



Professional Ethics

Process Servers, Deposition Officers & Private Investigators

INTRODUCTION

Many times there are legal or ethical concerns that come into play when dealing in the legal realm. Here we delineate different issues and concerns that one must be aware of when dealing within several different areas of litigation support services including process service, acting as a deposition officer, and investigations. We will broach the professional ethics of each, primarily focused on the individual roles in the state of California.

We will start with process servers.

PROCESS SERVERS

In California, a process server is not required to be licensed, but must be registered through a county if the server is serving legal documents more than ten times in a year or is receiving compensation for services. Licensed private investigators and their employees are among those exempted from registration.

Process Server Requirements and the Codification of Ethics

Bus. & Prof. Code §22350 requires that all process servers who serve process for compensation--and also any corporation or partnership that derives compensation for service of process within California--be registered with the county clerk in the county where he or she resides or has a principal place of business. Process servers are required to follow a strict code of conduct and ethics. The requirements to retain the process server registration are as follows: the server must reside in California for a year before applying for registration; the server must be at least 18 years of age; the server is required to pay a \$2,000 bond or cash deposit to be used against any misconduct in service. In certain cases, licensed private investigators are exempt from having to register. However, if a private investigator has not registered as a process server, they are unable to serve any documents that are specifically required by code to be served by a registered process server.¹ A person cannot become a process server if that person has been convicted of a felony, unless the person has been acquitted of that crime or presumed rehabilitated by a governmental official.

Professional organizations within the process serving industry have moved towards establishing expectations of professional conduct. These expectations can become codes of ethics for the respective organizations. The goals can vary by organization but they often similarly reflect the professionalization of the industry.

General Features of Ethical Codes

Often times when an organization sets a code of ethics they will feature many, if not all, of the following principles. A process server has the ethical responsibility to give fast and efficient service to the client while acting in a professional manner and following all laws and any parameters set up in the contract for service. If any conflict presents itself that prevents the service of process from being prompt and legal, the server should notify any and all parties involved of the delay or inability to perform said service. Additionally, in order to perform the service within the legal bounds, the process server has an obligation to obtain the proper education and training involved with the surrounding laws and the best practices for service of process. Finally, the process server shall quickly provide all the proper parties with the proof of service once the

¹ <http://www.pfiserves.com/rules/california.htm>

“[S]ervice cannot be avoided by denying service and moving away without consenting to take the document in hand.”

-In Re: Ball



relevant documents have been served, and, in the case of the inability to serve, the reason and information regarding the situation.

Such best practices set out to achieve professionalism and proper presentation of a process server while at the same time create the most optimal situation under which there is minimal conflict and prompt service. This includes following the law and protecting the rights of the server and the client.

Within the Framework of Proper Service

There are scenarios in which personal service is not possible. Courts have adjudicated many such scenarios to provide a guide towards the proper, ethical service of process when personal service is not possible.

There are several common queries about certain rules within the process service law that are not explicitly outlined in the law. Many people, whether in the process service industry or simply involved in legal issues, question whether the recipient has the legal right to refuse to accept service. Service is considered valid as long as the following 3 criteria are met: the server is within normal speaking distance of the person being served, the server must inform the person being served that they are being served and the general nature of the documents, the server must leave the documents with the person being served or in a place where the person served has reasonable access to them. The courts have rejected the notion that one can reject service of process.²

² In Re: Ball (2 Ca. App. 2d 578), the server talked to the defendant who refused to take the papers. The server then dropped the papers at the defendant's feet. The court held it was a valid service and said "We take it that when men are within easy speaking distance of each other and facts occur that would convince a reasonable man that personal service of a legal document is being attempted, service cannot be avoided by denying service and moving away without consenting to take the document in hand."

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In another example, a receptionist may be served on behalf of the business or occupant of the business, even if that receptionist isn't necessarily a direct employee of the defendant.³ A gate guard in private communities can be served on behalf of a resident, if the process server has made a diligent effort to serve the recipient directly to no avail, and if the gate guard denies access to the home. In *Bein v. Brechtel*, the court ruled that since the appellants had authorized the guard to control access to them and their residence, the gate guard could be considered a competent member of the household and the person apparently in charge.⁴

In the case of *Ramos vs. Homeward Residential, Inc.*, a process server was hired to serve the mortgage servicing company. A woman in charge of the Irvine branch of the mortgage company was handed the documents and subsequently informed the server that she was unable to accept them. The server then proceeded to mail the documents to the Irvine branch of the company. The envelope was addressed to the company but it did not include the name of the registered agent on another individual who was authorized to accept service on behalf of the company. The judge ruled that it was Ramos's responsibility to prove proper service of process and because of the incorrect mailing, the judge ruled that "Ramos did not provide the trial court with any evidence identifying the person to whom the summons and complaint was delivered in Irvine or other evidence from which it might be inferred.... [and the] record does not support Ramos's contention that no agent for service of process was provided to the Secretary of State," the judge concluded.

This is important because it is the responsibility of the person (or firm) to procure a process server who is educated in the legal implications involved with correct service of process. In this same way, law firms have an ethical obligation to hire a process server who knows what they are doing.

Recently, a process service company in Alameda, CA was sued by several members of the community. The process servers were supposed to have served debt collection papers; however, many of the final proofs of service were filled with inconsistent information. One such issue that arose was a declaration of service said that a teacher was served at a certain time, a time at which he had another proof of service showing that he was somewhere else serving documents at that same time. Because there is a distinct lack of regulation in this field, unethical situations can arise.

When these rules and codes of conduct are not followed, process servers and the law firms that hire them are often times sued and held responsible.

³ *Ludka vs. Memory* (25 Cal. App. 3d 316) held that leaving the summons with the receptionist who was not even an employee of the defendant was acceptable. This was a suite of offices where a receptionist employed by the owner of the building worked in a common area and the persons renting space had their own separate offices.

⁴ *Bein v. Brechtel-Jochim Group, Inc.*, 6 Cal. App. 4th 1387 (1992)

DEPOSITION OFFICERS

There are 3 methods provided for discovery by the California Discovery Act: oral testimony, written testimony secured by interrogatories, and documentary evidence by production of documents.⁵⁶⁷ A deposition officer deals with evidence obtained through the production of documents and is the person or company responsible for the proper retrieval, storage and distribution of those documents. Law firms acting as their own deposition officer are one of the most common examples of where ethical guidelines are unknowingly violated. The fact is that in many circumstances, law firms *cannot* legally act as their own deposition officer; and in most cases, for the ethical reasons outlined in the section, law firms *should not* act as their own deposition officer.

Deposition officers are required by chapter 20 of Division 8 of the Business and Professions Code (commencing with §22450), to be registered as a professional photocopier or to be a person exempt from registration. Although there are some exceptions that would allow an attorney to act as a deposition officer, what many firms don't understand is that there are a litany of statutory obligations found in CCP2020.430 & 2020.40 that a deposition officer is required to follow. In addition, companies who handle and store bank, employment and or medical records are subject to various forms of government oversight, and the violation of those regulations can be severe. For example, violation of any one of the thousands of HIPPA regulations could result in a \$10,000 fine. The fact is that most law firms are not aware of and unlikely to follow all of these statutes and regulations.

Furthermore, CCP 2020.420 states that the deposition officer "shall not be financially interested in the action or a relative or employee of any attorney of the parties", so even though an attorney may be exempt from registration, he or she cannot be the deposition officer on their own case or any case where they have a financial interest. California's State Bar Rules of Professional Conduct 5-210: (Member as Witness) states that "a member of the State Bar shall not act as an advocate before a jury which will hear testimony from a member except under specific circumstances". By acting as their own deposition officer an attorney runs the risk of being called to testify as to the authenticity of records and thus violate this ethical standard.

⁵ Oral testimony may be obtained by way of deposition. (C.C.P. §§2025.010 -2025.340 [oral deposition in California]; 2026.010 - 2027.010 [outside of California], 2035.010 - 203 6.0 50 [perpetuation of testimony or preservation of evidence before filing action and pending appeal].)

⁶ Written testimony may be secured by way of interrogatories (C.C.P. §§2030.010 - 2030.090 [special interrogatories]; 2033.710-2033.740 [form interrogatories]) or by deposition by written questions (C.C.P. §§2028.010 - 2028.080).

⁷ Documentary evidence may be obtained by request for production of documents (C.C.P. §§2031.010 - 2031.320), a description of documents to be produced attached to notice of deposition of a party (C.C.P. §2025.220(a)(4), 2025.280(a)), by a description of documents to be produced attached to a deposition subpoena (C.C.P. §§2020.020, 2020.510), or by a subpoena duces tecum (C.C.P. §§ 2020.410 - 2020.440). In addition to the request for documents, the same procedure can be used for production and inspection of land or other items of physical evidence. (C.C.P. §§2031.010 - 2031.320 [party] 2025.510 [non-party].)

It may be of interest to know, that Bosco Legal was originally founded by a private investigator and an attorney. In the early 1990's after Bosco began acting as the deposition officer for this attorney's law firm, these very issues were taken under consideration and the attorney sold his shares in the company to avoid any ethical dilemmas.

PRIVATE INVESTIGATORS

Licensed private investigators deal with many issues and concerns depending on the various investigations that they conduct, but we will focus just on ethical concerns for investigators and supervising attorneys here.

Private Investigator Guidelines

The requirements to become a private investigator in California are set out by the Private Investigator Act (Bus. & Prof. Code §§7512-73). The law prohibits investigators from gaining certain types of information under a deceptive or misleading guise. Depending on the circumstances, investigators are prohibited from misrepresenting intentions or personal identities, whether in action or by way of not affirming the misrepresentation. The private investigator's license may be revoked or suspended due to these actions. Any evidence gained during this alteration of the truth might not be held valid in the case. The victims of deceptive behavior perpetrated by the private investigator may seek damages from investigators and attorneys, including when such behavior happened during the lack of attorney supervision.⁸

Attorney Responsibilities

Both ABA Model Rule 5.3 and California Rule of Professional Conduct 3-110 require an attorney to adequately supervise non-attorney investigators to ensure compliance with ethical standards for attorneys. The ABA Model Rule 5.3: Responsibilities Regarding Non-Lawyer Assistant is essential to comprehend for a lawyer employing a private investigator or any other legal assistant who is not a lawyer. The partner or lawyer with authority over the firm and the direct supervisor must take a reasonable amount of precaution to ensure the private investigator or like person is compatible with the firm and the position being held, including any and all duties. Both the partner of the firm and the direct supervisor of the non-lawyer are responsible for any known misconduct taken throughout the duration of the legal assistant's employment.⁹

The California Rule of Professional Conduct 3-110 depicts a similar set of rules, but 3-110 concerns the competence of the lawyer in order to maintain professional conduct. According to these rules, competence means having the proper state of emotional, physical, and psychological stability in order to do the most effective job possible. Additionally, the lawyer must approach the case with the proper attentiveness and be prepared to learn any necessary information or skills. In the case that the lawyer is unable to learn a skill, a third party is to be employed to supplement any necessity.

⁸ <https://www.privacyrights.org/ar/PIs-Caragozian.htm>

⁹ http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant.html

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The Issue of Pretexting

California Penal Code §638 subjects any person who attempts to procure telephone calling records through fraud or deceit to a penalty of a \$10,000 fine and up to one year of jail time. During the course of an investigation, there can be many situations under which the private investigator is in a questionable legal situation regarding the way in which information is retrieved. “Pretexting” is a term used to describe the practice of obtaining information by acting in a misleading or deceitful way. In court, information that has been procured by pretexting is allowed to be used, but only under specific circumstances. Although it is the responsibility of the private investigator to know the laws and which courses of action will be the most beneficial to the accuracy of the legal process, attorneys can ultimately be required to adequately instruct the private investigator in the ethical and legal processes.¹⁰

In 1991, Stephen Slesinger sued the Walt Disney Company, alleging that Disney failed to pay certain royalties regarding rights to exploit the Winnie the Pooh series of children's stories. To assist with the lawsuit, Slesinger's legal team hired a private investigator but made no attempts at educating or supervising the investigator. Over three years, the investigator took thousands of confidential pages belonging to Disney, some of which were obtained by trespassing and breaking into buildings. Slesinger's attorneys did not keep reports of the documents received from the investigator and concealed the activities from Disney and the court. Due to the illegal and deceitful manner by which the evidence was retrieved and hidden, the court dismissed Slesinger's lawsuit with prejudice.¹¹

This lawsuit is an example of the relationship between the attorney or law firm and the investigator and how that can affect the outcome of the lawsuit. When the investigator proves to be, at best, negligent of rules and laws and, at worst, deliberately deceitful and misbehaved, there are consequences in the courtroom. In this instance, all of the evidence was deemed invalid. Additionally, the trial court further penalized this particular plaintiff due to the level of malicious intent. The lawyer and the case, as well as the investigator, faced the consequences of the lack of proper conduct during the private investigation.

It is clear that both the lawyer and the private investigator need to ensure that they are properly educated about the legal and ethical extent to which investigators are legally allowed to solicit information.

¹⁰ http://www.hunton.com/files/Publication/9e709c23-8a7f-4960-998d-b421ddcab530/Presentation/PublicationAttachment/f5da5e26-558f-4487-90fd-955344067dee/Hartwell_Compliance-Ethics-Investigations.PDF

¹¹ *Stephen Slesinger, Inc. v. Walt Disney Co.*, (2007) 155 Cal. App. 4th 736

CONCLUSION

We have highlighted a number different ethical issues and concerns when dealing with process servers, deposition officers, and investigators. We examined the professional ethics of each and outlined requirements to focus on. Here we focused on California as a whole; however different localities may establish different standards. There may also be additional cases and precedents that can further illustrate the various issues.

Ultimately, one must familiarize themselves with the rules of the law and the standards of professional conduct to operate ethically.