

# YOU SAID WHAT!?

## HOT TOPICS IN LEGAL ETHICS

HON. SUZANNE BRUGUERA (RET.)

DAVID FINK, ESQ.

MARY FINGAL SCHULTE (RET.)



# OUR SPEAKERS



HON. SUZANNE BRUGUERA



DAVID FINK, ESQ.



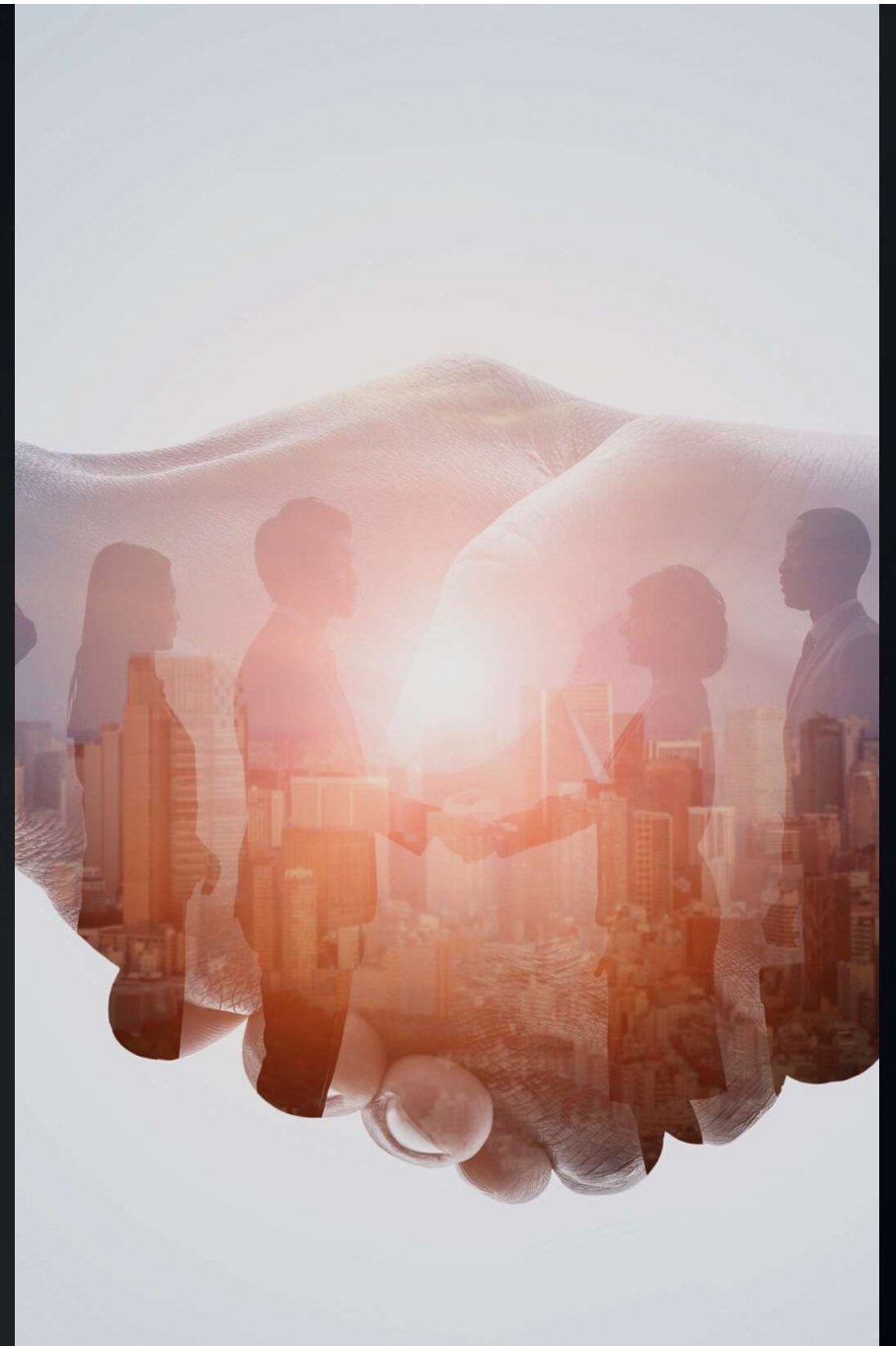
HON. MARY FINGAL SCHULTE

# OUR THEME

"Civility is an ethical component of professionalism. Civility is desirable in litigation, not only because it is ethically required for its own sake, but also because it is socially advantageous: it lowers the costs of dispute resolution. The American legal profession exists to help people resolve disputes cheaply, swiftly, fairly, and justly. Incivility between counsel is sand in the gears. [¶] Incivility can rankle relations and thereby increase the friction, extent, and cost of litigation. Calling opposing counsel a liar, for instance, can invite destructive reciprocity and generate needless controversies. Seasoning a disagreement with avoidable irritants can turn a minor conflict into a costly and protracted war."

"All those human hours, which could have been put to socially productive uses, instead are devoted to the unnecessary war and are lost forever. All sides lose, as does the justice system, which must supervise the hostilities. [¶] By contrast, civility in litigation tends to be efficient by allowing disputants to focus on core disagreements and to minimize tangential distractions. It is a salutary incentive for counsel in fee-shifting cases to know their own low blows may return to hit them in the pocketbook." *Karton v. Ari Design & Construction* (2021) 61 Cal.App.5th 734, 747

[citing *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507]



# APPELLATE CASES

*Shappell SoCal Rental v. Chicos*  
(2022) 85 Cal. App. 5th 66 (4th  
District, Div. 3)

- “The obligation to advise opposing counsel of an impending default is part of an attorney’s responsibility to the court and the legal profession and takes precedence over the obligation to represent the client effectively.”
- “That duty, and counsel’s responsibility to behave with professional courtesy, existed long before LaSalle was issued.”





# APPELLATE CASES

*LaSalle v Vogel* (2019) 36 Cal.  
App. 5th 127 (Fourth District,  
Division Three)

- “The policy of the state is that parties to a lawsuit ‘shall cooperate.’ Period. Full stop.”
- “We conclude by reminding members of the State Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel.” (Citation omitted.)



# APPELLATE CASES

*LaSalle* concludes with a quote from Justice Warren Burger in a 1971 address to the American Law Institute: “(L)awyers who know how to think but have not learned how to behave are a menace and 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 and in every case and in every court and their worst conduct will be emulated perhaps more readily than their best.”





# APPELLATE CASES

*Osborne v Todd Farm Service*  
(2016) 247 Cal. App. 4th 43  
(Second District, Division Six)

- “An attorney is an officer of the court. He or she must respect and follow court orders whether they are right or wrong....These time honored rules were lost upon counsel.”



# NEW CA RULE OF COURT 9.8.5 AND STATE BAR RULE 2.5



All “licensee’s responsible for trust funds” must report annually whether they held client funds in the preceding year, and if so, that they are knowledgeable about the new rules.



State Bar can (and now does) require you to complete an annual self-assessment on trust account duties and practices. ([CTAPP](#))



Each and every trust account must be registered with the State Bar, including Bank info and account numbers.



State Bar can audit compliance (by a CPA at the lawyer’s expense) and can impose mandatory corrective action and even refer for disciplinary proceedings.



# REVISIONS TO CA RULES OF PROFESSIONAL CONDUCT (“CRPC”) 1.15

CRPC 1.15(D)(1)

[amended]- When a lawyer receives funds, the lawyer must, absent good cause, notify the client or other person entitled to the funds or property of that fact no later than 14 days of receipt.

- Prior rule: Notice must be “promptly” given to the client or other person entitled to the funds.

CRPC 1.15(D)(7)

[amended] Requires a lawyer to “promptly distribute any undisputed funds or property in the possession of the lawyer or law firm that the client or other person is entitled to receive.”

- Prior rule: Distribution requirement triggered only upon request.

CRPC 1.15(F)

[amended] Unless agreed in writing by the client or other person entitled to funds, the property or funds must be distributed within 45 days of the time those funds or property become undisputed. Failure creates rebuttable presumption of violation of CRPC 1.15 (d) (7)

CRPC 1.15(G)

[amended] “Undisputed funds or property” means “funds or property, or a portion of any such funds or property, in the possession of a lawyer or law firm where the lawyer knows or reasonably should know that the ownership interest of the client or other person in the funds or property, or any portion thereof, has become fixed and there are no unresolved disputes as to the client’s or other person’s entitlement to receive the funds or property.” See Comments [6] and [7] of CRPC 1.15 for illustrative examples



## REVISIONS TO CALIFORNIA RULES OF PROFESSIONAL CONDUCT (“CRPC”) 1.4

New Comment [1] to CRPC 1.4 – A lawyer’s receipt of funds on behalf of a client requires communication with the client pursuant to [CRPC] 1.15, paragraphs (d)(1) and (d)(4) and ordinarily is also a significant development requiring communication with the client pursuant to this rule.

# STATE BAR RULES/RECENT ETHICS OPINIONS

[HTTPS://WWW.CALBAR.CA.GOV/ATTORNEYS/CONDUCT-  
DISCIPLINE/ETHICS/ETHICS-TECHNOLOGY-RESOURCES/ETHICS-  
OPINIONS-RELATED-TO-TECHNOLOGY](https://www.calbar.ca.gov/attorneys/conduct-discipline/ethics/ethics-technology-resources/ethics-opinions-related-to-technology)



2021-205

Duties to  
Prospective Client



2020-204

Litigation Funding



2021-207

Client with  
Diminished Capacity



2021-206

Colleague Impairment



2019-198

Settling before  
Withdrawal



2015-194

Puffing in  
Negotiation



## OUR ATTORNEY CIVILITY AND PROFESSIONALISM

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*California Attorney  
Guidelines of Civility and  
Professionalism*  
first approved 2007  
(Amended in 2014)

Needed replacement for B&P section 6068(f) which admonished attorneys “to abstain from all offensive personality.”

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Found to be unconstitutionally vague in *United States v. Wunsch* (9th Cir. 1996) 84 F.3d 1110. (The irony is that there was no serious dispute that Wunsch did not, in fact, abstain from an offensive personality).

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Another appellate court observed: “it is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law.’ (*People v. Chong* (1999) 76 Cal.App.4th 232, 243).” In *Re S.C.* (2006) 138 Cal.App.4th 396, 412.



# CIVILITY LANGUAGE IN ATTORNEY OATHS

“ California Example:

**I solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my knowledge and ability. As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.**

”

# OTHER PROFESSIONAL STANDARDS: ABOTA

## Civility Matters

Principles of Civility, Integrity, and Professionalism

## Code of Professionalism

includes promises to “Always remember that the practice of law is first and foremost a profession.”



“Always remember that my word is my bond...”

# OTHER PROFESSIONAL STANDARDS

## OCBA Civility Guidelines

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1. Counsel shall show civility to other counsel and self-represented litigants.
2. Counsel shall show civility during discovery.
3. Counsel shall show civility to the courts.



## LACBA

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### Civility Guidelines

# OTHER PROFESSIONAL STANDARDS: ACTL



## Code of Pretrial Conduct and Code of Trial Conduct

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“While trial lawyers owe undivided allegiance to their clients, they also owe important duties to the judicial system, to their colleagues, and to the public. Only by fulfilling these duties can trial lawyers help to ensure the proper administration of justice.”



# KARTON V. ARI DESIGN AND CONSTRUCTION

(2021) 61 Cal. App. 5th 734, 734



Trial courts have broad discretion in awarding and adjusting the attorney fee award. The trial judge may **ADJUST THE FEE DOWNWARD OR DENY AN UNREASONABLE FEE ALTOGETHER.**



Trial judges deciding motions for attorney fees properly may consider whether the attorney seeking the fee has become personally embroiled and has, therefore, over-litigated the case.



Similarly, judges permissibly may consider whether an attorney's incivility in litigation has affected the litigation costs.

# KARTON V. ARI DESIGN AND CONSTRUCTION (CONT.)



The benchmark in determining attorney fees is REASONABLENESS. The Lodestar is the product of a reasonable hourly rate and a reasonable number of hours . Germaine factors include the nature, difficulty and extent of the litigation, the skill it required, the attention given and the success or failure of the enterprise.

A reduced award might be fully justified by a general observation that an attorney over-litigated the case.

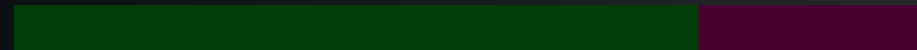


# KARTON V. ARI DESIGN AND CONSTRUCTION (CONT.)

The “percentage of recovery” approach to awarding attorney fees shares with the Lodestar method the fundamental goal of defining REASONABLENESS. Personal embroilment undermines objectivity about the appropriate scale of litigation.



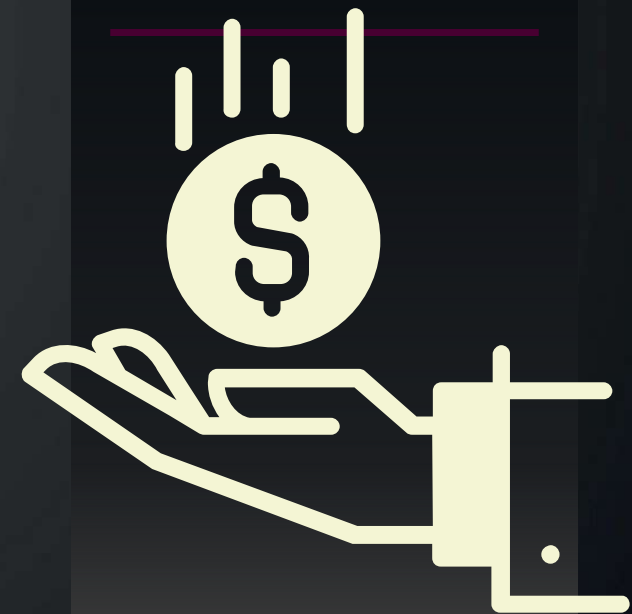
The size of a judgment is pertinent to rational evaluation of a requested fee. Rational decision-making weighs benefits and costs.



# KARTON V. ARI DESIGN AND CONSTRUCTION (CONT'D)

Attorney skill is a traditional touchstone in deciding whether to adjust a lodestar. Civility is an aspect of skill.

EXCELLENT  
LAWYERS  
DESERVE HIGHER  
FEES, AND  
EXCELLENT  
LAWYERS ARE  
CIVIL.





# SUMMARY OF GUIDELINES



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Do the Guidelines denigrate an attorney's duty of zealous representation?

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"No. Attorneys are officers of the court with responsibilities to the administration of justice, the courts, the public, and other counsel, in addition to attorneys' duties to their clients. Civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation are all essential to the fair administration of justice and conflict resolution"

*FAQs, California Attorney Guidelines of Civility and Professionalism (July 2009)*

## Section 1

Reminds attorneys of their responsibility to the justice system that mandate dignity, decorum and courtesy.

## Section 3

Covers responsibility to clients and client representation – explain to client you will not be an "attack dog."

# SECTION 4 – BE CIVIL IN WRITTEN WORK



## Reflect

“professional integrity, personal dignity, and respect for the legal system.”



## Consider

Do not “disparage the intelligence, integrity, ethics, morals,” of other participants in the proceeding.



## Avoid

“hostile, demeaning or humiliating words.”

Takeaway: Avoid harming a client’s case with your behavior, consciously or unconsciously.



## SECTION 6 - SCHEDULING

Tell your client up front you will act professionally and civilly.

Explain that co-operation results in lower legal fees.

Agree to reasonable requests for continuances that are not adverse to client's interests.

Avoid ex parte requests for continuance requests that should have been resolved informally.

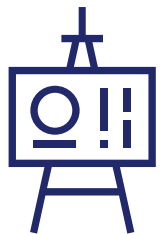
No sandbagging - if request an extension or continuance with the intent cut off opposing party's rights, should so state.



# SECTION 9 - DISCOVERY



- Meet and Confer!
- **Do not** use discovery to harass
- **Play fair** - if other side schedules a depo after conferring, do not unilaterally set other side's depo before that date
- **Do not** do anything at a depo that you would not have done in front of a judge
- If inadvertently receive a privileged document, **notify** other side and return it.
- **Do not** delay production of documents for tactical reasons.
- **Do not** produce documents in a manner that obfuscates.





# SECTION 19: SPECIAL RULES FOR FAMILY LAW PRACTITIONERS

In addition to other applicable Sections of these Guidelines, in family law proceedings an attorney should seek to reduce emotional tension and trauma and encourage the parties and attorneys to interact in a cooperative atmosphere and keep the best interest of the children in mind.

For Example:

- A** An attorney should discourage and should not abet vindictive conduct.
- B** An attorney should treat all participants with courtesy and respect in order to minimize the emotional intensity of a family dispute.
- C** An attorney representing a parent should consider the welfare of a minor child and seek to minimize the adverse impact of the family law proceeding on the child.

See also, American Academy of Matrimonial Lawyers, "Bounds of Advocacy": [https://www.fieldsdennis.com/wp-content/uploads/2018/03/bounds\\_of\\_advocacy.pdf](https://www.fieldsdennis.com/wp-content/uploads/2018/03/bounds_of_advocacy.pdf)

# SECTION 20: SPECIAL RULES FOR CRIMINAL LAW PRACTITIONERS

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In addition to other applicable Sections of these Guidelines, criminal law practitioners have unique responsibilities. Prosecutors are charged with seeking justice, while defenders must zealously represent their clients even in the face of seemingly overwhelming evidence of guilt. In practicing criminal law, an attorney should appreciate these roles.

For Example:

**A** A prosecutor should not question the propriety of defending a person accused of a crime.

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**B** Appellate counsel and trial counsel should communicate openly, civilly and without rancor, endeavoring to keep the proceedings on a professional level.

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# IMPLEMENTATION BY **JUDGES**

Section 21: “Judges are encouraged to become familiar with these Guidelines and to support and promote them where appropriate in court proceedings”



Advise parties at first CMC that it expects conduct in compliance with Guidelines

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Standing order incorporating Guidelines

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Call out those attorneys who violate the Guidelines

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Impact on determination of attorney fee award [*Karton*]

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In Family Law, Award of Monetary Sanctions under Family Code Sec. 217 [*IRMO Davenport*]

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# *CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM*

## **SAMPLE COURT ORDER**

**1**

The Court expects counsel to be familiar with and follow the California Guidelines of Civility and Professionalism. A copy may be obtained on the web at this URL:

<http://ethics.calbar.ca.gov/Ethics/AttorneyCivilityandProfessionalism.aspx>

Uncivil or unprofessional behavior will not be tolerated.

**2**

The Court expects parties to resolve all disputes regarding scheduling or time extensions without the necessity of Court involvement.



# IMPLEMENTATION BY ATTORNEYS

The guidelines are voluntary and attorneys are asked to sign a pledge to adhere to these standards.

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Consider writing opposing counsel and request that he/she join with you in signing the pledge.

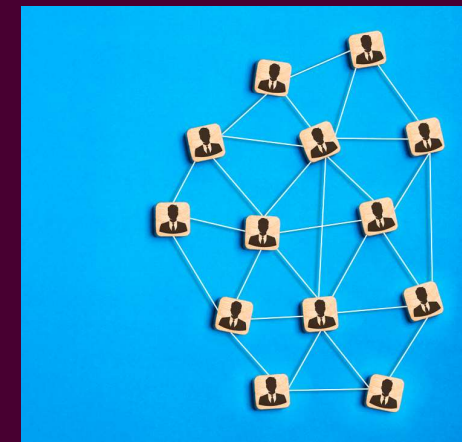
Tell client at the outset that this is how you practice

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Attorneys need to advise their clients that this is how I practice law and if all you want is an “attack dog” then you should go elsewhere.

Law Firms designate partner to discuss the Guidelines with new associates

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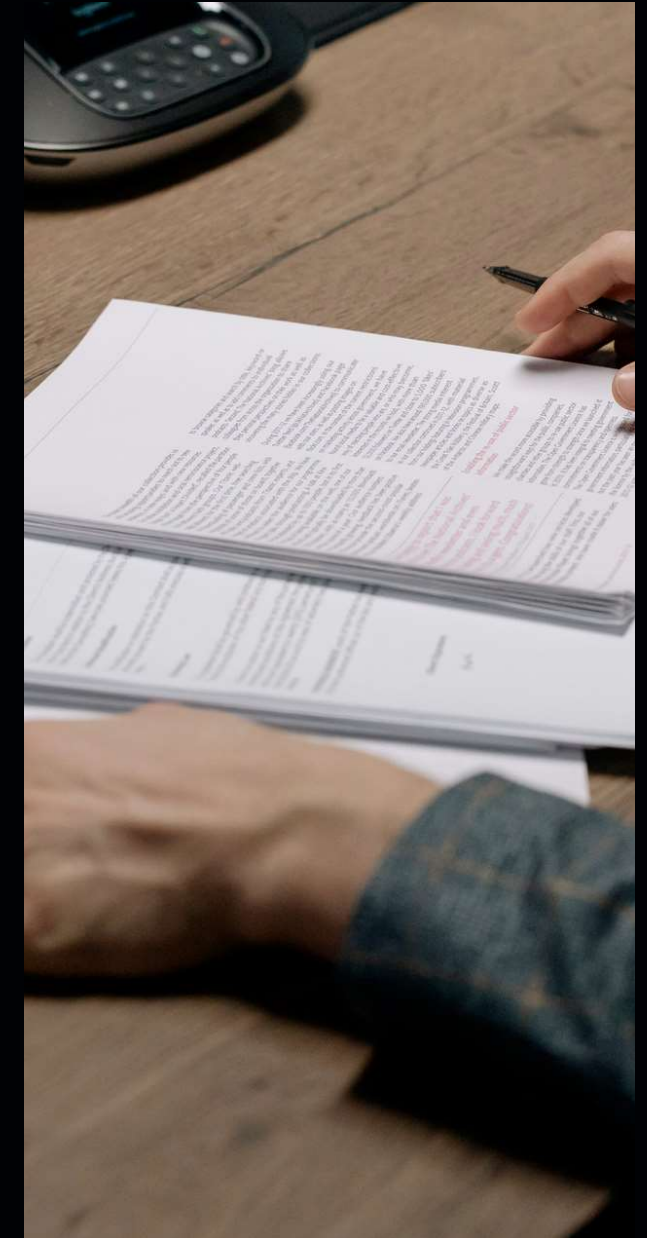
# CIVILITY IN APPELLATE PRACTICE

“California Rules of Court , rule 8.204 (a)(2)(C) provides that an appellant’s opening brief shall “provide a summary of the significant facts...”

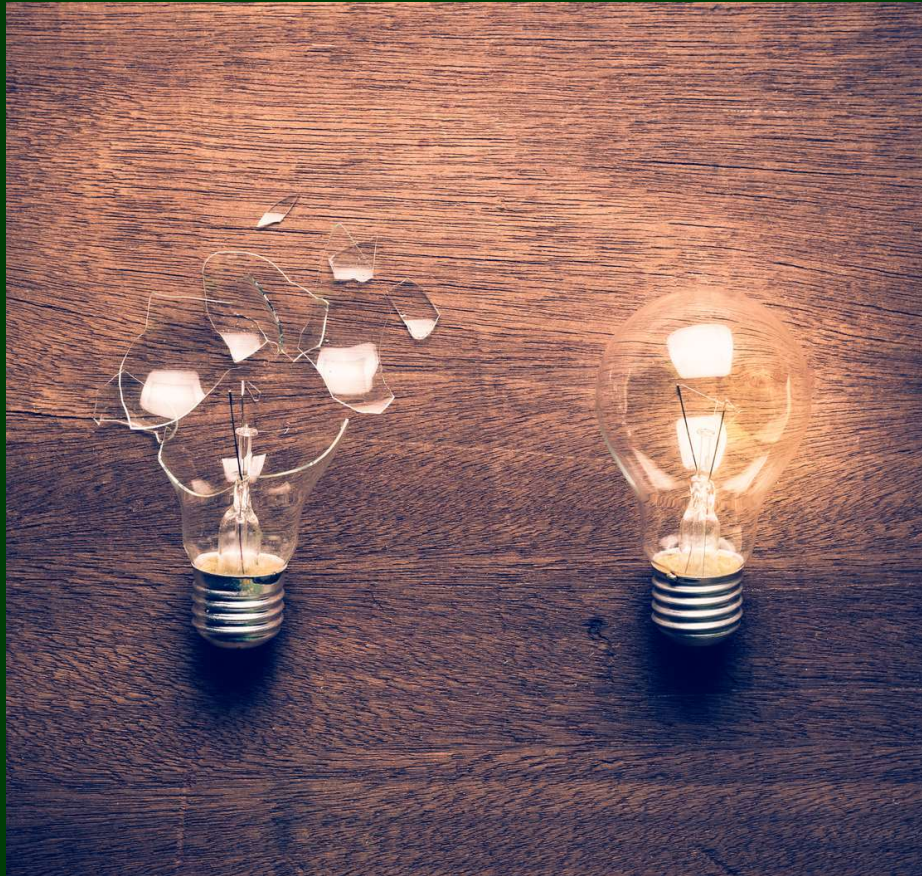
Before addressing the legal issues, your brief should accurately and fairly state the critical facts (including the evidence), free of bias, and likewise as to the applicable law.

Misstatements, misrepresentations and/or material omissions of the relevant facts or law can instantly undo an otherwise effective brief, waiving issues and arguments; it will certainly cast doubt on your credibility, may draw sanctions , and may well cause you to lose the case!”

In re marriage of Jill L. and Kenneth L. Davenport (2011) 194 Cal. App. 4th 1507



# CIVILITY IN APPELLATE PRACTICE (CONT.)



“As Justice Mosk well put it, such “factual presentation is but an attempt to reargue on appeal those factual issues decided adversely to it at the trial level, contrary to established precepts of appellate review. As such, it is doomed to fall.”

*In re Marriage of Jill L. Davenport v. Kenneth L. Davenport* (2011) 194 Cal.App. 4th 1507



## CIVILITY IN **APPELLATE PRACTICE (CONT.)**

Because a frivolous appeal or one taken for improper reasons, harms the court, not just the respondent, a growing number of courts are ordering appellants to pay sanctions directly to the court clerk to compensate the state for the cost of processing such appeals.

*Pierotti v. Torian* (2000) 81 Cal. App 4th 17





# CIVILITY IN APPELLATE PRACTICE (CONT.)



We note there is a particular need to discourage like conduct in the future because this appeal was taken from a judgement confirming an arbitration award. The primary purpose of arbitration is to provide a speedy and relatively inexpensive means of dispute resolution. Having chosen arbitration over civil litigation, a party should reap the advantages that flow from the use of that nontechnical, summary procedure. By filing a frivolous appeal from a judgement confirming an arbitration award, a party defeats the very purpose of the arbitration process.

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# WHAT DO COURTS EXPECT OF ATTORNEYS?

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A member shall not seek, accept or continue employment if the member knows or should know that the objective of such employment is (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal , without probable cause and for the purpose of harassing or maliciously injuring any person; or (B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.”

Rule 3-1 of the California State Bar Rules of Professional Conduct

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# WHAT DO COURTS EXPECT OF ATTORNEYS?

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Business and Professions Code Section 6068(d) makes it the duty of every attorney to “employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.” Personal attacks on an opposing lawyer may not be “consistent with truth” and may “seek to mislead the judge.”

Even if such accusations do not meet the definition of section 6068(d), they still may constitute misconduct.

In Re S.C. (2006) 138 Cal.App.4th 396, 412

# RULE 1.4 COMMUNICATION WITH CLIENTS

## (RULE APPROVED BY THE SUPREME COURT, EFFECTIVE NOVEMBER 1, 2018)

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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.

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B

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

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C

A lawyer may delay transmission of information to a client if the lawyer reasonably believes that the client would be likely to react in a way that may cause imminent harm to the client or others.

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D

A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

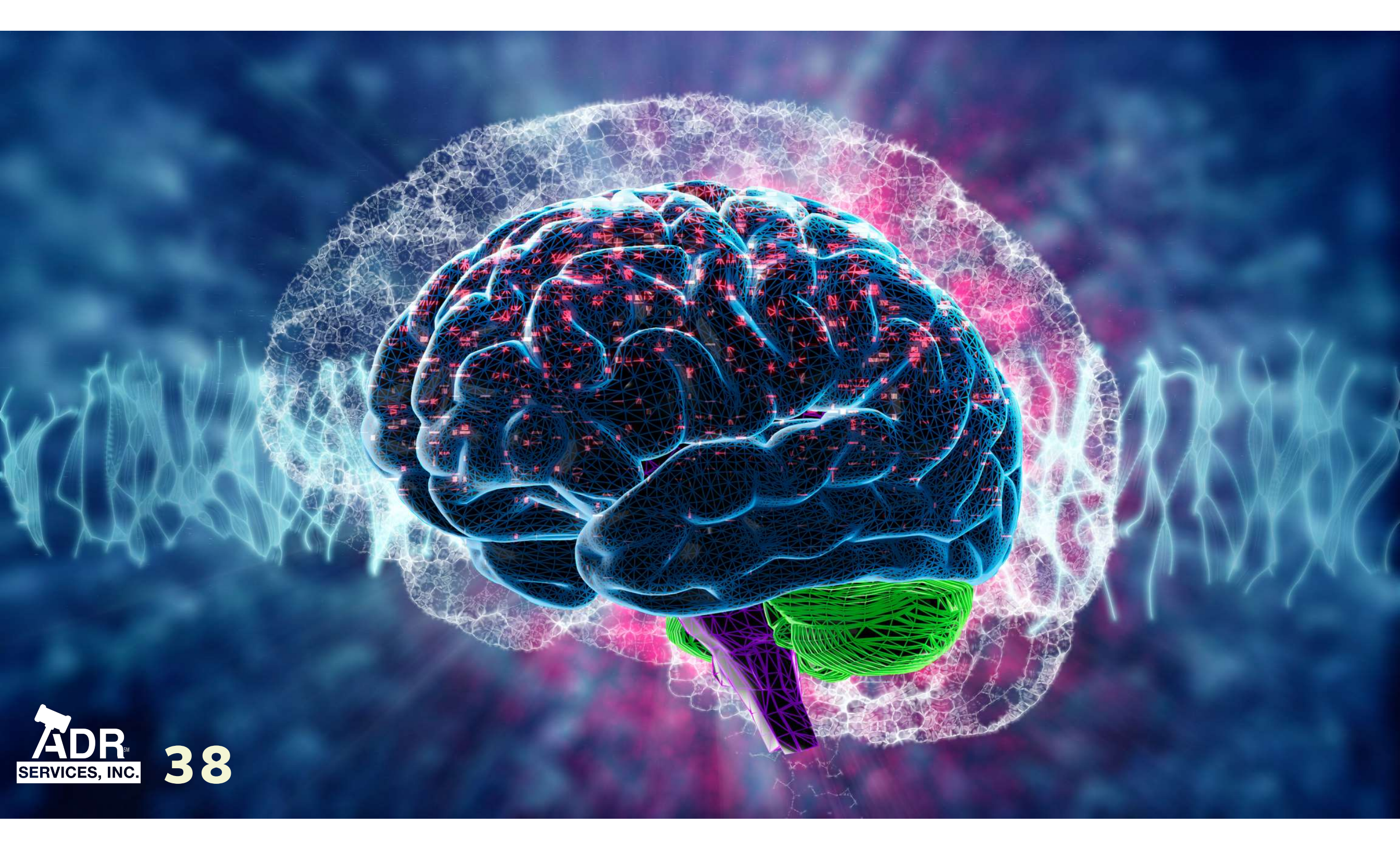
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**WHAT DOES  
NEUROBIOLOGY HAVE  
TO TELL US ABOUT  
THE CLIENT (OR  
COLLEAGUE OR US)  
WHO IS EMOTIONALLY  
TRIGGERED?**











# ATTORNEY ADVICE

Attorneys act as counselors, and in rendering advice to their clients may, and when appropriate should, consider social, economic and even political factors as well as legal. [Citations omitted.] Clients have a right to expect their attorneys to render complete and candid advice. *Wolfrich Corp. v. United Services Auto. Ass'n* (1st Dist. 1983) 149 Cal.App.3d 1206, 1211 (overruled on other grounds by *Doctors' Company v. Superior Court* (1989) 49 Cal.3d 39, 40).

# **RULE 2.1 ADVISOR**

## **(RULE APPROVED BY THE SUPREME COURT, EFFECTIVE NOVEMBER 1, 2018)**

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In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment:

[1] ● ● ●

[2] This rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.

See [https://www.calbar.ca.gov/Portals/0/documents/rules/Rule\\_2.1-Exec\\_Summary-Redline.pdf](https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_2.1-Exec_Summary-Redline.pdf) for redline changes to ABA Model Rule 2.1



A man in a white shirt is seen from behind, looking at a chalkboard. The chalkboard is covered with various mathematical formulas, including  $J = \frac{\partial x}{\partial u} \frac{\partial x}{\partial v}$ ,  $\int \frac{dx}{\sqrt{x}} = \lim_{\delta \rightarrow 0} \dots$ , and  $1+x = \frac{1}{2} \pi (\lambda+2)$ . A large, stylized white outline of a human brain is drawn on the board, with colorful paint splatters (red, yellow, blue, green) around it. The background is dark.

# COMMENT 2 TO ABA MODEL RULE 2.1

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied



A detailed close-up photograph of a mechanical watch movement, showing intricate gears, jewels, and metal components. The image is positioned on the left side of the slide, with a dark diagonal overlay separating it from the text area.

# COMMENT 2 TO ABA MODEL RULE 2.1

[2] Advice couched in **narrow legal terms** may be of **little value** to a client, especially where practical considerations, such as **cost or effects on other people**, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, **moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.**

# COMMENT 3 AND 5 TO ABA MODEL RULE 2.1

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by **a client inexperienced in legal matters**, however, the lawyer's responsibility as advisor may include indicating that more **may be involved than strictly legal considerations**.

[4] ....

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in **substantial adverse legal consequences** to the client, the lawyer's duty to the client under **Rule 1.4** may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under **Rule 1.4** to inform the client of forms of dispute resolution that might constitute **reasonable alternatives to litigation...**





# ATTORNEY-CLIENT RELATIONSHIP

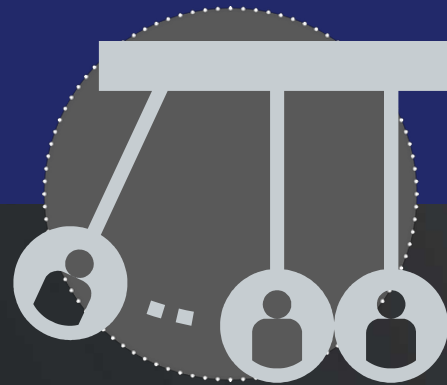
Case Law



The attorney-client relationship is a fiduciary relationship of the very highest character.

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*Cox v. Delmas* (1893) 99 Cal. 104



As a fiduciary, an attorney must refrain from using undue influence and must be committed to the most scrupulous good faith.

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*Trafton v. Youngblood* (1968) 69 Cal.2d 17; *Clark v. State Bar* (1952) 39 Cal.2d 161



Once an attorney renders his advice, an attorney must respect and defer to decisions properly reserved for the client.

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*Davis v. State Bar* (1983) 33 Cal.3d 231, 188 Cal.Rptr. 441, 655 P.2d 1276.



# THREE TENSIONS IN NEGOTIATION

*GETTING TO YES*, R. FISHER AND W. URY [2011]

Between Empathy (Compassion) and Assertiveness

Empathy

Demonstrating an understanding of the other person's interests and point of view.

Assertiveness

Asserting your own interests and point of view

**You can only do one or the other**

MYTH

FACT

**Both are critical to effective negotiation**

- Assertiveness w/o empathy => escalating conflict
- Empathy w/o assertiveness => can jeopardize legitimate concerns

# THANK YOU



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