



**6 hrs  
MCLE  
CREDIT**

#### MCLE Webinar Schedule:

##### **Ethics Panel 1:**

Strategy, Civility, Ethics and Sanity in an Uncivil Time:  
Mapping an Effective Settlement Strategy That Incorporates  
Ethical Rules and the Brain Science  
Time: 10:00 am – 12:00 pm (2 hrs credit)

##### **Competence Issues:**

Substance abuse and mental health issues in the legal profession-  
a threat to attorneys and clients alike.  
Time: 12:15 pm – 1:15 pm (1 hr credit)

##### **Elimination of Bias:**

Tell Me Something I Don't Know About 'Elimination of Bias'  
Time: 1:30 pm – 2:30 pm (1 hr credit)

##### **Ethics Panel 2:**

California's New Rules of Professional Conduct:  
Two Years Out – How is it Going?  
Time: 2:45 pm – 4:45 pm (2 hrs credit)

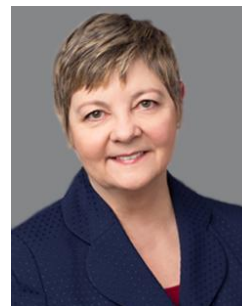
# January 6, 2021

## ADR Services, Inc.'s Complimentary MCLE Day



**ADR<sup>SM</sup>**  
**SERVICES, INC.**  
*Your Partner in Resolution*

**SESSION I: ETHICS – STRATEGY, CIVILITY, ETHICS AND SANITY IN AN UNCIVIL TIME: MAPPING AN EFFECTIVE SETTLEMENT STRATEGY THAT INCORPORATES ETHICAL RULES AND THE BRAIN SCIENCE (2 hours credit)**



**Presented by: Hon. Paul Beeman, Mark LeHocky, Esq. and Hon. Charlotte Woolard**

### **Part A: Rules and Challenges**

- Introductions and Backgrounds
- Civility and Ethics Rules Guiding Disputes and Disputants
- The Courts Weigh In -- Different Forms of Incivility and their Costs
- Have the Standards Changed? – The Impact of the Washington Dialogue
- Mental Health Trends and the Impact of the Pandemic
- The Brain Science Impacting Lawyer and Client Handicapping

### **Part B: Strategies for Navigating Civility and Ethics Issues**

- Raising the Mediation Topic with Clients and the Other Side
- Pre-mediation Issues and Best Practices:
  - Briefing
  - Pre-calls
  - Client preparation
- Conducting the Mediation Session:
  - Compelling mediation?
  - Joint Sessions
  - Staging the session
  - Remote mediation issues

### **Part A: Ethics and Civility Rules Governing Court and ADR Processes (Only a few examples):**

- **CA Rules of Court 9.4, effective 2014, imposes a "Civility Oath":**
  - "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity".

- **CA State Bar Rules of Professional Conduct:**
  - **Rule 1.3. Diligence:**
    - (a) “A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.”
    - (b) “For purposes of this rule, ‘reasonable diligence’ shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.”
  - **Rule 1.4. Communications with Clients:** (a) “A lawyer shall:
    - (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client’s informed consent is required by these rules or the State Bar Act;
    - (2) reasonably consult with the client about the means by which to accomplish the client’s objectives in the representation;
    - (3) keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed; and
    - (4) advise the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.”
- **CA Attorney Guidelines of Civility and Professionalism:** Examples:
  - “...not acceptable to engage in abusive behavior or other conduct unbecoming a member of the bar...
  - “...should avoid degrading the intelligence, ethics, morals, integrity or personal behavior of others.”
- **CA Business & Professions Code Section 6068:**
  - ”It is the duty of an attorney ... (b) To maintain the respect due to the courts of justice and judicial officers.”

### **The Courts Weigh In: Different Form of Incivility and their Cost (Overview of select cases):**

- *Lossing v. Superior Court* (1989) 207 Cal. App. 3d 635, 641
 

“Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the the law of the jungle”
- *Davenport v. Davenport* (2011) 194 Cal. App. 4<sup>th</sup> 1507, 1536

”We close this discussion with a reminder to all 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 a lack of civility.”

- *Kim v. Westmore Partners, Inc.* (2011) 201 Cal. App. 4<sup>th</sup> 267

”For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded that lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions.”

- *LaSalle v. Vogel* (2019) 36 Cal. App. 5<sup>th</sup> 127

“Here is what Code of Civil Procedure 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 disposition.” That is not complicated language. No jury instruction defining and 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.”

### **More Recent Reminders that Incivility takes Many Forms:**

- *Briganti v. Chow* (2019) 42 Cal. App. 5<sup>th</sup> 504

“[G]ender discrimination is a subcategory of the larger scourge of incivility afflicting law practice. ...Objectifying or demeaning a member of the profession, especially when based on gender, race, sexual preference, gender identity, or other characteristics, is uncivil and unacceptable. Moreover, the comments in the brief demean the serious business of this court.”

- *Martinez v. O’Hara* (2019) 32 Cal. App. 5<sup>th</sup> 853

Gender-biased statement – describing female judge’s ruling as “succubustic” – demonstrates “‘by words or conduct, bias, prejudice, or harassment based upon...gender’ and thus qualifies as reportable misconduct.”

### **Has the Washington Dialogue and Social Media Changed the Standards for Lawyers?**

- Exhibit #1: Drawing the wrong conclusions:
- Exhibit #2: Christopher Hook’s Nastygrams to Allstate’s Counsel:

### **Other Possible Factors Contributing to an Increase in Incivility (outside of Washington)?**

#### **The Brain Science Impacting Lawyer and Client Handicapping**

- Client confidence (Donna Shestowsky, Ph.D)
- Attorney handicapping (Randall Kiser, J.D.)

- It's not just lawyers and clients (Wall St. Journal)

## **Tying the Brain Science, Ethics and Civility to Settlement Efforts**

### **Part B: Strategies for Navigating Civility and Ethics Issues**

- **Ethics and Civility Issues Arising in Settlement Conferences and Mediation**
  - Court settlement conferences versus private mediations
  - Represented versus self-represented party mediations
- **Raising the Mediation Topic with Clients and the Other Side: Overcoming misimpressions when the mediation topic is raised:**
  - With your client
  - With the other side
- ***Pre-mediation* Ethics and Civility Issues and Best Practices:**
  - Briefing – Shared briefs? Purpose, content, tone and timing?
  - Pre-calls – Objective and opportunities for counsel and the mediator
  - Client preparation – Ethical obligations and setting expectations
- **Conducting the Mediation Session:**
  - Compulsory mediation?
  - Joint sessions – Objectives, opportunities and overcoming resistance
  - Staging the session – Developing a plan, and speaking roles for clients:
  - Remote mediation issues
  - Marathon sessions?
- **Ethical Issues in Vetting / Selecting Mediators**

### **Concluding comments / Additional Q&A**

### **Additional Reading / Resource Material:**

- Hon. Lynn Duryee, Ret. and Matt White, **Mastering Mediation** (Aspatore 2012)
- Bruce Edwards, **Chasing Dinosaurs** (Mediate.com – May 2017)
- Jane Goodman-Delahunty, et al: **Insightful or Wishful: Lawyer's Ability to Predict Case Outcomes**, Psychology, Public Policy, and Law, Vol. 16, No.2, 133-157 (2010)
- Randall Kiser, Martin A. Asher, and Blakeley B. McShane, **Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations**, Journal of Empirical Legal Studies, Vol. 5, Issue 3, 551-591 (September 2008)
- Randall Kiser, **Beyond Right and Wrong, The Power of Effective Decision Making for Attorneys and Clients** (Springer 2010)
- **Mark LeHocky, Rethinking Mediation: Using Behavioral Science Data, Rather Than Wishful Thinking, To Make Mediations More Productive**, California Consumer Attorneys' Advocate Magazine, August 2017 (pp. 88-100)
- Mark LeHocky, **Civility in the Mediation Process**, Contra Costa Lawyer Magazine, April 1, 2017
- George Lowenstein, et al, **Self-Serving Assessments of Fairness and Pretrial Bargaining**, 22 Journal of Legal Studies, pp. 135, 149-53 (1993)

- Donna Shestowsky, Ph.D., Professor of Law, University of California Davis School of Law, **The Psychology of Procedural Preference, How Litigants Evaluate Legal Procedures Ex Ante**, Iowa Law Review, Vol. 99, No. 2, pp. 637-710 (2014)

**SESSION II: COMPETENCE ISSUES – SUBSTANCE ABUSE AND MENTAL HEALTH ISSUES IN THE LEGAL PROFESSION-A THREAT TO ATTORNEYS AND CLIENTS ALIKE (1 hour credit)**



**Presented by: Hon. Kevin Murphy**

**COMPETENCY: The Scope of Substance Abuse and Mental Illness and its Impact on the Legal Profession**

**Presented by Hon. Kevin Murphy (Ret.)**

**1. RELEVANCE: WHY THIS SUBJECT MATTERS: (This is not a "bullshit course")**

- The Extent of the Problem in the General Public
- The Extent of the Problem in the Legal Community: Attorneys are 3 times more likely to suffer from substance abuse and 4 times more likely to suffer from depression than the general public!
- Additional Shocking Statistics
- Why do Lawyers Suffer from these Inflictions at a higher rate?
- The great misunderstandings about substance abuse and mental illness: moral weakness and character flaws

**2. THERE IS HELP AVAILABLE BUT LAWYERS ARE HESITANT TO ACCEPT IT**

- The Lawyers Assistance Program 877-LAP-4-HELP
- Other Bar 800-222-0767
- Judicial Officers Assistance Program 800-327-0422
- State Bar's Alternative Assistance Program
- Why Attorney Hesitate to seek Help

**3. THE LEGAL AND ETHICAL CONSEQUENCES**

#### A. COMPETENCY DEFINED

- To do our jobs "to the best of ... knowledge and ability" (Business and Professions Code section 6067)
- California Rules of Professional Conduct ("Rules")
- Rule 1.1(a) shall not "intentionally, recklessly, with gross negligence or repeatedly fail to perform legal services with competence"
- Rule 1.1(b) competence in any legal service means "to apply the learning and skill and mental, emotional, and physical ability reasonably necessary for the performance of such service"
- Rule 1.16(a)(3) shall not represent a client or where commenced SHALL WITHDRAW "if the lawyer's mental or physical condition RENDERS IT UNREASONABLY DIFFICULT to carry out the representation effectively"
- Rule 1.16(b)(8) "MAY WITHDRAW"...."RENDERS IT DIFFICULT" to carry out the representation effectively

#### B. THE RESPONSIBILITY OF OTHERS

- Do you have a moral responsibility to help?
- Do you have a legal responsibility to report violations of Rules and State Bar Act?
- Not under California law unless you ordered or ratified improper conduct (Rule 5.1(c)(1))
- American Bar Associations Model Rule 8.3(a) "SHALL" INFORM THE APPROPRIATE PROFESSIONAL AUTHORITY" if knows another lawyer committed a violation of the Rules of Professional Conduct that "raises a substantial question as to the lawyer's honesty, trustworthiness, OR FITNESS AS A LAWYER IN OTHER RESPECTS"
- The Responsibility of a Manager or Supervisor
- If you have MANAGERIAL AUTHORITY you must make reasonable efforts to ensure firm has "measures" giving reasonable assurance that all lawyers in firm comply with the Rules and State Bar Act (Rule 5.1(a))
- If you have DIRECT SUPERVISORY AUTHORITY over another lawyer make reasonable efforts comply with Rules and State Bar Act (Rule 5.1(b))
- If you DIRECTLY SUPERVISE another attorney and you have knowledge of conduct at a time when consequences can be avoided or mitigated must take "reasonable remedial action"(Rule 5.1(c)(2))

#### **4. THE JUDICIARY: SIMILAR PROBLEMS AND SIMILAR ISSUES ("Judge Sauce" and the Like)**

- Disproportionate Substance Abuse and Mental Illness
- Judges are required to be competent: perform judicial duties with the legal knowledge, skills, thoroughness, and preparation reasonably necessary to perform responsibilities of judicial office (California Code of Judicial Ethics Canon, Canon 3, Commentary)
- Judge's Duty to Report Attorneys Business and Professions Code section 6086: if personal knowledge attorney committed misconduct or violate the Rules "take appropriate corrective action"(California Code of Judicial Ethics Canon 3(D))
- Judges Shall Notify State Bar: if impose final order of contempt that may involve grounds warranting discipline under this chapter or impose judicial sanctions against attorney (except for discovery or sum under \$1000) (Business and Professions Code section 6086.7(a)(1)(3))
- Under Article VI Section 18 of the California Constitution a judge can be censored for habitual intemperance in the use of intoxicants or drugs; can be retired for disability that



seriously interferes with the performance of judicial duties. and is likely to become permanent.

- Judge's Responsibility regarding other Judges: "reliable information" another judge violated Judicial Ethics take "appropriate corrective action" (California Code of Judicial Ethics Canon 3(D))
- What should an attorney do with an impaired judge?
- Private Conversation
- In trial on the record recordation of the issue
- Report to another judge
- ABA Model Rule 8.3(b): Report the judge (1) if attorney knows that a judge is in violation of the applicable conduct rules; and, (2) substantial question about fitness

**SESSION III: ELIMINATION OF BIAS – TELL ME SOMETHING I DON'T KNOW  
ABOUT 'ELIMINATION OF BIAS' (1 hour credit)**



**Presented by: Irene Takahashi, Esq. with Commentary by Mary Ann Kim, Ph.D**

**A. What is bias? Where does it come from? Can bias be eliminated?**

One of the most significant aspects of practicing law in an increasingly global economy as communities grow more multi-ethnic and multicultural each day is the challenge of sustained interaction between people who are different from us in various ways. Identifying one's own "blind spots" has a real and practical effect on how we conduct ourselves in our personal relationships, our workplace, and in court.

**B. Tell me something I don't know**

Up close and personal options to making a formal complaint

**C. Backdrop to the experience of Bias**

When you understand our country's history, only then can you really understand

**D. Early childhood was awkward and confusing at times**

"You've got to be taught to hate and fear; you've got to be taught from year to year. It's got to be drummed in your dear little ear... to be afraid of people whose eyes are oddly made. And people whose skin is a different shade. You've got to be carefully taught..."  
Lyrics from South Pacific, a Musical, 1949

**E. Recognition that bias was a social wrong**

Sometimes, the best you can do is work hard to prove them wrong.

**F. Racism at my first job – Do I Belong?**

Someone in a more powerful position looked out for me when I felt powerless.

**G. Personal experiences in civil practice**

Early years as a woman of color facing explicit sexism and racism

**H. What if the judge is the offender?**

When faced with instances of micro aggression (implicit) racism, how I confronted two judges with entirely different outcomes

**Concluding Remarks**

Simple advice on having different dialogues

**"When you see something that is no right, not fair, not just, you have to speak up. You have to say something; you have to do something."**

Quote from John Lewis

**Reference Materials**

- 1) "Imagine" – lyrics by John Lennon

- 2) “A More Perfect Union” – U.S. history in California during World War II  
([https://amhistory.si.edu/perfectunion/non-flash/removal\\_process.html?back=https%3A%2F%2Fwww.google.com%2Fsearch%3Fclient%3Dsafari%26as\\_qdr%3Dall%26as\\_occt%3Dany%26safe%3Dactive%26as\\_q%3Dwho+said+once+a+jap+always+a+jap%26channel%3Daplab%26source%3Dappl%26hl%3Den](https://amhistory.si.edu/perfectunion/non-flash/removal_process.html?back=https%3A%2F%2Fwww.google.com%2Fsearch%3Fclient%3Dsafari%26as_qdr%3Dall%26as_occt%3Dany%26safe%3Dactive%26as_q%3Dwho+said+once+a+jap+always+a+jap%26channel%3Daplab%26source%3Dappl%26hl%3Den))
- 3) “Japanese Americans Home at Last” – The wartime experience of people of Japanese ancestry living in California
- 4) “You’ve Got to Be Careful Taught” – lyrics from South Pacific Musical 1949
- 5) Google chief apologizes for Dismissal – San Francisco Chronicle 12/14/2020
- 6) Diversity Consulting – All inclusive – The Economist 11/28/2020
- 7) Three Standup Comedians with a message – Laugh with us  
([https://www.youtube.com/watch?v=QlIcb\\_PKoTQ&feature=youtu.be](https://www.youtube.com/watch?v=QlIcb_PKoTQ&feature=youtu.be))

IMAGINE      by John Lennon

Imagine there's no heaven  
It's easy if you try  
No hell below us  
Above us only sky  
Imagine all the people living for today  
Imagine there's no countries  
It isn't hard to do  
Nothing to kill or die for  
And no religion too  
Imagine all the people living life in peace, you  
You may say I'm a dreamer  
But I'm not the only one  
I hope some day you'll join us  
And the world will be as one  
Imagine no possessions  
I wonder if you can  
No need for greed or hunger  
A brotherhood of man  
Imagine all the people sharing all the world, you  
You may say I'm a dreamer  
But I'm not the only one  
I hope some day you'll join us  
And the world will be as one





## REMOVAL *Process*

Registration of all Japanese Americans, both resident aliens and citizens, was the first step toward forced removal. In the spring of 1942, scenes like these were repeated in every Japanese American community along the Pacific Coast. General John L. DeWitt, military commander of the Western Defense Command, issued more than 100 military "Exclusion Orders" directed at civilians of Japanese ancestry living on the West Coast. These Exclusion Orders were based solely on race and ancestry.



*"A Jap's a Jap. It makes no difference whether the Jap is a citizen or not."*

— General John L. DeWitt, Commander, Western Defense Command, 1942



*"I am determined that if they have one drop of Japanese blood in them, they must go to camp."*

— Colonel Karl Bendetsen, Administrator, Wartime Civil Control Administration, 1942



## Timeline of Events

March 2, 1942

General DeWitt issues Public Proclamation Number 1, dividing the West Coast into military areas from which groups of individuals might be excluded under E.O. 9066.

March 11, 1942

General DeWitt names Colonel Karl R. Bendetsen as director of the Wartime Civil Control Administration, which would supervise the removal of Japanese Americans under E.O. 9066.





March 21, 1942

President Roosevelt signs Public Law 503, which makes violation of military orders issued under E.O. 9066 a federal offense. The bill passed in both houses of Congress without a dissenting vote.



March 24, 1942

General DeWitt issues Exclusion Order Number 1, ordering all Japanese resident aliens and Americans of Japanese ancestry on Bainbridge Island, near Seattle, Washington, removed under military guard.



At first, the forced removal of all Japanese Americans from their homes on the West Coast was the responsibility of a newly organized Army agency, the Wartime Civil Control Administration (WCCA), headed by Colonel Karl R. Bendetsen. The WCCA divided the West Coast into 108 exclusion areas, each with a population of roughly 1,000 Japanese Americans. These residents were ordered to report to a central point in their neighborhoods from which they would be taken to an "approved destination." "Evacuees" could take only those possessions they could carry.

**Sue Embrey:** [Registering After the Notice](#) (oral history transcript)

**Rae T.:** [FBI Search](#) (oral history transcript)

Next Gallery: [Moving Out](#)

[Overview](#) | [IMMIGRATION](#) | [REMOVAL](#) | [INTERMENT](#) | [LOYALTY](#) | [SERVICE](#) | [JUSTICE](#)  
REMOVAL: [Crisis: Pearl Harbor](#) | [Constitution and Executive Order](#) | [Process](#) | [Moving Out](#) | [First Stop: Assembly Centers](#)



Smithsonian  
National Museum of American History  
Behring Center

FLASH 5 RICH MEDIA VERSION

## You've Got To Be Carefully Taught

Lyrics from South Pacific, the Broadway musical

South Pacific is a musical composed by Richard Rogers, with lyrics by Oscar Hammerstein II and book by Hammerstein and Joshua Logan. The work premiered in 1949 on Broadway and was immediate hit, running for 1,925 performances. The plot is based on James A. Michener's Pulitzer prize-winning 1947 book, Tales of the South Pacific and combines elements of several of those stories. Rodgers and Hammerstein believed they could write a musical based on Michener's work that would be financially successful and, at the same time, send **a strong progressive message on racism.**

You've got to be taught  
To hate and fear,  
You've got to be taught  
From year to year, it's got to be drummed  
In your dear little ear  
You've got to be carefully taught.

You've got to be taught to be afraid  
Of people whose eyes are oddly made,  
And people whose skin is a different shade,  
You've got to be carefully taught.

You've got to be taught before it's too late,  
Before you are six or seven or eight,  
To hate all the people your relatives hate,  
You've got to be carefully taught!



# Google chief apologizes for dismissal

By Daisuke Wakabayashi

Sundar Pichai, CEO of Google's parent company Alphabet, apologized for the departure of a prominent artificial intelligence researcher, whose exit has roiled the company's workforce and raised questions about its stated commitment to diversity and the responsible development of AI technology.

In an email to employees last week, Pichai, however, stopped short of saying that the company was wrong in the way it hastened the resignation of Timnit Gebru, who was a co-leader of Google's Ethical AI team and one of its best-known Black female employees.

Gebru said this month that the company fired her after she sent an email that criticized the company's lack of progress in hiring women and minorities, as well as biases built into its

*Google continues on C4*

*Google from page C1*

artificial intelligence technology.

She said that she had demanded an explanation for why the company had told her to retract a paper that pinpointed flaws in a new breed of language technology, including a system built by Google that underpins its search engine.

She said that short of a transparent explanation or further discussion, that she would resign after an appropriate amount of time. The company immediately accepted her statement as a resignation and cut her off from all company services and systems.

Colleagues have rallied to

Gebru's defense, saying that Google did not treat her fairly and that this incident was an example of how Black employees are often mistreated at the company.

"I've heard the reaction to Dr. Gebru's departure loud and clear: It seeded doubts and led some in our community to question their place at Google. I want to say how sorry I am for that, and I accept the responsibility of working to restore your trust," Pichai wrote in an email viewed by the New York Times. Axios had reported about the email earlier.

"We need to assess the circumstances that led to Dr. Gebru's departure, examining

where we could have improved and led a more respectful process," he added. "We will begin a review of what happened to identify all the points where we can learn."

On Twitter, Gebru said Pichai's email was not a true apology. "I see this as 'I'm sorry for how it played out but I'm not sorry for what we did to her yet.'"

The parting with Gebru is especially fraught for Google, because it involves two thorny subjects for the company — a lack of diversity in its workforce and concerns about the dangerous consequences of artificial intelligence technology.

Gebru, who joined the com-

pany last year from Stanford, was vocal about the importance of the company's efforts to hire and retain more women as well as Black employees, who currently account for less than 2% of the company's workforce. In addition, her research to examine the long-term implications of AI put her at odds with the company's strategic goals of depending on artificial intelligence as the breakthrough technology to improve most, if not all, of its products.

This month, about 2,000 Google employees signed a petition protesting her dismissal from the company and demanding that executives within its research organization be

more transparent about the circumstances of Gebru's exit.

Last week, members of Google's Ethical AI team published a post that disputed some of the company's statements regarding her exit, including the company's assertion that she resigned and was not fired.

Jeff Dean, one of Google's most senior executives who oversees the company's AI research arm, met with a group of employees the next day to explain what took place with Gebru, but many walked away from the meeting even more upset.

*Daisuke Wakabayashi is a New York Times writer.*

SAN FRANCISCO CHRON. 12/14/20



Diversity consulting

## All inclusive

BOSTON

**Social unrest in America has fuelled a boom for a new kind of advice**

**A**S PROTESTS AGAINST police violence and racism convulsed America's streets this summer after the killing by a policeman of George Floyd, a black man, the heat could be felt in the air-conditioned corner offices above. America Inc rushed to announce plans to tackle racial inequality. Walmart said it would set up a \$100m initiative to fight racism. Pepsi vowed to double spending with black-owned suppliers. Facebook and Estée Lauder pledged to hire more non-white candidates. JPMorgan Chase promised to extend \$30bn in loans over five years to minority households and businesses. Even NASCAR, which runs a motor-racing series for a mostly rural and white fan base, prohibited the display of confederate flags at its events. Diversity, many said, is not just the right thing to do.

It is good for business.

For one breed of firms it has been very good indeed. Consultancies and recruiters are enjoying a mini-boom as companies look for advice on how to become more inclusive. The newly created diversity, equity and inclusion (DEI) practice at Bain, a consultancy, now has two dozen staff, and another two dozen want to be part of it at least some of the time, says Julie Coffman, who heads it. She calls diversity "the next digital". A partner at another consultancy says DEI is the "fastest growing business line we have right now". Lyndon Taylor, who leads DEI at Heidrick and Struggles, an executive-search firm, discerns a "quantum" jump in demand for such services.

Lots of companies promised to do things during the protests. Now, Mr Taylor says, they must work out what those are and how they are going to do them. The priority is hiring black senior executives or board members. Before 2020 diversity meant women, Latino, Asian and LGBTQ, says Dale Jones, boss of the Diversified Search Group, a 46-year-old recruitment firm originally set up to promote women. Now Mr Jones sees "a hyper focus around black leadership", with board placements up by half and c-suite recruiting by around a third over the past year.

Julie Hembrock Daum, who recruits board members at Spencer Stuart, another search firm, says she has to temper clients' expectations about what is possible. She tells them to think long and hard about what qualities they need on their board rather than "a knee-jerk reaction like 'we need a CEO who is black'".

The Economist November 28th 2020

Recruiters remind clients that boardrooms and c-suites are not overly blessed with other ethnic minorities, LGBTQ people or women. They also highlight other underrepresented groups, such as veterans, migrants and refugees, the "differently abled" and the all-encompassing "cognitively diverse" (consultant-speak for people who think differently).

The diversity industry has expanded beyond finding new hires. Consultancies' and recruiters' services include training staff on bias, advice for diversifying supply chains and coaching senior executives on

how to run more inclusive firms. Some offer broad-ranging strategies for organisational and managerial changes. As one recruiter puts it, "hiring can be a quick fix, but you can't just add a couple of diverse fish. You actually need to change the water in the pond."

Demand for such services is unlikely to abate any time soon. A survey by Edelman, a public-relations firm, conducted soon after news of Floyd's death, found that 60% of respondents said a brand's reaction to the protests "will influence whether I buy or boycott them in the future". Younger

customers and employees are likelier to hold strong views: 53% of those aged 18-34 said they would not work for a firm that failed to speak out during the protests, compared with 42% for all ages.

The change is driven by the drive and passion of younger employees, says Pamela Warren, who in July was appointed co-leader of the DEI council at Egon Zehnder, a big executive-search firm. As more of them enter the workforce, pressure on employers to be more representative of the population will grow—and with it demand for the diversity industry's services. ■

# IRENE TAKAHASHI, ESQ.

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## PROFILE

Irene Takahashi is widely recognized as one of the Bay Area's leading mediators. Building on a solid foundation of trial experience, she adds the insights gained while serving as a trial judge. She has tried scores of criminal and civil cases both bench and jury. She has wide experience in a range of civil disputes, involving, among others, personal injury, landlord-tenant, and public and private entity liability.

Beyond her widely acknowledged legal acumen, she has a deserved reputation for being able to identify and facilitate the resolution of the complex personal concerns that often form the most formidable barriers to settlements. Rather than practicing a set pattern of mediation, she has a style that allows her to 'shift gears' as conditions develop and as unforeseen difficulties arise. Her adaptability gives the parties the maximum opportunity for resolution. As one attorney put it, "Irene's perceptive instincts made the difference."

Mediations can be costly and stressful, Ms. Takahashi is known to work to minimize both those issues. She knows most cases resolve. She is persistent and works with the parties before, during and with follow-up to provide a successful resolution tailored to the individual case.

Ms. Takahashi, as reported by many attorneys, is a wise, empathetic, approachable and hard-working mediator. Both litigants and litigators agree that she listens carefully, demonstrates human concern with a dignity that inspires confidence, and provides legal and practical guidance of substantial value. As a result, many counsel have sought her help on multiple cases. Consistently she facilitates prompt, fair and lasting resolutions in the most difficult mediations.

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## AREAS OF EXPERTISE

Personal Injury: slip and fall, auto, motorcycle, pedestrian, skateboard accidents, wrongful death, sexual assault

Employment/ Title IX

Landlord-Tenant: commercial and residential

Property Liability and Damages: fires, floods, crimes committed on property

Eminent Domain

Professional Liability/ Errors & Omissions

Public and Private Entity Liability: school districts, churches, private and public organizations, and government institutions

Business Litigation/ Breach of Contract

Sexual Misconduct

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## **EDUCATION**

University of California at Davis, School of Law: Juris Doctor (1976)

University of California at Berkeley: Bachelor of Arts (1973)

Straus Institute for Dispute Resolution (2015)

Mediation Training, Mediation Offices of Steve Rosenberg (2017)

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## **CAREER HISTORY**

2001 – 2016      Lewis Brisbois Bisgaard & Smith – Partner

1998 – 2000      Santochi Gable Dwyer & Takahashi – Managing Partner

1996 – 1998      McLemore Collins & Toschi – Partner

1991 – 1996      Kincaid Gianunzio Caudle & Hubert – Senior Associate

1989 – 1991      Contra Costa County Superior Court – Judge  
Presided over civil and criminal cases, Law & Motion, settlement conferences, case management, community forums, and educational outreach to youth, women, and people of color

1982 – 1989      County of Contra Costa – Deputy District Attorney

1980 – 1982      Alameda County court-appointed criminal representation of juveniles

1978 – 1980      United States Department of Justice – Assistant U.S. Attorney for the Southern District of California - prosecution of federal criminal offenses, and argued appeals before the United States Court Of Appeals, Ninth Circuit

1976 – 1978      County of Alameda – Deputy District Attorney

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## **RECENT SPEAKING ENGAGEMENTS/ACTIVITIES**

"Young Women in Excellence," Speaker for young women's community group (2017)

Judge, Assistant Coach, and Scorer for Contra Costa County Mock Trial Competition (2017-2020)

Contra Costa Civic Theatre, Board of Directors (2018-Present )

"Does Gender Matter in Civil Litigation Mediations?" Alameda County Bar Association (2018)

Mentor/Mentee Program, Asian American Bar Association (2018-Present)

Judge, ABA Section, Dispute Resolution and Representation, Mediation Competition, Berkeley Law (2019)

# MARY ANN YAEIL KIM, PH.D.

CLINICAL PSYCHOLOGY

## CURRICULUM VITAE

Mary Ann Yaeil Kim, Ph.D.

### ACADEMIC HISTORY

- 1979-1984      University of California at Berkeley, Ph.D. in Clinical Psychology.
- 1975-1977      Oberlin College, Oberlin, Ohio, A.B. in Psychology, graduated December, 1978.
- 1977-1978      University of Illinois at Champaign-Urbana, Illinois in Psychology.
- 1977              Summer at Ewha University, Seoul, Korea in Korean history and Language.

### INTERNSHIPS

July 1985 - October 1985: Post doctoral intern at the San Francisco Veterans Administration Medical Center, San Francisco, CA 94121. Includes neuropsychological assessment for various services such as psychiatry, neurology and neurosurgery.

September 1983 - November 1984: Post doctoral fellow at the Institute for Human Development and Aging, 1350 7th Avenue, San Francisco, CA 94143. Includes individual psychotherapy with geriatrics and neuropsychological testing for the Alzheimer's research project.

September 1982 - September 1983: Psychology intern at the Palo Alto Veterans Administration Medical Center, 3801 Miranda Avenue, Palo Alto, CA 94304. Rotations for training included neuropsychology (assessment, diagnosis and treatment planning) with James Moses, Ph.D., Family Therapy Program (family and couples therapy) with Sheldon Starr, Ph.D., and inpatient psychiatry (locked psychiatric ward, individual and group psychotherapy) with Donna Horn, Ph.D.

August 1980 - June 1982: Psychology Intern, U. C. Berkeley, Psychology Clinic, 2055 Tolman Hall, Berkeley, CA 94720. Director Phillip Cowan, Ph.D., included training in couples and individual therapy.

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September 1980- June 1982: Psychology intern at the San Francisco Veterans Administration Medical Center, part time 5 hours/week, hypnosis for pain control, chronic habituation and phobias with Lewis B. Sachs, Ph.D.

September 1980 - June 1981: Psychology intern at the Richmond Area Multi Services of San Francisco, part of the National Asian American Training Program. Includes direct and indirect Asian American Community Services. Treatment of adults, children and families Director Herb Wong, Ph.D.

June 1980 - September 1980: Psychology intern at San Francisco Veterans Administration Medical Center. Training in Health Psychology with Lewis B. Sachs, Ph.D. Mental Hygiene Clinic with Hannah Levinson, Ph.D.

### **PROFESSIONAL EXPERIENCE**

August 1987 - present: Private Practice, 465 California Street, Suite 435, San Francisco, CA 94104, telephone: (415) 905-9680. Includes psychodiagnostic and neuropsychological assessment and evaluations, treatment of occupationally related stress disorders, consultations and individual psychotherapy. Assessments and evaluations are provided in civil, criminal and child custody matters.

June 1996 - June 2000: Consultant to the California State Bar, 555 Franklin Street, San Francisco. Includes giving expert opinion regarding learning disabilities and other neuropsychological conditions that may require special accommodations for the Bar exam. Also, consulting on the development of guidelines for special accommodations.

January 1994 - January 1995: Visiting professor in organizational psychology at California School of Professional Psychology, Alameda Campus. Includes teaching organizational culture and research methodology.

August 1992 - June 1996: Visiting Professor - Adjunct faculty at California School of Professional Psychology, Alameda Campus. Includes teaching, psychodiagnostic assessment, tests and measure for adults, adolescents and children.

June 1989 - July 1990: Staff therapist and instructor for Family Therapy Clinic, 2423 California Street, San Francisco, CA 94115. Includes family and couples therapy and teaching child neuropsychological assessment for school, psychiatrists, neurologist and family law.

April 1989 - November 1989: Neuropsychologist in a group practice. Stephen M. Raffle, M.D., Inc., 350 - 30 th Street, Suite 550, Oakland, CA 94609. Includes medical-legal evaluations, psychological assessment in personal injury, criminal cases and adult and child psychotherapy and evaluations..

July 1988 - April 1989: Consultant at the Martinez Veterans Administration Medical Center, 150 Muir Road, Martinez, CA 94553. Includes evaluations of compensation and pension examinations for military veterans. These assessments are rendered for disability ratings.

June 1988 - December 1988: Consultant for Center for Evaluation Services Associates, 3478 Buskirk, Suite 280, Pleasant Hill, CA 94520. Includes vocational assessment and evaluation for court ordered mediation in divorce proceedings. Assessment includes current vocational interests and labor market analysis and prognosis for rehabilitation.

August 1987 - June 1988: Supervisor at the Mount Zion Crisis Clinic, 2330 Post Street, San Francisco, CA 94115. Includes crisis intervention, diagnostic evaluations, administrative liaison for the City Community Mental Health System, and training and supervision of psychology trainees.

August 1987 - January 1988: Visiting Professor in Asian American Studies, San Jose State University. Includes teaching American history from the 1500s to 1900 and Afro-American studies, personality and culture.

May 1986 - June 1987: Associate in the private psychiatric practice for Lawrence T. Petrakis, M.D., St. Francis Memorial Hospital, 900 Hyde Street, San Francisco, CA 94109. Includes psychodiagnostics, neuropsychological assessment (forensic) and individual psychotherapy for pain management and stress reduction.

October 1985 - May 1986: Consultant for Asian Americans for Community Involvement, 516 Martha Street, San Jose, CA 95112. Includes developing outreach and training for mental health workers in Cambodian, Laotian, Vietnamese and Indochinese communities of San Jose.

February 1986 - May 1986: Visiting Professor in Asian American Studies, San Jose State University. Includes teaching Asian American History and Asian American Family, Culture and Communities.

September 1985 - April 1986: Visiting Professor in American Studies component at Oakes College, University of California at Santa Cruz, CA 95064. Includes teaching Asian American History and Asian American Women.

July 1985 - July 1986: Psychological Assistant to Margaret T. Singer, Ph.D., at the Berkeley Therapy Institute, 1749 Martin Luther King Way, Berkeley, CA 94709. Includes private practice individual psychotherapy.

Winter Quarter - May 1994: Teaching Assistant in Asian American studies and ethnic studies at U. C. at Berkeley, Dwinelle Hall, Berkeley, CA 94720. Includes supplementing lectures, introducing Asian American literature, history, developing writing styles and analytical abilities.

June 1983 and October 1983: On staff as expert witness at Hastings Law School, Program of Law and Advocacy, Director, Steven Mayo, J.D.

Fall quarter 1980, Winter/Fall Quarter 1981, Winter quarter 1982: Clinical supervisor for Psychology 131 (clinical psychology for undergraduates) group supervision for undergraduate placements and internships at U. C. Berkeley, Director, Phillip Cowan, Ph.D.

Fall quarter, 1980 and Winter quarter, 1982: Graduate instructor for Psychology 192, "Research Issues and Third World Americans", offered in the Psychology Department at U. C. Berkeley.

Fall quarter, 1979: Research Assistant for the Institute of Human Development at U. C. Berkeley, research of the longitudinal data on marriage and family with Arlene Scholnick, Ph.D.

### **HONORS**

1983-84          American Psychological Association Minority Fellow.

1977                  Delegate at the International Women's Year Conference, Houston, Texas.

1975                  Illinois State Scholar.

### **PRESENTATIONS**

1998: Series of talks on the psychology of domestic violence at the National College of District Attorneys, Houston, Texas.

1998: "The ADA and Psychiatric Claims," speaker at a conference sponsored by U.C. Davis Medical School, Department of Forensic Psychiatry, Silverado, California.

1998: "Cross-examining Psychological Witnesses," speaker at the National College of District Attorneys, topic of "Prosecuting Gang Cases," San Francisco, CA.

1993: "Examining the Role of Consent and Free Will in Sexual Harassment Cases", speaker at San Francisco Trial Attorneys Association, San Francisco, CA.

1989: "Images of Asian Women in Media", discussion at American Psychiatric Association, San Francisco, CA.

1983: "Psychological Research and Third World American", paper presented at the A.P.A., Anaheim, CA.



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1983: "In Quest of a New Paradigm", paper presented at the Western Psychological Association, San Francisco, CA.

1981: "Brief Therapy and Asian American Client", paper presented at the A.P.A., Los Angeles, CA.

### **PUBLICATIONS**

Abernethy, A., Cowan, P., Gurza, R., Huang, K., Kim, M. and N. King, "Psychology Tomorrow: A Unified Ethnic Psychology Course", Teaching a Psychology of People: Resources for Gender and Sociocultural Awareness, ed. Bronstein, P., and K. Quina, A.P.A. Publications 1988.

### **MEMBERSHIPS AND LICENSES**

Member, 602 Alienist Panel for the San Francisco Juvenile Court, 1987 to 1999

Member, Superior Court Expert Panel for the City of San Francisco, Hall of Justice, 850 Bryant Street, San Francisco, CA 94103. Includes an examination and a written report of a court appointed examination of a defendant in custody. This assessment is inclusive of special testing and examination, 1987.

Member, Superior Court, Expert Panel for Marin County in San Rafael, 1997

Oral Examiner, Board of Psychology, Bureau of Medical Quality Assurance, 1998 to 2000

Panel Member, Social Security Disability, Panel Psychologist for Disability Evaluations, 1993 to 1999

Qualified Medical Examiner for the State Industrial Medical Council, 1993 to 2002

Member, American Psychological Association, 1987

Member, California Psychological Association, 2006

Member, Marin Psychological Association, 2006

Member, Northern California Neuropsychology Forum, 1998

Licensed Clinical Psychologist, California #PSY10504



**SESSION IV: ETHICS - CALIFORNIA'S NEW RULES OF PROFESSIONAL CONDUCT TWO YEARS OUT – HOW IS IT GOING? (2 hours credit)**



**Presented by: Hon. James Lambden and Hon. James McBride**

California's Rules now conform generally the ABA's Model Rules of Professional Conduct.

In a series of slides and hypotheticals, Justice Lambden and Judge McBride will describe how the new rules have changed your obligations.

Topics to be covered include:

- A review of seventeen new rules.
- Significant changes to the Forty-two old rules.
- Analyzing Conflict of Interest. Is it now simpler?
- Recognizing Conflicts to Avoid Disqualification and Discipline.
- Avoiding Discipline for personal and intimate relationships.
- New and expanded duty to report discrimination and harassment.
- New and expanded duty to report misconduct of colleagues and clients.
- You are leaving your firm for a new one. What rules apply?

# Update on the New California Rules of Professional Conduct

Hon. James Lambden (Ret.)

Hon. James McBride (Ret.)

ADR SERVICES, INC.

January 6, 2021

# IN 2019 CALIFORNIA JOINED THE REST OF THE STATES (FINALLY) BY ADOPTING NEW ETHICS RULES CLOSER TO THE ABA RULES; WHAT HAVE WE LEARNED SINCE THEN

## **The first comprehensive revision in 29 years of the California Rules Of Profession Conduct took effect on November 1, 2018.**

- u California joined the other 49 states by adopting ethics rules patterned after the Model Rules of Professional Conduct adopted by the American Bar Association in 1983.
- u New Numbering: The former numbering such as 1-100 or 1-120 is now 1.0, 1.0.1, 1.2.1, etc., consistent with the ABA Model Rules numbering.
- u Relief for attorneys engaged in multi-jurisdictional practice, who have been required to look at multiple sources to understand California's outlier ethics rules.
- u Two blue-ribbon panels examined and proposed revisions to the Rules of Professional Conduct since 2001. The first Commission for the Revision of the Rules of Professional Conduct worked on revisions to the rules from 2001 to 2010, only to have its work rejected by the California Supreme Court in 2014.
- u The Court appointed a second Commission, whose work was approved by the State Bar Board of Trustees and presented to the Supreme Court, and redrafted during an extensive 14-month review. The Court unanimously approved the new rulebook in 2018.

# THE SUPREME COURT ISSUED 69 NEW RULES, EFFECTIVE NOVEMBER 1, 2018 AND CPRC OPINIONS HAVE FOLLOWED

- u The Court approved 27 amended rules just as they were drafted by the Commission.
- u However, the Court authorized 42 other rules with extensive modifications.
- u The Justices entirely rejected one proposed rule regarding an attorney's obligations to clients "with diminished capacity."
- u **The State Bar Standing Committee on Professional Responsibility and Conduct has issued seven formal Opinions since the new rules became effective. Formal Opinions No. 2019-197 through 2020-204. [calbar.ca.gov/ethics/opinions](http://calbar.ca.gov/ethics/opinions)**
- u The Rules do not expressly mention lawyers serving clients in the emerging cannabis industry, although the Commission sent the Supreme Court a proposed **Rule 1.2.1** that would allow a lawyer to "discuss the legal consequences of any proposed course of conduct with a client" so long as they do not counsel a client to break the law.
- u **Opinion 2020-202 clarifies that attorneys "may provide advice and assistance to clients with respect to conduct permitted by California's cannabis laws, despite the fact that the clients conduct...might violate federal law."**
- u **Rule 1.2.1** should also apply in other areas, such as immigration, where state and federal laws diverge.
- u The new conflict of interest rules are broader and less case specific under provisions that define what constitutes a legal "matter."
- u New Definition of "Person" In **Rule 1.0**, the definition of "Person" has the same meaning as set forth in Evidence Code §175, which "includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity."

# PROHIBITIONS ON HARASSMENT, DISCRIMINATION AND RETALIATION BY LAWYERS IN THE WORKPLACE AND IN PRACTICE ARE AS BROAD AS ANY RULE IN THE COUNTRY

- u **Rule 8.4.1** was vigorously debated at all stages of the revision process and broadens the scope of discipline as well as requiring lawyers to give notice to the State Bar of civil, administrative and criminal proceedings involving such charges.
- u The Rule also requires lawyers to notify workplace-fairness agencies of such disciplinary actions.
- u The State Bar can now open an investigation into alleged harassment or discrimination without the trigger of a civil finding from another enforcement agency.
- u And lawyers who suffer a related disciplinary action from the State Bar are required to notify the California Department of Fair Employment and Housing, the U.S. Department of Justice and the U.S. Equal Employment Opportunity Commission.
- u The Rule imposes on “all law firm lawyers” the responsibility to “advocate corrective measures” to address “known” improper conduct by the firm, other lawyers and law firm personnel.
- u Prohibited conduct extends to court proceedings, where lawyers must refrain from “manifesting by words or conduct, bias or prejudice...” subject to limited relevance exceptions (e.g., “Wheeler” motions are not *prima facie* evidence of actionable bias; and protected First Amendment conduct may be excluded).
- u **Rule 5.2 clarifies the duties of subordinate attorneys to “speak up.”**

# Hypotheticals

- u A lawyer discovers that her firm has an unspoken but obvious policy against hiring a particular minority.
- u The firm also has an obvious unspoken policy to never represent a certain minority.
- u The lawyer also observes a senior lawyer has serial liaisons with staff members and behaves inappropriately with clients.

# DUTIES OF A SUBORDINATE LAWYER

- u California has adopted **Model Rule 5.2**, which addresses the obligations of a subordinate lawyer.
- u It provides a subordinate lawyer does not violate the rules if he or she acts in accordance with a supervisory lawyer's "reasonable resolution of an arguable question of professional duty." The subordinate still must exercise independent judgment to determine if there is an "arguable question" and whether the supervisor's resolution is reasonable.
- u **Rule 5.2** eliminates a subordinate lawyer's defense that he or she "was simply following orders ..." when charged with an ethical violation.
- u **Rule 5.1** requires a supervising lawyer to make reasonable efforts to ensure ethical compliance by subordinates; and all firm lawyers may be "reasonably" responsible to the extent they exercise authority and/or ratify conduct.

# IN MOST CIRCUMSTANCES LAWYERS SHOULD NOT HAVE SEX WITH THEIR CLIENTS

- u **Rule 1.8.10** has received the most public attention (*because sex always receives the most attention*).
- u The former rules prohibited a lawyer from having sex with a client if the act was coerced, or if it was considered a form of payment for services.
- u **Over thirty years ago Formal Opinion 1987-92 pointed out that despite the many obvious ethical perils presented by intimate relations between attorneys and clients (e.g., confidentiality, the client's ability to consent, independence of judgment, undue influence, and the conflict of interests created by a sexual relationship between the attorney and the spouse of a criminal defendant represented by the attorney.) There was at that time no rule governing such matters.**
- u **The 1987 opinion also pointed out the problems presented by a *per se* ban (e.g., privacy, the ability of an attorney to represent the attorney's own spouse, the emotional issues in family law cases, including child custody and the policy of encouraging reconciliation).**
- u The new rule prohibits lawyer-client sexual relations unless there was a preexisting consensual relationship.
- u If the client is an "organization" the rule applies where the lawyer has sex with a "constituent of the organization" who "supervises, directs or regularly consults with that lawyer."
- u If a person other than the client alleges a violation of the rule, no Notice of Disciplinary Charges may be filed until the State Bar has attempted to obtain a statement from the client and determined whether the client would be "unduly burdened by further investigation."



# Hypothetical

- u A lawyer has a pre-existing sexual relationship with a lower level employee with no control over legal affairs at a large corporation and the firm takes over representation of the corporation as a client. There is no violation of the corporation's policies.
- u The employee is promoted to be special assistant to the corporation's general counsel and will be involved in all legal matters for the client.
- u What are the lawyer's obligations?

# NEW OPINIONS ON THORNY ISSUES ILLUSTRATE THE EMPHASIS OF THE NEW RULES REGARDING THE PRIMACY OF PROTECTION OF CLIENTS' INTERESTS

- u Opinion 2020-204 deals with the ethical obligations of lawyers representing clients whose cases are funded by a third-party litigation funder (including independence of judgment, confidentiality, and the competence and conflict issues raised when the same attorney negotiates the funding contracts as well as trying the case.)
- u 2020-203 discusses the ethical obligations of lawyers who suffer data breaches of electronically stored client information.
- u 2020-201 deals with the ethical challenges that arise when a lawyer departs from her firm, stressing that each client's interests must have priority over the interests of the lawyer and the law firm.
- u 2019-200 discusses three issues: #1 what must the attorney do when the attorney suspects that a witness in a civil trial has testified falsely; #2 what are the attorneys's duties when the attorney *knows* the witness has committed perjury; and #3 what if the attorney first learns of the perjury *after* the witness has testified at trial and the client has instructed the attorney to continue to use the perjured testimony.
- u An attorney has concluded she must withdraw under Rule 1.16 (a) because the client's car lacks merit. Can she go ahead and settle the case before withdrawing from representation? See Opinion 2019-198.
- u What obligations arise when lawyers in a firm consult with outside counsel concerning matters related to the firm's representation of a current client, such as ethical compliance or possible malpractice. And do those obligations change if the lawyer consults another lawyer in the same firm, perhaps the law firm's in-house counsel? See 2019-197

# NOT JUST COMPETENCE, BUT ALSO DILIGENCE, IS NECESSARY

- u California's Rulebook has always emphasized the requirement competence when representing a client (former Rule 3-110), and this duty is substantially unchanged in new **Rule 1.1**.
- u **Rule 1.3** adds a duty of diligence when representing a client. It provides a "lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to act with reasonable ... diligence in representing a client."
- u Per **subsection 1.3(b)** "'reasonable diligence' shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or without just cause, unduly delay a legal matter entrusted to the lawyer."
- u **Rule 1.3** has no equivalent under the former Rules of Professional Conduct and differs from ABA Model Rule 1.3, which provides a "lawyer shall act with reasonable diligence and promptness in representing a client...."

# NOT JUST COMPETENCE, BUT ALSO DILIGENCE, IS NECESSARY (continued)

- u **Rule 1.3** raises questions such as whether, for example, requesting multiple extensions to respond to discovery or other similar conduct might constitute a “diligence” violation.
- u Also **Rule 1.3** must be read with **Rule 3.2**, which provides that a “lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.”
- u **Remember the interplay of competence and lack of diligence may involve such matters as declining competence because of illness or age.**
- u If you are now thinking about your opponent’s behavior in a pending discovery dispute, consider new **Rule 3.10** (formerly Rule 5-100) which states “a lawyer shall not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute.”

# CONFLICTS OF INTEREST

- u **Rule 1.7** moves away from the former “checklist” approach to current client conflicts taken by former Rule 3-310.
- u **Rule 1.7** adopts the Model Rules test: whether a client’s interest is “directly adverse” to that of another client in the same or separate matter, or whether there is a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationship with another client, a former client or a third person, or by the lawyer's own interests.
- u **Rule 1.7** keeps the “informed written consent” standard.
- u The new “directly adverse” language is vexing when read along side **Rule 1.9** (conflicts with former clients) which refers to a lawyer’s interests being “materially adverse” to a former client.
- u “Adverse,” “directly adverse,” and “materially adverse.” What’s the difference? Those distinctions suggest one reason it took 29 years to revise the rules. (Answer: the main difference revolves around determining whether there is “harm” to the client). **Again: the best interest of the client is the primary consideration**
- u **Rules 1.10 and 1.8.11 and 1.18(c)** codify common-law imputation principles. **Rule 1.10** permits ethical screening for lateral attorneys in a new firm who did not substantially work on a former client conflict producing matter in their previous firm. **Rule 1.11** permits screening for government attorneys moving into private practice.

# SAFEKEEPING OF CLIENT FUNDS AND PROPERTY

- u New **Rule 1.15** requires that advance fee deposits (often mislabeled as a “retainer”) be deposited into a client trust account maintained in California (subject to a limited exception).
- u This rule uses the word “funds received or held,” which means it applies to all such fees, even those received prior to effective date of the Rule. By contrast, current rule 4-100 only required advance costs to be deposited into a client trust account.
- u The requirement to deposit advance fees into a trust account does not apply to a “true retainer,” which is earned upon receipt and ensures the lawyer’s availability to the client during a specified period or on a specified matter.
- u The new rule also permits a flat fee paid in advance for legal services to be deposited into an operating account, but only if the lawyer makes the required written disclosure as set forth in **Rule 1.15(b)**.
- u Confidential information: Study **Rule 1.6** thoroughly.
- u **And remember Opinion 2020-203 regarding unauthorized access to client’s electronically stored data (including trade secrets and HIPPA data under the Health Insurance Portability and Accountability Act).**
- u New **Rule 1.18** codifies common law that a lawyer owes a duty of confidentiality as to confidential information received from prospective clients. The lawyer shall not represent a client with material adverse interests to a prospective client in the same or substantially related matter if the lawyer received confidential information from the prospective client – even if the lawyer was never actually hired.

# THE FAVORITE RULE AMONG JUDGES

- u **Remember the 3 issues presented by Opinion 2019-200 in slide #6?**
- u **Rule 3.3** describes the lawyer's duty of candor toward the "Tribunal" as follows: A lawyer shall not:
  - u (1) knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  - u (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal the language of a book, statute, decision or other authority; or
  - u (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by law....

**THESE ARE NOT NEW CONCEPTS-- JUST A REMINDER.**

# Stay Connected!



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**Hon. James Lambden**  
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