

WHO KNEW THE COURTS ADOPTED COMMONSENSE PROFESSIONAL GUIDELINES?

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Is there deposition priority in California? Many attorneys say no, but the Attorney Guidelines of Civility and Professionalism suggest yes. For those attorneys thinking, “what guidelines of civility and professionalism?”— you are not alone.



*Top Ten Ethics
Tips That May Help
Your Case*

On July 20, 2007, the Board of Governors of The State Bar of California adopted the California Attorney Guidelines of Civility and Professionalism (the guidelines), which currently are found at www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Attorney-Civility-and-Professionalism. A decade later, many attorneys have never heard of these guidelines, let alone the abbreviated versions that have been adopted by most California courts. The guidelines memorialize what most ethics attorneys consider to be commonsense rules of practice. For those attorneys who nod off while attending ethics seminars, it’s time to pay attention because the guidelines offer both swords and shields for positions attorneys take in litigation. Here are the top ten ethics tips that may help your case.



TIP 1: Don't be tempted to read that clearly privileged document you mistakenly received. *Section 9—Discovery* states: “If an attorney inadvertently receives a privileged document, the attorney should promptly notify the producing party that the document has been received.” In *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, Gibson Dunn attorneys were disqualified from representing their client because they refused to return a privileged email they had received indirectly after the opposing party had inadvertently forwarded it to a family member. The court of appeal cautioned:

In that situation, the attorney receiving the materials must refrain from examining them any more than is necessary to determine their privileged nature, immediately notify the privilege holder the attorney has received materials that appear to be privileged, attempt to reach an agreement with the privilege holder about the materials' privileged

nature and their appropriate use, and resort to the court for guidance if an agreement cannot be reached. The attorney must not further review or use the materials for any purpose while the issue remains in dispute.

McDermott, supra, (2017) 10 Cal.App.5th at 1108. If you have not read this case yet, add it to your to do list pronto. The moral of the story—if it walks like a duck and talks like a duck, it is probably a duck. If you have any doubt whether that memo you received in opposing counsel's document production may be privileged, stop reading the memo and call the opposing counsel to discuss.

TIP 2: Don't hide the devil in the details. When exchanging drafts of written agreements, make use of your word processor's “redline” feature to ensure everyone knows what changes have been made. *Section 8—Writings Submitted to the Court, Counsel or Other Parties* states: “An

attorney should clearly identify all revisions in a document previously submitted to the court or other counsel.” Some federal district courts require parties to indicate whether they based their proposed protective order on the court’s model protective order and, if so, to identify any deviations from the model order by specifically using a redline comparison.

TIP 3: Pick up the phone and call opposing counsel before you file a discovery motion. *Section 10—Motion Practice* states: “In complying with any meet and confer requirement in the California Code of Civil Procedure, an attorney should speak personally with opposing counsel and engage in a good faith effort to resolve or informally limit an issue.” Streamline your meet and confer by first sending opposing counsel a letter outlining the facts and legal basis for demanding further discovery responses, and then follow up with a scheduled phone call to work toward a compromise. You will be surprised at what you may accomplish through conversation.

TIP 4: Think twice before seeking monetary sanctions. *Section 10—Motion Practice* states: “Because requests for

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monetary sanctions, even if statutorily authorized, can lead to the destruction of a productive relationship between counsel or parties, monetary sanctions should not be sought unless fully justified by the circumstances and necessary to protect a client’s legitimate interests and then only after a good faith effort to resolve the issue informally among counsel.” Asking for monetary sanctions, especially against the opposing attorney, will serve only to raise blood pressures

and fortify conflicting positions. There is a time and place for monetary sanctions, but not with every motion. Thoughtfully consider whether seeking sanctions will help you reach your goal of obtaining the necessary discovery, or just escalate the current dispute and potentially create future conflicts with opposing counsel.

TIP 5: Remind opposing counsel that the judge may not appreciate his refusal to grant your client an extension of time to respond to discovery. *Section 6—Scheduling, Continuance and Extensions of Time* states: “Unless time is of the essence, an attorney should agree to an extension without requiring motions or other formalities, regardless of whether the requesting counsel previously refused to grant an extension.” Attorneys should also refer to this section if their client demands that an extension not be granted.

TIP 6: Use opposing counsel’s failure to precisely articulate a discovery request to craft an appropriate response that also reinforces your position. *Section 9—Discovery* states: “An attorney should not intentionally misconstrue or respond to interrogatories in a manner that is not truly responsive.” Judges may issue sanctions for refusing to answer an interrogatory solely because it is vague and ambiguous as phrased. If the propounding party failed to define a term subject to more than one meaning, instead of providing no response, define the term in a way that suits your needs, as long as doing so is consistent with the issues presented in the case.

TIP 7: Consider alternate ways to resolve conflict. *Section 13—Settlement and Alternative Dispute Resolution* states: “An attorney should attempt to evaluate a matter objectively and to de-escalate any controversy or dispute in an effort to resolve or limit the controversy or dispute.” Before you jump head first into discovery and motion practice, pause and explore with your client the client’s goals for conflict resolution. Listen, then flip the dispute and observe the case from your opponent’s perspective. You may just fashion a solution that satisfies everyone. For example, does the plaintiff really want a large monetary settlement, or would she prefer that the defendant modify policies and procedures

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to avoid future occurrences of whatever event harmed her? Just think about the business promotion possibilities when your client boasts about your mindful resolution of the dispute with friends and colleagues.

TIP 8: Propose a first-look agreement to avoid unnecessary discovery battles. *Section 17—Privacy* states: “If an attorney must inquire into an individual’s private affairs, the attorney should cooperate in arranging for protective measures, including stipulating to an appropriate protective order, designed to assure that the information revealed is disclosed only for purposes relevant to the pending litigation.” When counsel objects to defendant’s subpoena to plaintiff’s gynecologist, propose a first-look agreement with an attorney’s-eyes-only option to view what plaintiff proposes to be redacted. You may find the portions of the records the opposing party seeks to redact are irrelevant for your purposes, so why waste time and resources arguing over record entries that are of no value to your case?

TIP 9: Don’t “race opposing counsel to the courthouse to knowingly enter a default before a responsive pleading can be filed.” *Section 15—Default* states: “An attorney should not take the default of an opposing party known to be represented by counsel without giving the party advance warning.” This guideline was cited in footnote 10 in *Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681. The court of appeal did not hold that a plaintiff’s attorney must always warn a defense attorney before taking a default; rather, because the defendant’s legal department had assisted plaintiff’s counsel to effect service in that case, the court of appeal cautioned an advance warning was an “ethical obligation” of counsel.

TIP 10: Circling back to the question of whether there is deposition priority in California, *Section 9—Discovery* states: “When another party notices a deposition for the near future, absent unusual circumstances, an attorney should not schedule another deposition in the same case for an earlier date without opposing counsel’s agreement.” This guideline suggests that deposition priority does exist in California, especially in the eyes of the court, which will ultimately be deciding your discovery dispute(s).

Attorneys should thoughtfully consider their ethical duties during all aspects of litigation, not only because being ethical is the right thing to do, but also because following these commonsense guidelines may help your case. Moreover, judges have been known to cite to the guidelines. The court of appeal did so in *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, eloquently stating: “Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive.”

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