

# CCBA MCLE Spectacular - Ethical issues in representing the successor trustee and other challenges

Amy Bomse - Rogers Joseph O'Donnell PC - [Abomse@rjo.com](mailto:Abomse@rjo.com)

Kathryn Korn - Korn Law Group - [kathryn@kornlawgroup.com](mailto:kathryn@kornlawgroup.com)

# AGENDA

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- Guide to CA Prof. Rules for Estate Planning, Trust and Probate Counsel
- Successor trustee role and lawyer's duties in representing successor trustee
- Representing families - communication and confidentiality
- Aging parents and children: conflicts issues

# Guide to CA Prof. Rules for Estate Planning, Trust and Probate Counsel

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- Purpose of book: introduce “new” rules
- Assist practitioners in navigating ethical duties

# Guide to CA Prof. Rules for Estate Planning, Trust and Probate Counsel

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- Competence and Diligence
- Identifying the Client and the Scope of the Representation
- Conflicts of Interest
- Confidentiality of Information
- Communication
- Compensation
- Ethics and Litigation
- Ethics and Technology

# Structure of Guide

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- Relevant current California Rule(s) of Professional Conduct
- Discussion of the rule and the practical effects of its ethical requirements
- Comments on the rule from the State Bar of California
- Commentary from ACTEC and ABA
- Former rule of the Rules of Professional Conduct
- Statutes that inform the ethical rule
- Case studies
- Case law, ethic opinions, articles on ethical issues
- Sample documents

# Hypo 1, part 1

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- Elderly client retains lawyer to amend his trust to increase distribution to nephew. Other principal beneficiaries are two sons of client.
- Nephew schedules meeting for grandpa, drives grandpa to meeting and attends meeting between Lawyer and Grandpa.
- Lawyer goes through capacity checklist and speaks privately with Grandpa to confirm his wishes.
- Lawyer makes notes of possible undue influence but drafts the amendment as instructed.
- *Has lawyer complied with his ethical duties?*

# Hypo 1, part 2: Undue influence

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- Grandpa dies.
- Nephew is named as Successor Trustee.
- Sons are shocked to learn about their decreased distributions, and plan on contesting the Trust.
- Lawyer does not think Sons know about possible undue influence.
- Can Lawyer volunteer to Sons the information concerning how he was retained, fact that nephew attended meetings, his own notes re possible undue influence?

# Can Lawyer volunteer information about undue influence?

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- A. No: information is privileged and privilege belongs to trustee
- B. No: duty of confidentiality is owed to client (trustee)
- C. Yes: information subject to exception to privilege
- D. Yes: information not privileged, and duty of confidentiality does not apply
- E. Unclear



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# Issues raised by hypo

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- Who is the lawyer's client?
- Who owns privilege?
- What of duty of confidentiality?
- Evidence code contains exceptions to privilege
- What does case law tell us?

## Hypo 2: The Successor Trustee

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- Lawyer represented parents for estate planning purposes.
- Mother dies and lawyer undertakes administration of trust following death of first Settlor, however the surviving settlor appears to struggle understanding everything.
- The couple has three children, and the youngest child is nominated to serve as the successor trustee.
- Lawyer begins to work with daughter who assures lawyer she is 'taking care of everything'.
- Two years later, lawyer receives a petition to remove the trustee and surcharge the trustee, as the youngest daughter has transferred at least half of the trust assets to herself.

# The Successor Trustee - discussion questions

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- What are lawyer's duties in representing successor trustee?
- Can lawyer represent successor trustee in opposing removal and surcharge?
- Can lawyer continue to represent the trustee in administering trust?
- Can fees for opposing petitions be paid out of the trust?
- Any conflicts of interest?

# The Successor Trustee

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- Lawyer for successor trustee should advise client of fiduciary duty to act impartially
- Lawyer can represent trustee but cannot assist in fraud or misrepresent to court, so lawyer can represent trustee unless doing so would assist in fraud
- Lawyer may be able to represent successor trustee depending on what lawyer learns about facts
- Fees to advise trustee and appropriately represent trustee can be paid out of trust but any fees incurred to further her interests as beneficiary must not be paid out of trust
- Lawyer should not advance the interests of trustee individually and should remember that communications with trustee stay with the trust

# Scope of Representation

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- A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably consult with the client as to the means by which they are to be pursued (Rule 1.2)
- Except that: "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." (Rule 1.2.1)

## Hypo 3: Family representation issues

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- Lawyer has represented family in EP. Drafted trust for father. Lawyer is asked to and does review daughter's pre-nuptial agreement.
- Later, father tells lawyer he wishes lawyer to prepare revised trust which will disinherit daughter.
- Father also instructs attorney not to tell daughter.
- Can lawyer ethically comply with these instruction?

# Can lawyer keep information confidential?

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- A. Yes
- B. No
- C. It depends



# Can lawyer keep information confidential?

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A. Yes

B. No

**C. It depends**

# What are lawyer's duties

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- Lawyer owes each client duty of confidentiality with respect to their matter(s)
- Lawyer also owes each client a duty of communication as to their matters
- If lawyer represents family as a single group representation, it becomes harder to keep secrets unless everyone agrees
- Engagement agreements and client consents can avoid such issues and provide road map

## Hypo 4: The kids want to pay

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Couple, both in their nineties, has two daughters. The couple's long time estate planning attorney has retired, and daughters want to engage attorney to advise their parents. Daughters assure the attorney they will pay for her services. What are the lawyer's duties?

# What are lawyer's ethical obligations?

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- A. Lawyer must obtain clients informed written consent to accept payment by daughters
- B. Lawyer must not allow arrangement to interfere with independent judgment
- C. Lawyer must refuse to meet with clients with daughters present
- D. Lawyer must keep clients' confidences

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# Hypo 5 - Standard of Care

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- Lawyer represents B. B has 2 children, C & D. C has some disabilities. D has 2 children. B tells lawyer he wants to leave 50% of his estate to C who cannot care for himself and the other 50% to his grandchildren.
- After remarrying, B instructs lawyer that he still wants to support his disabled son and grandchildren but that he has decided to leave everything to Wife 2 who he trusts to care for his family according to his wishes. B is elderly but appears to have capacity.
- Lawyer advises B to undergo neurological exam, which client does. Doctor confirms competence.
- Lawyer revises trust according to client instructions.
- B dies. Son and grandchildren sue lawyer for malpractice on the grounds that amendment was not consistent with client's intent to benefit his son and grandchildren.
- Did lawyer breach standard of care in revising EP?

# Did lawyer breach standard of care

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- A. Yes, client's intent was to take care of his son and grandchildren but EP failed to do that
- B. Yes, lawyer should have refused to follow instructions and withdrawn to avoid being sued
- C. No, lawyer did not owe son a duty of care

# Did lawyer breach standard of care

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*Grossman v. Wakeman*, 104 Cal. App. 5<sup>th</sup> 1012 (2024)



# THE END

Amy L. Bomse  
Rogers Joseph O'Donnell PC  
311 California Street, 10th Fl.  
San Francisco, CA 94104  
(415) 956-2828  
[Abomse@rjo.com](mailto:Abomse@rjo.com)

Kathryn S. Korn  
Korn Law Group  
23 Altarinda Road, Ste. 215  
Orinda, CA 94563  
347-G Healdsburg Avenue  
Healdsburg, CA 95448  
(925) 253-1808  
[Kathryn@kornlawgroup.com](mailto:Kathryn@kornlawgroup.com)