

2009 Guide to Trial Support Services

Los Angeles Lawyer

February 2009 / \$4

EARN MCLE CREDIT

**Private
Investigations
of Jurors**
page 21

Protecting Our Elders

Los Angeles lawyer
Robin Allen analyzes the
elements of the crime of
elder abuse **page 14**

PLUS

Federal ADA Amendments page 10

Class Action Coupon Settlements page 26

Text Messaging to Clients page 38

CONTENTS



Los Angeles Lawyer
the magazine of
the Los Angeles County
Bar Association
February 2009
Volume 31, No. 11

COVER PHOTO: TOM KELLER

LOS ANGELES LAWYER (ISSN 0162-2900) is published monthly, except for a combined issue in July/August, by the Los Angeles County Bar Association, 261 S. Figueroa St., Suite 300, Los Angeles, CA 90012, (213) 896-6503. Periodicals postage paid at Los Angeles, CA and additional mailing offices. Annual subscription price of \$14 included in the Association membership dues. Nonmember subscriptions: \$28 annually; single copy price: \$4 plus handling. Address changes must be submitted six weeks in advance of next issue date. POSTMASTER: ADDRESS SERVICE REQUESTED. Send address changes to Los Angeles Lawyer, P. O. Box 55020, Los Angeles CA 90055.

FEATURES

14 Protecting Our Elders

BY ROBIN ALLEN

Under the criminal elder abuse statute, prosecutors must prove that the perpetrator knew or should have known that the victim of a crime was 65 or older

21 The Private Lives of Jurors

BY TRACY J. HASPER AND GORDON F. LULL

When investigating potential jurors, private investigators are agents of the attorneys who employ them and must observe the Rules of Professional Conduct and the Private Investigator Act

Plus: Earn MCLE legal ethics credit. MCLE Test No. 178 appears on page 23.

26 Clipping Coupons

BY DAVID MARTINEZ AND REBECCA BIEJO

Unlike federal courts, California courts have rejected the notion that coupon settlements of class actions are inherently suspect

32 Special Section

2009 Guide to Trial Support Services

DEPARTMENTS

9 Barristers Tips

How malpractice insurance ERPs apply to LLP partners

BY DAN MCKENNA

10 Practice Tips

Recent amendments to federal law increase protection for the disabled

BY LYNNE M. HOOK AND STACEY A. LEE

38 Computer Counselor

What lawyers need to know about text messaging with clients

BY DAVID SCHNIDER

40 By the Book

The Buffalo Creek Disaster

REVIEWED BY JEFFREY D. WOLF

44 Closing Argument

The new pet trust statute is certain to dog the judiciary

BY KENNETH W. KOSSOFF

42 Classifieds

42 Index to Advertisers

43 CLE Preview

02.09



by Tracy J. Hasper and Gordon F. Lull

THE PRIVATE LIVES OF *Jurors*

Litigators must be cautious when employing private investigators to look into the background of jurors

In the 2003 film *Runaway Jury*, Rankin Fitch, a ruthless trial consultant played by Gene Hackman, strikes a cynical note about jurors: “You think your average juror is King Solomon? No, he’s a roofer with a mortgage. He wants to go home and sit in his Barcalounger and let the cable TV wash over him. And this man doesn’t give a single, solitary droplet...about truth, justice or your American way.” As a contrast, consider the banner prominently displayed at several Los Angeles County courthouses: “To Our Jurors...Embodying Justice, Serving the Community. Thank You For Your Service.”

As much as we may all want to believe in the ideal proclaimed by the banner, litigators in high stakes trials often see a different reality. Some jurors, far from “embodying justice,” embrace prejudice. Some, emboldened by jargon gleaned from daytime television,

believe they bring a wealth of legal wisdom to their jury service. Other jurors harbor deep biases. How does a trial attorney separate the good jurors from the bad, the jurors that will judge his or her case fairly from those that will wreak havoc?

In recent years, attorneys have begun to tap a growing body of experts, consultants, and litigation support providers to assist them in finding fair jurors. These experts provide an array of services, such as focus groups, mock trials, online juror testing, body language analysis, and draft questions for voir dire.

One increasingly controversial trend is

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the use of licensed private investigators to assist in sharpening the focus on jurors—before and after trial. The time-honored and vital role that investigators generally have played for lawyers includes locating missing witnesses, obtaining relevant public records, serving process, and finding assets. Now, in the ever-changing Internet age, investigators also access public and proprietary databases. This traditional use of private investigators usually draws little if any attention. However, recent investigative excesses have become headline news, putting the investigative industry on the defensive, attorneys on the fence, and judges in a rage. Consider these examples:

- During 2006, defense attorneys—including Kenneth W. Starr, the dean of Pepperdine Law School and former special prosecutor in

against Bryan Wagner and Cassandra Selvage, the owners of Eye in the Sky Investigations, Inc. FTC fines levied against the couple totaled \$538,762, and they faced federal charges in connection with the scandal.² Meanwhile, HP settled the spying charges brought against it by agreeing to pay \$14.5 million to the State of California. In her testimony before a congressional committee, ousted chair Dunn remarked, “I never doubted...that what they [the investigators] were doing was legal.”³

- During December 2007, 10 private investigators in five states were indicted on charges of identity theft. The investigators obtained personal financial, tax, and medical information of more than 12,000 people through the use of pretexting. According to published reports, the ultimate clients in the pre-

use investigators at all?

Generally, investigators find and report information for their clients. Investigators glean this information from three broad categories of sources: public records, interviews, and on-site observation (often documented through photography or videography).

Public records can yield a wealth of information regarding jurors. During trial, with frequent, imminent deadlines, investigators can offer the most efficient means by which to generate solid information quickly. Public records routinely accessed by private investigators include property transaction records, mortgages, assignments, substitutions, releases, notices, agreements, affidavits, tax liens, judgments, civil and small claims records, traffic records, local ordinance violation records, probate cases, criminal matters, federal court records (civil, criminal, and bankruptcy), vital records (birth, marriage, and death), corporate and partnership records, fictitious business names, records of political affiliation and contributions, licenses, and certifications.

Other records are available, although they are not technically public because they cannot be certified as authentic by a government agency. These include media accounts (print and electronic), business records, city street directories, records available at college and university libraries, and information in local history archives.

In addition, the Internet has spawned myriad new sources of information that can be used to develop a profile of jurors or to assess the veracity of answers to juror questionnaires. Investigators can profitably mine dozens of popular social networking Web sites, such as Facebook and MySpace, for critical information. During the recent Miami federal trial of accused terrorist Jose Padilla, for example, defense lawyers performed searches on their laptops for all jurors and determined that one female juror, who had claimed no experience in the criminal court system, was being investigated for malfeasance. She was summarily dismissed.⁶

As part of the effort to profile jurors, some litigators hire investigators to perform what is sometimes called a drive-by. This involves a visit to, and careful observation of, a juror's residence and neighborhood. While an investigator cannot directly contact a juror or a juror's family members or interview a juror's neighbors or acquaintances, a drive-by is permissible and can sometimes yield valuable information regarding the juror's economic, cultural, and social environment. One investigator, for example, performed a drive-by of a juror in a high-profile tobacco industry case and observed a vehicle parked in the driveway of the juror's home bearing a bumper sticker that read, “Cigarettes Kill!”

Investigators can profitably mine dozens of popular social networking Web sites, such as Facebook and MySpace, for critical information.

the impeachment investigation of President Bill Clinton—attempted to gain clemency for Michael Morales, convicted of the January 8, 1981, rape and murder of 17-year-old Terri Winchell, a Lodi, California, high school student. The defense team hired investigator Kathleen Culhane to follow up with jurors in the criminal trial. Culhane proceeded to draft false declarations for five of the jurors. The declarations were submitted in a clemency filing, only to be withdrawn after the forgeries were discovered. Culhane was later convicted on perjury and forgery charges¹ and is currently serving a five-year prison sentence.

- During 2005, Hewlett-Packard faced a series of embarrassing leaks to the media from its board meetings. The company's chair of the board, Patricia Dunn, hired a Massachusetts-based private detective agency to identify who was responsible for passing along the sensitive information. The detective contracted with five investigators nationwide, each of whom utilized a form of subterfuge, referred to as pretexts, with telephone company employees to obtain the telephone records of board members, HP employees, and journalists. The exposure of this caper triggered state and federal probes. The Federal Trade Commission brought suit

texting schemes were lawyers, insurance companies, collection firms, and other private investigators.⁴

- The recent trial, conviction, and sentencing of “private investigator to the stars” Anthony Pellicano constitute a shot across the bow for investigators and attorneys alike. Pellicano was convicted in federal court of 76 racketeering counts, including illegal wiretapping, computer fraud, identity theft, and wire fraud. The attorney who hired him, Terry Christensen, founder of a well-known Century City law firm, was also convicted on two felony counts and sentenced to prison, sending shock waves throughout the legal community.⁵

Clearly, something is amiss in the manner in which some attorneys hire and manage investigators. Attorneys are obligated to vigorously pursue the interests of their clients, including using all available tools to help them during the jury selection process. Private investigators may be instrumental in this task. But there are risks involved in using investigators as agents of the trial attorney. How should investigators be educated and managed? What criminal or tort liabilities might an attorney incur if an investigator crosses the line from aggressive performance to violation of the law? In fact, in criminal or civil trials, when the stakes are so high, why

MCLE Test No. 178



The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education legal ethics credit by the State Bar of California in the amount of 1 hour.

1. In 2005, investigators who utilized subterfuge during the course of an investigation for Hewlett-Packard were considered to be acting legally.
True.
False.
2. Information regarding potential jurors that is obtained from public databases, online court records, and social networking sites can provide grounds for a juror to be dismissed from jury service for cause.
True.
False.
3. Driving by a juror's home is considered to be "contact" with the juror and therefore is unacceptable.
True.
False.
4. Attorneys do not have a fiduciary duty to their clients to conduct due diligence regarding the hiring of a private investigator as long as the investigator is licensed.
True.
False.
5. The status of an investigator's license can be confirmed with the State Bar of California.
True.
False.
6. The definition of "private investigator" is set forth in the California Rules of Professional Conduct.
True.
False.
7. A lawyer who knowingly engages a nonexempt, unlicensed investigator is guilty of a misdemeanor and may receive a fine of \$5,000 and/or imprisonment.
True.
False.
8. Applicants for an investigative license may be denied licensure if their previous partners had their investigative licenses suspended.
True.
False.
9. Private investigators cannot lose their licenses for impersonating a law enforcement officer.
True.
False.
10. Investigators face the suspension or revocation of their licenses for acting as runners or cappers for an attorney but not for knowingly violating a court order.
True.
False.
11. In *Wayne v. Bureau of Private Investigators and Adjustors*, a licensed private investigator who misled interviewees regarding his representation in a case was not considered to be acting in a manner that constituted dishonesty or fraud.
True.
False.
12. The Private Investigator Act provides an exhaustive list of guidelines to investigators and attorneys on the type of conduct that is not permissible.
True.
False.
13. Investigators hired by attorneys are not required to comply with the same ethical rules that govern attorneys but are bound solely by the Business and Professions Code.
True.
False.
14. The Rules of Professional Conduct prohibit an attorney from communicating with a juror except in official proceedings.
True.
False.
15. An attorney who learns of improper conduct by a juror toward another juror is not required to disclose this information.
True.
False.
16. Rule 5-320(E)-(F) of the Rules of Professional Conduct prohibits an attorney from conducting an investigation of a juror in a manner that will influence the state of mind of that juror regarding present or future jury service.
True.
False.
17. In *Noble v. Sears, Roebuck & Company*, the court held that utilizing a pretext to gain admittance to a hospital room was a violation of the right to privacy.
True.
False.
18. In California, an attorney who hires a private investigator for an investigation may be liable for the intentional torts committed by the investigator (or the employees of the investigator) in the course of the investigation.
True.
False.
19. Evidence obtained by an investigator as a result of a feigned friendship can be used in trial.
True.
False.
20. An attorney and an investigator should formulate a written agreement to ensure compliance with the Rules of Professional Conduct.
True.
False.

Name _____
Law Firm/Organization _____
Address _____
City _____
State/Zip _____
E-mail _____
Phone _____
State Bar # _____

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2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
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ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1. True False
2. True False
3. True False
4. True False
5. True False
6. True False
7. True False
8. True False
9. True False
10. True False
11. True False
12. True False
13. True False
14. True False
15. True False
16. True False
17. True False
18. True False
19. True False
20. True False

The range of tasks that can be assigned to investigators is substantial. If an attorney is knowledgeable about the rules that govern the conduct of private investigators as well as the applicable rules of professional responsibility, the risks of investigator excess can be minimized.

Business and Professions Code

An attorney has a fiduciary obligation to his or her client to exercise caution in hiring outside parties who act as the attorney's agents at trial. Regarding private investigators, the foundation of due diligence by the attorney is to confirm that the investigator is a licensed private investigator.

The licensing and regulatory authority for private investigators in California is the

covered under Section 489, 4) previous suspension or revocation of an investigator's license, 5) past status as an officer, partner, or manager with one who has had a license suspended or revoked, 6) while unlicensed, having aided or abetted the commission of an act that required licensure, and 7) lying on an application.⁹

According to a subsequent section in the PIA, a licensed investigator faces the suspension or revocation of his or her license as a result of an array of conduct that includes impersonating a law enforcement officer; failing or refusing to render agreed upon client services; committing assault, battery, kidnapping, or using violence "without proper justification"; knowingly violating (or assisting in the violation of) a court order; acting

license. The court adopted a broad interpretation of the phrase "dishonesty or fraud" in the PIA, concluding, "There was a disposition to deceive, betray, and mislead the interviewees. In other words, there was a lack of complete integrity."¹¹

The PIA provides some guidelines to investigators and attorneys regarding the type of conduct that is not permissible. However, the PIA's provisions are not exhaustive. All agents of an attorney, including investigators, are also obligated to maintain the same rigorous standards with which lawyers themselves are tasked in California's Rules of Professional Conduct. This includes the proscriptions in the rules regarding contact with jurors and the need for juror privacy.

Rules of Professional Conduct

Thus when an attorney hires investigators or consultants to act on his or her behalf, by extension those agents are bound to comply with the same ethical rules that govern the attorney: the Rules of Professional Conduct. In fact, the rules obligate an attorney to carefully monitor the work of all employees, including investigators and other agents, to ensure compliance with Rule 3-110 regarding professional competency: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." The Discussion section of this rule states: "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents."¹²

Accordingly, attorneys cannot simply state the task to the investigator and stand back. Investigators must be carefully instructed and monitored. This is particularly critical when investigators are hired to work in connection with jurors. Several specific principles must be followed.

Rule 5-320 of the Rules of Professional Conduct is devoted to the conduct of attorneys (and their agents) regarding jurors. The rule prohibits communication with, or otherwise attempting to influence, any member of a panel from which a jury will be chosen. Specifically, an attorney cannot communicate directly or indirectly with a juror except in official proceedings, cannot ask questions designed to embarrass or harass a discharged member of a jury, and must promptly reveal to the court "improper conduct" by a juror toward another juror or another juror's family member.

Regarding any effect or influence an investigation during a trial may have, Rule 5-320(E)-(F) is clear: "A member shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such

The rule prohibits communication with, or otherwise attempting to influence, any member of a panel from which a jury will be chosen.

Bureau of Security and Investigative Services (BSIS), which operates as a division within the state's Bureau of Consumer Affairs. The status of an investigator's license can be confirmed with the BSIS.

Additionally, understanding the rules governing an investigator's conduct is critical for attorneys who hire private investigators. The regulations with which investigators must comply are set forth in Business and Professions Code Sections 7512 through 7573, which are generally referred to as the Private Investigator Act (PIA). The PIA cites Chapter 1, Division 5, of the California Insurance Code for its definition of a "private investigator," and makes it clear that "no person shall engage in the business of private investigator...unless that person has applied for and received a license...."⁷ Significantly, the next section of the PIA⁸ states, "Any person...who knowingly engages a nonexempt unlicensed person is guilty of a misdemeanor," subject to a fine of \$5,000, imprisonment for one year, or both.

Applicants for an investigative license may be denied licensure on one or more of seven different grounds: 1) an act that would constitute a basis for suspension or revocation, 2) "any act constituting dishonesty or fraud," 3) acts or crimes involving weapons

"as a runner or capper for any attorney"; and committing "any act in the course of the licensee's business constituting dishonesty or fraud."¹⁰ According to the PIA, the reference to "dishonesty or fraud" includes 1) knowingly making a false statement relating to evidence or information obtained in the course of employment, or knowingly publishing a slander or a libel in the course of business, 2) using illegal means in the collection or attempted collection of a debt or obligation, 3) manufacturing evidence, and 4) accepting employment that is adverse to a client or former client "relating to a matter with respect to which the licensee has obtained confidential information by reason of or in the course of his or her employment by the client or former client."

An appellate court applied the PIA in *Wayne v. Bureau of Private Investigators and Adjustors*, in which a licensed private investigator misled interviewees regarding his representation in a case. The investigator knew that if he told the interviewees that he represented an adverse party he would likely not obtain any information. So he introduced himself as an investigator "checking out the accident" and omitted any further disclosure.

Based on these facts, the appellate court upheld the suspension of the investigator's

person in connection with present or future jury service. All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.”¹³ Thus a lawyer is obligated to ensure that the agents that he or she hires maintain this principle of no contact with any jury member or the juror’s family members, and not engage in any undertakings that will cause contact to be made or cause a juror to be in any way influenced because of the investigator’s activity.

Tort Liability

The requisite professional codes and rules clarify the standards with which attorneys and investigators must comply. Case law further buttresses the general notion that attorneys can be held legally responsible for the torts committed by the investigators they hire.

In *Noble v. Sears, Roebuck & Company*, the attorneys for Sears, Roebuck retained a private investigator in connection with a personal injury lawsuit. In an attempt to locate the address of a witness in the case, an employee of the investigator “gained admittance to a hospital room” and, utilizing a pretext, “secured the address.” The plaintiff brought suit against Sears, its attorneys, and the private investigator for invasion of privacy and negligent entrustment of agents. The trial court sustained demurrers to the plaintiff’s claims, and the plaintiff appealed. The court of appeal reversed, finding that “an unreasonably intrusive investigation may violate a plaintiff’s right to privacy.”¹⁴ Additionally, the appellate court found that “in California the hirer of a detective agency for either a single investigation or for the protection of property, may be liable for the intentional torts of employees of the private detective agency committed in the course of employment.”¹⁵

Additionally, if an attorney uses an investigator to obtain evidence in a “deceitful” manner, the attorney risks a finding that the evidence cannot be used at trial. In *Redner v. Workmen’s Compensation Appeals Board*, an insurance company orchestrated a “sting” in which its retained investigator hired a man to befriend an allegedly injured worker. The supposed friend then invited the worker to his ranch, offered the worker alcohol, and convinced him to go horseback riding. The investigator documented these activities on film, including the actions of the worker that were inconsistent with the claimed injury. At a hearing on the worker’s claim for workers’ compensation, the insurance company sought to introduce a medical report from a doctor that had viewed the film and relied upon it in rendering his opinion. The hearing referee refused to admit the evidence, and the insur-

ance company appealed.

The California Supreme Court found that the hearing referee “should have refused to rely upon [the evidence] because the carrier obtained it by fraudulent inducement.”¹⁶ Elaborating on this concept, the supreme court declared that “the carrier should not profit from its own deceitful conduct. The investigators feigned friendship and concealed their employer’s identity in bringing about [the] applicant’s inebriation and effectuating his horseback ride....[Accordingly,] the board may not rely upon evidence obtained, as in the present case, by deceitful inducement of an applicant to engage in activities which he would not otherwise have undertaken.”¹⁷

Recommendations

Runaway Jury’s Rankin Fitch observes, “Gentlemen, trials are too important to be left up to juries.” Litigators involved in high stakes trials may at least agree that trials are too important to be left in the hands of unexamined jurors. Based upon case law as well as statutes and rules regulating the conduct of attorneys and the investigators they hire, some recommendations may be gathered regarding how an appropriate juror examination should take place.

Given the nature of their business and training, private investigators can be used, to great benefit, in profiling jurors. However, as important as the assessment of potential jurors may be, it is important to understand that information gathered by ethically or legally questionable means will invite consequences such as potential tort liability, discipline under the Rules of Professional Conduct, and exclusion of the evidence at trial. The value of using private investigators to profile jurors is directly related to the diligence with which the investigators are selected and managed.

Attorneys have an obligation to their clients to choose their investigators with great care. BSIS licensing is a necessary but far from sufficient qualification. Litigators should formulate a written agreement with the investigators they hire that commits investigators to fully comply not only with the PIA but also, because they are agents, with the Rules of Professional Conduct. This agreement should ensure that the objective of the engagement and its intended outcome are clear and agreed to by the attorney and the investigator. It should contain a promise by the investigator to fully educate his or her entire staff on the agreement’s provisions and an acknowledgment that the achievement of trial goals cannot include activities that violate any laws or the Rules of Professional Conduct under which they must operate. The agreement also should be provided to the client.

Additionally, attorneys should maintain ongoing communication with and management of investigators. In trial settings, it is critically important that attorneys scrutinize the activities of their investigators to avoid not only obvious violations of law but also any signs of aggressiveness that may be technically permissible but might create the appearance of misconduct for some judges. Management of investigators should be guided by key considerations in the requisite laws and rules governing investigators and attorneys as well as evolving principles from case law.

When case law is silent, attorneys and their investigators should err on the side of caution. Common sense is always a safe harbor. Attorneys should make this simple principle clear to the investigators they retain. By following this and the guidelines established by the appropriate laws and rules, attorneys can represent their clients vigorously by obtaining critical information about jurors while minimizing potential liability for investigative excesses. ■

¹ *People v. Culhane*, Sacramento County Superior Ct. Case No. 07F01781 (sentenced Aug. 16, 2007); Louis Sahagun, *Death Penalty Foe Gets Five Years in Prison*, L.A. TIMES, Aug. 17, 2007, at B-1. See also Bob Egelko, *Starr Says He Supports Death Penalty*, S.F. CHRONICLE, Feb. 17, 2006, at B-1.

² *Hewlett-Packard Pretextors Fined*, available at <http://www.piava.wordpress.com/2008/05/28>. This item includes a link to a Federal Trade Commission press release regarding the settlement.

³ Damon Darlin, *Hewlett-Packard Spied on Writers in Leaks*, N.Y. TIMES, Sept. 6, 2006. See also *Ousted Hewlett-Packard Chairwoman: I Consulted Others in Leak Probe, Never Doubted Legality*, Fox News.com, Sept. 27, 2006, available at <http://www.foxnews.com/story/0,2933,216200,00.html>.

⁴ Kim Zetter, *Private Eyes Indicted in Massive Identity-Theft Scheme Involving HP-Style “Pretexting,”* Wired Blog Network, Dec. 7, 2007.

⁵ Marc Graser, *Pellicano Convicted of Racketeering*, VARIETY, May 15, 2008. See also David B. Parker & Pierre B. Pine, *The Pellicano’s Mess: Ethical Considerations for Attorneys Who Hire Private Investigators in the Wake of Pellicano*, published in connection with the Film & Television Law Symposium, Beverly Hills, CA (Sept. 29, 2006).

⁶ David Oscar Markus, *Juror Research*, Southern District of Florida Blog, Aug. 13, 2008. This blog entry cites a passage from a *Daily Business Review* article authored by Julie Kay.

⁷ BUS. & PROF. CODE §7523(a).

⁸ BUS. & PROF. CODE §7523(b).

⁹ BUS. & PROF. CODE §7538.

¹⁰ BUS. & PROF. CODE §7561.

¹¹ *Wayne v. Bureau of Private Investigators & Adjusters*, 201 Cal. App. 2d 427, 437 (1962). See also John Caragozian, *Private Eyes*, LOS ANGELES LAWYER, Dec. 2004, at 31.

¹² CAL. RULES OF PROF’L CONDUCT R. 3-110A.

¹³ CAL. RULES OF PROF’L CONDUCT R. 5-320(E)-(F).

¹⁴ *Noble v. Sears, Roebuck & Co.*, 33 Cal. App. 3d 654, 660 (1973).

¹⁵ *Id.* at 663.

¹⁶ *Redner v. Workmen’s Comp. Appeals Bd.*, 5 Cal. 3d 83, 93-94 (1971).

¹⁷ *Id.* at 94-95.