



# Navigating the Nuances Legal Ethics Unveiled

Hon. David Rosen (Ret.)  
Hon. Thomas Willhite (Ret.)



ADREvolution

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# GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW

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# Traditional AI

- Traditional AI can learn from data, and make predictions or decisions based on data, but can't create anything new.

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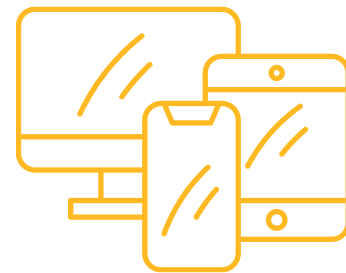
# Generative AI

- Generative AI is trained on a set of data, learns the underlying patterns in the data, and creates new data that mirrors the training set, based on a piece of data – a prompt-- you give it

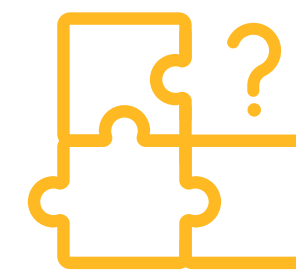
# Generative AI in the Practice of Law



Generative AI provides attorneys with a powerful new tool.



Many generative AI platforms already exist for specific applications in the practice of law.



The use of generative AI in the legal profession creates a unique set of potential ethical challenges.

Remember one of the excuses for the infamous CHAT GPT brief: “I did not comprehend that ChatGPT could fabricate cases.”

# Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law

On November 16, 2023, the California State Bar Board of Trustees adopted its Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law.

- Found at: <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Ethics-Technology-Resources>
- These are guidelines, not best practices, and will be updated as the technology evolves and matures, and as new issues are presented.

# The Source of the Ethical Challenges in Generative AI

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## Data Use

Generative AI uses mountains of data to train the AI and to obtain output, but the competing AI systems often don't clearly explain how that data is used for training and output.

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## Overreliance

Generative AI output imitates human responses that seem confident, complete, and accurate on their face, creating the risk of overreliance.

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## Ethical Implications

At least 9 areas of professional ethics may be implicated in the use of generative AI.

# The Duty of Confidentiality

(Bus. & Prof. Code, § 6068, subd. (a); Rule 1.6 Rule 1.8.2)

Inquiries or prompts used in generative AI that contain confidential client information might be shared with third parties or used for other purposes by the platform.

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Before inputting any confidential client information:

- Consult with IT professionals or cybersecurity experts on confidentiality and security protections.
- Review the Terms of Use of the program.
- Anonymize client information and avoid details that can be used to identify the client.



# Duties of Competence and Diligence

(Rules 1.1, 1.3)

Generative AI outputs may include false, inaccurate, or biased information (e.g., machine bias and selection bias).

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If AI-generated outputs are used in representing a client:



Scrutinize the outputs for accuracy and bias, and



Use the outputs only as a starting point, to be supplemented by human-performed research and critical, human-performed analysis and review.



# Duty to Comply with the Law

(Bus. & Prof. Code, § 6068(a); Rules 8.4, 1.2.1)

The law governing the use of generative AI is in a state of flux, with many emerging legal issues, including AI-specific laws, privacy laws, intellectual property laws, cybersecurity concerns, and cross-border data transfer laws.

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You must keep abreast of such developments, because a lawyer must comply with the law and cannot counsel a client to engage, or assist a client in conduct that the lawyer knows is a violation of any law, rule, or ruling of a tribunal when using generative AI tools.

# Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers

(Rules 5.1, 5.2, 5.3)

As the foregoing points make obvious, managerial and supervisory lawyers should:

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- Establish clear policies regarding the permissible uses of generative AI in keeping with professional responsibilities, and
- Make reasonable efforts to ensure that the firm adopts and implements those measures.

# Communication Regarding Generative AI Use

(Rules 1.4, 1.2)

Rule of Professional Conduct 1.4 describes and defines the duties involving client communication, and also defines the ethical limitations on an attorney's duty to communicate.

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Evaluate your duty to communicate with the client when you decide to use Generative AI and consider.

- Disclosing to the client that you intend to use generative AI in the representation,
- Explaining how the technology will be used, and the benefits and risks of such use, and
- Reviewing any applicable client instructions or guidelines that may restrict or limit the use of generative AI.

# Charging for Work Produced by Generative AI and Generative AI Costs

(Rule 1.5; Bus. & Prof. Code, §§ 6147–6148)

Under Rule 1.5, “A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.”

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## The Guidelines suggest:

- You may charge for actual time spent (e.g., crafting or refining generative AI inputs and prompts, or reviewing and editing generative AI outputs).
- You may not charge hourly fees for the time saved by using generative AI.
- You may charge for the costs associated with generative AI.
- Your fee agreement, which explains the basis for all fees and costs, should also specifically explain those associated with the use of generative AI.

# Candor to the Tribunal; and Meritorious Claims and Contentions

(Rules 3.1, 3.3)

Some judges and courts either have enacted or are considering enacting court rules or standing orders regarding the use of generative AI.

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The US Court of Appeal for the Fifth Circuit has proposed a rule requiring the lawyer to certify:

- No generative AI was used in drafting the document presented for filing, or,
- To the extent generative AI was used, that all generated text, including all citations and legal analysis, has been reviewed for accuracy.

Check whether any such rule has been implemented in the jurisdiction of your representation.

# Prohibition on Discrimination, Harassment, and Retaliation

(Rule 8.4.1)

The Guidelines advise that:

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- Lawyers should engage in continuous learning about AI biases and their implications in legal practice, and
- Firms should establish policies and mechanisms to identify, report, and address potential AI biases.

# Professional Responsibilities Owed to Other Jurisdictions

(Rule 8.5)

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The Guidelines advise lawyers to analyze the relevant laws and regulations of each jurisdiction in which a lawyer is licensed to ensure compliance with such rules.



# California's New "Snitch Rule"

CRPC 8.3; ABA MRPC 8.3; California Business and Professions  
Code Sections 6068(b), (d), (e)(2) (i) and (o)

# California is the last of the 50 states to adopt model rule 8.3



**EFFECTIVE**  
**8/1/23**

# CRPC 8.3

A California lawyer must “inform the State Bar, or a tribunal with jurisdiction to investigate or act upon [the] misconduct” whenever the lawyer knows of “credible evidence” that another lawyer has either “committed a criminal act” or has engaged in “conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property,” and the conduct or act “raises a substantial question as to the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” (emphasis added)

Comment One to CRPC 8.3 notes that, of course, “[t]his rule does not abrogate a lawyer’s obligations to report the lawyer’s own misconduct as required by these rules or the State Bar Act. [citations]”

# Note How CRPC 8.3 Differs From the Model Rule

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The ABA's Model Rule of Professional Responsibility, rule 8.3, on the other hand, requires far more broadly that “[a] lawyer who *knows* that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” (emphasis added)

# Judicial Reporting Requirements

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A judge is required under Business & Professions code section 6086.7, upon initial issuing an order, such as sanctions above a certain amount, that triggers notification requirements, for notifying the State Bar of the order. CRPC 10.609.

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Does CRPC 8.3 affect such judicial reporting to the State Bar?

# Exceptions to CRPC 8.3 -- CRPC 8.3(d)



Mediation confidentiality

Attorney-client privilege or any other applicable privileges

Statutory specific protections such as Business & Professions code section 6068 (b), CRPC 1.6 and 1.8.2

Information “gained by a lawyer while participating in a substance abuse or mental health program;”

Information “protected by [any] other rules or laws, including information that is confidential under Business & Professions code section 6234” (which protects “information provided to or obtained by the Attorney Diversion and Assistance Program”).



\*MRPC 8.3(c) is significantly less stringent in its carve-out language.

# Comment 10 to CRPC 8.3

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“Communications to the State Bar relating to lawyer misconduct are ‘privileged and no lawsuit predicated thereon may be instituted against any person.’ (Business & Professions Code, sec. 6094.)”

■ The new rule itself does not specifically comment about confidentiality of reports per 8.3.



# Penalties for False Reporting

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“[L]awyers may be subject to criminal penalties for false and malicious reports or complaints filed with the State Bar or be subject to discipline or other penalties by offering false statements or false evidence to the tribunal....” (emphasis added)

*citing*, CRPC 3.3a, and Business & Professions code sections 6043.5 (a); 6068 (b).

# Does the rule apply retroactively?

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# California Attorney Oath

Per the State Bar website

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- “Taking the attorney’s oath is not just a ritual. It is required for admission to practice law in California pursuant to California Business and Professions Code section 6067.

“OATH (to be taken before a Notary or other authorized administering officer): I, (licensee name) 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 of 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.*”

# CIVILITY IN THE PRACTICE OF LAW



# Pre-2023 Measures to Encourage Civility



In 2007, the State Bar adopted the California Attorney Guidelines of Civility and Professionalism (<https://www.calbar.ca.gov/attorneys/conduct-discipline/ethics/attorney-civility-and-professionalism>).



Since 2014, as required by California Rule of Court 9.7, anyone admitted to practice law in California has taken a civility pledge as part of the attorney oath: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

# Recent Recommendations of the Civility Task Force



On July 20, 2023, the State Bar of California's Board of Trustees approved proposed measures to improve the civility of attorneys who are authorized to practice law in California.

The proposed changes, which are before the California Supreme Court for review and approval, are based on recommendations of the California Civility Task Force, sponsored by the California Lawyers Association and the California Judges Association.

# The Current State of Civility

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*“[T]he legal profession suffers from a scourge of incivility. Discourtesy, hostility, intemperance, and other unprofessional conduct prolong litigation, making it more expensive for the litigants and the court system. Moreover, incivility ... interferes with ... transactions of every kind [and] can create toxic workplaces.... Y]oung lawyers, women lawyers, lawyers of color, and lawyers from other marginalized groups are disproportionately on the receiving end.” (Initial Report of the California Civility Task Force, p.2.)*



# Proposal to Amend California Rules of Court, Rule 9.7 - Revised Attorney Oath

The proposal would:

- Require all lawyers who have not taken the 2014 civility pledge ("As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity") to submit a declaration committing to that language, and

- Require all lawyers to reaffirm the civility pledge annually.

**The penalty for non-compliance would be suspension or disbarment.**

# Proposed New Rule 8.4.2

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## New rule 8.4.2 would:

- Provide that lawyer shall not engage in incivility in the practice of law or related professional activities, and
- Define incivility as *significantly unprofessional conduct that is abusive or harassing, to be determined on the basis of the facts and circumstances surrounding the conduct.*

# Clarifying Comments to New Rule 8.4.2:

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- 1 The current California Attorney Guidelines of Civility and Professionalism and other applicable civility authorities are reference models.
- 2 The rule is not violated simply by advocacy (standing firm in the position of the client, protecting the record, or preserving professional integrity).
- 3 There is a cross-reference to Rule 8.4(d) of the Rules of Professional Conduct which clarifies that a violation of the new rule may also constitute a violation of rule 8.4(d).
- 4 There is a clarification that “incivility” as used in this rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

# Changes to Comments Under Rule 8.4 Regarding Misconduct

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**The comments to Rule 8.4 would be amended in the following ways:**

- Comment [4] would be amended to provide a cross-reference to the proposed new stand-alone rule prohibiting incivility, Rule 8.4.2.
- Comment [6] to Rule 8.4 would be amended to clarify that incivility could violate Rule 8.4(d) (conduct that is prejudicial to the administration of justice).
- Comment [6] would also be amended to direct lawyers to consult the current California Attorney Guidelines of Civility and Professionalism and other applicable civility authorities for conduct that does not violate Rule 8.4(d).

# Rule 1.2: Scope of Representation and Allocation of Authority

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*The proposal would amend Comment [1] to Rule 1.2 (allocation of authority between an attorney and client) to clarify that a lawyer has the authority to conduct themselves with civility, even if their client directs otherwise, so long as the lawyer does not prejudice the rights of their client.*

# CLIENT TRUST ACCOUNT PROTECTION PROGRAM (CTAPP)

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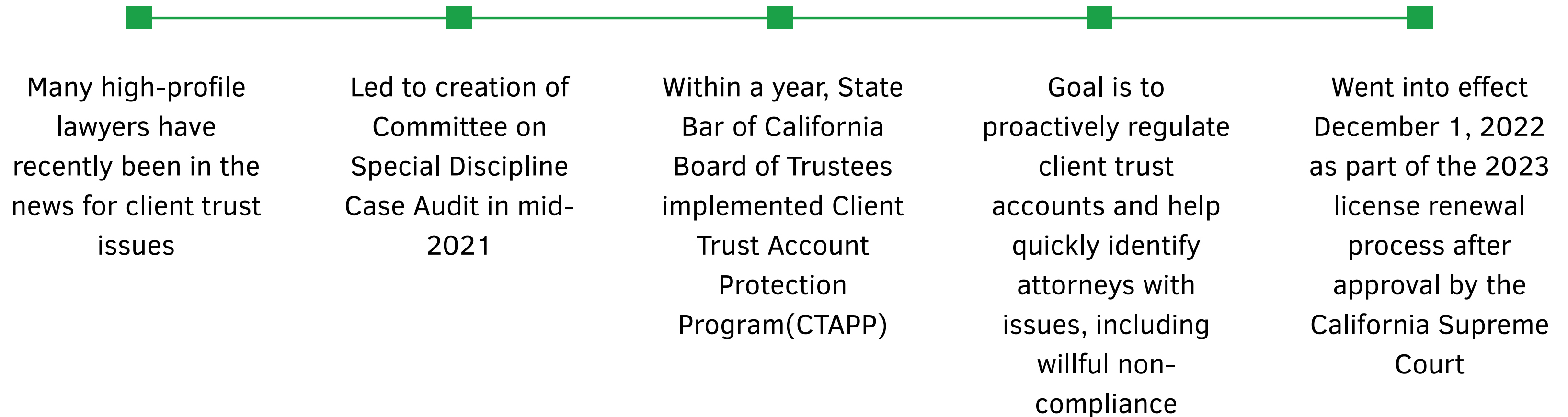


CRPC 1.15; California Rules of Court, rule 9.8.5; California Business and Professions code section 6068; and *Edwards v. State Bar* (1990) 52 Cal. 3rd 28.

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The Client Trust Account Protection Program (“CTAPP”) rules, effective 12/1/22, further clarify and sharpen the Bar’s focus on client trust account procedures.

# Overview





# ETHICAL REQUIREMENTS REGARDING CLIENT FUNDS

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- Lawyers have statutory and ethical obligations to safeguard funds they hold for their clients
- Funds must be kept separate from their personal and business accounts
- Must also maintain accurate accounting records and provide regular and timely reports to their clients
- Program is designed to better protect the public and better support attorneys to meet their obligations

# CTAPP REQUIREMENTS

## ■ Basically, all attorneys in good standing must comply with the new requirements, including:

- Register client trust accounts, including IOLTA, annually with the State Bar
- Complete an annual self-assessment of client trust account management practices
- Certify with the State Bar that you understand and follow all requirements and prohibitions pursuant to Rule 1.15 of the Rules of Professional Conduct

## ■ May fulfill your reporting requirements through My State Bar Profile

- CTAPP was implemented on December 1, 2022, the beginning of the 2023 license renewal period
- Deadline for reporting is same as deadline for paying annual license fees, February 1, 2024

## ■ To register a CTA, including IOLTA, must report year-end balance

# PENALTIES

Failure to comply results in a non-compliance penalty

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If continue to be in non-compliance, attorney will be enrolled as an inactive licensee

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# SELF-ASSESSMENTS

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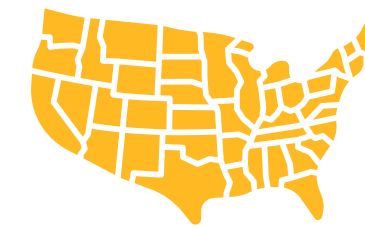
A subordinate lawyer may consult supervisory lawyer to confirm duties are performed by others at the firm



Entitled to rely on their responses



Objective of the Self-Assessment is to promote awareness of duties



No exceptions for out of state accounts

# FUTURE ENHANCEMENTS

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- Expanded public outreach and education
- Enhanced education for attorneys
- Compliance reviews of selected attorneys by CPAs

Sources, State Bar Of California Web Site, 2023, California Rules of Court, rule 9.8.5(a)(1)(A) (B), (2) (A)

**Enforcement of these rules is strict and specific. There is absolute liability for being even a penny out of balance, and good faith is not a defense.**

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*See, e.g., Guzetta v. State Bar* (1987) 43 Cal. 3rd 962, 976-980.

**Withdrawing money from a CTA  
and promptly redepositing all of  
it is still a violation.**

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*Kelly v. State Bar* (1991) 53 Cal. 3rd 509, 518-519.

# Possible “Exceptions”

Long-term deposit of a significant amount of client money may be placed in a separate interest-bearing trust account for the benefit of the client, avoiding IOLTA requirements

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*Brown v. Legal Foundation of Washington* (2003) 538 U.S. 216, 240, fn. 6 to dissent;  
*Washington Legal Foundation v. Legal Foundation of Washington* (2001) 271 F. 3rd 835, 843-844.

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# CONFLICTS FOR ATTORNEYS



# A Wall is Not Enough

*People ex. Rel. Dept. of  
Corporations v.  
Speedee Oil Change  
Systems, Inc. (1999)*  
20 Cal. 4th 1135

- Of counsel Lawyer was of counsel to a firm representing parties adverse to an oil company.
- Attorney, without knowledge that the firm to which he was of counsel was handling that case, briefly but substantively consulted with lawyers at the law firm representing the oil company.
- Supreme Court held that the firm for which the of counsel lawyer worked was subject to automatic disqualification
- The Court further held that the continuing significant relationship between the firm representing a party adverse to the oil company and an attorney who is of counsel to that firm, with its regular exchanges of information, advice, and opinions, properly makes the of counsel lawyer subject to the rule that imputes a conflict of interest to members of that same firm, with the consequences of automatic disqualification. 20 Cal. 4th at 1154.

**California law does not necessarily allow the use of ethical walls to prevent vicarious disqualification for conflict of interest.**

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*Hitachi, Ltd. v. Tatura* (2006) 419 F. Supp. 2d 1158.

# Consent and Waiver

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*Antelope Valley  
Groundwater Cases  
(2018) as 30 Cal.  
App. 5th 602*

- Court declined to extend the SpeeDee ruling where the affected parties clearly and expressly waive the conflict of interest and consent to continued representation by the otherwise conflicted lawyer.

# Disqualification for an alleged conflict is not automatic

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*Adams v. Aerojet General Corp.* (2001) 86 Cal. App. 3d 1324.

**Partial or full disgorgement of fees earned in the matter may be ordered upon disqualification for conflict of interest.**

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*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.*  
(2018) 6 Cal. 5th 59, 88-96.

# APPARENT VS. ACTUAL CONFLICTS OF INTEREST



# Criminal Cases

An appearance of a conflict is subject to inquiry, in seeking reversal of the conviction or to disqualify defense counsel, but only an actual conflict disqualifies counsel or mandates reversal, and an apparent conflict only becomes actual if the conflict is shown to have adversely affected counsel's performance.

*People v. Bonin* (1989) 47 Cal. 3d 808; *Mickens v. Taylor* (2002) 535 U.S. 162, 168 – 169.

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## As to disqualification of a prosecutor

*People v. Eubanks* (1996) is 14 Cal. 4th 580; *People v. AWI Builders, Inc.* (2022) 80 Cal. App. 5th 248, 255, 268-269.

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# Civil Cases

An apparent conflict can result in disqualification of counsel, even without the showing of any adverse effect on counsel's performance.

*Speedee Oil, supra*, 20 Cal. 4th at 1147; *Spindle v. Chubb/Pacific Indemnity Corp.* (1979) 89 Cal. App. 3d 706; *IRMO Abernathy* (1992) 5 Cal. App. 4th 1193; but see, citation to California Penal code, section 1424.

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CRPC 1.7 requires no showing of adverse effects on conflicted counsel's representation. The focus instead is on loyalty and confidentiality.

# CONFLICTS FOR JUDICIAL OFFICERS



The United States Supreme Court issued its Code of Conduct on November 13, 2023, but the specific wording, pervasive throughout the document (a Justice “should,” not “must” or “shall”) and the lack of any enforcement procedure or authority, renders this Code rather hollow when compared to, *inter alia*, the CRPC and the California Judicial Canons of Ethics. *See also*, Rothman, California Judicial Conduct Handbook, 4th ed., 2017, Ch. 7.

# In California, what constitutes a sufficient basis for recusal of the bench officer at counsel's instance?

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California Code of Civil Procedure sections 170.1, 170.5(b); but not 170.6.

170.1 Delineates factual circumstances under which the bench officer must recuse themselves. The default, however, is that a bench officer must hear and decide all matters assigned to them unless they are disqualified as a matter of law. CCP 170.

# Conflicts for venire members (potential jurors)

CCP sections 225(b)(1)(B), (c), 229(b), (d), such as *ownership* of an interest in a party, may be sufficient to support a successful For Cause challenge.

# Conflicts for Neutrals

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CCP section 1281.9; California Judicial Council Ethics Standards 7, 12(b); CRPC 2.4, et seq.; *Honeycutt v. J.P. Morgan Chase Bank* (2018) 25 Cal. App. 5th 909; *Ovitz v. Schulman* (2005) 133 Cal. App. 4th 830.

# Honeycutt v. J.P. Morgan Chase Bank (2018)

## 25 Cal. App. 5th 909

In Honeycutt, the Court of Appeal for our Second District reversed a trial court judgment confirming an arbitration award after the unsatisfied employee appealed on the basis that the award in favor of the employer was made by an arbitrator who failed to fully disclose possible conflicts of interest.

- Failed to disclose that the arbitrator had or would accept offers to serve as a neutral in other cases involving the same parties or attorneys
- Had sent inadequate disclosure letters to the parties which failed to fully satisfy the arbitrator's disclosure obligations
- Arbitrator failed to disclose their service in other pending arbitration matters involving counsel for the employer in this case.
- Had violated ethics standards requiring disclosure of any matters that could cause a person to reasonably doubt the arbitrator's ability to remain impartial

**This ruling has resulted in the fine tuning and expansion of disclosures routinely made by neutrals throughout the State.**





**The purpose of the focus, then, on apparent conflicts is to preserve and maintain the public's confidence in the legal system; but note politics and appointments.**

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*See, CRPC 8.4; In re Jasmine S.(2007) 153 Cal. App. 4th 835, 840.*

# THANK YOU

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