



# Three Reasons Right of Way Agents should **NOT** Call the Agency Lawyer and Ask for Legal Advice

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## 1 You May Not Be the Client

Lawyers can only provide legal advice to clients. The lawyer-client confidential communication privilege only exists where the communications are between a lawyer and a client. Right of way consultants are not always covered under the lawyer-client communication privilege, even when they are under contract with an agency.

An organizational client (i.e., government agency) can only act through individuals who are authorized to conduct its affairs. For example, the State Bar of California Rules of Professional Conduct, Rule 1.13 “Organization as Client” states in part:

(a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement...

The “comments section to this Rule states, “For purposes of this rule, **any agent or fiduciary authorized to act on behalf of an organization** is a constituent of the organization.”

Right of way consultants contract directly with agencies and not with their in-house agency lawyers. Contracts for right of way consulting seldom include specific language authorizing right of way consultants to directly communicate with in-house agency lawyers for legal advice without first seeking permission and authority through the agency staff managing the right of way contract. Agency lawyers must confirm the agent/fiduciary relationship with right of way consultants and only then can they accept and respond to legal questions.

Many agencies contract with outside special legal counsel on right of way matters. This presents another layer of complexity. In right of way matters, outside legal counsel executes a retainer agreement to provide specialty eminent domain legal services to agencies. Special legal counsel is managed by and report to the agency general counsel. Legal questions from right of way consultants first go through agency staff, to agency general counsel for approval and then to special legal counsel for review, discussion and responses.

### Situation Not Within the Scope of Representation or Assignment

On occasion, a lawyer representing an organization receives information about or a request from a right of way consultant that is inappropriate. Under California Rules of Professional Conduct Rule 1.2 “Scope of Representation and Allocation of Authority Between Client and Lawyer,” a lawyer must follow a client’s decisions concerning the objectives of representation and shall reasonably consult with the client as to the means by which they are to be pursued.

However, if a lawyer receives information in their communications with a right of way consultant that they are acting, intend to act or refuse to act in a matter related to potential violation of law, that poses a dilemma for the lawyer with that information. For example, learning of a consultant’s suspended professional license, malpractice allegations or inadequately performed duties under an agency contract may warrant a lawyer’s affirmative action. In situations where a lawyer knows or reasonably should know there is a violation of a legal obligation to the agency and organization or a violation of law reasonably imputable to the organization and likely to result in substantial injury to the organization, the lawyer must act in the best lawful interest of the organization. If the lawyer reasonably believes that it is in the best lawful interest of the agency to do so, the lawyer must report the situation to the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Notably, a lawyer’s ethical obligations are first to provide their clients with notice or prevention of inappropriate acts. Reporting directly to legal authorities without first informing a client may violate a lawyer’s duty to preserve the confidentiality of client information. It is also unclear what specific duties arise where a lawyer learns of reckless, inadvertent or negligent actions by a right of way consultant.

### Lawyer Fee

Lawyer involvement is not specifically required during the pre-condemnation phase of right of way acquisition and relocation assistance. Right of way consultant compliance with due process legal requirements in eminent domain matters are always required. Acquisition of property for public projects must follow the specific statutory and regulatory schemes. Agency staff working with right of way consultants with concerns should look first for answers to right of way “legal” questions within the well-vetted agency’s codes, regulations, right of way manual and pre-approved forms.

Providing legal advice and services to clients can be a significant and necessary project-related expense. Lawyers are typically not included in the pre-condemnation concept planning and design project team. Billable time for legal consultation is typically at an hourly rate, billed in minimum six-minute increments. There is a careful balancing of providing competent legal advice with cost efficiency in the project planning and design phases. Early requests for legal opinions and guidance result in lower overall project legal fees and costs. Questions concerning the appropriateness of the project process are always best resolved before project decisions are irreversible, avoiding the taking of one step forward and two steps back.

### Final Thoughts

Some of the most common unanticipated issues to consider involving right of way matters requiring legal advice: unlawful detainer, post-acquisition occupants, mortgage lienholder interests, joint powers authority agreements, other public agency impacts, interim property uses, agency reluctance to approve use of eminent domain power, environmental conditions, competing private and public projects, project funding, excess land sales, elimination of blight, use permit conditions, protection acquisitions, acquisitions for future prospective projects, public project bids, prevailing wage and the list goes on.

Lawyers review facts and then apply those facts to the law. Alternatively, lawyers review the law and help agencies to assemble appropriate facts supporting the law. With the above noted exceptions, don’t hesitate to involve your lawyer early in the project decision-making process. 🌟



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