



PUSHING THE LIMITS-GOING TOO FAR AS AN ADVOCATE

A PRESENTATION TO THE WOODLAND HILLS
TAX & ESTATE PLANNING COUNCIL

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PRESENTED BY:
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Joel A. Osman, partner and general counsel at Parker Shaffie LLP, concentrates his practice on litigation and legal ethics. Prior to joining Parker Mills in 2014, Mr. Osman managed a group of Staff Counsel to Travelers Indemnity Company. For Travelers, he was responsible for all aspects of managing its Southern California liability practice in defense of Travelers insureds in all manner of general liability, construction, auto, fire, and subrogation matters. Previously, Mr. Osman was a senior partner at Anderson, McPharlin & Connors LLP in Los Angeles.

Mr. Osman is a current member and former chair the LACBA Committee on Professional Responsibility and Conduct (“PREC”) and a former member of the State Bar’s Standing Committee on Professional Responsibility and Conduct (“COPRAC”).

Attorneys' Ethical Obligations

Attorneys have an obligation to follow the law and the Rules of Professional Conduct applicable in their jurisdiction. Failure to do so can result in:

- Discipline
- Disqualification
- Malpractice
- Loss of reputation



To follow the Rules of Professional Conduct attorneys must know and understand them!



Sources of Law/Rules (California)

- The Rules of Professional Conduct promulgated by the State Bar (subject to the approval of the Supreme Court).
- The State Bar Act, Business & Professions Code §§6000—6243.
- California Rules of Court.
- Reported Case Law.

The Lawyer As Zealous Advocate

“As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.”

From the Preamble to the ABA Model Rules of Professional Conduct



There Are Limits to Our Advocacy

Various provisions of the Rules of Professional Conduct and the State Bar describe the limits of how far we can go in our advocacy. We must know and observe these limits.

Failure to observe these limits can lead to bad things!



Outside the Movies An Attorney May Not Tell a Client How to Commit a Crime



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RPC 1.2.1

(a) A lawyer shall not counsel a client to engage or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.

(b) Notwithstanding paragraph (a), a lawyer may:

- (1) discuss the legal consequences of any proposed course of conduct with a client; and
- (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.

RPC 1.2.1 Comments

[1] There is a critical distinction under this rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity...

[3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

An Attorney Must Be Truthful



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RPC 4.1

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person;
or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e)(1) or rule 1.6.

RPC 4.1 Comments

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person that the lawyer knows is false. However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this rule, lawyers remain bound by Business and Professions Code section 6106 and rule 8.4.

RPC 4.1 Comments

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

A Lawyer May Not Commit a Crime



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RPC 8.4

It is professional misconduct for a lawyer to:

(a) violate these rules or the State Bar Act, knowingly* assist, solicit, or induce another to do so, or do so through the acts of another;

(b) **commit a criminal act** that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) **engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation;**





RPC 8.4 cont'd

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official, or to achieve results by means that violate these rules, the State Bar Act, or other law; or

(f) knowingly assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, “judge” and “judicial officer” have the same meaning as in rule 3.5(c).

“Criminal Act”

Not defined in RPC 1.01 [Terminology], RPC 8.3 or elsewhere in the Rules.

Business & Professions Code Section 6106 provides some guidance when it states:

“The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.”

See also RPC 8.4 and comments thereto discussed below.





Comment 4 to RPC 8.4

[4] A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

B&P Code 6106

The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor.

B&P Code 6068

It is the duty of an attorney to do all of the following:

- (a) To support the Constitution and laws of the United States and of this state...
- (b) To maintain the respect due to the courts of justice and judicial officers.
- (c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.
- (d) 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.

John Eastman-A Cautionary Tale

The Office of Chief Trial Counsel of the State Bar of California charged Eastman with 11 counts of misconduct arising from certain activities surrounding his representation of former president Donald J. Trump and the 2020 presidential election. Eastman was charged with one count of failing to support the Constitution and laws of the United States (Bus. & Prof. Code § 6068, subd. (a)); two counts of seeking to mislead a court (§ 6068, subd. (d)); six counts of moral turpitude by making various misrepresentations (§ 6106); and two additional counts of moral turpitude (§ 6106).



The Charges Summarized

The NDC alleges misconduct surrounding Eastman's involvement in the efforts to reject, delay and/or obstruct the electoral vote after the 2020 presidential election. Despite the depth, breadth, and complexity of the case law and historical context cited by the parties, this disciplinary proceeding boiled down to an analysis of whether or not Eastman, in his role as the attorney for then-President Donald Trump and his re-election campaign, acted dishonestly in his comments and advice given regarding the issue of whether then-Vice President Mike Pence had authority to unilaterally reject certain states' slate of electors and/or delay or recess the electoral count during the Joint Session of Congress on January 6, 2021, and the manner in which he pursued legal action aimed at obstructing the lawful electoral process.

The Result

After full consideration of the record, in a 128-page written decision dated March 27, 2024, a State Bar Court judge found that Bar prosecutors had satisfied their burden of proving all charges except for count eleven, which the court dismissed with prejudice. In view of the circumstances surrounding Eastman's misconduct and balancing the aggravation and mitigation, the court recommended that Eastman be disbarred.

Specially the State Bar Court Held:

“While attorneys have a duty to advocate zealously for their clients, they must do so within the bounds of ethical and legal constraints. Eastman’s actions transgressed those ethical limits by advocating, participating in and pursuing a strategy to challenge the results of the 2020 presidential election that lacked evidentiary or legal support.

Vigorous advocacy does not absolve Eastman of his professional responsibilities around honesty and upholding the rule of law. While his actions are mitigated by his many years of discipline-free practice, cooperation, and prior good character, his wrongdoing is substantially aggravated by his multiple offenses, lack of candor and indifference. Given the serious and extensive nature of Eastman’s unethical actions, the most severe available professional sanction is warranted to protect the public and preserve the public confidence in the legal system....” [Emphasis added]