

CCCBA Real Estate Section

The New Era of Ethics in Real Estate

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ETHICAL SCENARIOS

1. You represent Knights of the Roundtable, Inc. (“Knights”), an institutional client, in a real estate transaction as the buyer. The seller is Michael Mordred, a sophisticated landowner who you believe has substantial real estate and business acumen, but who is not represented by counsel to your knowledge. Do you have any obligations to Mr. Mordred to advise him to get representation? What if Mordred tells you that he has an attorney that he used for his DUI and other personal (criminal) matters (and that Mordred believes that this attorney does not carry any malpractice insurance), but does not want you to talk to her to save on the expense. Does that change anything? What if the attorney is only provisionally licensed? What if Mordred asks you to recommend an attorney for him? What if Mordred starts out working with an attorney and then tells you that he likes your work and doesn’t think he needs to pay his attorney any more since you are doing such a good job? What if Mordred tells you that his cousin Lancelot will be paying your fees?

Rule: 1.18, 1.4.2, 1.8.5, 4.2, 4.3

2. On the next transaction, Mordred comes to you and says he liked the work you did for Knights and he wants you to represent him in the sale of another parcel of property that he owns, followed by a 1031 exchange into a new property that will be used for Mordred’s new business: *Holy Grail Marijuana, LLC* (“HGM”). In addition to your discounted hourly rate, he offers to give you a 10% interest in HGM, as a bonus payment if and when the deal closes, plus all the free samples you want forever. Can you accept this arrangement? What if the 10% interest is your only payment and you will receive nothing if the deal does not close? What if Mordred says he likes your work so much that he wants to pay you a monthly retainer of \$10,000 (plus the free samples)? Is it a true retainer or a flat fee? What do these terms mean? What if you secretly know that the HGM property is next to the future site of an Amazon third headquarters center and is therefore potentially more valuable than Mordred thinks it is? What duties do you have to Mordred with regard to this information?

Rule: 1.2.1, 1.5, 1.8.1, 1.8.2

3. Because you have never worked with Mordred and you are afraid that he may be sampling too much of his own product, you are worried that he might be difficult and trash you on his Twitter feed. He has many followers and you do not want your reputation tarnished. You have in the past added the following language to your representation agreement:

“In the event of a dispute involving the legal services hereunder, the Parties agree that they will not disparage each other to third parties in writing, in any medium, including social media platforms. This provision does not restrict Client’s right to make a complaint against Attorney with the State Bar of California.”

In addition to the foregoing, you tell your associate to prepare the representation letter and in an excess of zeal, she strikes the last sentence above and adds the following language:

“Client agrees it will not sue the Attorney for malpractice or any other claim at any time.”

Is this provision ethical?

Rule: 1.8.8

4. You successfully represent Mordred in the second transaction. Before the closing you propose another business venture to him as follows: You and Mordred will take the proceeds from the sale of Mordred’s property and invest it in a deal that another client of yours, Sir Galahad, is putting together. You have represented Galahad for a number of years, through his ups and downs, including several near bankruptcy scenarios and workouts. Can you do this? What do you need to disclose to Mordred? Can you draft the partnership agreement for Mordred and Galahad if you get proper waivers from both of them? What if you don’t draft the partnership agreement and another lawyer represents Mordred and you represent Galahad. Is there still an attorney-client relationship between you and Mordred? How does this limit your ability to invest with Mordred or direct Mordred to Galahad’s deals? Can you just be an investor with your former clients.

Rule: 1.2, 1.7

5. Mordred comes to you with a new deal where he and two neighbors, Merlin Ambrosius and his half-sister Morgan Le Fay, are selling individual adjacent properties they own to Camelot Industries, Inc. Camelot will only purchase all of the properties so all the parties and parcels will need to close to complete the transaction. Merlin and Morgan are not represented. What if you are only representing Mordred, but Merlin and Morgan have told you they will not have an attorney and will agree to sign whatever form of purchase agreement you negotiate for Mordred? What do you need to disclose to Merlin and Morgan, if anything? What duties do you have to unrepresented third parties, if any? When do you have duties to non-clients? What if Merlin and Morgan ask you to represent them instead of Mordred?

Rule: 1.18, 4.2, 4.3

6. You represent Knights in a development project. After completion of the project, Knights sells the project to Saxon Invaders Equity Fund (“Saxon”). After the sale, problems arise with the building. Saxon believes it was ripped off by Knights and files suits for fraud, breach of contract and construction defects. You think you did a great job for Knights by advising them not to disclose certain information regarding environmental issues at the project, and that is one of the issues in Saxon’s claim. Knights tenders the claim to Trust US Insurance Company and accepts the defense subject to a reservation of rights. Trust US retains you to represent Knights. During your interview with Knights, they provide factual information and documents that could jeopardize its coverage if conveyed to Trust US. Meanwhile, Trust US calls you about your investigation. What information can you withhold? What if they specifically ask for project documents that could wind up impairing coverage? What if Trust US wants to tender and sue other parties but Knights balks? What is the lawyer to do? What should you do about your personal involvement in the claim? Do you have a conflict?

Rule: 1.7, 1.8.6, 4.1

7. In the course of your representation of Knights, Saxon produces hundreds of thousands of construction documents in over 100 bankers boxes. The documents need to get scanned and be word searchable in an OCR format. You have a vendor that you have used in the past and you believe will charge a reasonable price. However, Guinivere (the GC of Knights) has a buddy who was in litigation once, and she used a company in Cymru (wherever that is?) that can do it just as well for half the price (so she tells you). You search the internet and see all kinds of negative results for this vendor. You fear that it would require some kind of magic for this company to produce a quality result for that price.

- Should you just go ahead and send the documents to Cymru?
- What is your responsibility with regard to the performance of third party vendors, especially with the use of new technology?

Rule: 1.1, 1.2

8. During the litigation representing Knights, you hire a new lawyer. Unbeknownst to you, the new lawyer previously represented Saxon in several pieces of real estate litigation and has relationships in its general counsel's office. Can this ethical conflict be cured by creating an ethical wall? Can the other firm disqualify your firm from representing Knights? Does it make a difference if the new lawyer is over 70?

Rule 1.9, 1.10

9. Saxon responds to one of your document request and produces hundreds of thousands of documents. One of the documents is an email from the general counsel addressed to an unfamiliar email addresses outlining the facts of the claim against Knights. This email is damaging to Saxon in that it shows that it may have been aware of the issues that it claims constitute fraud. What are your obligations in this situation?

Rule: 4.4