DIGNITY, COURTESY AND INTEGRITY

Cal. R. Ct. 9.7.



KeyCite Yellow Flag - Negative Treatment
Distinguished by Gaines v. AT&T Mobility Services, LLC, S.D.Cal., December 10, 2019

36 Cal.App.5th 127
Court of Appeal, Fourth District, Division 3, California.

Angele LASALLE, Plaintiff and Respondent,
v.
Joanna T. VOGEL, Defendant and Appellant.

G055381
|
Filed 6/11/2019

Synopsis

Background: In legal malpractice action, the Superior Court, Orange County, Randall J. Sherman, J., entered default judgment against attorney following attorney's failure to timely answer and subsequently denied attorney's motion to set aside the judgment. Attorney appealed.

[Holding:] The Court of Appeal, Bedsworth, Acting P.J., held that attorney's neglect in failing to answer was excusable.

Reversed.

Procedural Posture(s): On Appeal; Motion to Set Aside or Vacate Default Judgment.

West Headnotes (12)

[1] **Attorneys and Legal Services** Character and Conduct in General

Judges In general; constitutional and statutory provisions

Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle. Cal. Civ. Proc. Code § 583.130.

[2] **Attorneys and Legal Services** Attorney as officer of court

The term "officer of the court," with all the assumptions of honor and integrity that append to it must not be allowed to lose its significance in maintaining standards of professionalism. Cal. Civ. Proc. Code § 583.130.

[3] **Appeal and Error** Judgment by default or decree pro confesso

An order denying a motion to set aside a default is appealable from the ensuing default judgment. Cal. Civ. Proc. Code § 473.

1 Cases that cite this headnote

[4] **Appeal and Error** Setting Aside Verdict; New Trial

The standard of review for an order denying a set aside motion is abuse of discretion. Cal. Civ. Proc. Code § 473.

[5] **Action** Course of procedure in general

The law favors judgments based on the merits, not procedural missteps.

[6] **Appeal and Error** Relief from default judgment

A trial court order denying relief from default judgment is scrutinized more carefully than an order permitting trial on the merits.

1 Cases that cite this headnote

[7] **Attorneys and Legal Services** Conduct as to Adverse Parties and Counsel

An attorney has an ethical obligation to warn opposing counsel that the attorney is about to take an adversary's default.

1 Cases that cite this headnote

[8] **Judgment** Want or insufficiency of notice of proceedings

Attorney's neglect in failing to answer malpractice complaint, regarding representation in matter dissolving registered domestic partnership, was excusable, and thus attorney

was entitled set aside default judgment entered against her, where attorney received notice of default via unreliable e-mail, deadline provided to attorney was unreasonably short, and no prejudice resulted from set-aside. Cal. Civ. Proc. Code §§ 473, 583.130.

2 Cases that cite this headnote

[9] **Constitutional Law** Notice

Due process requires not just notice, but notice reasonably calculated to reach the object of the notice. U.S. Const. Amend. 14.

[10] **Judgment** Right to Relief in General

Judgment Prejudice from judgment

When evaluating a motion to set aside a default judgment on equitable grounds, the court must weigh the reasonableness of the conduct of the moving party in light of the extent of the prejudice to the responding party. Cal. Civ. Proc. Code § 473.

2 Cases that cite this headnote

[11] **Evidence** Character or Reputation

Judicial decisions should fit the facts of a case and not be based on some general evaluation of a person's personal history. Cal. Evid. Code § 1101.

[12] **Judgment** Negligence in suffering default

Judgment Prejudice from judgment

Where there would have been no real prejudice had a set-aside motion been granted, the rule is that a party's negligence in allowing a default judgment to be taken in the first place will be excused on a weak showing. Cal. Civ. Proc. Code § 473.

Witkin Library Reference: 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 191 [Order Denying Relief; Order Reversed.]

****264** Appeal from a judgment of the Superior Court of Orange County, Randall J. Sherman, Judge. Reversed with directions.

Attorneys and Law Firms

Law Offices of Dorie A. Rogers, Dorie A. Rogers and Lisa R. McCall, Orange, for Defendant and Appellant.

Law Office of Frank W. Battaile and Frank W. Battaile for Plaintiff and Respondent.

OPINION

BEDSWORTH, ACTING P. J.

***130** Here is what Code of Civil Procedure [1] section 583.130 says: "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other ****265** disposition." That is not complicated language. No jury instruction defining any of its terms would be necessary if we were submitting it to a panel of non-lawyers. The policy of the state is that the parties to a lawsuit "shall cooperate." Period. Full stop.

Yet the principle the section dictates has somehow become the *Marie Celeste* of California law – a ghost ship reported by a few hardy souls but doubted by most people familiar with the area in which it's been reported. The section's adjuration to civility and cooperation "is a custom, More honor'd in the breach than the observance."[2] In this case, we deal here with more evidence that our profession has come unmoored from its honorable commitment to the ideal expressed in section 583.130, and – in keeping with what has become an unfortunate tradition in California appellate law – we urge a return to the professionalism it represents.

***131** FACTS

From 2011 to 2015, Appellant Attorney Joanna T. Vogel (Vogel) represented plaintiff/respondent Angele Lasalle (Lasalle) in the dissolution of a registered domestic partnership with Minh Tho Si Luu. Lasalle repeatedly failed to provide discovery in that case, and the court defaulted

her as a terminating sanction. She said her failure to provide discovery was caused by Vogel not keeping her informed of discovery orders, so she sued Vogel for legal malpractice.

Vogel was served with the complaint on March 3, 2016. Thirty five days went by. On the 36th day, Thursday April 7, Lasalle's attorney sent Vogel a letter and an email – the content was the same – telling her that the time for a responsive pleading was "past due" and threatening to request the entry of a default against Vogel unless he received a responsive pleading by the close of business the next day, Friday April 8. Our record does not include the time of day on Thursday when either the email was sent or the letter mailed, so we cannot evaluate the chance of the letter reaching Vogel in Friday's post except to say it was slim.

Counsel did not receive any response from Vogel by 3 p.m. the following Monday, April 11. He filed a request for entry of default and emailed a copy to Vogel at 4:05 p.m. That got Vogel's attention and she emailed her request for an extension at 5:22 p.m., but by then the default was a fait accompli.

Vogel acted rather quickly now that her default had been entered. She found an attorney by Friday April 15th,[3] and that attorney had a motion to set aside the default on file a week later. We quote the entirety of Lasalle's declaration in support of the set aside motion in the margin.[4]

**266 *132 Vogel's set-aside motion was made pursuant to those provisions of subdivision (b) of section 473 that commit the matter to the trial court's discretion in cases of "mistake, inadvertence, surprise, or excusable neglect." There was no "falling on the sword" affidavit of fault that might have triggered application of those provisions of section 473 *requiring* a set-aside when an attorney confesses fault.

In opposing relief, respondent's counsel asked the trial court to take judicial notice of state bar disciplinary proceedings against Vogel stemming from two unrelated cases, which had resulted in a stayed suspension of Vogel's license to practice. The court denied the set-aside motion in a minute order filed June 9, 2016, in which the trial judge expressly took judicial notice of Vogel's prior discipline. A year later, a default judgment was entered against Vogel for $ 1 million. She has appealed from both that judgment and the order refusing to set aside the default.

We sympathize with the court below and opposing counsel. We have all encountered dilatory tactics and know how frustrating they can be. But we cannot see this as such a situation, and cannot countenance the way this default was taken, so we reverse the judgment.

DISCUSSION

[1] Three decades ago, our colleagues in the First District, dealing with a case they attributed to a "fit of pique between counsel," addressed this entreaty to California attorneys, "We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel. All too often today we see signs that the practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle." (*Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 641, 255 Cal.Rptr. 18.)

*133 In 1994, the Second District lambasted attorneys who were cluttering up the courts with what were essentially personal spats. In the words of a clearly exasperated Justice Gilbert, "If this case is an example, the term 'civil procedure' is an oxymoron." (*Green v. GTE California* (1994) 29 Cal.App.4th 407, 408, 34 Cal.Rptr.2d 517.)

In 1997, another appellate court urged bench and bar to practice with more civility. "The law should not create an incentive to take the scorched earth, feet-to-the-fire attitude that is all too common in litigation today." (*Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 17, 62 Cal.Rptr.2d 422.)

**267 By 2002, we had lawyers doing and saying things that would have beggared the imagination of the people who taught us how to practice law. We had a lawyer named John Heurlin who wrote to opposing counsel, "I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit." Admonishing counsel to "educate yourself about attorney liens and the work product privilege," Mr. Heurlin closed his letter with the clichéd but always popular, "See you in Court." That and other failures resulted in Mr. Heurlin being sanctioned $ 6,000 for filing a frivolous appeal and referred to the State Bar. Our court

thought publishing the ugly facts of the case, which they did in *DeRose v. Heurlin* (2002) 100 Cal.App.4th 158, 122 Cal.Rptr.2d 630, would get the bar's attention. It didn't.

Almost a decade later, in a case called *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1537, 125 Cal.Rptr.3d 292, the First District tried again. They said, "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. [Citations.] Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive."

Six months later, our court said this, "Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It's time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions." We sanctioned counsel $ 10,000. (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 293, 133 Cal.Rptr.3d 774 (*Kim*).)

This is not an exhaustive catalogue. Were we writing a compendium rather than an opinion, we could include keening from every state, because, ***134** "Incivility in open court infects the process of justice in many ways. It compromises the necessary public trust that the system will produce fair and just results; it negates the perception of professionalism in the legal community, and it erodes respect for all people involved in the process." (*In re Hillis* (Del. 2004) 858 A.2d 317, 324.)

Courts have had to urge counsel to turn down the heat on their litigation zeitgeist far too often. And while the factual scenarios of these cases differ, they are all variations on a theme of incivility that the bench has been decrying for decades, with very little success.

It's gotten so bad the California State Bar amended the oath new attorneys take to add a civility *requirement.* Since 2014, new attorneys have been required to vow to treat opposing counsel with "dignity, courtesy, and integrity."

That was not done here. Dignity, courtesy, and integrity were conspicuously lacking.

We are reluctant to come down too hard on respondent's counsel or the trial court because we think the problem is not so much a personal failure as systemic one. Court and counsel below are merely indicative of the fact practitioners have become inured to this kind of practice. They have heard the mantra so often unthinkingly repeated that, "This is a business," that they have lost sight of the fact the practice of law is *not* a business. It is a profession. And those who practice it carry a concomitantly ****268** greater responsibility than businesspeople.

[2] So what we review in this case is not so much a failure of court and counsel as an insidious decline in the standards of the profession that must be addressed. "The term 'officer of the court,' with all the assumptions of honor and integrity that append to it must not be allowed to lose its significance." (*Kim, supra,* at p. 292, 133 Cal.Rptr.3d 774.) We reverse the order in this case because that significance was overlooked.

[3] **[4]** **[5]** **[6]** An order denying a motion to set aside a default is appealable from the ensuing default judgment. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981, 35 Cal.Rptr.2d 669, 884 P.2d 126 (*Rappleyea*).) We acknowledge the standard of review for an order denying a set aside motion is abuse of discretion. (*Ibid.*) But there is an important distinction in the way that discretion is measured in section 473 cases. The law favors judgments based on the merits, not procedural missteps. Our Supreme Court has repeatedly reminded us that in this area doubts must be resolved *in favor of relief,* with an order denying relief scrutinized more carefully that an order granting it. As ***135** Justice Mosk put it in *Rappleyea,* "Because the law favors disposing of cases on their merits, 'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.' (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233 [211 Cal.Rptr. 416, 695 P.2d 713]; see also *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1136 [17 Cal.Rptr.2d 408].)" (*Id.* at p. 980, 35 Cal.Rptr.2d 669, 884 P.2d 126.)[5]

Warning and notice play a major role in this scrutiny. Six decades ago, when bench and bar conducted themselves as a profession, another appellate court, in language both apropos to our case and indicative of how law ought to be practiced, said, "The quiet speed of plaintiffs' attorney in seeking a default judgment without the knowledge of defendants' counsel is not to be commended." (*Smith v. Los Angeles Bookbinders Union* (1955) 133 Cal.App.2d 486, 500, 284 P.2d 194 (*Bookbinders*).)[6]

[7] In contrast to the stealth and speed condemned in *Bookbinders*, courts and the State Bar emphasize warning and deliberate speed. The State Bar Civility Guidelines deplore the conduct of an attorney who races opposing counsel to the courthouse to enter a default before a responsive pleading can be filed. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 702, 84 Cal.Rptr.3d 351 (*Fasuyi*), quoting section 15 of the California Attorney Guidelines of Civility and Professionalism (2007).) Accordingly, it is now well-acknowledged that an attorney has an *ethical* obligation to warn opposing counsel that the attorney is about to take an adversary's default. (*Id.* at pp. 701-702, 84 Cal.Rptr.3d 351.)

In that regard we heartily endorse the related admonition found in The Rutter Group practice guide, and we note the authors' emphasis on *reasonable time*: "Practice Pointer: If you're representing plaintiff, and have had *any* contact with a **269 lawyer representing defendant, don't even *attempt* to get a default entered without first giving such lawyer *written* notice of your intent to request entry of default, and a *reasonable time* within which defendant's pleading must be filed to prevent your doing so." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) § 5:73, p. 5-19 (rev. #1, 2008) as quoted in *Fasuyi, supra*, 167 Cal.App.4th at p. 702, 84 Cal.Rptr.3d 351.)

*136 To be sure, there is authority to the effect giving any warning at all is an "ethical" obligation as distinct from a "legal" one. The appellate case usually cited these days for this ethical-legal dichotomy is *Bellm v. Bellia* (1984) 150 Cal.App.3d 1036, 1038, 198 Cal.Rptr. 389 (*Bellm*). Indeed, it was the most recent case cited by the trial court's minute order denying Vogel's set aside motion.

Bellm was written at a time when incivility was surfacing as a problem in the legal profession.[7] "Like tennis, the legal profession used to adhere to a strict etiquette that kept the game mannerly. And, like tennis, the law saw its old standards crumble in the 1970s and 1980s. Self-consciously churlish litigators rose on a parallel course with Jimmy Connors and John McEnroe." (Gee & Garner, *The Uncivil Lawyer:* (1996) 15 Rev. Litig. 177, 190.) Thus the majority opinion in *Bellm* lamented the "lack of professional courtesy" in counsel's taking a default without warning (See *Bellm, supra*, 150 Cal.App.3d at p. 1038, 198 Cal.Rptr. 389 ["we decry this lack of professional courtesy"]) but deemed it an ethical issue rather than a legal one and affirmed the trial court's denial of relief. The *Bellm* dissent would have found an abuse of discretion. (*Bellm, supra*, 150 Cal.App.3d at p. 1040, 198 Cal.Rptr. 389 (dis. opn. of Haning J.).)

But *Bellm* was handed down on January 19, 1984. That was only two weeks after section 583.130, quoted above, went into effect. The section obviously could not have been briefed or argued in that case, so the *Bellm* court did not have the benefit of the statute. The statute was passed to curb what the Legislature considered an inappropriate rise in motions to dismiss for lack of prosecution – sometimes brought, like this one, as soon as a time limit was exceeded. As the Law Revision Commission phrased it:

"Over the years the attitude of the courts and the Legislature toward dismissal for lack of prosecution has varied. From around 1900 until the 1920's the dismissal statutes were strictly enforced. Between the 1920's and the 1960's there was a process of liberalization of the statutes to create exceptions and excuses. Beginning in the late 1960's the courts were strict in requiring dismissal. In 1969, an effort was made in the Legislature to curb discretionary court dismissals, but ended in authority for the Judicial Council to provide a procedure for dismissal. In 1970, the courts brought an abrupt halt to strict construction of dismissal statutes and began an era of liberal allowance of excuses that continued to the early 1980's. The judicial attitude in the latter time was stated by the Supreme Court: 'Although a defendant is entitled to the weight of the policy underlying the dismissal statute, which seeks to prevent unreasonable delays in litigation, the policy is less powerful than that which seeks to dispose

of litigation on the merits rather than on *137 procedural grounds.' " (*Wheeler v. Payless Super Drug Stores* (1987) 193 Cal.App.3d 1292, 1295, 238 Cal.Rptr. 885, quoting **270 *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566, 86 Cal.Rptr. 65, 468 P.2d 193; see also *Hocharian v. Superior Court* (1981) 28 Cal.3d 714, 170 Cal.Rptr. 790, 621 P.2d 829.)

So to the extent it was possible for a party seeking a default with unseemly haste to commit an *ethical* breach without creating a *legal* issue, that distinction was erased by section 583.130. The ethical obligation to warn opposing counsel of an intent to take a default is now reinforced by a statutory policy that all parties "cooperate in bringing the action to trial or other disposition." (§ 583.130.) Quiet speed and unreasonable deadlines do not qualify as "cooperation" and cannot be accepted by the courts.

We cannot accept it because it is contrary to legislative policy and because it is destructive of the legal system and the people who work within it. Allowing it to flourish has been counterproductive and corrosive. First, it has led to increased litigation. Unintended defaults inevitably result in motions to overturn them (this case, exemplary in no other way, demonstrates well the resources consumed by such motions) or lawsuits against the defaulted party's attorney (who thought enough of his client's position to agree to represent him and then bungled it). There are plenty of demands on our legal resources without adding such matters.

But worse than that, it forces practitioners to sail between Scylla and Charybdis. They are torn between the civility we teach in law schools, require in their oath, and legislate in statutes like section 583.130, and their obligation to represent their client as effectively as possible. We ask too much of people with families and mortgages – not to mention ex-spouses who fail to make tax and mortgage payments – when we ask them to choose "dignity, courtesy, and integrity" over easy "fish in a barrel" victories that are perceived to have statutory support. We owe ourselves an easier choice, and the legislature has given it to us in section 583.130.

[8] With that in mind, we conclude that by standards now applicable to such motions, the trial judge here abused his discretion in not setting aside the default. Several factors combine to convince us of that.

The first is the use of email to give "warning." Email has many things to recommend it; reliability is not one of them. Between the ease of mistaken address on the sender's end and the arcane vagaries of spam filters on the recipient's end, email is ill-suited for a communication on which a million *138 dollar lawsuit may hinge. [8] A busy calendar, an overfull in-box, a careless autocorrect, even a clumsy keystroke resulting in a "delete" command can result in a speedy communication being merely a failed one.

[9] We all learned in law school that due process requires not just notice, but notice reasonably calculated to *reach* the object of the notice. (See *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 318, 70 S.Ct. 652, 94 L.Ed. 865.) While there is no due process problem in the case before us now (Vogel has not complained she wasn't actually served), emails are a lousy medium with which to warn opposing counsel that a default is about to be taken. We find it significant that by law emails are insufficient to serve notices on counsel in an ongoing case without prior agreement and written confirmation. (§§ 1013, subd. (e); 1010.6, subd. (a)(2)(A)(ii); Cal. Rules of Court, rule 2.251(b).)

**271 Indeed, the sheer ephemerality of emails poses unacceptable dangers for issues as important as whether an *entire case* will be decided by default and not on the merits. While some emails seem to live on for years despite efforts to bleach them out, others have the half-life of a neutrino. We ourselves have learned the hard way that spam filters can ambush important, non-advertising messages from lawyers who have an important legal purpose and keep them from reaching their intended destination – us. We have, on occasion, had to reschedule oral arguments because notices to counsel of oral argument dates and times sent by email got caught in spam filters and did not reach those counsel, or their requests for accommodation did not reach us.

The choice of email to announce an impending default seems to us hardly distinguishable from stealth. And since the other course adopted by respondent's trial attorney was mailing a letter on Thursday in which he demanded a response by Friday, it is difficult to see this as a genuine warning – especially when 19th century technology – the telephone – was easily available and orders of magnitude more certain.

The second factor we consider is the short-fuse deadline given by respondent's counsel. It was *unreasonably* short. It set Vogel up to have her default taken immediately. "[T]he quiet taking of default on the beginning of the first day

on which defendant's answer was delinquent was the sort of professional discourtesy which, under [*Bookbinders*] justified vacating the default." (*Robinson v. Varela* (1977) 67 Cal.App.3d 611, 616, 136 Cal.Rptr. 783 (*Robinson*).)

[10] The third factor is the total absence of prejudice to Lasalle from any set-aside, given the relatively short time between respondent seeking the *139 default and Vogel asking to be relieved from it. "When evaluating a motion to set aside a default judgment on equitable grounds, the 'court must weigh the reasonableness of the conduct of the moving party in light of the extent of the prejudice to the responding party.' " (*Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, 1248-1249, 240 Cal.Rptr.3d 900.) Setting aside *this* default would have involved little wasted time, and the de minimis expenses incurred could have been easily recompensed.

The fourth factor is the unusual nature of the malpractice claim in this case. Some cases are suited for defaults: An impecunious debtor who is sued for an unquestionably meritorious debt may very well make a rational decision not to spend good money after bad by contesting the case. (See *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1751, 33 Cal.Rptr.2d 391 [discussing dynamics bearing on whether a defendant might elect to default a given claim].) But this legal malpractice action covering the entirety of a family law action lies at the opposite end of the spectrum.

Because of the facts alleged in the complaint – namely that Vogel had been responsible for losing Lasalle's *entire* dissolution case – Lasalle's damages called for litigation of multiple items of property characterization, credits, reimbursement claims, and perhaps even claims for support. (See *d'Elia v. d'Elia* (1997) 58 Cal.App.4th 415, 418, fn. 2, 68 Cal.Rptr.2d 324 ["every item of marital property presents a host of challenging issues"].) This means the malpractice claim here was going to require a trial within a trial about some complex issues indeed. (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241, 135 Cal.Rptr.2d 629, 70 P.3d 1046 [plaintiff must prove that "*but for* the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in **272 which the malpractice allegedly occurred."].) That's pretty much the opposite of simple debt collection.

A fifth factor favoring a set-aside here was the presence of a plainly meritorious defense to at least part of Lasalle's default judgment. That judgment eventually included emotional distress damages of $ 100,000. Those damages are contrary to law. In *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1038-1039, 13 Cal.Rptr.2d 133, this court squarely held that emotional distress damages are not recoverable in an action for family law legal malpractice. Even if we were not directing the trial court to set aside the default, we would have to reduce the judgment by at least this amount as contrary to law, and its inclusion only underscores the impossibility of respondent's 24-hour deadline for answering the complaint.

[11] Next, there was the trial court's taking judicial notice of, and reliance on, Vogel's two previous instances of discipline for not having properly communicated with clients on previous cases. Evidence Code section 1101 *140 represents the Legislature's general disapproval of the use of specific instances of a person's character to establish some bad act. We note the statute is not limited to criminal cases by its terms,[9] though it usually shows up in criminal cases. (See *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1176, 214 Cal.Rptr.3d 467 ["The purpose of this evidentiary rule 'is to assure that a defendant is tried upon the crime charged and is not tried upon an antisocial history.' [Citation.]".) Nonetheless, the point is the same: judicial decisions should fit the facts of a case and not be based on some general evaluation of a person's personal history. The fact Vogel had failed to comply with standards of professional conduct in the past should not have colored the determination of whether she deserved an extension in this case.

And finally, we are disappointed that Vogel's explanation of her botched reply in this case was not considered adequate. A single mother who is juggling the inevitable pressures of that role and a caseload of family law matters, and has just learned that her ex-has failed to pay the property taxes or make the house payment – thus, ironically, throwing those into default – deserves some consideration.

To be sure, Vogel's declaration in support of her set aside might have been more polished – but then again she had very little time to prepare it. As we have noted, one of the considerations in a section 473 motion is how much time has elapsed since the default. The clock was ticking, and the obligations noted in the last paragraph were not about to disappear.

[12] In a case like this one, where there would have been no real prejudice had the set-aside motion been granted, the rule is that a party's negligence in allowing a default to be taken in the first place "will be excused on a *weak showing*." (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 740, 216 Cal.Rptr. 300, italics added.) Vogel's declaration crossed that threshold.

We do not hold that every section 473 motion supported by a colorable declaration must be granted. Since every section 473 motion must be evaluated on its own facts, we can hold only that *this one* should ****273** have been granted. As we have said, Vogel was notified by unsatisfactory means of an unreasonably short deadline (just being out of the office for one day – for example, *on another case* – would have prevented her from meeting it), and ***141** she had significant family emergencies of her own, including an urgent need to take care of taxes and unpaid mortgage payments lest she lose her home. *Her* neglect was excusable. (See *Robinson, supra*, 67 Cal.App.3d at p. 616, 136 Cal.Rptr. 783 [noting short period of time to respond, press of business, limited office hours during a holiday period and defense counsel's preoccupation with other litigated matters made failure to timely file an answer "excusable"].) We hope the next attorney in these straits will not have such a compelling set of facts to offer ... and that opposing counsel will act with "dignity, courtesy, and integrity."

CONCLUSION AND DISPOSITION

Supreme Court Chief Justice Warren Burger long ago observed, "[L]awyers who know how to think but have not learned how to behave are a menace and a liability ... to the administration of justice.... [¶] ... [T]he necessity for civility is relevant to lawyers because they are the living exemplars – and thus teachers – every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best." (Burger, Address to the American Law Institute, 1971, 52 F.R.D. 211, 215.) In recognition of this fact, section 583.130 says it is the policy of this state that "all parties shall cooperate in bringing the action to trial or other disposition." Attorneys who do not do so are practicing in contravention of the policy of the state and menacing the future of the profession.

The judgment is reversed. Appellant will recover her costs on appeal.

WE CONCUR:

MOORE, J.

IKOLA, J.

All Citations

36 Cal.App.5th 127, 248 Cal.Rptr.3d 263, 19 Cal. Daily Op. Serv. 5414, 2019 Daily Journal D.A.R. 5093

Footnotes

1 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

2 Hamlet, Act I, Scene 4, ll. 15-16.

3 It took Vogel four days because she initially contacted an attorney who had just decided to represent one of the codefendants – other attorneys who had represented Lasalle, but are not parties to this appeal.

4 "I am an attorney at law, and the defendant in this matter. [¶] When I was served with the summons and complaint, I was in the middle of a number of family law matters in court as the attorney. [¶] I was also involved in my own divorce, wherein I had just discovered my husband had failed to pay the taxes on our property, and it had gone into default. Also he failed to pay the mortgage on the family residence and it went into default. [¶] I received the summons and complaint and the discovery and had met with an attorney to represent me. I then learned that the lawyer had just associated with one of the other defendants in this matter. [¶] I therefore, determined to find a new attorney and contacted the plaintiff's attorney to request a brief extension to respond to the complaint. While waiting to hear back and without having the courtesy of

the extension, I received the notice of default. [¶] I was served with discovery before I even answered the complaint, and had begun to work on that as well. [¶] I am a single mother and between taking care of the family, the practice of law, and trying to revive [sic] the files of from the plaintiff, I did fail to timely file my answer. [¶] As soon as I could, I contacted [the attorney who filed the motion] and retained him to represent me. I provided for him the summons and complaint, but have yet to gather the files together to answer what appears to be an unverified complaint. [¶] I have attached hereto my proposed answer. [¶] I state the above facts to be true and so state under penalty of perjury this 16th day of April in Fullerton, California."

Vogel's counsel at the time is not Vogel's appellant's counsel on appeal.

5 Indeed, some cases go so far as to say " 'very slight evidence will be required to justify a court in setting aside the default.' [Citation.]" (*Miller v. City of Hermosa Beach*, supra, at p. 1136, 17 Cal.Rptr.2d 408.) More on this point below.

6 Disapproved on other grounds in *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 551, 343 P.2d 36.

7 The incivility lamentations we quoted earlier began in 1989, although this case certainly falls into the voice-crying-in-the-desert type of entreaty that grew louder a few years later.

8 The default judgment obtained against Lasalle by respondent was exactly $ 1,000,000.

9 Subdivision (a) of which provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." By their terms all four statutory exceptions are limited to criminal actions.

End of Document

RULE OF LAW IN TIMES OF MAJOR DISASTER

AUGUST 2007

AMERICAN BAR ASSOCIATION
RULE OF LAW IN TIMES OF MAJOR DISASTER

The twin blows of the September 11, 2001, terrorist attack and the August 29-30, 2005, devastation caused by Hurricane Katrina, clearly demonstrated that major disasters pose a multitude of challenges to the people and governments of the United States. The challenges not only threaten the lives of Americans but the legal fabric that binds our society together. The Section of Litigation of the American Bar Association convened a Task Force to evaluate whether the legal system operated effectively in these situations and whether changes could be recommended that would more completely insure adherence to the rule of law. Neither the Task Force nor the Section of Litigation considers ourselves to be experts in disaster planning. An array of professionals, with substantial talent and expertise, has contributed valuable insights on how governments, businesses and families should prepare to respond to, and overcome, a major disaster.

On the other hand, the American Bar Association is in a unique position to evaluate the ways in which the legal system can be challenged in times of major disaster, to identify core values of the rule of law which should be respected and promoted, even in stressful times, and to promulgate principles that preserve the rule of law. Key to this process is the notion of advance planning. Much as a municipal government cannot develop an evacuation plan in the midst of a chemical attack, the legal system cannot create a plan to insure the safety of incarcerated arrestees when all the jail personnel have been stricken with avian flu.

The September 11, 2001, terrorist attack and Hurricane Katrina imposed tremendous pressure on the rule of law and, in the case of Hurricane Katrina, the justice system literally collapsed. In the opinion of professionals whose responsibility it is to predict such matters, this country will face other events equally challenging. Some will be man-made; some will be natural. What is believed to be certain is that the consequences will be disastrous if the country has not adequately planned. Planning, preparation and training are key, not just to our survival but to insuring that the values we cherish are maintained, even in trying times. Below are twelve principles. They are the product of a lengthy process spearheaded by the Section of Litigation. Each principle is supplemented in this report with amplifying language, designed to explicate the core value and purpose of the Principle, and to make plain the manner in which the Principle may be implemented so as to reinforce the rule of law.

It is the purpose of these Principles to preserve the rule of law in times of major disaster. The Principles are intended to help insure that justice will continue to be dispensed despite the damage and disruption caused by a major disaster. The Principles are also intended to foster reliance on legal mechanisms when the effort is undertaken to restore a disaster-torn community through programs designed to compensate for loss or render assistance in recovery.

In America the executive and legislative branches of government are vested with the authority and charged with the responsibility to declare that a major disaster has occurred, to design a response to it and to provide the resources necessary to carry out that response. Once these steps have been taken, it is the responsibility of the courts, the organized bar, prosecutors, public defenders, providers of legal services to the poor and individual lawyers to insure that society's response conforms with the dictates of law and fairness. It is only when the rule of law is satisfied that the effectiveness and legitimacy of restoration can be assured.

Each Principle is followed by commentary. The commentary reflects ways in which the Principle can be implemented. Thus, it is the intention of the drafters that the accompanying commentary be used as a guideline to inspire implementation of these Principles.

Principle 1

The rule of law must be preserved when a major disaster occurs.

These Principles are intended to insure that the rule of law is preserved in times of major disaster.

A major disaster is any adverse occurrence, by whatever term described, that is designated as such by national or state authorities pursuant to existing law or is so recognized pursuant to action of Congress or a state legislature.

Principle 2

The preservation of the rule of law requires proactive planning, preparation and training before a major disaster strikes.

It is the duty of all legal organizations – the courts, the organized bar, prosecutors, public defenders, providers of legal services to the poor, individual lawyers, police, and prison and jail officials – to undertake adequate planning and preparation to insure that the legal systems, both civil and criminal, can continue to dispense justice in times of major disaster. To that end all those involved in the dispensing of justice should prepare and adopt appropriate emergency plans. Such plans must be coupled with periodic training exercises to insure effective coordination and cooperation within the legal system in times of major disaster. In effectuating this principle, collaborative efforts are encouraged.

Principle 3

All those involved in the justice system must work collaboratively to assure the ongoing integrity of the system in times of major disaster.

In planning, preparing and training for a major disaster at least eight steps should be undertaken to insure the ongoing integrity of the legal system:

(i) The courts must plan, prepare and practice the deployment of mechanisms to insure that presiding judges or their designees are ready and empowered to direct the operations of the courts in times of major disaster without significant interruption. Court "holidays" or suspension of operations should be a disfavored response.

(ii) Those involved in the investigation and prosecution of crime and in the dispensing of justice must plan, prepare and practice appropriate steps to assure the maintenance and integrity of legal records and evidentiary materials. Where such records or materials have been destroyed or damaged due to negligence or reckless disregard, courts should be authorized to impose sanctions if circumstances warrant.

(iii) The courts must plan, prepare and practice the utilization of alternative physical facilities to conduct judicial business. Most particularly the sharing of facilities by courts with different jurisdictional authority should be authorized and planned for.

(iv) The courts must plan, prepare and practice for the need to share or lend judicial personnel especially between courts with different jurisdictional authority. Authorization to undertake such action should be the subject of enabling legislation where necessary.

(v) The courts must plan, prepare and practice for the need to share and lend court protective personnel especially between courts with different jurisdictional authority. Authorization to undertake such action should be the subject of enabling legislation where necessary.

(vi) Prison and jail officials and the courts must plan, prepare and practice for the need to share incarceration space. Authorization to undertake such action should be the subject of enabling legislation where necessary.

(vii) Those involved in the dispensing of justice must plan, prepare and practice appropriate steps to insure that an adequate number of public and private attorneys are available to carry out the adjudicatory activities of the justice system. Use of such methods as the admission of attorneys *pro hac vice* should be considered along with responses relying on existing resources within the jurisdiction.

(viii) Those involved in the dispensing of justice must make information available regarding the status of pending matters as soon and as often as practicable to lawyers, clients, families of clients, the press and the public.

Principle 4

In times of major disaster the requirements of the Constitution must be respected, particularly with respect to criminal prosecutions.

The following points are essential to the operation of the justice system in times of major disaster:

(i) Major disasters do not abrogate the Constitution. Public authorities are obliged, even in times of major disaster, to provide criminal offenders, accused individuals and others in custody with humane treatment and adjudicative due process.

(ii) Public authorities charged with the operation of the criminal justice system must plan, prepare and practice for major disasters. Effective law enforcement must continue at all times. Essential to that goal is the establishment of methods to insure sound and continuous leadership of police, prosecutorial, defender and judicial personnel.

(iii) Mass arrests must be justified and mass prosecutions are never acceptable.

(iv) In the event of a major disaster, public authorities must continue to process those accused or convicted of misdemeanors in a prompt and orderly manner consistent with the requirements of the Constitution. Where such processing is rendered impracticable commutation should be the preferred response.

(v) In the event of a major disaster, the criminal courts must continue to operate and must respect the due process rights of criminal offenders and accused individuals. When resources are in critically short supply triage strategies for their use should be implemented with the most serious violent felony charges receiving the highest priority.

(vi) In the event of a major disaster, criminal custodial and detention institutions must continue to insure the safety of inmates and the security of the public. In such circumstances it is also incumbent upon custodial institutions to facilitate communication between inmates and their immediate families.

(vii) Deviation from the requirements of the Constitution may only be permitted when martial law has been lawfully invoked. In such circumstances deviation from rights guaranteed by the Constitution should be kept to an absolute minimum and continued only for so long as necessary to insure the restoration of order.

Principle 5

Where the acts or omissions of individuals or organizations result in a major disaster, or exacerbate a natural major disaster, the executive and legislative branches of federal or state government should consider establishing an independent commission of inquiry to examine the reasons for and consequences of such acts or omissions.

The commission should have subpoena power, should hold public hearings and, within one year from the date of the a major disaster, prepare and publish a public report of its findings, including methods of improving legal and other procedures in the event of future major disasters.

Principle 6

To the fullest extent permitted by law the persons affected by a major disaster should be compensated for their losses through insurance coverage and the operation of the judicial system.

Public authorities should, to the extent feasible, promote the availability and effectiveness of private insurance to provide compensation for losses suffered pursuant to a major disaster. Steps that should be considered include: (a) development of the broadest possible set of private insurance programs to address the widest array of potential disastrous events; (b) active encouragement of individuals to participate in such programs; (c) provision of assistance to those who cannot, on their own, afford to participate in such programs; (d) enforcement of measures to secure insurer solvency and effective claims handling practices; (e) development of joint public-private insurance programs where private programs cannot be maintained independently; and (f) reduction in government compensation that is made available to persons affected by a major disaster for those affected persons who decline, without sufficient cause, available insurance coverage or undertake unreasonable risks with respect to exposure to major disasters.

Public authorities should, to the extent feasible, promote the availability and effectiveness of judicial remedies that, pursuant to existing law, hold persons or entities accountable for acts or omissions that cause or exacerbate a major disaster. To improve judicial effectiveness in such cases courts should be granted authority: (a) to concentrate decision-making power in a single or small group of judges consistent with the right to jury trial; (b) to locate the proceedings in a single court or limited number of courts; (c) to designate a single set of legal principles to govern consistent with due process and applicable law; (d) to requisition adequate resources and personnel; (e) to utilize reasonable latitude in fact-finding consistent with the right to jury trial; (f) to take such steps as will streamline and speed the adjudicatory process; and (g) to recognize the propriety of pro rata and other forms of partial awards where necessary. Authorization to undertake such steps should be the subject of enabling legislation.

Principle 7

Government payment of compensation or additional assistance to persons affected by a major disaster should be considered when government is either implicated in the major disaster or public authorities determine that it is in the public interest to do so. Principles of equal treatment, due process and transparency should govern the distribution of compensation and disaster assistance.

In cases where neither insurance coverage nor judicial action is likely to provide reimbursement for losses to persons affected by a major disaster, public authorities should consider providing reasonable compensation or additional disaster assistance to individual persons affected by a major disaster for losses when public authorities determine that it is in the public interest to do so, for example, where public authorities are responsible, through their action or inaction, for the disaster event or where public authorities determine that a remedy traditionally available either through the operation of the judicial system or otherwise should not be made available or should be severely curtailed. In such cases public authorities may provide for alternatives to judicial action to determine eligibility and fix awards. Public authorities should also be free to offer to persons affected by a major disaster, on a voluntary basis, a fair alternative to judicial action for the resolution of claims or the award of assistance.

In cases where public authorities determine to provide compensation to persons affected by a major disaster, priority should be given to providing compensation as follows: first, for physical injury and death; second, for mental suffering or property damage; and third, for economic loss claims. In cases where public authorities determine that public compensation to individual persons affected by a major disaster should be awarded with respect to death claims, it should be presumed that all such persons should be provided equal awards unless they have been deprived of otherwise available judicial remedies, or have had access to such remedies severely curtailed by legislative action, in which case awards should be rendered to account for such deprivation or curtailment.

To the extent feasible, the size and basis for awards should be specified in advance. In cases where public authorities determine that public compensation to individual persons affected by a major disaster should be awarded, claimants seeking such awards should be permitted as expeditious an administrative proceeding as circumstances allow. Hearings should be presided over by a neutral hearing officer. Claimants should be allowed to present relevant documentation and statements. Determinations made should be set forth in written decisions with appropriate explanations. Claimants should be entitled to have a negative determination reviewed, either by a court or meaningful alternative review process. During the course of proceedings, claimants should be treated with dignity and respect.

Principle 8

Government assistance authorized by law should be distributed in an expeditious and efficient manner consistent with principles of equal treatment, due process and transparency.

Public authorities are responsible for insuring that assistance authorized by law both of a regular (e.g. welfare payments) and of an emergency nature (e.g. FEMA assistance, including both mass care--food kitchens, emergency shelters, emergency medical care--and individual and household assistance) is provided to persons affected by a major disaster in the most efficient and expeditious manner. Emergency assistance should be made available to all in need regardless of immigration status.

Principle 9

Charitable assistance to persons affected by a major disaster should be encouraged and benefits to persons affected by a major disaster should be maximized.

Public authorities should take steps, such as negotiation of pre-disaster memoranda of understanding addressing credentialing, licensing, and logistical support and coordination, that allow the effective (but coordinated) operation of charitable organizations in dealing with a major disaster.

Principle 10

Federal, state, territorial, tribal and local governments should work with each other and with the private sector to plan, prepare and train for a major disaster. Such efforts should focus on means to preserve order, protect vulnerable populations, insure adequate communications and assure continuity of operations of business and government.

Distinct from compensation and assistance, there are a range of institutional steps that public authorities should take in response to a major disaster. These include the following:

(i) Federal response to a major disaster should be treated as a separate and distinct task from protecting the security of the United States.

(ii) Federal-state-territorial-tribal-local coordination is critical. State, territorial, tribal and local officials are on the scene and have critical local knowledge; the federal government has expertise, resources, and "surge" capacity. In advance of any a major disaster, the federal, state, territorial, tribal and local governments should establish a clear allocation of response obligations in the event of a major disaster.

(iii) Disaster risk assessment and planning should be integrated into

government and private infrastructure and land use decisions. Environmental assessments should include consideration of disaster scenarios and discuss mitigation measures.

(iv) Standing government procedures should be in place to assess prevention and response to all major disasters, rather than relying on *ad hoc* mechanisms.

(v) Disaster plans should be specific and coupled with emergency exercises and training programs.

(vi) States should have in place a disaster recovery agency to address housing needs and other post-disaster reconstruction issues without delay.

(vii) The maintenance of order is essential. To this end law enforcement should remain first in the hands of state and local police, then the state national guard, then law enforcement and national guard units from other states supplied under mutual aid agreements, and federal law enforcement resources. Consistent with the Posse Comitatus Act, federal military personnel should be used for law enforcement only if these responses are insufficient and only after the President has made the findings required by law.

(viii) Special attention should be given to the needs of vulnerable populations in planning disaster responses. Characteristics requiring special consideration include poverty, age (including both the elderly and children) and disability.

(ix) Children should be zealously protected. Actions affecting children should conform to the following principles: (a) that maintaining the integrity of the family is in the best interests of children unless clearly demonstrated to be otherwise; (b) that children are presumptively entitled to and eligible for benefits and a major disaster-specific relief; and (c) that the health, education and safety of children in state custody is of paramount concern.

(x) Legislation should insure that deadlines, whether found in state or federal rules or statutes or in private contracts such as insurance, can be modified or tolled in the event of a major disaster.

(xi) Legislatures, the executive branch and the courts should have standing committees on disaster risk or dedicated staff positions to insure that these risks receive on-going attention.

(xii) States should review regulatory statutes to insure that they contain appropriate waiver provisions for conditions resulting from a major disaster.

(xiii) Since much infrastructure (including telecommunications, media, and power and transportation systems) is in private hands, private providers should, in case of a major disaster, be given assistance where appropriate to facilitate restoration and maintenance of essential services.

(xiv) Maintaining or restoring means of communication in the wake of a major disaster is critical for preservation of the rule of law and must be a top priority in emergency response.

(xv) Planning should include a risk assessment of various natural and man-

made threats that could cause a disaster and implementation of a program to minimize such risks, with the goal of assuring continuity of government operations following a disaster. Governments should also educate the private sector on ways businesses can assess their own risk and implement disaster recovery and business continuity programs, and encourage the private sector to implement such programs.

Principle 11

To the extent feasible, attorneys should provide emergency free legal services to those affected by a major disaster to address their unmet basic legal needs and should provide ongoing pro bono services to those who are not able to obtain or pay for services on a fee basis.

To the extent feasible, attorneys representing persons affected by a major disaster who claim compensation or assistance because of losses resulting from the major disaster should provide representation either without fee or on a reduced fee basis. In cases where fees are awarded by courts, the fees should be donated to charitable organizations providing assistance to persons affected by the major disaster.

Principle 12

State, local and territorial Bars should educate their members to plan, prepare and train for a major disaster, including information enabling attorneys to assure the continuity of their operations following a disaster, while maintaining the confidentiality and security of their clients' paper and electronic files and records.

Background on the Principles

These Principles are the product of a collaborative effort, led by the Section of Litigation. In the summer of 2006, Chair of the Section of Litigation, Kim Askew, established the Task Force on the Rule of Law in Time of Calamity. Its assignment was to fashion a set of principles to help insure the preservation of the rule of law when a major disaster strikes – a matter the American Bar Association had not addressed in prior standards or principles.

To that end the Task Force commissioned a series of white papers by leading experts in relevant fields. Those experts included:

- Stephen Sugarman, Roger J. Traynor, Chair at the University of California, Berkeley School of Law (a leading torts scholar)
- Mark Geistfeld , Crystal Eastman, Professor at New York University School of Law (an outstanding insurance law scholar)
- Professor Tom Tyler of the Psychology Department at New York University (the leading academic psychologist in the country regarding the psychological impact of different legal processes)
- Anthony Sebok, Centennial Professor at Brooklyn Law School (the author of a leading torts text)
- Daniel Farber, Sato Sho Professor and Director of the Environmental Law Program at the University of California, Berkeley School of Law (co-author, along with Jim Chen, of DISASTERS AND THE LAW, the leading legal text in the field)
- Jim Chen, Dean and Professor of Law at the University of Louisville School of Law (co-author, along with Daniel Farber, of DISASTERS AND THE LAW, the leading legal text in the field)
- Professor Tracey Meares of Yale Law School (a leading criminal law and procedure scholar)
- Professor Margo Schlanger of Washington University School of Law (a leading scholar regarding empirical assessment of the legal system)

After the white papers were prepared and circulated, The Section held a symposium in Chicago on December 1-2, 2006. The objective of the symposium was to prepare a preliminary draft set of major disaster principles. To that end, the Task Force's co-chairs, Stephan Landsman, Robert A. Clifford Professor of Tort Law and Social Policy at DePaul University and Professor and Associate Dean JoAnne Epps of

Temple University Beasley School of Law submitted a discussion draft. This was augmented during the symposium by a number of contributions from the white paper drafters. The resulting material was reviewed by the drafting scholars and a distinguished group of advisors to the project. These included Federal District Judge Jack Weinstein (a leading member of both academia and the federal bench with particular expertise in mass litigation), Federal District Judge Alvin Hellerstein (a jurist particularly well versed in matters relating to 9/11), Kenneth Feinberg (Special Master of the 9/11 Compensation Fund), Professor Robert Rabin of Stanford Law School (a leading torts scholar), Professor Francis McGovern of Duke University School of Law (a leading expert on mass litigation), Professor Marc Galanter of the University of Wisconsin Law School (an outstanding scholar with respect to the legal profession) and a number of leaders from the Section of Litigation.

After the December symposium a redrafted set of principles was prepared. These were presented and discussed at the January 18-20, 2007, leadership meeting of the Section of Litigation in Charleston, South Carolina. On January 19, Kenneth Feinberg addressed the leadership, discussing and defending the draft principles. He was joined in these discussions by Professor Stephen Saltzburg of George Washington University Law School as well as Professors Epps and Landsman. Out of these discussions and the contributions of a number of members of the Section of Litigation leadership, including Council Members John Barkett and Irwin Warren, came the redrafted Principles included in the Recommendation. They reflect the best thinking of a distinguished team of scholars, an outstanding group of advisors and the leaders of the Section of Litigation.

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2012-184

ISSUE: May an attorney maintain a virtual law office practice ("VLO") and still comply with her ethical obligations, if the communications with the client, and storage of and access to all information about the client's matter, are all conducted solely through the internet using the secure computer servers of a third-party vendor (i.e., "cloud computing")?

DIGEST: As it pertains to the use of technology, the Business and Professions Code and the Rules of Professional Conduct do not impose greater or different duties upon a VLO practitioner operating in the cloud than they do upon an attorney practicing in a traditional law office. While an attorney may maintain a VLO in the cloud where communications with the client, and storage of and access to all information about the client's matter, are conducted solely via the internet using a third-party's secure servers, Attorney may be required to take additional steps to confirm that she is fulfilling her ethical obligations due to distinct issues raised by the hypothetical VLO and its operation. Failure of Attorney to comply with all ethical obligations relevant to these issues will preclude the operation of a VLO in the cloud as described herein.

AUTHORITIES INTERPRETED: Rules 1-100, 1-300, 1-310, 3-100, 3-110, 3-310, 3-400, 3-500, 3-700, and 4-200 of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code section 6068, subdivisions (e), (m), and (n).

Business and Professions Code sections 6125, 6126, 6127, 6147, and 6148.

California Rules of Court, Rules 3.35-3.37 and 5.70-5.71.[2/]

STATEMENT OF FACTS

Attorney, a California licensed solo practitioner with a general law practice, wishes to establish a virtual law office (VLO).[3/] Attorney's target clients are low and moderate-income individuals who have access to the internet, looking for legal assistance in business transactions, family law, and probate law.

In her VLO, Attorney intends to communicate with her clients through a secure internet portal created on her website, and to both store, and access, all information regarding client matters through that portal. The information on the secure internet portal will be password protected and encrypted. Attorney intends to assign a separate password to each client after that client has registered and signed Attorney's standard engagement letter so that a particular client can access information relating to his or her matter only. Attorney plans not to communicate with her clients by phone, e-mail or in person, but to limit communications solely to the internet portal through a function that allows attorney and client to send communications directly to each other within the internet portal.

Attorney asks whether her contemplated VLO practice would satisfy all applicable ethics rules.

1/ Unless otherwise noted, all rule references are to the Rules of Professional Conduct of the State Bar of California.

2/ Rules 5.70-5.71 repealed effective January 1, 2013 is revised and renumbered as Rule 5.425 adopted effective January 1, 2013.

3/ For a general discussion of virtual law practice, see Stephanie L. Kimbro, ABA Law Practice Management Section, "Virtual Law Practice" (2010) (ISBN 978-1-60442-828-5).

DISCUSSION

As a result of ever increasing innovations in technology, the world has moved significantly toward internet communications – through email, chats, blogs, social networking sites, and message boards. The legal services industry has not been untouched by these innovations and the use of technology, including the internet, is becoming more common, and even necessary, in the provision of legal services. Consistent with this trend, and with the benefits of convenience, flexibility, and cost reduction, the provision of legal services via a VLO has started to emerge as an increasingly viable vehicle in which to deliver accessible and affordable legal services to the general public.

The VLO, also variously known as Digital Law, Online Law, eLawyering and Lawfirm 2.0, may take many different forms. For the purposes of this opinion, "VLO" shall refer to the delivery of, and payment for,[4/] legal services exclusively, or nearly exclusively, through the law firm's portal on a website, where all of the processing, communication, software utilization, and computing will be internet-based. In the hypothetical VLO discussed in this opinion, a client's communication with the law firm, as well as his access to the legal services provided, is supplied by the firm through a secure internet portal provided by a third-party internet-based vendor, accessible by the client with a unique user name and access code specific to the client's particular matter only. The lawyer and client may not ever physically meet or even speak on a telephone.

The Committee recognizes that although VLOs exist and operate only through the use of relatively new technology, the use of such technology itself is not unique to this VLO; rather, many lawyers operating in traditional non-VLOs utilize some or many aspects of this same technology. The California Business and Professions Code and the Rules of Professional Conduct do not impose greater or different duties upon a VLO practitioner than they do upon a traditional non-VLO practitioner as it pertains to the use of technology. This opinion focuses on issues that the Committee believes are particularly implicated by the VLO's cloud-based nature described herein, although many of the same issues may arise in any law practice.[5/] For a fuller discussion on the analysis that the Committee believes an attorney should undertake when considering use of a particular form of technology, we refer the reader to California State Bar Formal Opinion No. 2010-179.

1. Attorney's Duty of Confidentiality in Our Hypothetical VLO Is the Same as That of an Attorney in a Traditional Non-VLO, But Requires Some Specific Due Diligence.

A lawyer has a duty to "maintain inviolate the confidence, and at every peril to himself or herself, preserve the secrets of his or her client." (Bus. & Prof. Code, § 6068(e)(1)). With certain limited exceptions, the client's confidential information may not be revealed absent the informed written consent of the client. (Rule 3-100(A); Cal. State Bar Formal Opn. No. 2010-179.)

[4/] Attorneys accepting credit card payment should consult Cal. State Bar Formal Opn. No. 2007-172.

[5/] The Committee recognizes that the fact situation presented in this opinion may raise an issue regarding the unauthorized practice of law – particularly where prospective clients from anywhere in the country (or, indeed, the world) easily may contact Attorney through her internet site. Rule 1-300(A) states that "[a] member shall not aid any person or entity in the unauthorized practice of law." However, this opinion is not intended to address or opine on the issue of the unauthorized practice of law. Regarding activities undertaken by an individual who is not an active member of the California State Bar, members should consider Business and Professions Code sections 6125-6127. Members should also consider rule 1-300 (Unauthorized Practice of Law) and rule 1-310 (Forming a Partnership with a Non-Lawyer). Regarding what constitutes the practice of law in California, members should consider the following cases: *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 661]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corporation* (1922) 189 Cal. 531, 535; *Birbrower, Montalbano, Condon & Frank v. Superior Ct.* (1998) 17 Cal.4th 119 [70 Cal.Rptr.2d 304]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960]. Members of the State Bar of California should also consider how their VLO services might implicate rules and regulations regarding the unauthorized practice of law of other jurisdictions outside of California, if applicable.

In California State Bar Formal Opinion No. 2010-179, this Committee discussed the ethical confidentiality and competency concerns of a practitioner using technology in providing legal services, and the considerations an attorney should take into account when determining what reasonable steps would be necessary to comply with those obligations. While those obligations are the same for attorneys using technology both in a VLO and a traditional non-VLO,[6/] due to the *wholly outsourced* internet-based nature of our hypothetical VLO, special considerations are implicated which require specific due diligence on the part of our VLO practitioner.

This is because even though Attorney in this hypothetical is choosing an outside vendor, the fact of the outsourcing does not change Attorney's obligation to take reasonable steps to protect and secure the client's information. (Cal. State Bar Formal Opn. No. 2010-179; *see also* American Bar Association (ABA) Formal Opn. No. 08-451.)[7/] Attorney's compliance with her duty of confidentiality requires that she exercise reasonable due diligence both in the selection, and then in the continued use, of the VLO vendor. Attorney should determine that the VLO vendor selected by her employs policies and procedures that at a minimum equal what Attorney herself would do on her own to comply with her duty of confidentiality.[8/] This Committee has recognized that while Attorney is not required to become a technology expert in order to comply with her duty of confidentiality and competence, Attorney does owe her clients a duty to have a basic understanding of the protections afforded by the technology she uses in her practice. If Attorney lacks the necessary competence to assess the security of the technology, she must seek additional information, or consult with someone who possesses the necessary knowledge, such as an information technology consultant. (Rule 3-110(C); Cal. State Bar Formal Opn. No. 2010-179.) Only after Attorney takes these reasonable steps to understand the basic technology available and how it will work in this hypothetical VLO, and determines that her duty of confidentiality and competence can be met in the contemplated VLO, may Attorney proceed. Factors to consider when selecting a VLO vendor may include:

A. *Credentials of vendor.* ABA Formal Opn. No. 08-451; New York State Bar Assoc. Opinion 842.

B. *Data Security.* Cal. State Bar Formal Opn. No. 2010-179; ABA Formal Opn. No. 08-451, ABA Formal Opn. No. 95-398; eLawyering Task Force, Law Practice Management Section, "Suggested Minimum Requirements for Law Firms Delivering Legal Services Online" (2009); New York State Bar Assoc. Opinion 842; Penn. Bar Assoc. Formal Opinions 2010-200 and 2011-200.

[6/] Similarly, while this opinion addresses a VLO that exists only in a "cloud" setting – that is, on the internet, through a third-party vendor, where the services are provided wholly through and on the internet – the Committee understands that it is possible to have a VLO that can be accessed in a technology-based, but non-"cloud" setting. The special considerations discussed in this section of this opinion may not necessarily apply to such VLOs. A member must consider the specific circumstances of his or her VLO, particularly where information is hosted and by whom, to determine whether these considerations apply.

[7/] The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do not conflict with California policy. *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852. Thus, in the absence of related California authority, we may look to the Model Rules, and the ABA Formal Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. (Rule 1-100(A) (ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered); *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799].)

[8/] Even apart from a VLO and the use of technology, attorneys have a duty to take reasonable precautions to protect their client's confidential information. (Rule 3-100(A); Cal. State Bar Formal Opn. No. 2010-179.) For example, an attorney who keeps files both in paper form and on an internet server may employ the most up-to-date security precautions for his server, but then fail to lock the door to his office, thereby allowing anyone to come in and rifle through his clients' paper files. The duties an attorney assumes when he operates exclusively in the cloud are no different than the lawyer who exclusively prefers paper files – both must act competently and take reasonable steps to preserve their client's confidences. All that changes in a VLO is the steps the attorneys must take to meet this competence and confidentiality requirement.

C. *Vendor's Transmission of the Client's Information in the Cloud Across Jurisdictional Boundaries or Other Third-Party Servers.*[9/] ABA Formal. Opn. No. 08-451; Navetta and Forsheit, Information Law Group, Legal Implications of Cloud Computing (2009) series, parts 1, 2, and 3.

D. *Attorney's Ability to Supervise Vendor.* ABA Formal Opn. No. 08-451.

E. *Terms of Service of Contract with Vendor.* Rules Prof. Conduct, rules 3-100 and 3-700.

Even after Attorney satisfies herself that the security of the technology employed by the VLO provider is adequate to comply with her ethical obligations, Attorney should conduct periodic reassessments of all of these factors to confirm that the VLO vendor's services and systems remain at the level for which she initially contracted, and that changes in the vendor's business environment or management have not negatively affected its adequacy.[10/]

Finally, Attorney should consider whether her ethical obligations require that she make appropriate disclosures and obtain the client's consent to the fact that an outside vendor is providing the technological base of Attorney's law firm, and that, as a result, the outside vendor will be receiving and exclusively storing the client's confidential information. (ABA Formal Opn. No. 08-451; see also Cal. State Bar Formal Opn. No. 2010-179.) In that regard, compare California State Bar Formal Opinion No. 1971-25 (use of outside data processing center without client's consent for bookkeeping, billing, accounting, and statistical purposes, if such information includes client secrets and confidences, would violate section 6068(e)) with Los Angeles County Bar Assn. Formal Opn. No. 374 (1978) (concluding that, in most circumstances, if protective conditions are observed, disclosure of client's secrets and confidences to a central data processor would not violate section 6068(e) and would be the same as disclosures to non-lawyer office employees).

In our hypothetical facts, Attorney's proposed VLO is password protected and encrypted, and each specific client will only be allowed access to his own matter. Assuming attorney has taken reasonable steps to determine that her duty of confidentiality and competence can be met, given the current standards of technology and security, such protections likely are sufficient in today's business environment. As technologies change, however, security standards also may change. Attorney, either directly or with the assistance of consultants, should keep abreast of the most current standards so that she can evaluate whether the measures taken by her firm's VLO provider to protect client confidentiality have not become outdated.

2. <u>The Online-Based Nature of Communication and Delivery of Legal Services Inherent in this VLO Raises Distinct Concerns As It Pertains to Attorney's Fulfillment of Her Duty of Competence.</u>

Just as the duty to maintain a client's confidences is one of the cornerstones of an attorney's duty of competence (rule 3-110), so too is the attorney's ability to effectively communicate with a client a prerequisite to affording competent counsel. (Rule 3-500; see also *Calvert v. State Bar* (1991) 54 Cal.3d 765, 782 [1 Cal.Rptr.2d 684] ("Adequate communication with clients is an integral part of competent professional performance as an attorney.").

[9/] Data stored and traveling in the cloud potentially travels across numerous jurisdictional boundaries, including international boundaries, as a matter of course. In some instances, the data may be designed from the outset to be stored on servers located outside of the United States. Third-party vendors may also subcontract out their work. When selecting and contracting with her VLO vendor, Attorney should address and minimize exposure of the client to legal issues triggered by both the international movement, and/or storage, of information in the cloud, and the potential subcontracting out of the vendor's services to unknown third-party vendors, which may impact confidentiality, without the prior written consent of Attorney and affected clients.

[10/] In the event Attorney determines that the third-party vendor fails to meet the confidentiality standards that Attorney believes necessary for her VLO to comply with her ethical responsibilities relating to information storage, Attorney may consider alternative situations to store the client information at issue, in a non-cloud-based setup, as long as the non-cloud based setup, as it relates to information storage and access to that stored information, each independently comply with Attorney's duty of confidentiality as discussed herein, and as set forth in California State Bar Formal Opinion No. 2010-179.

In our VLO, all services and communications are conducted wholly through the VLO portal on the internet, without any physical meeting, and without any one-on-one contact even by phone. While the Committee believes that such an internet-only, attorney-client relationship, under the right circumstances, can meet all of Attorney's ethical obligations, such an internet-only structure does raise distinct ethics issues as it pertains to communications and competency.

First, Attorney must take reasonable steps to set up her client intake system in such a way that she is receiving from the prospective client sufficient information to determine if she can provide the prospective legal services at issue.[11/] As an initial matter, Attorney should obtain sufficient information to conclude that the client in fact is the actual prospective client, or an authorized representative of the client, as opposed to someone acting without authority. Although an attorney in a non-VLO has this same obligation, the lack of face-to-face or even phone communication with the client in our hypothetical VLO may hinder Attorney's ability to make this determination, thereby potentially necessitating extra measures of assurance. Whether Attorney must take additional steps to confirm the prospective client's identity will depend on the circumstances of the representation and initial communications, and the information Attorney obtains from the prospective client.[12/]

Second, Attorney's intake procedures also must include her receipt of sufficient information to make the initial determination of whether she can perform the requested legal services competently in a VLO at all,[13/] or at least receipt of sufficient detailed information to determine whether the circumstances are such that further investigation is needed. *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 [228 Cal.Rptr. 499].

Third, once Attorney determines that she has sufficient information to determine that she can provide the legal services at issue, on any matter which requires client understanding, Attorney must take reasonable steps to ensure that the client comprehends the legal concepts involved and the advice given, irrespective of the mode of communication used, so that the client is in a position to make an informed decision. (Cal. State Bar Formal Opn. No. 1984-77.) Attorney is not truly "communicating" with the client if the client does not understand what Attorney is saying – whether because of a language barrier or simply a lack of understanding of the legal concepts being discussed. This would be the case whether Attorney is communicating with the client in person, on the phone, by letter, or over the internet. In this hypothetical VLO, however, it may be more difficult for Attorney to form a reasonable belief that the client understands her, as Attorney will be without nonverbal cues (such as body language, eye contact, etc.) or even verbal clues (such as voice inflections or hesitations). Thus, Attorney may need to take additional reasonable steps to permit her to form a reasonable belief that she truly is "communicating" with her client.

In California State Bar Formal Opinion No. 1984-77, this Committee addressed the issue of client comprehension if an attorney has reason to doubt it, and specific steps that an attorney should take where the client does not speak the same language, or does so in a limited fashion. The opinion advises that an attorney providing services in a traditional law office to a client with little or no ability to communicate in English may need to communicate in the

---

[11/] Attorney's obligations on intake are the same as the usual obligations of a non-VLO on intake. See, e.g., Rules Prof. Conduct, rule 3-310 (conflicts of interest); Bus. & Prof. Code, §§ 6147, 6148 (engagement letters).

[12/] See for example, *Ethics Alert: Internet Scams Targeting Attorneys* (January 2011) The State Bar of California Committee on Professional Responsibility and Conduct <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=z8N90vbh088%3d&tabid=834> (as of May 23, 2012).

[13/] The Committee recognizes that certain legal practices may be amenable to this type of VLO, while others likely are not. By way of example only, an attorney may be able to competently draft a simple will or provide tax advice over the internet without speaking with the client, but it is less likely that she can defend the client in litigation in this same manner. Still further, even within practice areas, or within specific matters, there are differing levels of complexity that can alter the permissibility of using the VLO for delivery of the services. This opinion does not define specifically what practices can or cannot work under this type of cloud-based VLO. Instead, attorneys are cautioned that they should make an individual matter-by-matter analysis as to whether they can fulfill their duty to act competently in a VLO, first, as to the type of matter involved generally, and, second, as to the specific aspects of that given matter. Only when the answer to both inquiries is affirmative may Attorney proceed under a cloud-based VLO as described herein.

client's particular language or dialect, or use a skilled interpreter. Attorney must likewise confirm that the client has sufficient skills in the language being used by Attorney. Written internet-based communications between Attorney and the client may demonstrate the client's understanding. However, a third party may be communicating on behalf of a client who does not understand the language in question or is not literate in that language. Attorney may wish to take further steps to confirm the client's level of comprehension.

Fourth, once Attorney begins the representation, she must 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. (Bus. & Prof. Code, § 6068(m) & (n); rule 3-500.) To the extent Attorney's process for informing the client is merely posting the information in the internet portal, Attorney must take reasonable steps to determine that the client in fact is receiving the information in a timely manner. Attorney also may wish to emphasize to the client throughout the representation the importance of checking into the portal regularly to get updates, and to establish an alternative method of communication in the event the portal does not work effectively to reach the client in a timely manner. If Attorney is not reasonably convinced that she is effectively and timely communicating with the client in the hypothetical VLO, and that the client understands what is being communicated, then Attorney may not proceed with the VLO representation as contemplated.

Fifth, given that individuals have varied understanding of technology and how to use it, attorneys using a VLO must have a reasonable basis to believe that the client has sufficient access to technology and the ability necessary to communicate through Attorney's web-based portal, just as the non-VLO attorney must have a reasonable basis to believe that the client can understand her on the phone, read and understand her written correspondence, or otherwise have an ability to communicate with her.

Sixth, if after her initial intake, Attorney concludes that she cannot competently deliver legal services to the client through this VLO, Attorney must decline to undertake that representation within this VLO context. (Rule 3-110.) If legal services already have commenced when Attorney determines she cannot competently continue to deliver legal services to the client through this VLO, Attorney must cease further representation through this VLO. (Rule 3-700.)[14/] In that circumstance, Attorney may choose instead to undertake or continue the prospective legal services in a traditional non-VLO, if she has the proper traditional non-VLO structure to do so, and if the traditional methods of delivering legal services cure the problems of competency raised by this VLO. At a minimum, even if Attorney determines that she should withdraw, consistent with rule 3-700, she must continue to competently provide legal services to the client until such withdrawal is both ethically permissible and complete. Such continued representation must include non-VLO services, such as telephone or in-person communications, if such services are reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. (Rule 3-700(A)(2).)

Alternatively, in the situation where competency problems arise due to the complexity of the legal matter at issue, if narrowing the scope of legal services to be provided in the VLO would be permissible and also cure those competency problems, Attorney may do so and proceed through the VLO. In this circumstance, the material change in scope of representation must be communicated to and accepted by the client and Attorney. (See ABA Formal Opn. No. 11-458.)[15/] Before undertaking a limited scope representation, Attorney should consider the various restrictions on such representations.[16/] Even under a permissible limited scope representation, Attorney should still

---

[14/] Rule 3-700(D) requires that, upon termination of the attorney-client employment, subject to any protective order or nondisclosure agreement, an attorney shall promptly release to the client, at the request of the client, all of the client papers and property. In our VLO, all the data is electronic and should be in a format to which Attorney has, by contract with the third-party vendor, already arranged for access – both for her and for the client – even after Attorney terminates the relationship with the third-party vendor for that particular matter. Upon client request, Attorney must release to the client the electronic versions of *all* papers and property in question, at Attorney's expense, after first stripping each document of any and all metadata that contains confidential information belonging to other clients. (Cal. State Bar Formal Opn. No. 2007-174.)

[15/] In narrowing the scope of representation, Attorney must satisfy herself that the fee arrangements with the client remains reasonable and continues to comply with Rule 4-200, and if not, make the necessary adjustments with the client.

[16/] See Cal. Rules of Court, Rules 3.35-3.37 (limited scope representation in general civil cases); ABA Model Rule 1.2(c) and Comments (6)-(8) (lawyer may limit scope of representation provided limitation is reasonable and the

advise the client (a) what services are not being undertaken; (b) what services still will need to be done, including advice that there may be other remedies that Attorney will not investigate or pursue; (c) what risks to the client, if any, could result from the limitation of the scope of representation; and (d) that other counsel should be consulted as to those matters not undertaken by the present counsel. (*Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1683-1684 [19 Cal.Rptr.2d 601] ("even when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention"); ABA Model Rule 1.2(c).)

Finally, in all law offices, including this hypothetical VLO, attorneys have a duty to supervise subordinate attorneys, and non-attorney employees or agents. (Rule 3-110 (discussion par. 1); *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 [177 Cal.Rptr. 670] (rejecting contention that attorney's rules violations were "precipitated by members of his staff"); *Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 218 [113 Cal.Rptr.3d 692] ("Although an attorney cannot be held responsible for every detail of office procedure, it is an attorney's responsibility to supervise the work of his or her staff members."); see also ABA Model Rule 5.1.) In our hypothetical VLO, supervision can be a challenge if Attorney and her various subordinate attorneys and employees operate out of several different physical locations. Whatever method Attorney chooses to comply with her duty to supervise, Attorney must take reasonable measures to ascertain that everyone under her supervision is complying with the Rules of Professional Conduct, including the duties of confidentiality and competence, notwithstanding any physical separation.

CONCLUSION

The Business and Professions Code and the Rules of Professional Conduct do not impose greater or different duties upon a VLO practitioner operating in the cloud than they do upon attorneys practicing in a traditional non-VLO. While Attorney may maintain a VLO in the cloud, Attorney may be required to take additional steps to confirm that she is reasonably addressing ethical concerns raised by issues distinct to this type of VLO. Failure by Attorney to comply with her ethical obligations relevant to these issues will preclude the operation of a VLO in the cloud as described.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

***[Publisher's Note:** Internet resources cited in this opinion were last accessed by staff on May 23, 2012. Copies of these resources are on file with the State Bar's Office of Professional Competence.]*

---

client gives informed consent); see also *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520 ("limited" appearance of counsel in immigration proceedings prohibited by federal regulations); Cal. Rules of Court, Rules 5.70-5.71 repealed effective January 1, 2013, revised and renumbered as Rule 5.425 adopted effective January 1, 2013 (limited scope representation in family law cases); rule 3-400 (discussion).