

SEVENTEENTH ANNUAL STATEWIDE
ETHICS SYMPOSIUM
UNIVERSITY OF CALIFORNIA LOS ANGELES

- **Doing Good Made Easy (or at least Easier): Ethical Issues Arising in Pro Bono Representations**
- **Breaking Up is Hard to Do: Ethical Issues Arising in Law Firm Dissolutions and Partner Withdrawals**
- **Sticks and Stones May Break Your Bones, But Your Own Words (and Conduct) Might REALLY Hurt You**
- **Loose Lips Sink Ships: Media, Confidentiality & Trial Publicity**

April 2013

This program is presented by The State Bar of California
Committee on Professional Responsibility and Conduct.

**SEVENTEENTH ANNUAL STATEWIDE ETHICS SYMPOSIUM
SATURDAY, APRIL 20, 2013
UNIVERSITY OF CALIFORNIA, LOS ANGELES**

Program Schedule

Registration	8:30	–	9:30 am
Welcoming Remarks	9:30	–	9:45 am
Panel 1	9:45	–	11:15 am
Break	11:15	–	11:30 am
Panel 2	11:30	–	1:00 pm
Lunch	1:00	–	1:30 pm
Award Ceremony/Keynote Address	1:30	–	2:00 pm
Panel 3	2:00	–	3:30 pm
Break	3:30	–	3:45 pm
Panel 4	3:45	–	5:15 pm

WELCOMING REMARKS

*Neil J Wertlieb: Chair, Committee on Professional Responsibility and Conduct
Rachel F. Moran: Dean, UCLA School of Law*

■ **PANEL ONE**

**DOING GOOD MADE EASY (OR AT LEAST EASIER): ETHICAL ISSUES
ARISING IN PRO BONO REPRESENTATION**

■ **PANEL TWO**

**BREAKING UP IS HARD TO DO: ETHICAL ISSUES ARISING IN LAW FIRM
DISSOLUTIONS AND PARTNER WITHDRAWALS**

LUNCH

■ **AWARD PRESENTATION AND KEYNOTE ADDRESS**

■ **PANEL THREE**

**STICKS AND STONES MAY BREAK YOUR BONES, BUT YOUR OWN WORDS
(AND CONDUCT) MIGHT REALLY HURT YOU**

■ **PANEL FOUR**

LOOSE LIPS SINK SHIPS: MEDIA, CONFIDENTIALITY AND TRIAL PUBLICITY

STATE BAR OF CALIFORNIA
COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT
2012-2013 OFFICERS

Neil J Wertlieb, Chair

Los Angeles, CA

Neil Wertlieb is a Partner in the Los Angeles office of Milbank, Tweed, Hadley & McCloy LLP. Mr. Wertlieb's practice focuses on corporate transactions and restructurings. Mr. Wertlieb is a member and current Chair of the California State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC). He is also the Chairman of his firm's Ethics Group for its California practices, and the author of a series of articles on ethical issues published in the Business Law News. Mr. Wertlieb is also an Adjunct Professor of Law at the UCLA School of Law, and the former Chairman of both the Business Law Section of the California State Bar and its Corporation Committee. Mr. Wertlieb is the General Editor of the legal treatise "Ballantine & Sterling: California Corporation Laws," and has been recognized in *The Legal 500* for his M&A work. He was recognized as one of the top 100 most influential lawyers in California (California Law Business, October 30, 2000). Mr. Wertlieb received his law degree from the UC Berkeley School of Law, and graduated with honors in Management Science from the UC Berkeley School of Business Administration. Mr. Wertlieb also served as a Judicial Extern for Associate Justice Stanley Mosk on the California Supreme Court. For additional details, go to: <http://www.milbank.com/attorneys/neil-j-wertlieb.html>.

Wendy Wen Yun Chang, Vice-Chair

Los Angeles, CA

Wendy Wen Yun Chang, Partner, Hinshaw Culbertson LLP, Los Angeles, represents businesses in all types of business litigation, with particular emphasis in high exposure complex litigation, trials and appeals. She also represents lawyers in all types of complex matters that involve the practice of the law, including risk management counseling, ethics, crises management, fee related issues, and litigation defense. Ms. Chang is a Certified Specialist in Legal Malpractice Law by the State Bar of California's Board of Legal Specialization. Ms. Chang is Vice Chair of the State Bar of California's Standing Committee on Professional Responsibility & Conduct (COPRAC). Ms. Chang also serves as Co-Chair of the Judiciary Committee for the National Asian Pacific American Bar Association. In addition, Ms. Chang serves on the Professional Responsibility and Ethics Committee (PREC) and the State Appellate Judicial Evaluation Committee for the Los Angeles County Bar Association, and on the Alumni Board of Governors for Loyola Law School, Los Angeles. Ms. Chang received her J.D. from Loyola Law School, Los Angeles, and her B.A. from the University of California, at Los Angeles.

Wendy L. Patrick, Advisor

San Diego, CA

Wendy Patrick is the immediate past Chair and current Advisor of the California State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC), a past Chair of the San Diego County Bar Association's (SDCBA) Ethics Committee, and is an accomplished public speaker on the topic of ethics both nationally and internationally. She teaches ethics around the country on a regular basis for various legal and business organizations, is an Institute of Criminal Investigation certified instructor for law enforcement, and teaches upper division business ethics at San Diego State University. Ms. Patrick is a San Diego County Deputy District Attorney named by her peers as one of the Top Ten criminal attorneys in San Diego by the San Diego Daily Transcript. She has completed over 150 trials ranging from hate crimes, to domestic violence, to first-degree murder. In her current assignment in the Sex Crimes and Stalking Division she prosecutes cases involving vice, human trafficking, child molestation, and sexually violent predators. Ms. Patrick is published on a regular basis. She is co-author of the revised version of the New York Times bestseller *Reading People* (Random House 2008), and was a contributing author to the *Encyclopedia of Race and Racism* (Macmillan Reference 2007), and *Hate Crimes: Causes, Controls, and Controversies* (SAGE 2004). She has had her own ethics column in the San Diego Daily Transcript for over a decade and writes and publishes for a variety of other publications. Ms. Patrick received her PhD from the University of Wales Trinity Saint David, her Master of Divinity degree summa cum laude from Bethel Seminary San Diego, her law degree from California Western School of Law, and her Bachelor's degree in psychology with honors from the University of California Los Angeles.

SPECIAL GUESTS

Patrick M. Kelly, President, State Bar of California

Los Angeles, CA

Pat Kelly is the regional managing partner of the firm's Western region. He is also the president-elect of the State Bar of California – the largest state bar in the United States. Pat is a veteran trial lawyer who focuses his practice on advising and representing insurance carriers in coverage matters and defending individuals and companies in high-stakes professional liability and commercial cases. His practice also encompasses insurance bad faith, insurance coverage, product liability, premises liability, employment litigation, ski resort liability and railroad liability matters. He has particular experience with class actions involving directors and officers (D&O) liability, product liability, employment and consumer fraud claims. Pat is a fellow of the prestigious International Academy of Trial Lawyers. Among his many leadership roles, Pat was elected by his peers to serve as president of the Los Angeles County Bar Association. He also was appointed by the Governor of California to serve as one of 11 members of the Commission on Judicial Performance, which disciplines California state judges and has the power to remove them from the bench. Pat has presented more than 125 lectures and written more than 80 articles for both industry and legal groups. Topics he has addressed include trial tactics, evidence, professional liability, alternative dispute resolution, directors and officers, class actions, liability and coverage issues, bad faith, design, professional liability, attorney error and omissions, employment liability, punitive damages and insurance coverage. Pat is an original co-author of the California Insurance Litigation Guide, the most cited treatise on insurance coverage in California, and is a past president of the Professional Liability Underwriting Society. Pat's practice places a strong emphasis on professional liability issues. Pat is past president of the Professional Liability Underwriting Society and served as a founding chair of the Los Angeles County Bar Association Attorneys Errors and Omissions Prevention Committee.

Rachel F. Moran, Dean of UCLA School of Law

Los Angeles, CA

Rachel Moran is the Dean and Michael J. Connell Distinguished Professor of Law at UCLA School of Law. She received her A.B. in Psychology from Stanford University in 1978 and her J.D. from Yale Law School in 1981. Prior to her appointment at UCLA, Dean Moran was the Robert D. and Leslie-Kay Raven Professor of Law at UC Berkeley School of Law. From July 2008 to June 2010, she served as a founding faculty member of the UC Irvine Law School. Dean Moran is highly active in the legal community. In September 2011, she was appointed by President Obama to serve as a member of the Permanent Committee for the Oliver Wendell Holmes Devise. She was appointed as President of the Association of American Law Schools (AALS) in 2009. She is a member of the American Law Institute and served on the Executive Committee of the Association of American Law Schools. She sat on the Standing Committee of the Division of Public Education of the American Bar Association; serves on the Board of Advisors for the Texas Hispanic Journal of Law and Policy; and was on the Executive Board of the Berkeley Law Foundation. She recently completed her service as a Senator for the Phi Beta Kappa Society. Some of her recent publications include "Equal Liberties and English Language Learners: The Special Case of Structured Immersion Initiatives" and "What Counts as Knowledge?: A Reflection on Race, Social Science, and the Law." For additional details, go to: <http://www.law.ucla.edu/faculty/all-faculty-profiles/professors/Pages/rachel-moran.aspx>.

**Doing Good Made Easy (or at Least Easier): Ethical
Issues Arising in Pro Bono Representations**

DOING GOOD MADE EASY (OR AT LEAST EASIER): ETHICAL ISSUES ARISING IN PRO BONO REPRESENTATIONS

Neil J Wertlieb, Panel Moderator

Los Angeles, CA

Neil Wertlieb is a Partner in the Los Angeles office of Milbank, Tweed, Hadley & McCloy LLP. Mr. Wertlieb's practice focuses on corporate transactions and restructurings. Mr. Wertlieb is a member and current Chair of the California State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC). He is also the Chairman of his firm's Ethics Group for its California practices, and the author of a series of articles on ethical issues published in the Business Law News. Mr. Wertlieb is also an Adjunct Professor of Law at the UCLA School of Law, and the former Chairman of both the Business Law Section of the California State Bar and its Corporation Committee. Mr. Wertlieb is the General Editor of the legal treatise "Ballantine & Sterling: California Corporation Laws," and has been recognized in *The Legal 500* for his M&A work. He was recognized as one of the top 100 most influential lawyers in California (California Law Business, October 30, 2000). Mr. Wertlieb received his law degree from the UC Berkeley School of Law, and graduated with honors in Management Science from the UC Berkeley School of Business Administration. Mr. Wertlieb also served as a Judicial Extern for Associate Justice Stanley Mosk on the California Supreme Court. For additional details, go to: <http://www.milbank.com/attorneys/neil-j-wertlieb.html>.

Renée Glover Chantler

East Palo Alto, CA

Renee Glover Chantler is Pro Bono Counsel for DLA Piper LLP (US), based in its East Palo Alto (Silicon Valley) office. In that role, she has primary management responsibility for the operation of pro bono and community services in most of the firm's west coast offices and assists with the management of the firm's national and international pro bono initiatives. Under Ms. Chantler's leadership, the efforts of DLA Piper's California offices have been recognized by the California State Bar Board of Governors, which awarded those offices its President's Pro Bono Service Award in the Law Firm category in 2011. Ms. Chantler has received several awards for her pro bono work including California Lawyer Magazine's Angel Award in 2008 and the Living the Dream Award from the Lawyers Committee for Civil Rights of San Francisco. Ms. Chantler received her law degree from Stanford University Law School and was an adjunct professor at the school while also serving as Executive Director for the former East Palo Alto Community Law Project. She has been a licensed attorney and litigator for 22 years, and currently focuses her practice on real estate litigation and helping immigrant victims of violence normalize their status in the US. She is currently a member of the Lawyers Committee for Civil Rights in San Francisco, and serves the public as a Planning Commissioner for the City of East Palo Alto.

Prof. Scott Cummings

Los Angeles, CA

Professor Scott Cummings teaches Business Associations, Professional Responsibility, and Community Economic Development, and he is faculty chair of the Epstein Program in Public Interest Law and Policy. His scholarship focuses on the organization and practice of public interest law, and he is currently working on a book that examines the role of public interest lawyers in the movement to transform the Los Angeles low-wage economy. In law school, Prof. Cummings served as executive editor of the Harvard Civil Rights-Civil Liberties Law Review. He clerked for Judge A. Wallace Tashima of the Ninth Circuit Court of Appeals and Judge James B. Moran of the Northern District of Illinois. In 1996, Prof. Cummings was awarded a Skadden Fellowship to work in the Community Development Project at Public Counsel in Los Angeles, where he provided transactional legal assistance to nonprofit organizations and small businesses engaged in community revitalization efforts.

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Amos E. Hartston**Los Angeles, CA**

Amos Hartston is Chief Counsel and Director of Legal Services at Inner City Law Center (ICLC), a nonprofit law firm located on Skid Row in Los Angeles focused on housing, homelessness and veterans' issues. Mr. Hartston oversees a staff of 40 and a pro bono program providing legal services to low-income tenants, working-poor families, people who are homeless or disabled, and veterans focused on combating slum housing, obtaining access to disability benefits, and developing strategies to prevent and end homelessness. Projects include Housing Litigation, Homelessness Prevention, Homeless Veterans Project, Skid Row Advocacy, Healthy Homes and Tenant Organizing, Public Benefits, and Housing Policy. Prior to joining ICLC, Mr. Hartston practiced for 14 years with Latham & Watkins LLP. Between 2004 and 2011, Mr. Hartston split his time between his commercial litigation practice and serving as Pro Bono Counsel, overseeing Latham's worldwide pro bono efforts. His commercial litigation practice focused on intellectual property and complex business disputes in both state and federal court. Mr. Hartston sits on the boards of the Lawyers' Committee for Civil Rights Under Law and the Los Angeles County Bar Foundation. Mr. Hartston received his law degree from Georgetown University Law Center.

Toby J. Rothschild**Los Angeles, CA**

Toby Rothschild is the General Counsel of the Legal Aid Foundation of Los Angeles, after serving as the executive director of the Legal Aid Foundation of Long Beach for 28 years and Interim Executive Director of LAFLA. He graduated from UCLA School of Law in 1969, and has worked at legal aid programs since graduation. He has been the president of the Long Beach Bar Association and was Vice Chair of the California Commission on Access to Justice. Toby served as Chair of the Professional Responsibility and Ethics Committee of the Los Angeles County Bar, and as liaison on access to justice issues to the commission which drafted the proposed new California Rules of Professional Responsibility. He currently serves as a member of the State Bar Committee on Professional Responsibility and Conduct. He frequently serves as a trainer on ethics, negotiation and management skills.

**DOING GOOD MADE EASY (OR AT LEAST EASIER):
ETHICAL ISSUES ARISING IN PRO BONO REPRESENTATIONS**

LIST OF WRITTEN MATERIALS

1. Pro Bono Resolution (Adopted by the Board of Governors of the State Bar of California at its December 9, 1989 Meeting and amended at its June 22, 2002 Meeting)
2. California Business and Professions Code Section 6068
3. “The Ethics of Pro Bono,” by Toby J. Rothschild (Los Angeles County Bar Update, April 2005, Vol. 25, No. 4)
4. “Ethics: The California Pro Bono Stimulus Package,” by Mark C. Scarsi (Los Angeles County Bar Update, October 2009, Vol. 29, No. 9)
5. “An Ethics Primer on Limited Scope Representation,” by the State Bar of California Committee on Professional Responsibility and Conduct (Ethics Hotliner, Fall 2004)
6. “Blueprint for Constructing a Pro Bono Project in a Mid-Size Law Firm,” American Bar Association Standing Committee on Pro Bono and Public Service (October 1997)
7. Rules 1-650, 3-110, 3-310 and 3-700 of the California Rules of Professional Conduct
8. Suggested Reading List on Ethics in *Pro Bono* Representations

- 1. Pro Bono Resolution (Adopted by the Board of Governors of the State Bar of California at its December 9, 1989 Meeting and amended at its June 22, 2002 Meeting)**

STATE BAR OF CALIFORNIA PRO BONO RESOLUTION

(Adopted by the Board of Governors of the State Bar of California
at its December 9, 1989 meeting and amended at its June 22, 2002 Meeting)

RESOLVED that the Board hereby adopts the following resolution and urges local bar associations to adopt similar resolutions:

WHEREAS, there is an increasingly dire need for pro bono legal services for the needy and disadvantaged; and

WHEREAS, the federal, state and local governments are not providing sufficient funds for the delivery of legal services to the poor and disadvantaged; and

WHEREAS, lawyers should ensure that all members of the public have equal redress to the courts for resolution of their disputes and access to lawyers when legal services are necessary; and

WHEREAS, the Chief Justice of the California Supreme Court, the Judicial Council of California and Judicial Officers throughout California have consistently emphasized the pro bono responsibility of lawyers and its importance to the fair and efficient administration of justice; and

WHEREAS, California Business and Professions Code Section 6068(h) establishes that it is the duty of a lawyer “Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed”; now, therefore, it is

RESOLVED that the Board of Governors of the State Bar of California:

- (1) Urges all attorneys to devote a reasonable amount of time, at least 50 hours per year, to provide or enable the direct delivery of legal services, without expectation of compensation other than reimbursement of expenses, to indigent individuals, or to not-for-profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged, not-for-profit organizations with a purpose of improving the law and the legal system, or increasing access to justice;
- (2) Urges all law firms and governmental and corporate employers to promote and support the involvement of associates and partners in pro bono and other public service activities by counting all or a reasonable portion of their time spent on these activities, at least 50 hours per year, toward their billable hour requirements, or by otherwise giving actual work credit for these activities;
- (3) Urges all law schools to promote and encourage the participation of law students in pro bono activities, including requiring any law firm wishing to recruit on campus to provide a written statement of its policy, if any, concerning the involvement of its attorneys in public service and pro bono activities; and
- (4) Urges all attorneys and law firms to contribute financial support to not-for-profit organizations that provide free legal services to the poor, especially those attorneys who are precluded from directly rendering pro bono services.

[Publisher’s Note: Operative January 1, 2012, Business and Professions Code section 6010, in part, provides that the State Bar is governed by a board known as the board of trustees of the State Bar and that any provision of law referring to the “board of governors” shall be deemed to refer to the “board of trustees.” In accordance with this law, references to the “board of governors” are deemed to refer to the “board of trustees.”]

2. California Business and Professions Code Section 6068

Business and Professions Code Section 6068

Duties of Attorney

It is the duty of an attorney to do all of the following:

- (a) To support the Constitution and laws of the United States and of this state.
- (b) To maintain the respect due to the courts of justice and judicial officers.
- (c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.
- (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.
- (e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
- (f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.
- (g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.
- (h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.
- (i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.
- (j) To comply with the requirements of Section 6002.1.
- (k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.
- (l) To keep all agreements made in lieu of disciplinary prosecution with the agency charged with attorney discipline.

- (m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.
- (n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.
- (o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following:
- (1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.
 - (2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.
 - (3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).
 - (4) The bringing of an indictment or information charging a felony against the attorney.
 - (5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.
 - (6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.
 - (7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.
 - (8) As used in this subdivision, “against the attorney” includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney’s knowledge already been reported by the law firm or corporation.
 - (9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.

This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline. (Origin: Code Civ. Proc., § 282. Amended by Stats. 1985, ch. 453; Stats. 1986, ch. 475; Stats. 1988, ch. 1159; Stats. 1990, ch. 1639; Stats. 1999, ch. 221; Stats. 1999, ch. 342; Stats. 2001, ch. 24; Stats. 2003, ch. 765, operative July 1, 2004.)

- 3. “The Ethics of Pro Bono,” by Toby J. Rothschild
(Los Angeles County Bar Update, April 2005, Vol. 25, No. 4)**

The Ethics of Pro Bono

by Toby J. Rothschild
(*County Bar Update, April 2005, Vol. 25, No. 4*)

By Toby J. Rothschild, General Counsel, Legal Aid Foundation of Los Angeles, and member, LACBA Professional Responsibility and Ethics Committee. The opinions expressed are his own.

California Supreme Court Chief Justice Ronald George recently said, "Our justice system must be there for all who need it." The Chief Justice made the comment at a meeting of the L.A. Pro Bono Council, a new organization made up of representatives of large law firms and nonprofits that support pro bono work. The need for pro bono work to help the poor and disadvantaged is indisputable. Meeting that need does raise some ethical issues that need to be considered by an attorney providing legal assistance on a pro bono basis.

An analysis of the ethical issues in pro bono first requires a definition. Pro bono (short for "pro bono publico," for the good of the public), is defined by the State Bar of California as follows:

The direct delivery of legal services, without expectation of compensation other than reimbursement of expenses, to indigent individuals, or to not-for-profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged, not-for-profit organizations with a purpose of improving the law and the legal system, or increasing access to justice. *Pro Bono Resolution, adopted by the Board of Governors of the State Bar of California, amended 2002.*

The first question that arises is whether there is an ethical duty to provide pro bono legal assistance. Business and Professions Code Sec. 6068(h) provides that it is the duty of a lawyer "never to reject, for any consideration personal to himself or herself, the cause of the defenseless and oppressed." *County of Tulare v. Ybarra* (1983) 143 Cal App 3d 587. The State Bar, citing this section, adopted a resolution calling for all attorneys to voluntarily devote at least 50 hours per year to providing pro bono legal services. The ABA Model Rule 6.1 urges a similar voluntary commitment.

Once the decision to provide pro bono services is made, the next question is: Does the attorney owe a lesser ethical duty to a pro bono client? In California today, the answer is no. "Segal's argument presupposes that pro bono clients deserve less diligent services than paying clients, a proposition that undermines the integrity of the legal profession. An attorney's standard of professional conduct to a pro bono client should be no different from his or her responsibility to any other client." *Segal v. State Bar of California* (1988) 44 Cal 3d 1077, 1084.

The most frequent ethical issue that arises in pro bono representation is conflicts of interest. In accepting a pro bono matter, attorneys must perform the same kind of conflicts check that they would for a paying client and decline representation for the same reasons. One way around this problem is to seek out pro bono cases in areas that are unlikely to create a conflict. If your firm represents financial services institutions, then you probably should not volunteer at a pro bono bankruptcy clinic; however, work assisting immigrant victims of domestic violence to regularize their status is not likely to create any conflicts. In its recent revision of its Model Rules, the ABA addressed a part of this concern in Rule 6.5. Rule 6.5 allows a lawyer in "a program sponsored by a nonprofit organization or court" to provide "short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter." In such circumstances, because the lawyer is not able to check conflicts firmwide, conflicts are only disqualifying if the attorney is personally aware of them. This includes both direct and imputed conflicts. The commission currently revising the California

rules has not yet considered Rule 6.5. Accordingly, until such time as California adopts a "safe harbor" such as Rule 6.5, a California lawyer providing pro bono services in a court or nonprofit setting is subject to the same conflict rules as in any other client matter.

Another concern many attorneys have about pro bono representation is their lack of skill and knowledge of litigation or of the particular substantive areas affecting the poor. (*See* California Rule of Professional Conduct 3-110(A), which provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.") Pro bono needs are far more than just litigation. They include corporate and tax work for non-profits, transactional work for non-profit housing developers, employment issues, and even intellectual property issues. Most lawyers can find a need for pro bono services within their expertise. Beyond that, most pro bono legal services programs provide training and back-up support that meet the requirements of Rule 3-110(C).

The State Bar's call to provide pro bono services is only one of many reasons attorneys should volunteer their services. Others include gaining training and experience, improving the image of lawyers, making you feel good about being a lawyer, and, most importantly, making your mother proud of you!

4. **“Ethics: The California Pro Bono Stimulus Package,”
by Mark C. Scarsi (Los Angeles County Bar Update,
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county bar update

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Ethics: The California Pro Bono Stimulus Package

By Mark C. Scarsi of Milbank, Tweed, Hadley & McCloy LLP in Los Angeles, and member of LACBA's Professional Responsibility and Ethics Committee. The opinions expressed are his own. He can be reached at mscarsi@milbank.com.

On July 29, 2009, the California Supreme Court adopted new Rule of Professional Conduct 1-650, which limits some of the conflict of interest problems associated with volunteer participation in limited legal services programs.

Public comments urging quick adoption of the new rule—based on the American Bar Association's Model Rule of Professional Conduct 6.5 [Non-Profit and Court Annexed Limited Legal Services Programs]—stressed the dire need for volunteer legal services in California caused by the recent economic downturn.

While Rule 1-650 should certainly provide a boost to the bar's pro bono efforts, it will be important for practitioners to understand the new rule's limits.

Overview of Rule 1-650. Professional Rule of Conduct 3-310 prohibits members from taking on representations that are adverse to their clients or clients of their firm without first getting informed written consent. To comply with this rule, members typically conduct a conflict database search before accepting a new matter. While conflict searches are easy to do when you are fielding new client requests in your office, they are a bit more difficult in situations where you are counseling multiple clients on a number of different matters as is typical in volunteer legal clinics. The inherent conflict issues that could arise in this type of situation might cause a prudent member to avoid volunteering for legal clinics altogether.

New Rule 1-650 is intended to take away this potential disincentive associated with serving in legal clinics by limiting the circumstances under which a member is subject to Rule 3-310. Specifically, Rule 1-650 provides that members who participate in a qualified short-term limited legal services clinic are subject to Rule 3-310 only if the members *know* that the representation of a client involves a conflict. Additionally, Rule 1-650 provides that such members would only have an imputed conflict of interest if they *know* that someone in their firm would have a conflict with the matter at hand. The new rule also holds that a conflict of interest arising out of the clinic setting will not be imputed back to the member's law firm.

These provisions greatly simplify the conflict check required in a clinic setting. Members are merely required to avoid representations where they know that a conflict exists with their clients or the clients of their firm. In practice, the new rule should relieve much of the conflict pressure associated with work in legal service clinics and in turn should encourage more members to seek these enriching volunteer opportunities.

Practice pointers. While the new rule goes a long way toward providing members with peace of mind when operating in legal clinics, it does not completely alleviate the duty to avoid conflicts. While collective experience with the new rule will certainly develop a sound list of do's and don'ts, the following practice pointers immediately come to mind.

1. Understand the types of representations that the rule covers. The new rule applies to "short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation on the matter." This means that if you continue a representation after your initial clinic consultation, you fall outside the rule's protections. Therefore, you should be sure to do a normal conflict check before agreeing to continue any representation.

2. Ask the right questions. To ascertain whether you *know* of conflicts that arise from a clinic representation, you first need to find out who the potential adverse parties are with respect to your potential client's matter. It will be very important for you to do this *before* you begin receiving confidential information. The last thing you want to do is receive confidential information from a potential client about a dispute, only to find out that your potential client's dispute is with a client you are currently representing. If this does happen, you should immediately cease the potential representation and seek guidance from competent ethics counsel.

3. Keep quiet back at the office. The new rule provides that conflicts of interest arising from your participation in a legal clinic will not be imputed to members of your firm. While you could be precluded from acting adverse to your pro bono client, the rest of the members of your firm are not. It also means that you must be careful not to share your pro bono client's confidential information with your firm colleagues. If you do, you will create a potential conflict for them as well.

4. Remember your pro bono representations. As discussed above, while your clinic representations may not create future conflict problems for members of your firm, they may create future conflict problems for you. Due to this distinction, inclusion of your clinic client matters in the general conflict database of the firm may be inappropriate. In this event, you will need to keep your own personal conflict database of additional matters where you alone are conflicted.

5. Know your audience. While your natural instincts may point you to legal clinics geared toward your particular area of specialization, this may not always be a good idea. If you are giving advice in your area of specialization, you may incur a greater risk of creating conflict situations. For example, if your typical practice includes representing banks and you volunteer for a foreclosure clinic, you could wind up in the unfortunate position of having to turn down a new engagement in your area of expertise because of a pro bono conflict. This same concern would be virtually non-existent if instead you chose to volunteer at a clinic geared toward landlord-tenant or immigration issues.

Rule 1-650 should go a long way toward encouraging member to step up their pro bono efforts in these trying times. It alleviates one obvious downside to pro bono, the unintended creation of conflicts. Members seeking the protections of Rule 1-650, however, should be mindful of its limits.

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- 5. “An Ethics Primer on Limited Scope Representation,”
by the State Bar of California Committee on Professional
Responsibility and Conduct (Ethics Hotliner, Fall 2004)**



An Ethics Primer on Limited Scope Representation

*By The State Bar of California
Committee on Professional Responsibility and Conduct*

Have you ever asked yourself this question: If I needed to hire a lawyer, could I afford to pay someone the fees I charge my clients? For many of us, the cost of legal services to handle even a routine legal matter is a “luxury” we simply cannot afford. For the indigent, getting the services of an attorney is often out of the question when, despite their eligibility for legal aid, they are unable to obtain representation due to the shortage of legal services attorneys. Thus, resorting to self-representation has become an economic necessity, not just for indigent individuals, but for large numbers of middle class litigants who find the cost of legal representation prohibitive. Moreover, while many litigants opt for partial self-representation because they have no financial alternative, others who have the resources to pay a lawyer to handle all aspects of their legal matter are choosing limited scope representation either to exert greater control and input, or to hold down the cost of legal services.

Therefore, it is not surprising that self-represented litigants (also called *pro per* or *pro se* litigants) are increasing in numbers and placing a strain on the limited resources of our judges and court system. Self-represented litigants are frequently unaware of the issues or procedures necessary to adequately represent their own interests, and repeatedly clog the courts with inaccurately prepared or inappropriately filed documents. As such, the courts and the legal profession have been challenged to find solutions to promote access to justice while at the same time limiting the burdens self-represented litigants place on the administration of justice.

One approach that has been increasingly utilized to bring down the costs of legal services is for lawyers and clients to allocate the duties and responsibilities for handling a legal matter between themselves, thereby limiting the scope of the lawyer’s representation to specific services or discrete tasks. Such “limited scope” or “discrete task” representation can provide the layperson with much-needed legal expertise and advice and limit the burdens placed on the courts by self-represented litigants, while keeping the cost of legal representation at an affordable level.¹

While limited scope representation promotes the core value of improving access to justice, attorneys who attempt to limit the scope of their representation must be mindful of their

¹ Throughout this article, the terms “limited scope representation” and “discrete task representation” are used interchangeably. Limiting the scope of legal representation is also sometimes referred to as “unbundling” a lawyer’s legal services.

professional obligations, and must take care to communicate fully with the client and put appropriate procedures in place to ensure that the client receives competent representation and is not prejudiced. Thus, lawyers engaging in limited scope representation need to ask the right questions, identify the issues, make the necessary disclosures, and develop the procedures that facilitate the proper handling of the client's legal matter.²

Some of the most important questions facing lawyers who provide limited scope or discrete task representation are:

- (1) *Have I carefully evaluated whether limited scope representation is appropriate in my area of practice?*

We want to emphasize that not every type of practice is conducive to limited scope representation. Attorneys should carefully consider whether their practice lends itself to limited scope representation. For example, in family law limited scope representation has been successfully used for years. As a result, the Judicial Council has promulgated new forms to facilitate limited scope representation in family law cases. Others areas in which limited scope representation has proven effective include landlord-tenant disputes and consumer advocacy. Legal services providers have also utilized discrete task representation very effectively in a variety of matters in order to provide at least limited assistance to indigent clients who cannot afford the services of an attorney. Many of these efforts have been directed toward assisting self-represented litigants to navigate the legal system and conform to court practice and procedures. On the other hand, it is wise to avoid limited scope representation in very sophisticated and/or complicated litigation. In fact, attorneys practicing in some areas (e.g., immigration law) may not be allowed to limit their representation for a particular aspect of a judicial or quasi-judicial proceeding.

- (2) *Have I adequately communicated the risks as well as the benefits of this type of legal service to the client?*

Attorneys engaging in limited scope representation should endeavor to fully advise their clients of the limitations on the representation, including the matters the attorneys are *not handling*. Clients also should be advised of the possible adverse implications of the limited scope representation, and to consult with other counsel about legal matters their attorney is not handling. It also may be advisable to recommend against a proposed allocation of responsibility or even to decline the representation if the attorney believes the client's proposed split of responsibility is a prescription for disaster.

- (3) *Have I put procedures in place to ensure that in limiting the scope of representation I am still providing the client with competent representation?*

As noted, attorneys need to communicate with their clients regarding not only the limitations on the scope of the representation, but the risks and benefits arising from the arrangement. Amongst the most important procedures to ensure competent representation are written fee

² In this article the authors do not intend to set or to define the standard of care or the duties of attorneys with respect to any of the issues discussed.

agreements and other written risk management tools designed to ensure that clients understand the specific nature and ramifications of their specific arrangement. Some suggested materials have already been prepared for family law practitioners and can be adapted by attorneys in other practice areas as a checklist to ensure that all matters relating to the limited scope representation are covered either by the attorney or the client or both, and that both parties fully understand their respective assignments and responsibilities.

(4) If my scope of work does not include representing the client from start to finish, have I put procedures in place to avoid prejudice to my client upon my withdrawal?

In many limited scope or discrete task representations, the attorney and the client have an understanding from the outset that the lawyer is not going to see the matter through to its conclusion. However, in withdrawing from representation before the conclusion of a client's matter, an attorney must take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. (Cal. Rule of Prof. Conduct 3-700.) These obligations apply irrespective of whether the client and attorney agreed at the outset that the attorney's representation would not extend through the conclusion of the matter. Thus, from the beginning of the representation, the attorney should pay particular attention to the need to educate and inform the client in order to avoid reasonably foreseeable prejudice to the client's rights upon the completion of the attorney's services. In many situations this will include informing the client about matters pending at the time of the attorney's withdrawal, applicable deadlines, etc. The attorney should also check California Rule of Professional Conduct 3-700 as well as applicable statutes and rules of court to ensure compliance with the law in connection with the termination of the relationship.

(5) Have I put procedures in place to ensure that I am treating limited scope clients the same as all other clients for purposes of fulfilling my duties of undivided loyalty and confidentiality?

Attorneys who offer limited scope representation are required to comply with the same fiduciary duties of undivided loyalty and confidentiality as lawyers providing full service representation for a legal matter. Therefore, conducting conflicts checks and avoiding the disclosure of confidential client information remain the attorney's responsibility.

(6) Have I fulfilled my duties to the ethical administration of justice?

Each limited scope representation is different, and these questions should be answered in the context of each client matter. The following discussion highlights the issues which each attorney should carefully consider before undertaking a limited scope representation.

A. Agreements Defining the Limited Scope of Legal Representation

In California, most attorney-client arrangements involving payment for the attorney's services must be memorialized in writing. [See Bus. & Prof. Code §6147 (pertaining to contingency fee agreements) and §6148 (pertaining to non-contingency fee agreements)].³ These statutory mandates apply whether the attorney is providing full service representation for a particular matter, or has, instead, limited the scope of his or her representation. However, because of the nature of discrete task representation and the importance of educating the client concerning the scope, risks and benefits of that representation, it is of paramount importance that any fee agreement that purports to limit the scope of the attorney's representation be in writing, and be clear, unambiguous, and reasonable regarding the services to be performed by the attorney and client, respectively.

Thus, in limited scope representation, no part of the written fee agreement is more important than the provision defining the scope of the attorney's representation – what the attorney will be doing -- and often, even more importantly, what the attorney will *not* be doing -- and what the client will be doing. It is easy enough for clients and attorneys to develop misunderstandings about their respective responsibilities when the attorney is providing full service representation for a transaction or litigated matter. In limited scope representation, the potential for misunderstandings, serious adverse consequences and malpractice exposure increases dramatically when the agreement is not memorialized in a writing signed by both the attorney and client. In addition, agreements regarding the scope of the representation may change over the course of the representation, and it is equally essential that these changes be memorialized in writing as well.

Because of the particular risks created when attorneys limit the scope of their representation in any specific matter, we recommend incorporating language in the agreement to the effect that the client has read the provisions of the agreement defining the limited scope of the engagement, that the scope of the attorney's services has been limited by express agreement (and at the client's request if that is the case), that the attorney has fully explained the nature and risks of the arrangement, and that the client understands the potential adverse consequences of limiting the scope of the attorney's representation.

While the definition of scope is generally included in the fee agreement, it can be set forth in a separate document. If a separate document is used, it should be prepared and signed by both the attorney and the client contemporaneously with the fee agreement as well as when changes in the scope of representation are agreed to by the attorney and client.

³ Failure to comply generally renders the agreement voidable at the option of the client and limits the attorney to recovery of the reasonable value of the services rendered.

B. The Duty of Competence

Once you have determined that limited scope representation is appropriate to handle your client matter, you must be prepared to comply with California Rule of Professional Conduct 3-110 by performing competently. The competency of an attorney's performance can become an issue in limited scope matters when the client and attorney disagree over whether the attorney has performed (a) as agreed or (b) as otherwise required. The latter issue is highlighted in the case of *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, in which an attorney desiring to limit the scope of his representation of an injured client to prosecuting a workers' compensation claim drafted an agreement so limiting the scope of representation. The agreement made no mention of a potential third party tort claim, and when the client learned that his tort case was time barred, he sued his attorney for negligently failing to put him on notice of that potential remedy.

In analyzing the malpractice claim, the court of appeal addressed an attorney's duty to advise clients, stating:

One of an attorney's basic functions is to advise. Liability can exist because the attorney failed to provide advice. ***Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client's objectives. The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered.***

Nichols v. Keller, supra, 15 Cal.App. 4th 1672, 1683-1684 (emphasis added).

In explaining the rationale for its decision, the court stated: "A trained attorney is more qualified to recognize and analyze legal needs than a lay client, and, at least in part, this is the reason a party seeks out and retains an attorney to represent and advise him or her in legal matters." (*Nichols v. Keller, supra*, 15 Cal.App.4th 1672, 1686.)

In the specific context of a lawyer representing a client in a workers' compensation matter, the *Nichols* court held that the lawyer could limit the scope of services to the workers' compensation action, but to avoid exposure to the client for negligence, the attorney had to inform the client of: (1) the limitations on the scope of the attorney's services; and (2) the possible adverse implications of the limited scope representation.

As to explaining the possible adverse implications of the limited scope representation, the court noted that the attorney should disclose: (a) that there may be other remedies or issues pertaining to the client's legal matter that the attorney is not investigating (e.g., third party tort claims); (b) apparent legal problems pertaining to the limited scope of services (e.g., time deadlines would impact the client's ability to pursue other claims); and (c) the advisability of consulting different counsel for other aspects of the client's legal matter. (*Nichols v. Keller, supra*, 15 Cal.App. 4th 1672, 1686-1687.)

Nichols teaches that because we, as attorneys, have greater knowledge than lay clients about the law and the potential pitfalls our clients may encounter, we have an obligation to alert our clients

to matters that may result in adverse consequences if not considered. Although *Nichols* involved a situation where it was the attorney, rather than the client, who sought to limit the scope of the legal services being provided, the case provides a helpful roadmap for attorneys entering into limited scope or discrete task representation agreements with clients, particularly with respect to the fact that in defining a limited scope of representation it can be as important to *alert the client to what the attorney is not doing* as it is to identify the tasks the attorney is doing.

There are additional authorities to which attorneys may look for guidance in defining the limited scope of legal services. In the family law arena, Judicial Council Form FL-950 (July 1, 2003) entitled “Notice of Limited Scope Representation” specifies whether the attorney or the client will be “attorney of record” with respect to the following general issues and matters, each of which is then broken down in more detail: (a) Child Support; (b) Spousal Support; (c) Restraining Orders; (d) Child Custody and Visitation; (e) Division of Property; (f) Pension Issues; (g) Contempt; and (h) Other. The form also requires the attorney to verify the existence of a written fee agreement. As this Judicial Council form has been approved for use in family law cases, attorneys can consider the panoply of services provided in their own areas of practice and adapt forms that reference those specific services, leaving a place for “other” to cover matters that might be unique to a specific legal representation. The Limited Scope Representation Committee of the California Commission on Access to Justice also has created helpful and critical Risk Management Materials for attorneys to utilize in family law limited scope representation that may be adapted to your particular limited scope representation matters. These forms may be obtained by contacting the State Bar of California Office of Legal Services or online from a link to the Commission on Access to Justice, which can be reached through <http://www.calbar.ca.gov>.

It is also important to keep in mind that there are contexts in which the duty of competence prohibits limiting the scope of representation in a particular manner. [See, *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 521 (“there is no ‘limited’ appearance of counsel in immigration proceedings.”) and *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930 (an attorney’s obligations may extend beyond a document purporting to limit scope to include the duty to assert claims arising out of the same facts that the client would reasonably expect to be asserted to accomplish the objectives of the representation.)]

C. The Duty to Avoid Prejudice to the Client’s Interests Upon Withdrawal

Before withdrawing from representation of a client in any matter, whether the representation is full or limited in scope, an attorney must comply with California Rule of Professional Conduct 3-700, and therefore must take:

reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with all applicable laws and rules.”⁴

[Cal. Rule of Prof. Conduct 3-700 (A)(2).]

⁴ Rule 3-700(D) pertains to the release of client papers and property, and to the return of unearned fees.

In addition, if an attorney is of record in a litigated matter, permission of the client and/or tribunal is generally required. [Cal. Rule of Prof. Conduct 3-700(A)(1)].

In the context of a limited scope representation in which the attorney and client agree the representation will cease before the conclusion of the client's matter, the obligations of the withdrawing attorney pursuant to subdivisions (A)(1) and (A)(2) of California Rule of Professional Conduct 3-700 should be addressed in the initial agreement between the attorney and client. In the context of limited scope representation, the avoidance of prejudice to the client is apt to depend upon the extent to which the attorney has disclosed: (1) the limitations on the scope of the attorney's services; (2) apparent legal problems that are reasonably likely to exist at the projected time of withdrawal; and (3) the advisability of consulting different counsel for those aspects of the client's legal matter the parties expect to be pending at the time of completion of the attorney's services. Litigation attorneys, particularly those practicing in the tort arena, have included such limitations in their fee agreements for years by explaining that their scope of representation does not include an appeal or collection of a judgment.

If the circumstances pertaining to the conclusion of the attorney's services have been adequately addressed at the outset of the attorney-client relationship, and there have been no unforeseen developments that have materially altered the situation, an advance agreement between the attorney and client setting forth the parameters for withdrawal may be sufficient to prevent reasonably foreseeable prejudice to the rights of the client. On the other hand, if these issues have not been adequately addressed in advance, the attorney will need to take precautions prior to the proposed withdrawal to ensure compliance with California Rule of Professional Conduct 3-700(A)(2).

Another related issue is whether a client can agree in advance to execute a substitution of attorney form upon the conclusion of a limited representation. There is no case law to suggest that it would be unethical for an attorney and client to agree at the outset to execute the documents necessary to formalize the conclusion of the relationship, such as a substitution of attorneys, when the terms of the engagement have been completed. The ability to enter into such an agreement also furthers the personal autonomy of a client to choose limited scope, rather than full service, legal representation for a particular matter.

However, an attorney who obtains a pre-signed substitution *for filing in the attorney's sole discretion* will run afoul of California Rule of Professional Conduct 3-700. (See, Los Angeles County Bar Association Formal Opinion 371.) This is particularly true when the client disagrees that the services were completed and the timing of the withdrawal prejudices the client's rights. In Family Law matters, the Judicial Council has created a form that permits the attorney to request an order relieving him or her as counsel because the limited scope representation has been completed as agreed. This application is served on the client, and if the client disagrees, he or she has the right to file an objection with the court.

If an attorney providing limited scope representation in a litigated matter desires to withdraw and the client does not agree to sign a substitution of attorney, the attorney must seek permission from the tribunal to withdraw, and in so doing, should note completion of the limited

scope representation. Because written fee agreements are confidential communications under California Business and Professions Code section 6149, there is a question as to whether it is permissible for an attorney to use a written fee agreement limiting the scope of services as a basis for a motion to withdraw. In order to assure that there is an understanding between the attorney and client as to the attorney's intention to place the agreement before the court, the attorney can obtain an advance waiver of California Business and Professions Code section 6149 from the client. (See, e.g., Cal. Rule of Prof. Conduct 3-310(C)(1) and (2); *Zador Corp. v. Kwan*, (1995) 31 Cal.App.4th 1285; California State Bar Formal Opn. No. 1989-115.) However, because submission to a court or other tribunal can result in dissemination of the agreement to the adversary and the public, an *in camera* production or protective order may be appropriate in certain circumstances.

Even if the attorney has not obtained the client's consent to disclose the agreement in advance, if the agreement defines the limitations on the scope of representation, and the client is nevertheless unwilling to sign a substitution when the scope has been completed, the attorney can use the limited scope agreement without violating California Business and Professions Code section 6068, subdivision (e) or the attorney-client privilege, on grounds that the issue for which it is offered is the client's breach of the agreement. (Cal. Evid. Code §958; *Fox Searchlight v. Paladino* (2001) 89 Cal.App.4th 294, 313.) However, to protect client confidentiality, *in camera* review or a protective order may be warranted.

D. The Duties of Loyalty and Confidentiality

The fiduciary duties of loyalty and confidentiality apply with equal force and effect whether an attorney is providing full service representation for a transactional or litigation matter, or representing the client only on a limited scope basis. The duty of confidentiality is "fundamental to our legal system" and attaches upon formation of the attorney-client relationship, or even in the absence of such a relationship where a person has consulted an attorney in confidence. (See, Cal. Bus. & Prof. Code, § 6068, subd. (e); Cal. Evid. Code, §§950 et seq., *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal. 4th 1135; California State Bar Formal Opn. No. 2003-161.)

For conflict of interest purposes, the duty of undivided loyalty attaches whenever "the attorney knowingly obtains material confidential information from the client and renders legal advice or services as a result." (*People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.*, *supra*, 20 Cal. 4th 1135, 1148; *see also, Flatt v. Superior Court* (1995) 9 Cal. 4th 275, 284; Cal. Rule of Prof. Conduct 3-310.) Thus, this core value of the legal profession must be honored irrespective of the limited scope of the representation.

E. The Duty to the Administration of Justice

Pursuant to California Rule of Professional Conduct 5-200 (A) & (B), an attorney has a duty to be truthful and not to "mislead the judge, judicial officer, or jury by an artifice." Self-represented litigants are often given more latitude by the court in the preparation of pleadings. Thus, federal courts have expressed concern that if an attorney has authored pleadings and guided the course of litigation for a self-represented litigant it may improperly disadvantage an

adverse party. (*Ricotta v. State of California* (S.D. Cal. 1998) 4 F.Supp.2d 961.) Thus, if a “behind the scenes” attorney providing limited scope representation in the form of coaching or ghostwriting appears to be “guiding the course of the litigation with an unseen hand,” (*Id.* at 986) or preparing a brief “in any substantial part,” some courts have suggested that the attorney is obligated to advise the court of his or her role in the matter. (*Ellis v. State of Maine* (1st Cir. 1971) 448 F.2d 1325, 1328.) While indicating concern, the *Ricotta* court found no case law or local rules prohibiting ghostwriting in California.

Due to the overwhelming number of *pro per* litigants (approximately 80% in family law matters alone), the courts are finding new ways to encourage greater attorney participation to alleviate the strain on judicial resources caused by self-represented litigants. For example, in 2003, the California Judicial Council adopted Rule of Court 5.70 specifically providing that an attorney who contracts with a client to draft or assist in drafting legal documents, but not to make an appearance in the case, is not required to disclose within the text of the document that he or she was involved in preparing the documents.

F. Conclusion

Most attorneys either have been, or soon will be, faced with client requests for limited scope legal representation. As our initial question suggested, it is not difficult to understand why consumers of legal services are increasingly seeking this flexible, economical and empowering option from attorneys.

All attorneys who are considering or engaging in limited scope representation should carefully consider the issues raised in this article (1) to determine whether their practice area can accommodate limited representation on particular matters, and if so (2) to establish procedures that not only reduce the cost of legal representation through limiting the attorneys role, but also foster compliance with all of the duties attorneys owe their clients. Those attorneys who provide limited scope representation responsibly and ethically will not only increase the public’s access to justice, but should also experience increased client satisfaction flowing from the collaborative effort of achieving the client’s desired goals.

A PUBLICATION OF THE STATE BAR OF CALIFORNIA ETHICS HOTLINE



ETHICS HOTLINER

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6. **“Blueprint for Constructing a Pro Bono Project in a Mid-Size Law Firm,” American Bar Association Standing Committee on Pro Bono and Public Service (October 1997) [Attachments Omitted]**

BLUEPRINT
For Constructing a Pro Bono
Project in a Mid-Size Law Firm

A PROJECT OF THE STANDING COMMITTEE ON PRO BONO and PUBLIC SERVICE

October 1997
American Bar Association
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This manual has not been reviewed by the House of Delegates or the Board of governors of the American Bar Association and, accordingly, should not be construed as representing policy of the American Bar Association.

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Standing Committee on Pro Bono and Public Service
Honorable Judith M. Billings, Chair

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accurate at the time of print.**

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FOREWORD

In 1993 the American Bar Association adopted Model Rule of Professional Responsibility 6.1, which establishes for each attorney an aspirational goal of 50 hours of pro bono service per year. The ABA's Standing Committee on Pro Bono and Public Service and its project, the Center for Pro Bono, recognize the longstanding efforts on the part of attorneys who work in mid-size law firms (those employing 50 or less attorneys) to provide free legal services to the needy in their community and to meet the commitment of Model Rule 6.1.

To assist mid-size firms and the pro bono organizations that work with these firms in developing successful and efficient pro bono policies and projects, the Center for Pro Bono has developed this **BLUEPRINT**. The **BLUEPRINT** guides pro bono practitioners and coordinators through the issues concerning the development of a mid-size firm pro bono project. The **BLUEPRINT** also highlights new and familiar models which will provide the bases for creating a successful project.

Principal credit for the drafting of this **BLUEPRINT** goes to Greg McConnell, Assistant Staff Counsel for the Center for Pro Bono. Editorial assistance was provided by B. Riney Green, a Member of the Standing Committee on Pro Bono and Public Service, Steven Scudder, Committee Counsel to the Standing Committee on Pro Bono and Public Service, and Bonnie Allen, Staff Counsel to the Center for Pro Bono.

Pro bono work requires sacrifice and dedication, both of time and money. However, in an era of decreased funding for legal services organizations and public support initiatives, the need has never been greater. This **BLUEPRINT** is an aid to helping those who are dependent on your assistance. Thank you for your commitment to pro bono work.

Honorable Judith M. Billings
Chair, ABA Standing Committee on Pro Bono and Public Service

INTRODUCTION

The American Bar Association Center for Pro Bono is pleased to present this packet of materials to provide guidance for developing a pro bono project for mid-size law firms (firms comprised of approximately 10-50 lawyers).¹ The Center realizes that the term "mid-size" may not accurately reflect a firm's size or stature relative to its market. For example a 45-attorney firm located in Los Angeles, California may be a "small" firm in that market, while a firm of the same size located in Nashville, Tennessee may be a "large" firm. Additionally, the Center also recognizes that firms of this size may vary substantially with respect to matters that may impact a firm's methods and means of providing pro bono work, including firm culture, management structure, areas of practice, practice group division, compensation policies, and partner-to-associate ratio. Because of the many variances among mid-size firms, this publication presents a wide variety of illustrative examples of policies and projects. Each illustration has been selected in an effort to present a textually and geographically diverse representation of approaches. Since many of the pro bono policies and project descriptions presented are not dated, the Center recommends contacting each law firm or pro bono organization before relying on its policy or project description in developing a pro bono project.

TABLE OF CONTENTS

INTRODUCTION	Page iii
TABLE OF CONTENTS	Page iv
I. CONTEMPLATE THE CONCEPT OF PRO BONO	Page 2
II. CONSTRUCTING A PRO BONO PROJECT	Page 4
A. Lay the Foundation: Establish a Commitment to Pro Bono Work	Page 4
1. Clarify the Reasons for Providing Pro Bono Work	Page 4
a. The Lawyer's Responsibility	Page 4
b. Pro Bono Provides a Firm with Substantial Economic Benefits	Page 4
i. Community Relations/ Client Building	Page 4
ii. Client Relations	Page 5
iii. Enhance the Image of the Legal Profession	Page 5
iv. Recruiting	Page 5
2. Develop a Pro Bono Policy Statement	Page 5
3. Establish a Pro Bono Committee	Page 6
4. Cultivate a Top-to-Bottom Commitment to Pro Bono	Page 6
B. Build a Framework	Page 6
1. Determine the Firm's Time Capacity and Flexibility	Page 6
a. Project Administration	Page 7
b. Supervisory Time	Page 7
c. Training Time	Page 7
d. Screening Time	Page 7
2. Determine the Community's Legal Needs	Page 7
C. Create a Structure: Establish a Pro Bono Project	Page 8

1.	Commit to Participate with an Independent Pro Bono Organization	Page 8
a.	Commitment Projects	Page 8
b.	Clinics	Page 9
c.	Hotlines	Page 9
i.	Standard Models	Page 9
ii.	CARPLS - a New Breed of Hotline	Page 9
2.	Develop a Signature Project	Page 10
a.	Firm-Sponsored Clinics	Page 10
b.	Represent Community Economic Development Organizations	Page 11
c.	Adopt a Nonprofit Organization	Page 11
d.	Special Projects	Page 11
i.	Conflict Clinics	Page 11
ii.	Time-Dollars Projects	Page 12
III.	IF YOU BUILD IT, WILL THEY COME?	Page 12
	- RECRUITING ATTORNEYS	
A.	Personal Satisfaction	Page 12
B.	Professional Growth for Young Lawyers	Page 13
C.	Billable Hours Credit	Page 13
D.	CLE Opportunities	Page 13
E.	Involve Summer Associates and Interns	Page 13
F.	Working with Attorneys in Different Practice Groups	Page 13
	FOR MORE INFORMATION AND RESOURCES	Page 13
	Endnotes	Page 15
	Attachments	
A-1	Supreme Court of Florida	Page 17
A-2	Marion Cowell: Putting His Term Into Perspective	Page 24
A-3	Reply to Charlotte Office March 14, 1997 "Corporations"	Page 27
A-4	Corporate Counsel Partners in Pro Bono	Page 30

A-5	Reply to Charlotte Office March 14, 1997 "Law Firms"	Page 32
A-6/Tab a	January 1993 The Atlanta Bar Association..	Page 35
A-6/Tab b	Model Law Firm and Corporate Legal <i>Pro Bono</i> Policies	Page 38
A-6/Tab C	Board adopts Model Pro Bono Policy	Page 40
A-6/Tab d	Los Angeles County Bar Association Pro Bono Policy	Page 44
A-7/Tab a	Munger, Tolles & Olson LLP Pro Bono Policy	Page 55
A-7/Tab b	The Missouri Bar Volunteer Lawyer Registration	Page 56
A-7/Tab c	PRO BONO POLICY Weiss, Berzowski, Brady & Donahue	Page 58
A-7/Tab d	PRO BONO POLICY Ross & Stevens	Page 59
A-8	D.C. Bar Psac Law Firm Pro Bono Clinic A Law Firm Rotation Model	Page 61
A-9	Legal Services For Cape Cod And Islands, Inc. Law Firm Counseling Project	Page 66
A-10	Coordinated Advice and Referral Program for Legal Services CARPLS	Page 71
A-11	Whitman-Walker Clinic, Inc. Legal Services Department	Page 76
A-12	Community Economic Development: A Role for the Private Bar	Page 78
A-13	Pro Bono Report: Community Counsel Matches Hillsborough Real Estate Lawyers with Non-Profit Corporations	Page 84
A-14	Pro Bono Opportunities in Community Development Law	Page 89
A-15	Equal Access on Harbour Island	Page 96
A-16	Community Law Group	Page 102
A-17	Final Report Of The Pro Bono Review Committee	Page 104

I. CONTEMPLATE THE CONCEPT OF PRO BONO

When considering the construction of a pro bono project, a firm should first consider its responsibilities for engaging in pro bono work. The term "pro bono" is short for the Latin phrase "pro bono publico" meaning "for the public good." Generally, pro bono is understood to mean legal work undertaken with the intent to provide legal services at no cost, or at a substantially reduced rate, to persons of limited means. The lawyer's responsibility (some may call it a duty) to provide services to the poor long has been recognized. In ancient Rome, the impoverished were linked to upper-class patronus who assisted the poor and weak in all matters, including litigation. As governments and society evolved and reflected greater concern for the poor, statutes were passed into law which required lawyers to provide free assistance to the poor, or allowed courts to appoint counsel.

In American jurisprudence, the recognition of an ethical duty to affirmatively provide legal assistance to the poor was articulated as early as the 1850's when noted jurist and professor George Sharwood wrote in his "A Compendium of Lectures on the Aims and Duties of the Law" that a lawyer:

"certainly owes it to his profession, as well as himself, that when the client has the ability, his services should be recompensed; and that according to a liberal standard. There are many cases, in which it should be his duty, perhaps more properly his privilege, to work for nothing. It is to be hoped that the time will never come, at this or any other Bar in the country, when a poor man with an honest cause, though without a fee, cannot obtain the services of honorable counsel, in the prosecution or deference of his rights."

The Florida Supreme Court gave a more modern twist on Prof. Sharwood's words in a recent opinion upholding that court's mandatory requirement that members of the Florida bar annually report their pro bono efforts: "Lawyers have been granted a special boon by the State of Florida--they in effect have a monopoly on the public justice system. In return, lawyers are ethically bound to help the state's poor gain access to that system."²

The American Bar Association has taken steps to clarify and quantify the lawyer's obligations with respect to providing legal services to the poor. In 1975, the ABA House of Delegates passed a resolution that provided "it is the basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services." In 1993, the ABA adopted Model Rule of Professional Conduct Rule 6.1, which states that a lawyer should provide at least 50 hours of pro bono service to persons of limited means or charitable, religious, civic, community, governmental and educational organizations. MR 6.1 provides as follows:

RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE

A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.³

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

There are a number of different activities to choose from which satisfy the definition of pro bono publico as set forth in Model Rule 6.1:

1. Rendering of free or reduced fee legal services

- individual, organizational and class representation
- legal advice
- training or mentoring those who represent persons of limited means

2. Participating in legal services contract or judicare projects

3. Accepting court appointments

4. Engaging in activities that improve the law, the legal system or the legal profession

- serving on bar association committees
- serving on boards of pro bono or legal services projects
- taking part in Law Day activities
- acting as a continuing legal education instructor
- serving as a mediator or an arbitrator
- legislative lobbying
- administrative rule making

5. Providing financial support to organizations providing free legal services to persons of limited means.

The ABA's call has not gone unheeded. The bar associations of Hawaii, Montana, Minnesota and Mississippi have adopted MR 6.1. In addition, the supreme courts in six other states (Arizona, Florida, Georgia, Kentucky, Nevada and Virginia) have incorporated aspirational service goals similar to MR 6.1 into their ethical rules.

II. CONSTRUCTING A PRO BONO PROJECT

The development of a pro bono project can be looked at as if it were the construction of any other well-built structure: a combination of a strong foundation and a properly suited edifice.

A. Lay the Foundation: Establish a Commitment to Pro Bono Work

The foundation of a successful pro bono project is a firm's desire to undertake pro bono work and a bonafide commitment to make that desire a part of the firm's culture. The reality of pro bono work is that it creates a dilemma both for the individual lawyer and also for the firm. In an increasingly competitive legal market, lawyers and law firms are under great time demands to provide their paying clients with the best, fastest and most reliable legal services possible. At the same time, the need for legal assistance by persons who cannot afford to pay is greatly increasing. As a result, to help meet the needs of the poor, lawyers and law firms likely must sacrifice a portion of time that they otherwise may have spent on billable matters or to attend to the normal demands of life such as family, religion, friends and self. Thus, before beginning a pro bono project, a firm should reconcile the competing time demands of running a law practice and building a successful pro bono project. By doing this, a firm will cement its commitment to pro bono work.

1. Clarify the Reasons for Providing Pro Bono Work

There are many reasons why a law firm accepts pro bono work. A firm will develop a project best suited to its goals and abilities by understanding what reasons motivates its decision to undertake pro bono work. The following is a discussion of reasons why a firm would initiate a pro bono project.

a. The Lawyer's Responsibility

A pro bono project helps the firm enable the individual lawyers in the firm to fulfill their professional responsibility, as described above, to render services to those who are in need of legal services but unable to pay.

b. Pro Bono Provides a Firm with Substantial Economic Benefits

Beyond the duty to assist the poor and needy, pro bono work provides law firms with many tangible benefits that can improve its business standing.

i. Community Relations/Client Building

It is well recognized that clients prefer attorneys who have gained the confidence of others and who have built relationships with individuals and businesses within the community. Word-of-mouth referrals are among the most common means of client development. Pro bono work may lead to referrals from pro bono clients, opposing counsel, program administrators, judges and other persons committed to providing services to the poor who come in contact with pro bono attorneys.

Additionally, assisting the poor and underprivileged is another means for a law firm to demonstrate that it is a good corporate citizen to other persons and businesses in the community. Businesses may look to hire outside counsel who also have demonstrated a commitment to community improvement. As an example, First Union Corporation, a large banking corporation that owns and operates

branch offices across the east coast, has informed all potential outside legal providers that it considers pro bono an important consideration in its hiring decision, and requests that potential outside counsel provide information concerning, among other matters, the firm's pro bono policy and activities. (Attachment 2) First Union, through its General Counsel Marion Cowell, sent letters to other business leaders encouraging them to adopt similar policies. (Attachment 3) Thus, pro bono work may provide a firm with the opportunity to separate itself from its competitors.

ii. Client Relations

In addition to assisting firms acquire new clients, pro bono work may provide a law firm an opportunity to nurture and build relationships with the clients it already serves. DFS Corporation, a San Francisco-based corporation with a three person legal counsel staff, recently joined with its principal outside counsel at Heller, Ehrman, White & McAuliffe, to form a pro bono partnership and jointly participate in a homeless advocacy program sponsored by the Bar Association of San Francisco Volunteer Legal Services Program. (Attachment 4) Through this opportunity, Heller, Ehrman attorneys regularly work alongside the attorneys and other employees of DFS and interact with those persons in a social environment. Similarly, First Union Corporation recently invited all of its outside legal providers to participate as partners in its pro bono efforts. (Attachment 5)

iii. Enhance the Image of the Legal Profession

"The first thing we do, let's kill all the lawyers." Shakespeare's oft-quoted passage seems to typify the negative public view of attorneys in the 1990's. Providing service to the public and demonstrating lawyers' concern for the public welfare and willingness to take action on behalf of others will go a long way to reversing the trend toward negativism regularly associated with the profession.

iv. Recruiting

The ABA's law school accreditation standards provide that a law school "should encourage its students to participate in pro bono activities and provide opportunities for them to do so."⁴ In recent years, many law schools either have expanded or initiated new clinics and other projects designed to introduce law school students to pro bono and educate them about the needs of the underprivileged for legal services. Inspired by these law school experiences, many potential new associates look to continue serving the community as part of their professional lives. According to Judy Bernstein-Baker, the Director of the Public Service Program at the University of Pennsylvania Law School, a potential employer's pro bono commitment and opportunities are a strong consideration of many students graduating from that university, and is frequently the tiebreaker for students choosing between firms offering comparable opportunities.

2. Develop a Pro Bono Policy Statement

To become assimilated into the firm's culture, a pro bono project should be communicated effectively to the attorneys and employees of the firm. Thus, a critical first step is the development of a pro bono statement or policy. Several bar associations have recognized the importance of these policies and urged their members to adopt such written statements. (Attachment 6)

Generally, the policy should state clearly that the firm supports the pro bono efforts of its attorneys and define the type of activities that constitute pro bono. Additionally, to encourage attorney participation, the policy should credit an attorney's pro bono work as billable time toward meeting any recommended amount of work hours established by the firm. At a minimum, the statement should assure all attorneys that they will not be penalized (either officially or unofficially) for participating in a pro bono project. Attached are several sample policies used by law firms. (Attachment 7)

3. Establish a Pro Bono Committee

A firm should form a pro bono committee to effectively implement its commitment to pro bono. In the initial stages, the committee will be charged with organizing the project and generating firm-wide support. In later stages, the committee will act as the development arm to ensure a varied and rich project, and also as a buffer for associates who may work for less supportive partners. Additionally, the committee will ensure that one person's absence or departure will not mean the delay or demise of the project. The committee will act as a symbol of the firm's lasting commitment to pro bono work.

The size of the committee is not of great importance. It may be that only one person, or more than one person acts as the pro bono committee. No matter the size of the committee, it is a good idea to select as participants influential partners who can persuade others of the importance of pro bono work. In addition, the committee might include representatives from different practice groups, both to provide balance and to act as a volunteer draw from all areas of the firm's practice groups. Some firms also include secretarial and paralegal representatives to ensure the full participation of all the firm's resources.

4. Cultivate a Top-to-Bottom Commitment to Pro Bono

For most firms, the largest resource for pro bono work is its associates and young partners. However, younger attorneys may be reluctant to participate because they are insecure about their future status and are unwilling to undertake activities which may diminish their career aspirations or opportunity for promotion. The support, enthusiasm and participation of one or more senior attorneys will signal to younger attorneys that the firm looks at pro bono in a favorable light and will ease the fears of younger attorneys. The support of key senior attorneys also is necessary to run interference for associates who work for less committed attorneys. An often times unspoken, but important facet of senior attorney participation is that a commitment to spread pro bono work broadly among all attorneys assures the firm's lawyers that the economic risk for uncompensated hours is fairly allocated.

B. Build a Framework

After constructing a solid pro bono foundation the next step is to outline the parameters of the pro bono commitment to ensure that the project will be supported by the foundation, fit the designs of the firm, and meet the needs of the community.

1. Determine the Firm's Time Capacity and Flexibility

As discussed above, the reality of pro bono work is that it takes attorney time which may otherwise be spent on billable work projects for the firm, or as attorney free time, both of which are valuable commodities. Thus, before undertaking a pro bono commitment, a firm should examine how much time the firm

realistically is able to donate, and how much time it may expect its attorneys to donate. The amount of time that a firm is willing to devote to pro bono will help shape the type of project that the firm can create. Additionally, the amount of available flexible time also may impact a firm's pro bono project. For example, smaller firms that have fewer attorneys, or firms whose attorneys carry excessive travel loads, may have limited flexibility during regular business hours and may better be able to devote time to pro bono on a week night or weekend. Firms with greater flexibility may be willing to participate in a daytime clinic.

A firm also should be aware of the time required to participate in a project. Among other things, a project may require time devoted to the following matters:

a. Project Administration

Depending on the type of pro bono commitment, a law firm may need to engage in internal administrative work to prepare a conflicts check, establish file numbers, load database information, etc. A firm may relieve itself of much of the time demands if it joins with an existing pro bono provider that already has established an administrative vehicle and is able to assume the administrative responsibilities.

b. Supervisory Time

As with billable work, younger attorneys who do not have excessive experience or development may need assistance from more senior attorneys in preparing their cases. It is advisable to make some pro bono tutoring and mentoring available.

c. Training Time

Frequently, law firms and attorneys engage in pro bono work outside their regular field of practice. To gain the necessary expertise over the subject matter, the pro bono attorney may need to undertake training either by reading prepared materials, or from an attorney within the firm or affiliated with a pro bono provider.

d. Screening Time

If the firm decides to initiate its own project, it may be necessary to screen prospective clients based on, among other issues, their income levels and type of assistance needed. As with administrative time, a firm may shift much of the screening responsibility to an existing program that already has in place a screening mechanism and staff to manage it.

2. Determine the Community's Legal Needs

Pro bono needs vary by community according to various factors. The geographic, economic and civic state of the community play an important consideration. Is the community an urban area or is it principally rural? What is the strength of the local economy? How involved are the citizens in charitable giving? Of course, the existing pro bono situation is also a factor. How many projects are in existence? Which constituencies are they serving? What volunteer opportunities do they offer?

Also, a firm should consider what areas of pro bono work are needed. According to a recent legal needs study performed by the ABA, persons of low economic means most frequently were in need of legal assistance in the areas of:

personal finances and consumer matters, housing and property, and community and regional matters.⁵ Additionally, at the current time many federal, state and local agencies, and private foundations are providing citizen groups (community economic developments groups) substantial funds to develop plans designed to help their own communities. Many of these groups need assistance in traditional business matters such as incorporation, taxes, employment policies, etc.

One available means of determining resource allocation is to ask public interest providers their assessment of the community's legal needs and identify particular problems that need to be addressed or groups that require special assistance. Also, the legal communities in many cities and states have prepared legal needs studies which discuss the particular volunteer needs of the community. Further investigation may be completed informally by meeting with representatives from the major providers of legal services to the poor: pro bono projects, bar associations, legal services projects, and others. In addition, a firm should speak with non-legal service providers. These groups will help identify a list of problem types and client groups, and will help avoid duplication of services where services already exist. These groups also may be willing to join in a collaborative effort providing invaluable service to citizens of the community.

C. Create a Structure: Establish a Pro Bono Project

After constructing the foundation and framework, the next step is to complete the structure and build a successful pro bono project. Generally, law firms construct either of two project models: (1) a commitment to encourage and facilitate attorney participation with an independent local pro bono organization; or (2) a signature project, a project that is readily identified with the firm, which the firm creates, staffs and administers. Both models have proven effective. The reasons for selecting one model over the other or developing another type model are varied, and depend on the particular circumstances of the community and the firm as examined in the Framework analysis in the previous section.

1. Commit to Participate with an Independent Pro Bono Organization

Pro bono organizations commonly perform a great deal of administrative tasks, such as client screening, follow-up, conflict checks, training, etc. Thus, joining an existing organization may eliminate much of the administrative work associated with creating and maintaining a signature project. Additionally, several pro bono organizations exist in every state and many cities or counties. These organizations, either individually or collectively, may address a wide variety of legal issues and serve a wide variety of clients, depending on the firm's location. This allows firm attorneys a varied selection of pro bono opportunities from which to choose. The following is a sample description of particular projects available to law firms.

a. Commitment Projects

A firm may be able to join with other firms or bar associations as part of an organized commitment to participate with various pro bono programs. For example, several bar associations have issued challenges to the law firms in their cities to devote a specified number of hours to pro bono activities, with no connection to a particular issue or group of legal service recipients.⁶ The

St. Louis bar has issued a "25/25" challenge, which urges local law firms to devote 25 hours per year from 25% of the firm's lawyers. One firm that accepted that challenge, Sandberg, Phoenix & von Gontard, agreed to allow local pro bono programs to solicit it for the assistance of its attorneys, and also encouraged its attorneys to individually join various programs. Sandberg, Phoenix manages its response by placing one of its attorneys in a coordinator position to oversee the amount and the type of pro bono conducted by the firm's attorneys. See (Attachment 7)

b. Clinics

Many existing pro bono organizations have successfully developed special programs or clinics, which are specialized projects designed to serve either the particular needs of an identifiable group of individuals (i.e. immigrants, the elderly, etc.), or to assist persons in resolving a specific legal problem (i.e. bankruptcy or divorce). Many firms have joined with these clinics and absorbed a portion of the clinic's caseload. Firms commonly accept a certain number of cases developed by the clinic, or staff a clinic on a designated day or time (i.e. one day a week, one Saturday a month, etc.).

In the District of Columbia, the D.C. Bar Public Services Activities Corporation (PSAC) instituted a Law Firm Pro Bono Clinic which utilizes the services of several law firms. Generally, each participating firm staffs a certain number of clinic nights per year (depending on the size of the firm). The firm provides attorneys and supporting legal assistants who interview and, if warranted, provide representation to the 15 or so clients whom legal services providers have pre-screened and referred. Legal services providers and experts from the private bar furnish training and mentoring. (Attachment 8)

The Legal Services for Cape Cod and Islands, Inc. (LSCCI) sponsors a "Law Firm Counseling Project," which is similar to the PSAC clinic, and is designed for firms with 5-15 attorneys. The LSCCI clinic schedules low income and elderly residents for 30 minute meetings with an attorney to discuss legal problems concerning wills, landlord/tenant, disability and a variety of other concerns. These meetings take place at four separate locations in the Cape Cod area and are scheduled at various times of the day. Several firms have committed to staffing, either separately or jointly with another firm (or even as an individual), a specific day or time slot for the clinic. (Attachment 9)

c. Hotlines

i. Standard Models

A Hotline is a telephone-based intake model which provides clients brief legal advice or guidance for locating a source for further assistance. Commonly, a pro bono organization establishes and advertises a telephone call-in service for persons with a specific legal situation and recruits attorneys to accept the calls and provide the necessary and appropriate legal advice. Often times, the calls lead to referrals to the sponsor organization or other pro bono organizations for more involved legal assistance.

ii. CARPLS - a New Breed of Hotline

In 1993 the Chicago legal community created CARPLS, the Coordinated Advice and Referral Program for Legal Services, in response to its study which found that four out of five legal needs of the poor went unmet, and that many potential clients had difficulty finding the right agency to provide services. CARPLS is

a system designed to accomplish two tasks: (1) match persons who have in-court needs with the agency or an attorney that can best respond to the request for legal services; and (2) provide quick, over the phone legal advice to persons requesting assistance who do not need in-court representation.

The process begins when a person requests legal services from an organization affiliated with CARPLS (over 45 such agencies in Chicago are affiliated with CARPLS). The agency refers the person to CARPLS which performs initial screening to determine the person's eligibility at any of the affiliated agencies. After screening for eligibility, the intake person matches the person with the appropriate agency, if in court assistance is needed, or with an onsite attorney who provides advice on the spot, over the telephone. Law firms have assisted CARPLS by agreeing to staff the hotline calls for a designated time or day. CARPLS provides training and backup legal support by an onsite staff attorney. (Attachment 10)

2. Develop a Signature Project

As highlighted above in the Foundation discussion, one of the essential aspects to a firm's successful pro bono project is the assimilation of the project and pro bono work in general into the firm's culture. A firm may enhance the assimilation process by developing a signature project because such a project allows the firm to take ownership of the project and its direction, and to develop creative means for achieving its goals. The success of the project depends on the firm and its attorneys.

A signature project allows the firm to develop a strong connection with the clients it serves. For example, a firm may want to initiate a homeless clinic. In this circumstance, the firm no longer serves generically labeled pro bono clients, but instead serves the community's homeless, a group that lawyers in the firm and citizens of the community can more easily identify. Additionally, a signature project provides the firm marketing opportunities regarding the community work performed by the project and the firm attorneys. When the community newspaper writes an article on the plight of the homeless, the firm gets a call; when the mayor establishes a blue-ribbon panel on ways to improve the city's response to homelessness, the firm is asked to participate.

a. Firm-Sponsored Clinics

As an alternative to participating in a clinic sponsored by an independent pro bono organization, a law firm may initiate a clinic of its own (or in partnership with a neighborhood-based social service provider). In this model, the law firm takes on greater responsibility by staffing the clinic with attorneys and support staff and, in many cases, providing financial assistance to cover the administrative costs of the project. Common characteristics of a firm-sponsored clinic are the following:

- a firm sends a team of lawyers to a neighborhood-based organization, which may be connected to a legal services provider, on a regularly scheduled basis. The team interviews indigent clients and provides legal services as are appropriate.
- the neighborhood organization and the firm determine jointly the kinds of legal matters that the team will handle.

- the firm interviews clients under the supervision of the legal services provider and takes cases requiring ongoing representation back to the firm as ongoing pro bono matters.
- the law firm schedules the volunteers and follows up on the status of ongoing matters and cases.

As an example of such a clinic, the Washington, D.C. law firm of Beveridge & Diamond has instituted a wills clinic in conjunction with the Whitman-Walker Clinic. The Whitman-Walker Clinic provides legal and other services to persons with AIDS or who are infected with the HIV virus. Beveridge & Diamond lawyers travel on-site to the clinic on a regularly developed schedule and draft wills for clients of the clinic. (Attachment 11)

b. Represent Community Economic Development Organizations

Increasingly, groups of concerned citizens have banded together to form community economic development organizations which are grassroots organizations designed to revitalize distressed neighborhoods into viable economic centers. (Attachment 12) These organizations often need legal assistance to incorporate, implement tax decisions, defend audits, develop employment policies, and respond to other issues that commonly face small businesses. Many law firms, including those that specialize in transactional areas of law such as corporate and real estate, have discovered that they are uniquely qualified to help these citizens help themselves by providing assistance to the community economic development groups. (Attachment 13)

c. Adopt a Nonprofit Organization

In recent years, nonprofit organizations have taken a substantial role in providing various social services to communities including child care, foster care, adult education, teen recreation, health care, etc. Law firms across the country have adopted these organizations as full clients who receive continuing legal advice regarding various topics. The Greater Miami Local Initiatives Support Corporation (LSIC), as part of a grant from the Sadowski Legal Fellowships, has established a project under which local law firms act as general counsel for nonprofit organizations in the area. As part of the LSIC program, the firms agree to serve as legal counsel to the nonprofit for a period of 18 months, devote a minimum of 600 hours of pro bono hours to the organization, and designate a mid-level associate and a partner to act as the official links to the organization. (Attachment 14)

d. Special Projects

In addition to the traditional project models discussed above, several firms have developed innovative projects to address the needs of their communities. Although these projects are unique, the circumstances creating the need for the projects are not and the projects or variations thereof may be duplicated in other cities or areas of the country.

i. Conflict Clinics

Frequently, pro bono organizations are unable to provide assistance to parties seeking help, particularly in domestic matters, because the project already has provided assistance to the opposing party involved in the dispute. As a

consequence, the party seeking representation is deprived of one of the few available options for legal assistance. In Tampa, Bay Area Legal Services, Inc. has remedied this problem through the assistance of Macfarlane, Ferguson and Mullis. This firm, along with one other Tampa firm, has agreed to take all conflict cases from Bay Area Legal Services and either accept representation or pass the matter to another provider of legal services. By doing this, these firms have freed valuable time for Bay Area Legal Services and have provided an avenue of justice to persons who otherwise may not have received legal counsel. (Attachment 15)

ii. Time-Dollars Projects

Edgar S. Cahn, Ph.D, J.D., founder of the Legal Services Corporation and Antioch Law School, developed the "time-dollars" concept, which has recently been applied to the pro bono arena. In short, the time-dollars concept involves a trade of one hour of the legal service provider's time for one hour of the client's time spent on community activity. Depending on the project, the client could receive time-dollar credit for any number of activities, including spending time watching a street corner as part of a crime prevention program or tutoring a child. Holland & Knight's Washington, D.C. office (approximately 105 attorneys) initiated a time-dollar project in partnership with MANNA, Inc., a local nonprofit housing provider. In exchange for helping neighbors, tutoring students, orchestrating cleanups, working on playgrounds and other similar activities, neighborhood residents receive legal advice from Holland & Knight attorneys on problems related to absentee ownership, code violations, and crack houses. The law firm of Macfarlane, Ferguson & McMullen (approximately 55 attorneys) has begun planning the inception of a similar program in Tampa, Florida. (Attachment 16)

III. IF YOU BUILD IT, WILL THEY COME? - RECRUITING ATTORNEYS

Constructing a pro bono project is no guarantee that firm attorneys will participate. Attorneys often need to be educated not only about the benefits received by the legal service recipients, but also about the personal and professional benefits available through pro bono work.

A. Personal Satisfaction

Lawyers have knowledge and a skill that can improve directly the lives of almost everyone around them. For example, pro bono lawyers may assist an individual who wants to adopt a child, make a plan for their economic future, escape a violent relationship, or pay the rent. Alternatively, a pro bono lawyer may be responsible for indirectly benefiting the residents of his or her community by assisting a community center purchase a building to serve neighborhood children, or advising a small business on ways to improve its efficiency and therefore its ability to provide jobs to persons in the community.

For lawyers who predominately represent businesses, pro bono work provides an opportunity to assist individuals. Moreover, the persons seeking pro bono assistance may be different from those persons with whom the pro bono lawyer regularly associates. Thus, pro bono work not only provides lawyers the opportunities to make a difference in the life of their clients, but also exposes lawyers to the problems faced by individuals who come from a broad demographic and economic background.

B. Professional Growth for Young Lawyers

Young lawyers continually seek greater responsibility over case strategy and client contact, and avenues to develop their lawyering skills. Pro bono work can provide maturing attorneys with these valuable opportunities for professional growth in a low stress environment outside of the normal scrutiny of their positions. Frequently, pro bono matters require participation at hearings in front of administrative or court tribunals, brief writing, deposition taking, contract and settlement negotiations, and even trial appearances. While more experienced lawyers commonly provide guidance and oversight, young lawyers frequently find in pro bono work the chance to cut their first teeth.

C. Billable Hours Credit

According to a survey conducted by the New York State Bar Association, the number one reason that attorneys failed to perform any pro bono work was a lack of available time.⁷ To combat this concern, and provide attorneys an incentive to accept pro bono work, a firm should give its attorneys credit toward their budgeted number of hours for the hours that they work on pro bono matters. Firm policy also should assure its attorneys that time spent working on pro bono matters will not negatively influence their annual reviews. See (Attachment 7) Such a policy gives credence to the firm's stated policy in favor of pro bono and alleviates the concerns of attorneys anxious to meet their budgeted billable hour requirements.

D. CLE Opportunities

Many states require that attorneys take certified Continuing Legal Education (CLE) courses to maintain their good standing with the bar. Many pro bono programs offer CLE credit for participation in the program or training. Thus, to provide attorneys with another way to efficiently use their time a firm may want to join with, or make available, the opportunity for firm attorneys to participate in a pro bono program that offers CLE credit. Further, CLE training credit, coupled with a billable hour credit policy, provides attorneys accountable professional credit for every hour they engage in pro bono work.

E. Involve Summer Associates and Interns

Law firms commonly hire law school students as interns or summer associates before they become licensed practitioners. As with young associates, these students are generally eager to learn their trade and take on new responsibilities. By providing them with meaningful opportunities through pro bono work at this early age, that future attorney likely will continue to participate in pro bono work during the course of his or her career. Additionally, by providing summer associates with substantive responsibility, a firm will be able to better evaluate their abilities and potential.

F. Working with Attorneys in Different Practice Groups

Law firms which are comprised of several attorneys that specialize in a discrete area of law frequently structure their workforce into practice groups. As a result, attorneys who work in different groups may not have the opportunity to work with other attorneys in the firm who practice a different area of law. Similarly, for cost reasons, firms may staff cases with only one or two attorneys, which decreases the opportunity to work with other attorneys in a team format. A pro bono project may allow attorneys to work with different

attorneys in the firm and to staff cases with several attorneys to recapture the lost team opportunities.

FOR MORE INFORMATION AND RESOURCES

To assist bar associations and volunteer legal services providers develop and operate effective programs in delivering legal services to the poor, the ABA Center for Pro Bono offers free on-site and telephone consultation, and access to a comprehensive clearinghouse of materials and info packs on the operation of pro bono programs. The Center staff also is available to assist mid-size law firms in the development of pro bono policies and projects. The Center is sponsored by the ABA Standing Committee on Pro Bono and Public Service, and staffed through the ABA's Division for Legal Services.

For further information, please contact the Center for Pro Bono at the American Bar Association, 321 N. Clark St., Chicago, IL 60610. The Center's Hotline telephone number is 312/988-5769. Staff Internet addresses are Greg McConnell, mccconneg@staff.abanet.org; Dina Merrell, merrelld@staff.abanet.org; Cheryl Zalenski, zalenskc@staff.abanet.org

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ENDNOTES

¹More information regarding the pro bono concerns of small firms and sole practitioners is available through the Center for Pro Bono, and an info pack on this subject is available upon request. The unique pro bono concerns of large law firms (50 or more attorneys) are addressed by the ABA's Law Firm Pro Bono Project, which is administered by the Pro Bono Institute. For more information on large law firm pro bono projects and policies, please contact Esther Lardent (202/662-9231).

²Amendments to Rule 4-6.1 of the Rules Regulating the Florida Bar - Pro Bono Public Service, No. 88646 (May 2, 1997). (Attachment 1)

³Comment No.5 to MR 6.1 emphasizes that the lawyer should strive to meet the 50 hour goal through activities described in subpart (a).

⁴Standards for Approval of Law Schools of the American Bar Association, Standard 302(e).

⁵"Agenda for Access: The American People and Civil Justice," Final Report on the Implication of the Comprehensive Legal Needs Study, The American Bar Association Consortium on Legal Services and the Public (1996).

⁶These local bar challenges are distinct from the ABA Law Firm Pro Bono Challenge administered by the Pro Bono Institute. The Pro Bono Challenge targets the nation's largest law firms, recommending that they contribute at least 3% of their legal services to pro bono efforts.

⁷Final Report of The Pro Bono Review Committee, New York State Bar Association, April 18, 1994. (Attachment 17)

7. Rules 1-650, 3-110, 3-310 and 3-700 of the California Rules of Professional Conduct

California Rule of Professional Conduct 1-650

Limited Legal Services Programs

(A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:

(1) is subject to rule 3-310 only if the member knows that the representation of the client involves a conflict of interest; and

(2) has an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm would have a conflict of interest under rule 3-310 with respect to the matter.

(B) Except as provided in paragraph (A)(2), a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.

(C) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

Discussion:

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110. Except as provided in this rule 1-650, the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code § 6068(e)(1), are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (A)(2) imputes conflicts of interest to the member only if the member knows that another lawyer in the member's law firm would be disqualified under rule 3-310.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that imputed

conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) imputes conflicts of interest to the participating member when the member knows that any lawyer in the member's firm would be disqualified under rule 3-310. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the matter on an ongoing basis, rule 3-310 and all other rules become applicable. (Added by order of the Supreme Court, operative August 28, 2009.)

California Rule of Professional Conduct Rule 3-110

Failing to Act Competently

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Discussion:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances. (Amended by order of Supreme Court, operative September 14, 1992.)

California Rule of Professional Conduct 3-310
Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

- (1) “Disclosure” means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;
- (2) “Informed written consent” means the client’s or former client’s written agreement to the representation following written disclosure;
- (3) “Written” means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

- (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
- (2) The member knows or reasonably should know that:
 - (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
 - (b) the previous relationship would substantially affect the member’s representation; or
- (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
- (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

- (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
- (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
- (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

(F) A member shall not accept compensation for representing a client from one other than the client unless:

- (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
- (2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and
- (3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:
 - (a) such nondisclosure is otherwise authorized by law; or
 - (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written consent of the clients thereto pursuant to

subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) (Amended by order of Supreme Court, operative September 14, 1992; operative March 3, 2003.)

California Rule of Professional Conduct 3-700

Termination of Employment

(A) In General.

- (1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.
- (2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal.

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

- (1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
- (2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or
- (3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

- (1) The client
 - (a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or
 - (b) seeks to pursue an illegal course of conduct, or
 - (c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
 - (d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or
 - (e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or
 - (f) breaches an agreement or obligation to the member as to expenses or fees.
- (2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or
- (3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or
- (4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or
- (5) The client knowingly and freely assents to termination of the employment; or
- (6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

(D) Papers, Property, and Fees.

A member whose employment has terminated shall:

- (1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. “Client papers and property” includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert’s reports, and other items reasonably necessary to the client’s representation, whether the client has paid for them or not; and
- (2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

Discussion:

Subparagraph (A)(2) provides that “a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients.” What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, “reasonable steps” do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.

Paragraph (D) makes clear the member’s duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member “promptly” return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).

Paragraph (D) is not intended to prohibit a member from making, at the member’s own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member’s expense in any subsequent legal proceeding.

8. Suggested Reading List on Ethics in Pro Bono Representations

CASES:

- *Segal v. State Bar of California* (1988), 44 Cal.3d 1077 [attorney's standard of professional conduct to *pro bono* client no different from responsibility to any other client]
- *Nichols v. Keller* (1993), 15 Cal.App.4th 1672 [attorney may owe a duty to alert client of legal problems, even though outside scope of limited retention]
- *MC v. GC* (2007), Supreme Court of the State of New York, Index # 76148/07 [failure to supervise *pro bono* attorney]
- *Maples v. Thomas* (2012), 132 S.Ct. 912 [cause exists to excuse procedural default due to the abandonment by *pro bono* attorneys]

STATUTES:

- California Business & Professions Code § 6073 [*Pro Bono Services*]

RULES:

- ABA Model Rules of Professional Conduct Rule 6.1 & Comments [Voluntary *Pro Bono Publico* Service]
- ABA Model Rules of Professional Conduct Rule 6.5 & Comments [Nonprofit and Court-Annexed Limited Legal Services Programs]

OPINIONS:

- State Bar of California Ethics Opinion 1989-108 [issues conflicts]
- Los Angeles County Bar Association Formal Opinion 502 (1999) [duties when working with in pro per litigant]

ARTICLES:

- "Ethics and the Pro Bono Attorney: Lawyers Who do Pro Bono Must be Familiar with Legal and Ethical Rules Governing their Behavior," by Wendy Patrick (California Bar Journal, January 2010)
- "Managing Pro Bono: Doing Well by Doing Better," by Scott Cummings and Deborah L. Rhode, 78 Fordham Law Review 2359 (2010)
- "The Politics of Pro Bono," by Scott Cummings, UCLA Law Review 1 (2004)

**Breaking Up Is Hard to Do: Ethical Issues Arising
in Law Firm Dissolutions and Partner Withdrawals**

BREAKING UP IS HARD TO DO: ETHICAL ISSUES ARISING IN LAW FIRM DISSOLUTIONS AND PARTNER WITHDRAWALS

Merri A. Baldwin, Panel Moderator

San Francisco, CA

Merri Baldwin is a shareholder in the San Francisco-based law firm of Rogers Joseph O'Donnell. She focuses her practice on business litigation and issues relating to attorney liability and conduct, including legal malpractice, State Bar disciplinary defense, ethics and fee disputes. She has extensive trial and arbitration experience, and has handled a number of appeals. Ms. Baldwin is a member of the State Bar of California Committee on Professional Responsibility and Conduct, and is a committee chair for the ABA Litigation Section, Professional Liability Litigation Committee. She co-chairs the Bar Association of San Francisco's Legal Malpractice section. Ms. Baldwin regularly lectures on legal ethics and malpractice issues to professional organizations, and is an adjunct professor at Golden Gate University. She has been selected for inclusion in the Northern California Super Lawyers list every year since 2004. Ms. Baldwin graduated from Smith College and received her law degree from the University of California at Berkeley, Boalt Hall School of Law.

Cecily A. Dumas

San Francisco, CA

Cecily Dumas practices in the fields of commercial transactions and business restructuring and bankruptcies. She has represented debtors, trustees, secured and unsecured creditors, asset acquirers, and committees. In the past ten years, Ms. Dumas has represented the interests of more than 175 law firm partners in bankruptcy cases of Brobeck Phleger & Harrison LLP, Heller Ehrman White & McAuliffe LLP, Howrey LLP and Dewey LeBoeuf LLP. Ms. Dumas is a Fellow of the American College of Bankruptcy, and member of the American Bankruptcy Institute, Association of Restructuring and Insolvency Advisors, American Bar Association Business Law Section, and Bar Association of San Francisco Commercial Law and Bankruptcy Section. Ms. Dumas writes and lectures frequently on various topics in commercial law and bankruptcy, with a particular emphasis on ethical issues in bankruptcy. Ms. Dumas received an A.B. from the University of California at Berkeley, and J.D. from Golden Gate University School of Law. She is licensed to practice in California.

Scott B. Garner

Irvine, CA

Scott Garner is a partner in the Irvine office of Morgan, Lewis & Bockius, where he serves as the leader of the Irvine Litigation Group and as one of the firm's loss prevention partners. His practice focuses on complex business litigation, with an emphasis on attorney liability defense. He also has significant experience in the areas of securities litigation, patent litigation, corporate governance, and hospital and health care law. Mr. Garner currently serves as a member of the State Bar's Committee on Professional Responsibility and Conduct and is the Co-Chair of the Orange County Bar Association's Professionalism and Ethics Committee. He also serves as a member of the Board of Directors of the Orange County Bar Association. He is a frequent author of ethics-related articles. Mr. Garner graduated cum laude from Harvard Law School in 1991, and received his B.A. degree with distinction from Stanford University in 1988.

Pamela Phillips

San Francisco, CA

Pamela Phillips is a trial lawyer at the law firm of Arnold & Porter LLP in San Francisco, where she heads the firm's Attorney Liability Practice Group. She represents law firms and lawyers in a variety of litigation, including *Jewel v. Boxer* cases, legal malpractice and malicious prosecution claims, and partnership disputes. She successfully defended Orrick in a trial of *Jewel v. Boxer* claims arising out of Lyon & Lyon's dissolution, along with her partner, Jonathan Hughes. She also acts as outside ethics counsel to many law firms, testifies as an expert witness, and frequently lectures on the laws governing lawyers. Her teaching experience includes teaching Professional Responsibility for two years at the University of California, Berkeley, School of Law.

**BREAKING UP IS HARD TO DO: ETHICAL ISSUES ARISING IN
LAW FIRM DISSOLUTIONS AND PARTNER WITHDRAWALS**

LIST OF WRITTEN MATERIALS

1. “*Jewel v. Boxer* Litigation: Overview of Issues Currently Being Litigated In Law Firm Bankruptcies Across The Country (April 2013)” by Pamela Phillips and Jonathan W. Hughes
2. “Breaking Up is Hard to Do: Ethical Issues in Law Firm Break-Ups and Partner Withdrawals” by Merri Baldwin

***Jewel v. Boxer* Litigation:
Overview of Issues Currently Being Litigated In Law
Firm Bankruptcies Across The Country
(April 2013)**

**Pamela Phillips
Jonathan W. Hughes
Arnold & Porter LLP**

1. So-called “Jewel Claims” are being litigated in the bankruptcies of Brobeck, Phleger & Harrison LLP (ND Cal.), Heller Ehrman LLP (ND Cal.), Thelen LLP (SDNY), Coudert Bros. LLP (SDNY), and are anticipated in the bankruptcy of Howrey LLP (ND Cal.).
2. The current trend is for bankruptcy trustees to pursue the so-called “Jewel Claims” as “fraudulent transfer claims.”
3. There are many issues being litigated in these cases that have not yet been resolved by appellate courts.
 - a. Does the theory really belong in bankruptcy court? The principle underlying the decision in *Jewel* is based on the fiduciary duties that partners of a law firm owe each other and their firm. California law encourages partners to adopt an agreement clarifying whether they have any duty to account for post-dissolution profits. Can this fiduciary duty principle be used to create a creditor’s remedy? Could applying this principle in bankruptcy court create situations where partners in an insolvent firm owe their creditors a higher duty than they owe their clients? Is using the principle as a creditor’s remedy inconsistent with California’s principle of client autonomy? Would it violate the rules regarding fee-splitting? Would it undermine California’s public policy against restricting an attorney’s right to practice law?
 - b. What is the “property” transferred? Prior to dissolution, if a client transfers its work to another law firm, the firm that lost the work has no right to recover profits that the new firm earns for doing that work. All agree that a law firm does not “own” the client, or the client relationship, or matters that the client entrusts to the firm. Indeed, all agree that clients are free to fire a lawyer at any time. Given that, what property is transferred by virtue of an unfinished business agreement, which merely clarifies that the law firm will have no rights to unfinished business profits, which is precisely the same position the law firm was in when it was a going concern?
 - c. Should the decision of *Jewel v. Boxer* addressing a four-partner firm be applied to large modern law firms? In *Jewel*, four partners split into two separate law firms—two partners went to one firm, and two went to the other. When the “unfinished business” was completed, it was completed by partners at the new firm who had been partners at the old firm. How does the principle of *Jewel* apply, where, for example, one partner in a 200-partner law firm moves to a new law firm with 2,500 lawyers spanning the globe? If the “unfinished business” is completed at the new firm by one former partner of the dissolved firm and 20 other lawyers who never worked at the dissolved firm, does the dissolved firm have any right to profits generated by the 20 lawyers who have never had any relationship with the dissolved firm?
 - d. If the partners of the dissolving firm agree that there will be no post-dissolution duty to account, do the well recognized benefits of such an agreement provide the

dissolved firm with reasonably equivalent value? California law encourages law firms to have a *Jewel* agreement for several important reasons. Having such an agreement facilitates orderly dissolution and avoids disputes. Clients benefit, because they can retain the same attorneys, who are already familiar with their matters, at their new firms without creating major disruptions in the representation. Removing the financial burden of having to account back to the dissolved firm for profits earned on the work frees those lawyers, and their new firms, from having to perform that work without earning a profit, a burden that could negatively affect how they treat the work. These benefits, in turn, also benefit the dissolved firm – smooth transitions of client matters reduces the likelihood that clients will file claims against the dissolved firm for abandonment or malpractice. It also increases the payment of outstanding bills, which benefits the estate’s creditors. Do these benefits constitute the fair consideration that would make the Jewel agreements enforceable under fraudulent transfer law?

- e. How could new firms, lawfully hiring new laterals from the dissolved law firm, face liability to creditors of the dissolved firm? The Unfinished Business Rule is predicated upon the fiduciary duties that partners of a dissolved firm owe each other and their dissolved law firm. But the law firms that hire the partners of the dissolved firm, and that are hired by the former clients of the dissolved firm, owe no duties to the dissolved firm or its creditors. The hiring firms have done nothing wrong. They are providing the services for clients that the dissolved firm no longer can perform. The hiring firm bears the risks of the work. Why shouldn’t it be entitled to earn a reasonable profit on the work when it bears no fault for the other firm’s dissolution?
- f. Hourly rate cases: are they subject to the rule? If the Unfinished Business Rule makes some sense in the context of contingency cases, does it make any sense in the context of an hourly rate case? In an hourly rate case, the dissolved firm is fully compensated for all of its work through the last second its lawyers perform work on a matter. It has no right or expectation to any future income once it stops representing the client. It wasn’t able to perform any more work. A recent New York case recognized this issue. *See Sheresky v. Sheresky Aronson Mayefsky & Sloan*, 150178/10, NYLJ 1202515426993, at *1 (N.Y. Sup. Sept. 13, 2011) (“[T]he court is not inclined to recognize a cause of action for unfinished business for hourly fee cases which has, hitherto, not been recognized by the New York courts”). While lower courts in California have held that the Unfinished Business Rule applies to hourly rate cases, they did so in a different context and in a reflexive manner without thorough analysis of the ethical issues. The California Supreme Court has never addressed the issue and might have different views.¹
- g. Damages: Did RUPA overrule Jewel? At the time of the *Jewel v. Boxer* decision, the Uniform Partnership Act governed partnerships in California. Under that

¹ In *Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 2012 WL 2952929, at *6 (S.D.N.Y.) (*In re Coudert Brothers LLP*), Judge McMahon noted that “the United States Supreme Court has suggested (albeit in dictum) that billable hours matters might indeed be treated differently than contingent fee matters” for the purpose of the unfinished business doctrine.

statute, partners of the dissolved firm who finished the work were required to pay all monies they derived from that work to the old firm, after deducting overhead expenses. But at that time, a partner was not entitled to deduct any funds to compensate himself for completing the work. Rather, the profits earned on the matter were put back into the old “communal pot,” and then re-distributed according to the dissolved firm’s old compensation system.

That was changed with the advent of RUPA. Under RUPA, deductions are first made for overhead and reasonable compensation, and it is only if profits remain after those deductions that those profits are due to the dissolved firm. But in a law firm, the very definition of a partner’s reasonable compensation is that partner’s proportionate share of profits. So typically, then there are no “profits” remaining after overhead and reasonable partner compensation. For this reason, some commentators have recognized that RUPA’s adoption of the rule allowing a partner to be paid reasonable compensation essentially “overruled” *Jewel*. See, e.g., Mark I. Weinstein, *The Revised Uniform Partnership Act: An Analysis Of Its Impact On The Relationship Of Law Firm Dissolution, Contingent Fee Cases And The No Compensation Rule*, 33 Duq. L. Rev. 857, 871 (Summer 1995).

4. Recent cases discussing these issues:

- a. *In re Brobeck Phleger & Harrison LLP: Greenspan v. Orrick, Herrington & Sutcliffe, LLP*, 408 B.R. 318 (Bankr. N.D. Calif. 2009)
- b. *In re Coudert Brothers LLP: Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 2012 WL 2952929 (S.D.N.Y)
- c. *In re Thelen LLP: Geron v. Robinson & Cole*, 476 B.R. 732 (S.D.N.Y. Sept. 4, 2012)
- d. *In re Heller Ehrman LLP: Memorandum and Decision* (Bankr. N.D. Calif. March 11, 2013) (Bankr. Case No. 08-32514)

Breaking Up is Hard to Do: Ethical Issues in Law Firm Break-Ups and Partner Withdrawals

By: Merri A. Baldwin, Rogers Joseph O'Donnell, PC¹

Introduction

Big law firm break-ups have always been headline news, and commentators suggest more large firm dissolutions are in store. Small firms also close their doors with alarming frequency. Partner withdrawals from both large and small law firms are even more of a daily event. Lawyers who find themselves in the situation of a law firm dissolution or leaving a firm, and the clients whom they represent, often need guidance as to what their options are and how to best (and most ethically) protect the interests of those involved.

This is a brief outline of certain of the central legal ethics issues involved in law firm dissolution and partner withdrawal.

Duties Implicated

A number of ethical duties and principles arise in the context of law firm dissolutions and partner withdrawals. A non-exhaustive list includes the following: Clients have the right to counsel of their own choosing. *See, e.g., Fracasse v. Bent*, 6 Cal.3d 784, 790 (1972) Lawyers owe their clients a duty of loyalty, which includes a duty to represent their interests free of any conflicting loyalties, including personal interests of the lawyer. California Rule of Professional Conduct (CRPC) 3-310. Lawyers owe their clients a duty to handle matter competently, which continues through a law firm dissolution or other change. CRPC 3-110. Lawyers also have a duty to inform clients of “significant developments” relating to the representation. (CRPC 3-500) Lawyers have a duty to protect confidential information of their clients, including in certain circumstances even the identity of their clients (CRPC 3-100). Rules limit the “solicitation” of new clients, but exempt from the rule solicitations “to a former or present client in the discharge of a member’s or law firm’s professional duties”. (CRPC 1-400(C))

Upon termination of a representation, lawyers have certain duties with respect to clients, including a duty to return the client file upon request. (CRPC 3-700(D)(1)) The client “owns” the file, although a lawyer may make a copy of that file before returning it to the client. A lawyer also owes a duty to promptly refund to a client any unearned portion of an advance fee. (CRPC 3-700(D)(2))

In addition to duties lawyers owe their clients and third parties, other duties come into play when a law firm dissolves or a lawyer leaves. All lawyers owe their firms fiduciary duties

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including the duty of loyalty. This general duty applies regardless of whether the lawyer is a partner or an associate, and whether the law firm is a partnership or a professional corporation. Partnership or shareholder agreements may contain additional provisions establishing specific duties lawyers may owe their firms. These duties do not mean that lawyers may not seek other employment while still at the firm; however, in doing so, lawyers must act reasonably to protect the firm's interests. In particular, lawyers should use extreme caution in soliciting existing employees of their law firm to leave the firm with the lawyer. Such solicitation may constitute an intentional tort as well as a violation of the firm partnership agreement. *See Reeves v. Hanlon*, 33 Cal.4th 1140, 1154-1155 (2004).

Above all, lawyers should be honest and forthright if asked directly for information about their status by other members of their firm.

Who “Owns” the Client?

Lawyers frequently feel ownership over clients and client matters, whether because of historic or existing client relationships, the level of involvement a lawyer has had on a particular matter, business attribution within a firm, or for other reasons. The reality is that lawyers do not “own” clients, and nor do law firms. Clients may choose whomever they want as counsel. “Clients are not merchandise.” ABA Formal Opn. 300 (1961).

Rules may apply to govern who is entitled to fees going forward, including the unfinished business doctrine or *Jewel v. Boxer* rule (156 Cal.App.3d 171 (1984).)

Who May Notify the Client?

Lawyers who are leaving a firm frequently are uncertain of the rules governing how and when they may inform clients of their departure. This issue becomes important when lawyers wish to “compete” for clients when leaving a firm or when a law firm is dissolving.

First, it is important to understand that lawyers leaving a firm are ethically permitted to solicit any person or entity with whom they had a prior relationship. CRPC 1-400(C); Cal. State Bar Formal Opn. 1985-86. However, notwithstanding that fact, numerous questions arise concerning how and when departing lawyers may communicate to clients that they are leaving (and to ask if the client wishes to come to the new firm.)

ABA Formal Opinion 99-414 addressed ethical issues arising in the context of notifying clients when a lawyer resigns from a firm. That opinion concluded that under the Model Rules, lawyers may have an ethical obligation to notify current clients, that is, those who have active matters the lawyer is involved in handling. The opinion also concludes that a lawyer may contact such clients unilaterally and before he or she informs the firm of the planned departure: “The lawyers does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact before advising the firm of her intentions to resign, so long as the lawyer also advises the client of the client’s right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit or misrepresentation.”

The California State Bar Committee on Professional Responsibility (COPRAC) issued an opinion in 1985 that considered the ethical issues underlying notice to clients when a lawyer leaves a law firm or a law firm dissolves. The opinion concludes that lawyers have a “professional duty to act as fiduciaries to the clients who are affected by the withdrawal” or dissolution. Formal Opin. 1985-86. As part of that duty, lawyers must notify clients when the lawyer handling the matter is leaving a firm. As to the specific details of how to give the notice, the opinion states that notice does not have to be delivered jointly by the firm and the departing lawyer.

To the extent practical, the law firm and attorneys involved in the dissolution or withdrawal should attempt to provide a joint notice to the clients regarding the change. . . . If the involved attorneys are unable, or unwilling to provide joint notice, each has an obligation and the right to communicate with the client in conformance with the guidance provided by this opinion. Unfortunately, law firm dissolutions or attorney withdrawals are often fraught with acrimony and accusations of wrongdoing. However, in the context of advising clients of these changed circumstances, lawyers must act professionally by subliming their own feelings for the benefit of their clients.

COPRAC Formal Opn. 1985-86. The law firm and/or attorney providing notice should also advise the client of the options for moving forward. “In addition, the attorneys are required to inform the client of the client’s right to select either the former firm, the withdrawing attorneys, or another lawyer, to handle their legal matters in the future. The client should be advised of the client’s right to have all files, papers, and property delivered either to the client or to whomever the client wishes to continue to handle the legal affairs.” *Id.*

In accordance with both the COPRAC and ABA opinions, notice of a lawyer’s departure or a law firm dissolution must be given to current clients of that lawyer. The notice preferably should be given jointly by the firm and the departing lawyer, in the situation of a lawyer withdrawal, but may be given by an individual lawyer or the law firm separately. The parties should not disparage one another. The notice to the client must advise the client of his or her right to select counsel, should advise the client of any limitations in one party’s ability or willingness to continue representation, and should inform the client of his or her right to the file. Of course, if a client requests information about the status of representation or options for proceeding, accurate information should be provided.

Access to Work Product, Client Information and Client Files

When a lawyer leaves a firm, frequently he or she will want to bring with them work product generated while at the firm, whether for clients who may go with the lawyer to a new firm or not. Similarly, lawyers may wish to bring with them client contact information for their former clients, and client files for those matters which the lawyer is taking to a new firm.

Of these issues, the clearest rules govern client files: if the client consents to go with the lawyer to the new firm, the lawyer may take the file with him or her, pursuant to the client’s right to the file upon termination of the representation. CRPC 3-700(D). The law firm may make copies of the file at its own expense. *See* Discussion to CRPC 3-700.

The other issues are thornier and there is little clear guidance in California law. Generally, work product is regarded as belonging to the attorney, since it is the thoughts, impressions, evaluation and other product of the attorney's work on a matter. CCP § 2018.030. That being said, many law firms may have policies that apply to a lawyer's access to work product when leaving a firm. Access may differ depending upon the type of work product: the attorney's own work product prepared for clients or in connection with a client matter; work product the attorney prepared for his or her own general use (form files or the equivalent); publicly available work product (pleadings, administrative filings). An attorney leaving a firm should determine in advance what the firm's policies are, if any, governing retrieval of work product. As a general rule, in advance of leaving a firm lawyers should not access or download electronically stored information that does not pertain to the lawyer's own work product or matters that the lawyer is bringing with him or her to the new firm, absent the consent of the firm to such downloading or copying.

Of course, any work product (or other documents) that the attorney takes are subject to the duty of confidentiality (CRPC 3-100; Bus. & Prof. Code § 6068(e)) and thus care should be taken when bringing those materials to a new firm. (For example, the lawyer should not put these documents on a shared server where they may be accessed by other lawyers or employees of the new firm.)

It is also clear that lawyers leaving a firm (or withdrawing from representation of a client) may not remove work product that is necessary to the ongoing representation of the client. *See Reeves v. Hanlon*, 33 Cal.4th 1140, 1154-1155 (2004).

Law firm client lists, matter listings and client contact information are generally regarded as proprietary information belonging to the law firm and should not be accessed or removed by a withdrawing partner. However, a lawyer may utilize client contact information for current clients to provide required notice.

Confidentiality and Conflicts

A departing lawyer who joins a new firm and seeks to bring client matters to the new firm has an obligation to ensure that no conflicts of interest are present that would limit the new firm's ability to handle the matter. CRPC 3-310. At the same time, lawyers must protect against the disclosure of confidential client information. CRPC 3-100. There is therefore a potential tension between a lawyer's need to clear conflicts before moving to a new firm and the need to protect the confidentiality of information belonging to current and former clients.

ABA Model Rule 1.6 was modified in August 2012 to address this situation. While not binding in California, the ABA model rules can provide guidance when the California rules do not directly address a particular situation. The new section provides a clear stated exception as a new Paragraph (b)(7) of Model Rule 1.6:

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

...

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

The amendment to Model Rule 1.6 is expanded in two new Comments to the rule, [13] and [14], which make clear that lawyers and law firms are permitted to disclose limited information, but should do so only once substantive discussions regarding the new relationship have occurred, and only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.

There is no corresponding California rule or ethics opinion that specifically addresses this issue. However, as a practical matter, since lawyers have to check for and clear any conflicts before associating with a new firm, lawyers have to disclose some information to a prospective new law firm employer. The question is what information may ethically be provided and when. It appears clear that lawyers may ethically provide information to a prospective firm about matters for which the lawyer's representation of a client is (or was) public record. For any matters which are particularly sensitive, or for which the lawyer's role is not known, the lawyer may need to seek the consent of the client before disclosing that information to the prospective firm.

As a preliminary matter, before disclosing specific client information, the lawyer and the new firm should do sufficient due diligence concerning the type of matters the lawyer expects to handle, the type of clients the lawyer expects to bring in, and the law firm's existing business and business plan to determine whether there is a significant risk of disabling conflicts. In such an instance, the prospective move can be terminated before the need to exchange specific client information is triggered.

“Orphaned” Clients or Matters

There may be instances in either a law firm partner withdrawal or a law firm dissolution situation in which no one wants to continue representation of an existing client, or where conflicts prevent a lawyer from taking the matter to a new firm. These are difficult issues, for which there is no easy solution. Attorneys owe a continuing duty to their clients until the clients have new counsel in place, an obligation that sometimes could potentially place significant burdens on individual lawyers. The California State Bar Committee on Professional Responsibility and Conduct issued a proposed opinion addressing these issues that, as of this date, has not been issued in final.

Duty to Sign Substitution

If a client wishes to terminate an existing relationship, whether to go with a departing lawyer to a new firm or because of a law firm dissolution, the discharged lawyer or firm owes a duty to the client to promptly execute the substitution of counsel, so as not to put the client at risk. *Kallen v. DeLug*, 157 Cal.App.3d 940, 950-951 (1984).

Sticks and Stones May Break Your Bones, But Your Own Words (and Conduct) Might REALLY Hurt You

STICKS AND STONES MAY BREAK YOUR BONES, BUT YOUR OWN WORDS (AND CONDUCT) MIGHT REALLY HURT YOU

Wendy Wen Yun Chang, Panel Co-Moderator

Los Angeles, CA

Wendy Wen Yun Chang, Partner, Hinshaw Culbertson LLP, Los Angeles, represents businesses in all types of business litigation, with particular emphasis in high exposure complex litigation, trials and appeals. She also represents lawyers in all types of complex matters that involve the practice of the law, including risk management counseling, ethics, crises management, fee related issues, and litigation defense. Ms. Chang is a Certified Specialist in Legal Malpractice Law by the State Bar of California's Board of Legal Specialization. Ms. Chang is Vice Chair of the State Bar of California's Standing Committee on Professional Responsibility & Conduct (COPRAC). Ms. Chang also serves as Co-Chair of the Judiciary Committee for the National Asian Pacific American Bar Association. In addition, Ms. Chang serves on the Professional Responsibility and Ethics Committee (PREC) and the State Appellate Judicial Evaluation Committee for the Los Angeles County Bar Association, and on the Alumni Board of Governors for Loyola Law School, Los Angeles. Ms. Chang received her J.D. from Loyola Law School, Los Angeles, and her B.A. from the University of California, at Los Angeles.

Alison Buchanan, Panel Co-Moderator

San Jose, CA

Alison Buchanan is a shareholder with Hoge Fenton, where she focuses her practice on business litigation, professional liability/professional malpractice, and legal ethics. Ms. Buchanan has jury and bench trial experience in the areas of legal malpractice defense, business litigation, and employment litigation. Ms. Buchanan is a member of the State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC). She is an active member of the Santa Clara County Bar Association and she teaches Professional Responsibility at Lincoln Law School in San Jose.

Honorable Lawrence Cho

Los Angeles, CA

Honorable Lawrence Cho was appointed to the Los Angeles Superior Court of the State of California in June, 2005, by former California Governor Arnold Schwarzenegger. He currently sits in Department S of the Santa Monica Courthouse. Prior to his appointment, Judge Cho was the Deputy Chief of the Counterterrorism section of the United State Department of Justice, Criminal Division, in Washington DC, where, as Head of International Terrorism Operations, Section II, he supervised and coordinated international terrorism investigations and prosecutions. Before that Judge Cho was an Assistant United States Attorney, Criminal Division, with the United States Attorney's Office for the Central District of California, where he prosecuted white collar crimes, narcotics, and violent and organized crime. Prior to the US Attorney's Office, Judge Cho was a corporate litigation associate at Cravath, Swaine & Moore, in New York. He also was a former law clerk to the Honorable Chief Judge Manuel L. Real. Judge Cho is an adjunct professor for Trial Advocacy at Loyola Law School Los Angeles, and an advisor to their Bryne Intramural Mock Trial Team. He is also a former guest instructor in Special Agent Moot Court Training for the FBI academy. Judge Cho received his BA in economics, and his J.D. with High Honors from Rutgers University.

Continued...

Honorable Holly J. Fujie**Los Angeles, CA**

Honorable Holly Fujie was appointed to the Los Angeles Superior Court of the State of California on December 27, 2011 by Governor Jerry Brown. She is currently sitting in a Family Law assignment in Department 87 of the Mosk Courthouse. Prior to her appointment, Judge Fujie was a shareholder in the Los Angeles-based law firm of BuchalterNemer, APC, where she practiced corporate civil litigation. She received A.B. and J.D. degrees from the University of California, Berkeley, where she was an editor of the California Law Review, and in 2008-2009 she was the third woman and the first Asian American to serve as the President of the State Bar of California. She has also served as Vice President of the California Bar Foundation, President of the Boalt Hall Alumni Association and of the Chancery Club, and at the time of her appointment to the bench she was Chair of Bet Tzedek Legal Services. Judge Fujie continues to serve on numerous boards and she has received many awards for her work in diversity and for bar leadership, including the Women Lawyers Association of Los Angeles' Distinguished Service Award, the National Association of Women Lawyers' M. Ashley Dickerson Diversity Award, the ABA's Difference Makers Award and the National Asian Pacific American Bar Association's Trailblazer Award. Since 1991, she has served on Senator Feinstein's Judicial Advisory Committee, advising the Senator and the White House on federal judicial nominations and on the nomination of United States Attorneys for the Central District of California. Judge Fujie lives in Los Angeles with her husband of 34 years, Lee Cotugno, an employment lawyer, and their son Thomas (16). Their daughter, Sabrina (22), is an animator in Disney Animation Studio's Talent Development Program.

Ellen A. Pansky**South Pasadena, CA**

Ellen Pansky is a partner in the law firm of Pansky Markle Ham LLP, South Pasadena, California, specializing in professional liability litigation, State Bar disciplinary defense, legal ethics consultations and expert testimony. She is a California State Bar Certified Legal Malpractice Specialist. She is a former prosecutor for the State Bar of California. Ms. Pansky has extensive experience before the California Supreme Court, the Court of Appeals, the State Bar Court and State Superior Courts, is admitted to several districts of the U.S. District Court, and to the Ninth Circuit Court of Appeal. Ms. Pansky is a member of the ABA Standing Committee on Ethics and Professional Responsibility (2012-2015). She previously served as a member of the Los Angeles County Bar Association Board of Trustees (2005-2012), and serves on the LACBA Professional Responsibility and Ethics Committee (chair 1996-97). She has published extensively in the areas of legal ethics and professional responsibility, and is a California State Bar certified MCLE provider. She is past president of the Association of Professional Responsibility Lawyers; a charter member of the ABA's Center for Professional Responsibility; and is an Inaugural Founder of the National Institute for Teaching Ethics and Professionalism (NIFTEP). She is a longtime member of the ABA, and served as a member of the Editorial Board of the ABA/BNA Lawyers' Manual on Professional Conduct (2004-2007). She is a member of the United States District Court, Central District, Standing Committee on Discipline (2008-2013). Ms. Pansky served as chair of the State Bar of California's Committee on Women in the Law, as president of the National Association of Women Lawyers, and is a lifetime member of WLALA and of CWL. Ms. Pansky graduated summa cum laude from the University of California at Los Angeles in 1974, and received her J.D. degree from Loyola University School of Law in Los Angeles in 1977. She has been rated a "preeminent" lawyer by Martindale Hubble, a Los Angeles Times best lawyer, a SuperLawyer, and a Southern California Top 50 woman lawyer.

**STICKS AND STONES MAY BREAK YOUR BONES, BUT YOUR
OWN WORDS (AND CONDUCT) MIGHT REALLY HURT YOU**

LIST OF WRITTEN MATERIALS

1. Panel Outline
2. Powerpoint Presentation in PDF
3. State Bar of California "Attorney Civility Toolbox"

STICKS AND STONES MAY BREAK YOUR BONES, BUT YOUR OWN WORDS
(AND CONDUCT) MIGHT REALLY HURT YOU

This panel will examine the ethical issues that arise when lawyers cross the line from aggressive lawyering to uncivil or unprofessional conduct resulting in sanctions, contempt orders, reporting to the Bar, and more. This distinguished panel of ethics attorneys and two Los Angeles Superior Court trial judges will discuss these issues from an ethics perspective and will look at real-life recent instances of courts taking steps to address attorneys' lack of civility and professionalism.

1. Speakers
 - a. The Honorable Lawrence H. Cho: Judge, Superior Court of Los Angeles County
 - b. The Honorable Holly Fujie: Judge, Superior Court of Los Angeles County; Former President, State Bar of California
 - c. Ellen Pansky: Partner, Pansky Markle Ham LLP, South Pasadena, epansky@panskymarkle.com
 - d. Wendy Wen Yun Chang: Co-Moderator; Vice Chair, Committee on Professional Responsibility and Conduct; Partner, Hinshaw & Culbertson, LLP, Los Angeles, wchang@hinshawlaw.com
 - e. Alison Buchanan: Co-Moderator; Member, Committee on Professional Responsibility and Conduct; Shareholder, Hoge, Fenton, Jones & Appel, Inc., San Jose, APB@hogefenton.com
2. Statutes and Rules
 - a. Business & Professions Code
 - i. Business & Professions Code 6068
 - (1) Section (b)
 - (a) It is the duty of an attorney to “maintain the respect due to the courts.”
 - (2) Section (c)
 - (a) It is the duty of an attorney to “to counsel or maintain those actions, proceedings, or defenses

(b) only as appear to him or her legal or just, except the defense of a person charged with a public offense.”

(3) Section (d)

It is the duty of an attorney “To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.”

(4) Former Section (f)

(a) It is the duty of an attorney to “abstain from all offensive personality”

(5) Current Section (f)

(a) It is the duty of an attorney “to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.”

(6) Section (o)

(a) It is the duty of an attorney “To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following... (3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000),... (7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney... (10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.”

ii. Business & Professions Code 6086.7

(a) A court shall notify the State Bar of any of the following:

(1) A final order of contempt imposed against an attorney that may involve grounds warranting discipline under this chapter.

The court entering the final order shall transmit to the State Bar a copy of the relevant minutes, final order, and transcript, if one exists.

(2) Whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney.

(3) The imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).

(4) The imposition of any civil penalty upon an attorney pursuant to Section 8620 of the Family Code.

(b) In the event of a notification made under subdivision (a) the court shall also notify the attorney involved that the matter has been referred to the State Bar.

(c) The State Bar shall investigate any matter reported under this section as to the appropriateness of initiating disciplinary action against the attorney.

iii. Business & Professions Code 6106

The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor.

b. California Code of Civil Procedure

i. California Code of Civil Procedure 128.

(a) Every court shall have the power to do all of the following:

(1) To preserve and enforce order in its immediate presence.

(2) To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority.

(3) To provide for the orderly conduct of proceedings before it or its officers.

(4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein.

(5) To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.

....

(b) Notwithstanding Section 1211 or any other law, if an order of contempt is made affecting an attorney, his or her agent, investigator, or any person acting under the attorney's direction, in the preparation and conduct of any action or proceeding, the execution of any sentence shall be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, the violation of which is the basis of the contempt except for the conduct as may be proscribed by subdivision (b) of Section 6068 of the Business and Professions Code, relating to an attorney's duty to maintain respect due to the courts and judicial officers.

ii. California Code of Civil Procedure 177.5

A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars (\$1,500), notwithstanding any other provision of law, payable to the court, for any violation of a lawful court order by a person, done without good cause or substantial justification. This power shall not apply to advocacy of counsel before the court. For the purposes of this section, the term "person" includes a witness, a party, a party's attorney, or both.

Sanctions pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or on the court's own motion, after notice and opportunity to be heard. An

order imposing sanctions shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

iii. California Code of Civil Procedure 1209

(a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

(1) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.

(2) A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding.

(3) Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service.

(4) Abuse of the process or proceedings of the court, or falsely pretending to act under authority of an order or process of the court.

(5) Disobedience of any lawful judgment, order, or process of the court.

....

(9) Any other unlawful interference with the process or proceedings of a court.

c. California Penal Code

i. California Penal Code 166

(a) Except as provided in subdivisions (b), (c), and (d), a person guilty of any of the following contempts of court is guilty of a misdemeanor:

(1) Disorderly, contemptuous, or insolent behavior committed during the sitting of a court of justice, in the immediate view and presence of the court, and directly

tending to interrupt its proceedings or to impair the respect due to its authority.

- (2) Behavior specified in paragraph (1) that is committed in the presence of a referee, while actually engaged in a trial or hearing, pursuant to the order of a court, or in the presence of any jury while actually sitting for the trial of a cause, or upon an inquest or other proceeding authorized by law.
- (3) A breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of the court.
- (4) Willful disobedience of the terms as written of any process or court order or out-of-state court order, lawfully issued by a court, including orders pending trial.
- (5) Resistance willfully offered by any person to the lawful order or process of a court.
-
- (8) The publication of a false or grossly inaccurate report of the proceedings of a court.

d. California Rules of Court

i. Rule 2.30. Sanctions for rules violations in civil cases

(a) Application

This sanctions rule applies to the rules in the California Rules of Court relating to general civil cases, unlawful detainer cases, probate proceedings, civil proceedings in the appellate division of the superior court, and small claims cases.

(b) Sanctions

In addition to any other sanctions permitted by law, the court may order a person, after written notice and an opportunity to be heard, to pay reasonable monetary sanctions to the court or an aggrieved person, or both, for failure without good cause to comply with the applicable rules. For the purposes of this rule, "person" means a

party, a party's attorney, a witness, and an insurer or any other individual or entity whose consent is necessary for the disposition of the case. If a failure to comply with an applicable rule is the responsibility of counsel and not of the party, any penalty must be imposed on counsel and must not adversely affect the party's cause of action or defense thereto.

ii. Rule 5.14. Sanctions for violations of rules of court in family law cases

(a) Application

This sanctions rule applies to any action or proceeding brought under the Family Code.

(b) Definition

For purposes of the rules in this division:

(1) "Sanctions" means a monetary fine or penalty ordered by the court.

(2) "Person" means a party, a party's attorney, a law firm, a witness, or any other individual or entity whose consent is necessary for the disposition of the case.

(c) Sanctions imposed on a person

In addition to any other sanctions permitted by law, the court may order a person, after written notice and an opportunity to be heard, to pay reasonable monetary sanctions to the court or to an aggrieved person, or both, for failure without good cause to comply with the applicable rules. The sanction must not put an unreasonable financial burden on the person ordered to pay.

iii. Rule 8.276

(a) Grounds for sanctions

On motion of a party or its own motion, a Court of Appeal may impose sanctions, including the award or denial of costs under rule 8.278, on a party or an attorney for:

(1) Taking a frivolous appeal or appealing solely to cause delay;

- (2) Including in the record any matter not reasonably material to the appeal's determination;
- (3) Filing a frivolous motion; or
- (4) Committing any other unreasonable violation of these rules.

e. California Rules of Professional Conduct (“CRPC”)

i. Rule 3-110 Failing to Act Competently

- (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
- (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
- (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Comment: The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents.

ii. Rule 4-200 Fees for Legal Services

(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.

iii. (B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

- (1) The amount of the fee in proportion to the value of the services performed.

- (2) The relative sophistication of the member and the client.
- (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
- (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
- (5) The amount involved and the results obtained.
- (6) The time limitations imposed by the client or by the circumstances.
- (7) The nature and length of the professional relationship with the client.
- (8) The experience, reputation, and ability of the member or members performing the services.
- (9) Whether the fee is fixed or contingent.
- (10) The time and labor required.
- (11) The informed consent of the client to the fee.

iv. Rule 5-200

In presenting a matter to a tribunal, a member:

- (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
- (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;
- (C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;
- (D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

v. Fiduciary Duty?

(1) Overcharging?

f. ABA Model Rules

i. Persuasive Authority:

(1) The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do not conflict with California policy. *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal. 4th 839, 852.

(2) In the absence of related California authority, we may look to the Model Rules, and the ABA Formal Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. (CRPC Rule 1-100(A) (ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered); *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656.

ii. Model Rule 1.3 Diligence

(1) The Rule: A lawyer shall act with reasonable diligence and promptness in representing a client.

(2) Comment 1: A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client... A lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

iii. Model Rule 3.4 Fairness to Opposing Party and to Counsel

(1) The Rule: A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

iv. Model Rule 4.1 Truthfulness In Statements To Others

(1) In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment 1: A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

v. Model Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

vi. Model Rule 8.4 Misconduct

(1) The Rule: It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;...

(2) Comment 2: Many kinds of illegal conduct reflect adversely upon fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed

to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to practice law. Offenses involving violence, dishonest, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeat offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

- (3) Comment 3: A lawyer, who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

- 3. “... it is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law. In order to instill public confidence in the legal profession and our judicial system, an attorney must be an example of lawfulness, not lawlessness. [p] Accordingly, an attorney ‘however zealous in his client’s behalf, has, as an officer of the court, a paramount obligation to the due and orderly administration of justice...’ [citation.] An attorney must not willfully disobey a court’s order and must maintain a respectful attitude toward the court. [Citations.]”

People v. Chong (1999) 76 Cal. App. 4th 232, 243.

4. Civility Guidelines

- a. State Bar of California Attorney Guidelines of Civility and Professionalism (Civility Toolbox)
 - i. <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=mPBEL3nGaFs%3d&tabid=455>
- b. California Federal Court Guidelines
 - i. Central District of CA:

- (1) <http://www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines>
- c. County Superior Court Guidelines
- i. Los Angeles County Superior Court Guidelines for Civility in Litigation
 - (1) <http://www.lasuperiorcourt.org/courtrules/CurrentRulesAppendixPDF/Chap3Appendix3A.PDF>
 - ii. Orange County Superior Court
 - (1) <http://www.occourts.org/directory/civil/complex-civil/department-guidelines.pdf>
 - iii. Riverside County Superior Court Civility Guidelines
 - (1) <http://www.riverside.courts.ca.gov/guidecourtesy.pdf>
 - iv. Sacramento County Superior Court
 - (1) Local Rule 9.22 adopting the State Bar’s Civility Guidelines.

“...Upon a motion of any party pursuant to CCP Sections 128, 128.5, 128.7, 177, and 177.5, conduct inconsistent with these Standards may be considered in the discretion of the court in determining if sanctions are warranted....”
 - v. Santa Clara County Bar Association Code of Professionalism
 - (1) http://www.sccba.com/displaycommon.cfm?an=1&subarticle_nbr=167
- d. County Bar Association Guidelines
- i. Los Angeles County Bar Association
 - (1) <http://www.lacba.org/Files/Main%20Folder/Services/FaxOnDemand/files/LitigationGuidelines.pdf>
 - ii. Marin County Bar Association Code of Civility
 - (1) http://www.marinbar.org/docs/Code_of_Civility.pdf

- iii. Riverside County Bar Association Guidelines of Civility and Professionalism
 - (1) <http://riversidecountybar.com/documents/civility-guidelines-2008.pdf>
- iv. Santa Clara County Bar Association Code of Professionalism
 - (1) http://www.sccba.com/displaycommon.cfm?an=1&subarticle_nbr=167
- v. San Diego County Bar Association Attorney Code of Conduct
 - (1) <http://www.sdcba.org/index.cfm?pg=AttyCodeConduct>
- vi. Ventura County Bar Association Guidelines on Professional Conduct and Civility
 - (1) http://www.vcba.org/wp-content/uploads/2009/11/VCBA_Civility_Code.pdf

5. California Recently Reported Civility Decisions

- a. *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253 (9th Cir. 2010)
 - i. Defendants filed a Motion for Summary Judgment on the last day permitted under the scheduling order, August 25. Pursuant to local rules, the last day to file the opposition was September 2.
 - ii. Defense counsel, notwithstanding previous professional courtesies extended by Plaintiff's counsel, refused counsel's request to stipulate to move all deadlines out for one week.
 - iii. Plaintiff's counsel moved for a one week extension of time to file both his opposition to defendants' Motion for Summary Judgment, as well as for Plaintiff to file their reply, citing as good cause 1) the extremely short eight day response deadline (with three of those days falling over Labor Day weekend), shortened from 14 days, created due to a local scheduling rule and defendants' litigation tactics; 2) lead counsel's preplanned absence from the state, beginning the day the motions were filed, to serve as a duty-elected California delegate to a major political party's national convention; 3) 1,000 pages of supporting exhibits and declarations.

- iv. Defense counsel vigorously opposed Plaintiff counsel’s ex-parte application to seek that one week extension, arguing Plaintiff had failed to establish good cause. Defense counsel questioned Plaintiff counsel’s trip out of state, speculating on why. Defense counsel argued prejudice with a “weak and false” argument the continuance would give Plaintiff “several weeks” to prepare an opposition, yet leave Defendants with one week to file their reply. Defendants finally argued they’d be left with less time to prepare for trial (which, at that point, was set 3 months out).
 - v. “Despite the presence of what most reasonable jurists would regard as good cause and the absence of prejudice to anyone, the district court denied the motion.”
 - vi. Plaintiff’s counsel filed the opposition, 3 days late, and a motion to accept the late filed motion. The motion to accept the late opposition was denied. Defendant’s motion for summary judgment was granted, and defendants were granted \$247,171.32 in attorneys’ fees.
 - vii. The Ninth Circuit found the district court abused its discretion, and reversed the grant of the summary judgment, vacated the fee award, and remanded the matter for further proceedings. The Opinion criticized defense counsel’s tactics.
 - (1) “Defense counsel steadfastly refused to stipulate to an extension of time, and when Ahanchian’s counsel sought relief from the court, defense counsel filed fierce oppositions, even accusing Ahanchian’s counsel of unethical conduct. Such uncompromising behavior is not only inconsistent with general principles of professional conduct, but also undermines the truth-seeking function of our adversarial system. [citation to California Civility Guidelines]”.
 - (2) “Our adversarial system relies on attorneys to treat each other with a high degree of civility and respect [citation]”.
- b. *In Re Marriage of Davenport* (2011) 194 Cal. App. 4th 1507
- i. Family law litigation in which trial court granted a Family Code 271 motion for sanctions against Attorney.
 - ii. “With no background in either civil or family law litigation, Mr. Andrew Watters admitted to the Court that he was taught to litigate

this case with unbridled aggression. These uncooperative and uncivil courses of action have caused Mrs. Davenport unnecessary delays and unnecessary attorney fees and costs. Both Mr. and Mrs. Davenport deserve justice and fairness in the Court.”

iii. Record replete with “abusive, rude, hostile, and/or disrespectful language” by Attorney in correspondence with opposing counsel, which even Attorney eventually acknowledged at oral argument could have increased the costs of litigation.

(1) November 22, 2006 letter stated "Regarding your client's failure to appear once again for his continued deposition, we too regret that your client chose not to appear. As you know, we duly noticed his continued deposition for 11/20/06-11/22/06. Once again, you offer the same tired, old, and shopworn excuse. Your continued blustering about mutually agreeable dates, efficiency and promptness, and convenience is pathetic when your client's actions negate any semblance of cooperation. Talk is cheap. Actions speak louder than words. Your credibility is at stake here."

(2) March 13, 2007 letter stated:

(a) "Enough already with the delays."

(b) "We don't accept your implication that you didn't already have [the Request to Inspect].... Perhaps you didn't look hard enough,..."

(c) “this seems like a case of the `pot calling the kettle black”

(d) "In your last paragraph, your first suggestion is illusory..."

(e) "Your last paragraph rings hollow."

(3) September 11, 2008 letter stated:

(a) "We've noticed that, in the past, you have had some trouble keeping things straight. We also noticed that you tend to stretch things somewhat too far in the name of appearances."

- (b) "It's no surprise, then, that your letter of 8/7/08 appears to be an attempt to create a false and misleading exhibit for use at a later law and motion hearing so that your client can sit in court with a halo over his head, and so you can say 'look how many times Ken offered to settle!' That wouldn't surprise us at all, given your practice of attaching a large pile of exhibits to your declarations without any testimony from you concerning their truth."
 - iv. Rejected argument that Attorney's behavior was justified due to his youth and frustration at difficulties encountered in discovery.
 - (1) "We close this discussion with a reminder to counsel—all counsel, regardless of practice, regardless of age—that zealous advocacy does not equate with "attack dog" or "scorched earth"; nor does it mean lack of civility...Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive."
 - v. Attorney charged that if Appellate Court affirmed with published decision, it would have a chilling effect on family law advocacy
 - (1) Impropriety of much of the conduct involved here extends beyond family law.
 - (2) Family law practitioners are not exempt from general notions of what is appropriate advocacy.
- c. *Scott C. Moody, Inc. v. Staar Surgical Co.* (2011) 195 Cal. App. 4th 1043
 - i. Trial court made ruling at sidebar that counsel should not inquire into a particular area with a witness. Counsel proceeded to do just that.
 - ii. At trial court's inquiry whether he had issued that ruling instructing counsel not to inquire in to that area, counsel answered "that must be true." When the Court asked "is it or is it not true?" counsel replied "I can't tell you exactly." Counsel later said "I must say, when I left that side bar it was fairly obvious I was not totally certain on what your ruling was."
 - iii. After an OSC re Sanctions hearing, the trial court ordered \$1,500 in sanctions for violating the Court's order.

- iv. Court of Appeal affirmed. Citing to Code of Civil Procedure 128.5, 177.5 and Business & Professions Code 6068(b), the Court found Attorney made a calculated decision to violate the Court's order and that Attorney took his chances that an apology would cure his violation.
- d. *Kim v. Westmoore Partners Inc.* (2011) 201 Cal. App. 4th 267
 - i. Lender action for breach of contract, negligent misrepresentation, professional negligence, conversion and unfair business practices.
 - ii. Respondent's counsel sought extension of time to file appellate brief under false pretences, then filed a brief that was boilerplate and a virtual copy of a brief from another case, which had included a boilerplate accusation of misconduct and boilerplate request for sanctions.
 - iii. Court of Appeal gave notice it was considering sanctions; counsel's response was "truculent and dismissive", and asserted Court of Appeal must have issued notice in error.
 - iv. \$10,000 sanction issued.
 - v. The Court stated this case was distinguishable from a run of the mill boilerplate request for extension of time on briefing because of Counsel's subsequent filing of a boilerplate copy brief. The boilerplate copy brief proved that Counsel's request for extension, requested for "complexity of issues," was untrue.
 - vi. "We cannot overlook such conduct. It is critical to both the bench and the bar that we be able to rely on the honesty of counsel. The term 'officer of the court,' with all the assumptions of honor and integrity that append to it, must not be allowed to lose its significance. While some might find these to be only 'little' white lies, we feel the distinction between little lies and big ones is difficult to delineate and dangerous to draw. The corrosive effect of little lies differs from the corrosive effect of big lies only in the time it takes for the damage to become irreversible. Donahue's violations of the requirement to set forth in the California Rules of Court governing extension requests meet the standard of unreasonableness, and warrant the imposition of sanctions."
 - vii. Counsel also copied and pasted a sanctions request from an earlier brief, deleted the factual application from the earlier brief, and

simply proceeded with his argument in rhetoric alone, without attempt to apply to the case at issue.

- (1) “It is difficult for us to express how wrong that is. Sanctions are serious business. They deserve more thought than the choice of a salad dressing... A request for sanctions can *never* be so lightly considered as to be copied word for word from another brief – much less copied in reliance on facts from another case that do not obtain in the present one. A request for sanctions should be reserved for serious violations of the standard of practice, not used as a bullying tactic.”
- (2) “Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It is time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions.”

viii. Matter referred to the State Bar.

e. *People v. Whitus* (2012) 209 Cal. App. 4th Supp.1

- i. Defendant was charged with driving under the influence. The trial court issued a \$750 sanction against defense counsel for failing to appear at three trial readiness conferences.
- ii. The Court of appeal affirmed. Trial counsel failed to appear at the trial readiness conference despite being ordered to do so, and having been granted multiple continuances.
- iii. The Opinion referred the opinion to the State Bar, due to Appellant’s oral advocacy.
 - (1) “The foundation of the rule of law is dependent upon lawyers treating judicial officers and each other with respect, dignity, and courtesy. The need for civility and dignity is critically important, especially today, with the legal profession and the judicial branch of government under cynical attack from various quarters.”

- (2) “Consisting of repeated tirades and impertinence, and with a tone wholly condescending and accusatory, Appellant’s conduct is a serious and significant departure from acceptable appellate practice, or for that matter, practice in any court of law. If left unaddressed, this sort of advocacy demeans the profession, lowers the public respect, and conveys the impression it is acceptable and effective.”
- (3) “We will not condone this behavior. Instead of issuing additional monetary sanctions, however, we will refer this opinion to the California State Bar for consideration of discipline. Although we do so reluctantly, the tone, tenor and content of Appellant’s appellate argument demand an appropriate response.”
- (4) Appellant’s oral argument:
 - (a) “Appellant’s oral argument ..a parade of insults and affronts”
 - (i) Repeated disparagement of trial and appellate judges
 - (ii) Rude behavior
 - (iii) Counsel referred to Court of Appeal as “fox [watching] the hen house.”
 - (iv) Confrontational, accusatory and disdainful tone
 - (b) When asked about the record, counsel stated “I don’t need to give you the universe of evidence in the proceedings... You don’t need a transcript.”
 - (c) When asked about a case citation, counsel said “It must have been a while since you read the brief.”
 - (d) Demanded disclosure from each appellate justice if the judge has discussed the case with the trial judge
 - (v) Counsel said: “But it’s common knowledge in the legal community, and you would be insulting me if you suggested otherwise, for us to believe that you judges don’t talk like women

in a sewing circle about us lawyers. You do. I know you do.”

- (e) Repeatedly referred to trial judge by first name. When asked not to do so, counsel responded:
 - (vi) “OK. Well, hereinafter, I will honor your request [not to address trial judge by first name]. But before I proceed to honor your request, I’ll tell you that in the 33 years that I’ve practiced law, I’ve appeared in front of many great men and women judges, including you three. And I’ve appeared in front of a few who are an embarrassment to our profession and [trial judge] is one of those people.”
- (f) Counsel issued a veiled threat
 - (vii) Counsel said “And he said he didn’t care. He was the epitome of the completely sealed and closed shut mind. You know... a human mind is a lot like a parachute. If it doesn’t open, it will get you killed someday.”
- (g) Counsel described litigation like a boxing match. The Court of Appeal rejected that analogy.
 - (viii) “The chosen analogy leaves much to be desired, and is especially incongruous in light of Appellant’s oral advocacy. The practice of law is not a boxing match; it involves something far more profound and important – the adjudication of civil and criminal disputes between citizens in a democratic republic.”
 - (ix) “It is a privilege to appear as counsel before the court representing a client in the pursuit of justice. Counsel are considered officers of the court. The handshake at the end of the trial is not the only time when professionalism and civility are expected. It is demanded of lawyers, at *all times* and at *all stages* of a case, no matter what the stakes are involved; [citation]. Especially in this day and age of

distrust and cynicism, counsel's respect for the institution and administration of justice is critical."

- (x) "Although we have considered additional monetary sanction, something more therapeutic needs to be done. There is no place for this sort of argument in any courtroom, state or federal, trial or appellate. It demeans the profession, lowers the public respect and, if left unaddressed, conveys the impression that it is acceptable behavior, perhaps even effective advocacy. Most assuredly, it is neither acceptable behavior nor effective advocacy."

6. Recent Civility-Related Discipline and/or Sanctions Outside of California

a. Arizona

- i. ***In re: the Matter of a Member of the State Bar of Arizona, Meyer L. Ziman***, Report and Order Imposing Sanctions, PDJ-2011-9067, April 30, 2012.

- (1) Arizona attorney Ziman, while attempting to obtain his client's medical records over the telephone, engaged in a "string of expletives" with one hospital employee. Ziman's efforts to obtain the records were not successful and Ziman's frustration and anger grew. While on the phone with another hospital employee, Ziman again engaged in a tirade of insults and profanities. The employee said, "[e]xcuse me but you are talking to a lady," to which Ziman replied that the employee was *not* a lady and that she was "nothing but a slut who worked for a copy service." Ziman then repeated the word "slut" slowly and loudly.
- (2) During the two-day hearing before the Presiding Disciplinary Judge, Ziman testified that he did not use the word "slut," but rather, used the word "slug," referring to the slow and cumbersome process of obtaining the sought-after records. The employee on the receiving end of the insult testified that she has never had a problem distinguishing words ending in "t" or "g".

- (3) Arizona's Oath of Admission to the Bar requires lawyers to swear that they will abstain from offensive conduct.
- (4) The Report and Order includes additional counts of misconduct, such as threatening a client, accepting an offer without his client's consent, attempting to hit a client, and, in a separate incident, making vulgar and offensive comments to a surgery center employee (and criticizing her grammar) over the telephone while trying to obtain medical records for another client.
- (5) The panel found that Ziman violated Rule 42, Ariz. R.Sup.Ct., specifically Rule 31(a)(2)(E) and Rule 41(g) by engaging in unprofessional and offensive conduct and failing to adhere to the provisions set forth in the Supreme Court Rules, the Oath of Admission to the State Bar, and the Lawyer's Creed of Professionalism.
- (6) When evaluating aggravating factors, the panel specifically noted that Ziman has a prior disciplinary record involving past, similar conduct (Ziman was disciplined in 1991, 1993, 1997, 2002 and 2009). The panel also noted that Ziman still does not accept that his conduct is offensive.
- (7) The Report and Order states, "[l]awyers should always strive to treat others with dignity and respect. Rude attacking comments reflect poorly on a self regulating profession. When making business calls, it is not necessary to give grammar lessons, but that is not a sanctionable action. It does however demonstrate a pattern of insensitivity and intentional disregard of other and rule which prior discipline had little impact upon. Worse and more aggressively to the point, it is inexcusable to make profane and insulting remarks..."
- (8) The Report and Order notes that Mr. Ziman, "brandishes his opinion as a battering ram, intentionally offending people. This Panel does not believe these are "slips of the tongue" or inadvertent. Respondent is intentional in his conduct and bull whips people by his words with a zeal. While in his private life he may be as rude, offensive and demeaning as he chooses, in his professional life he may not hide behind his First Amendment right [in order] to ignore his sworn responsibilities..."

- (9) The panel suspended Ziman from practice for 12 months after finding that he “repeatedly and intentionally committed offensive conduct.”

b. Florida

i. *The Florida Bar v. Martocci* (2001) 791 So. 2d 1074; 2001 Fla. LEXIS 843

- (1) Attorney Martocci represented Francis Berger in a dissolution of marriage and child custody action and a child dependency action. The Bar alleged that Martocci made unethical, disparaging, and profane remarks to belittle and humiliate the opposing party, Florence Berger, and her attorney, Diana Figueroa.
- (2) The referee found the following: Martocci called Ms. Berger a "nut case," referred to Ms. Berger as a "crazy," made demeaning facial gestures and stuck out his tongue at Ms. Berger and Ms. Figueroa. Martocci told Ms. Figueroa that she was a "stupid idiot" and that she should "go back to Puerto Rico." In another incident, during an intermission of a deposition, Ms. Figueroa telephoned the office of Judge Edward J. Richardson and reached Pamela Walker, a judicial assistant. After Ms. Figueroa spoke to Ms. Walker, Martocci took the telephone and yelled the word "bitch."... Martocci repeatedly told Ms. Figueroa that she did not know the law or the rules of procedure and that she needed to go back to school.
- (3) The referee recommended a public reprimand and a two-year period of probation with conditions including an evaluation by Florida Lawyers Assistance for possible anger management or mental health assistance or both.
- (4) On review, the Supreme Court of Florida found:

“The record reflects that Martocci: (1) made insulting facial gestures to Ms. Berger and Ms. Figueroa; (2) called Ms. Figueroa a "bush leaguer"; (3) told Ms. Figueroa that depositions are not conducted under "girl's rules"; (4) continually disparaged Ms. Figueroa's knowledge and ability to practice law; and (5) threatened Mr. Paton physically within the courtroom during a recess to a hearing. The entire

record is replete with evidence of Martocci's verbal assaults and sexist, racial, and ethnic insults supporting the referee's conclusion that Martocci engaged in patently unethical behavior designed to belittle and humiliate Ms. Berger and Ms. Figueroa and threaten Mr. Paton.”

- (5) The Supreme Court of Florida affirmed the referee's findings of fact, conclusions of guilt, and recommended discipline. The Court also issued judgment for costs against Martocci and in favor of The Florida Bar in the amount of \$5,187.63.

ii. ***The Florida Bar v. Ratiner*** (2010) Supreme Court of Florida, Case No. SC08-689

- (1) During a deposition, attorney Ratiner’s opposing counsel tried to affix an exhibit sticker on Ratiner’s laptop computer. Ratiner briefly touched his opponent’s hand and then attempted to run around the table toward him. The deponent said she was very scared by Ratiner’s behavior. The court reporter said, “I can’t work like this!” Ratiner’s own consultant tried to calm him down, telling him to “take a Xanax.” Ratiner leaned forcefully over the table, lambasting opposing counsel in a tirade while tearing up the evidence sticker and flicking it in opposing counsel’s direction.
- (2) The Supreme Court of Florida affirmed the referee's findings of fact and recommendations as to guilt. However, the Court declined to accept the referee’s recommendation that Ratiner be disbarred or have his license suspended for two years.
- (3) Instead, the Supreme Court of Florida imposed a 60-day suspension and a two-year probationary period, required Ratiner to undergo mental health counseling, and directed him to bring bar-approved co-counsel to all depositions during the probationary period (or to arrange to have them video-taped).

iii. ***Avista Management, Inc. v. Wausau Underwriters Insurance Company***, Order dated June 6, 2006, U.S. Dist. Ct. Middle Dist. FL, Orland Div., Case No. 6:05-cv-1430-Orl-31JGG

- (1) Plaintiff filed a motion to designate the location of a Rule 30(b)(6) deposition after Plaintiff and Defendant could not reach an agreement regarding same.

- (2) The court denied the motion and instead ordered:

“[T]he Court will fashion a new form of alternative resolution, to wit: at 4:00 p.m. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the ... Courthouse... Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant witness. At that time and location, counsel shall engage in one (1) game of “rock, paper, scissors.” The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period July 11-12, 2006.”

- (3) The Order has been referenced by several sources, including CNNMoney.com, loweringthebar.net, and in *The Book of Strange and Curious Legal Oddities* by Nathan Belofsky.

c. Illinois

- i. *In the Matter of Marvin Ira Gerstein* (2007) Supreme Court of Illinois, Commission No. 06 SH 70

- (1) Illinois Attorney Marvin Gerstein wrote two profanity-laced letters to a public works official in response to receiving a *Notice of Public Nuisance* from the public works department. The first letter read as follows:

“Jason: I hate your f*!@#& existence. What you did to my property was a vicious attack against the sumac cover planted by Irene Poulsen. Your existence obviously is predicated upon a pair of pig f*!@#& parents otherwise I can't otherwise explain that you are product of the sow factor of birth. Too bad your abortion of a birth wasn't successful. So know this you scum piece of a c*#!@. I pray every time I pass the front portion of my property that the rest of your life is a living hell. I damn you in the name of my God you piece of human dog sh*!. Marvin”

The second letter was longer and almost equally profane.

- (2) The Illinois Supreme Court ordered a 60-day license suspension, noting that the length of the suspension was

appropriate in light of the fact that Gerstein had previously been disciplined three times, twice for sending letters containing “offensive and intemperate remarks.” (In 2002, the Illinois Supreme Court suspended him for 30 days for writing letters calling opposing attorneys "geekbreath" and telling them to shove their correspondence "in that bodily orifice into which no sun shines." He was censured in 1991 for a different letter.)

d. Michigan

i. *Fieger, et al. v. Michigan Supreme Court*, 553 F.3d 955 (6th Cir. 2009)

- (1) During a broadcast of his popular radio show, attorney Fieger made insulting and vulgar comments regarding the three judges who had served on the panel that – three days prior – had overturned a \$15 million jury verdict for Fieger’s client. The Supreme Court summarized Fieger’s comments as follows:

““Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too." Mr. Fieger, referring to his client, then said, "He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses."

Two days later, on the same radio show, Mr. Fieger called these same judges "three jackass Court of Appeals judges." When another person involved in the broadcast used the word "innuendo," Mr. Fieger stated, "I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist." Finally, Mr. Fieger said, "They say under their name, 'Court of Appeals Judge,' so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think--what was Hitler's--Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals."

- (2) The Michigan Attorney Grievance Administrator charged Fieger with violating Michigan Rules of Professional Conduct (MRPC) 3.5(c) and 6.5(a), the "courtesy and civility" provisions.

- (3) Fieger stipulated to a disciplinary reprimand while reserving his rights to challenge the applicability and constitutionality of the rules. Thereafter, the Michigan Supreme Court upheld the violations and the constitutionality of the rules as applied to Fieger. *Grievance Adm'r v. Fieger*, 476 Mich. 231, 719 N.W.2d 123 (Mich. 2006).
- (4) Fieger then challenged the constitutionality of the disciplinary rules on facial grounds. The United States District Court for the Eastern District of Michigan held that the courtesy and civility provisions violate the First and Fourteenth Amendments to the United States Constitution because the rules are overly broad and vague and enjoined their enforcement.
- (5) The Michigan Supreme Court vacated the judgment of the district court and remanded the matter with instructions to dismiss the complaint for lack of jurisdiction.

e. New York

i. *Laddcap Value Partners, LP v. Lowenstein Sandler P.C.*, 859 N.Y.S.2d 895 (N.Y. 2007)

- (1) Attorney Rice brought a motion pursuant to CPLR 3104 for a Court-appointed referee to supervise further depositions and for an order directing that further depositions be held at the courthouse. The basis for Rice's motion was a claim of contumacious, abusive, and strident conduct by opposing counsel, Decea, during a deposition.
- (2) During the course of the witness's deposition, Decea repeatedly directed the witness not to answer certain questions posed to him, which were, on many occasions, followed by inappropriate, insulting, and derogatory remarks against Rice concerning her gender, marital status, and competence.
- (3) The following are some examples of the colloquy between Rice and Decea:

MR. DECEA: What I want to do is get you mad enough so I can try this case.

THE WITNESS: She won't be at trial.

MR. DECEA: Promise you'll let me try this case.

MS. RICE: You should look me up, man.

A. I did.

Q. Obviously not well enough

A. I didn't look into whether you're married or not.

MR. DECEA: We're interested as to why you don't wear your wedding ring.

MS. RICE: Is that right? You can be interested all you want.

MR. DECEA: I'm very interested. (EBT., Vol. 2, page 192)

MS. RICE: Attacking everyone at the table accomplishes absolutely nothing.

MR. DECEA: What accomplishes nothing is your inability to conduct a deposition. This is not an interview which apparently you're more accustomed to doing than taking depositions.

THE WITNESS: I agree.

MS. RICE: That's wonderful. This line is--

MR. DECEA: This is not a white collar interview that you're sitting here interviewing something with your cute little thing going on.

MS. RICE: My cute little thing?

MR. DECEA: This is a deposition that has rules about what kinds of questions you can ask and how to ask them. You've led him the entire morning. You led him all day Monday when there's no reason to lead him. If you want to lead him to get into a subject area I can understand that and I'll let that go,

but when you get to the subject area ask him nonleading questions.

MS. RICE: Mr. Decea, you conduct the type of deposition you wish to conduct, I conduct the type of deposition I wish to conduct.

MR. DECEA: And I respect that. I'm just saying respect my defense, respect my defense of the litigation, that's all. Nothing personal, dear.

MS. RICE: Nothing personal, dear, let's see. I can't tell you the number of things that you have said were more than personal and certainly offensive and probably--

MR. DECEA: You told me you're not offended.

MS. RICE: Listen, listen.

THE WITNESS: Now she's offended.

MR. DECEA: Now you're offended.

MS. RICE: I'd like to complete a sentence.

MR. DECEA: Your skin is getting thin now.

MS. RICE: There are rules of conduct as you well know that you have to observe. Whether or not you like being opposite a table from a woman, you have to observe them. (EBT., Vol. 2., page 85-89).

MR. DECEA: Let me just say, if you ask another leading question I am directing him not to answer.

MS. RICE: I am well-entitled to ask leading questions, as you know, and indeed he has proven himself to be quite a hostile witness --

A: Me?

MS. RICE: -- so I would be entitled to ask him leading questions at any point.

A. I am not hostile.

MS. RICE: So, in any event --

MR. DECEA: But this is not the trial.

MS. RICE: It doesn't matter.

MR. DECEA: It does, hon.

MS. RICE: It does, hon?

MR. DECEA: Yes, it does.

A. As an Attila. As an Attila. Don't get--it's not--it was not personal.

Q. As an Attila? I don't even understand that.

A. Attila the Hun.

Q. Attila the Hun.

(EBT., Vol. 2, pages 28-29).

MR. DECEA: This is the first deposition you ever took?

MS. RICE: Right.

MR. DECEA: I mean, come on, you got to be kidding me. You're not trying this case, are you?

MS. RICE: Are you done?

MR. DECEA: You better get somebody else here to try this case, otherwise you're gonna be one sorry girl.

MS. RICE: A sorry girl?

MR. DECEA: Yes. (EBT., Vol. 3, pages 31-32).

- (4) Decea's conduct reminded the court of another New York case:

"In a case squarely on all fours, *Principe v Assay Partners* (154 Misc 2d 702, 586 N.Y.S.2d 182 [Supreme Court, New York County]), counsel Lawrence Clarke, in front of numerous attorneys and the witness being deposed, made several remarks toward counsel, Beth Rex, including: "What do you know, young girl"; "Be quiet little girl"; "Go away, little girl" while dismissively flicking his fingers and waiving a back hand at Ms. Rex. In opposition to a motion for sanctions based on such conduct, Mr. Clarke attempted to justify his comments, characterizing them as "name-calling."

- (5) Decea's opposition:

"I am not aware of any rule or law which requires civility between counsel." (Thomas B. Decea, Esq.).

- (6) The court noted, "[o]ffensive and abusive language by attorneys in the guise of zealous advocacy is plainly improper, unprofessional, and unacceptable (see, Annotation, Attorney's Verbal Abuse of Another Attorney as Basis for Disciplinary Action, 87 ALR3d 351 [1978]). An attorney who demonstrates a lack of civility, good manners and common courtesy taint the image of the legal profession and, consequently, the legal system, which was created and designed to resolve differences and disputes in a civil manner (see *Matter of McAlevy*, 69 NJ 349, 354 A2d 289, 291 [1976]), and an attorney's "conduct . . . that projects offensive and invidious discriminatory distinctions . . . based on race . . . [or] gender . . . is especially offensive" (*Matter of Vincenti*, 114 NJ 275, 283, 554 A2d 470, 474 [1989]; see also *People v Fagan*, 104 AD2d 252, 483 NYS2d 489 [4th Dept 1984] [noting that "while the correct resolution of civil disputes is indeed an important goal of our legal system, it may fairly be said that society's primary interest in the resolution of civil disputes is that they be settled in a peaceful, orderly, and impartial manner])."
- (7) The court granted Rice's request for a Court-appointed referee to supervise further depositions and for an order directing that further depositions be held at the courthouse.

f. South Carolina

i. *In the Matter of Anonymous Member of the South Carolina Bar*,
392 S.C. 328 (2011)

- (1) The attorney Respondent represented a client in a hotly-contested domestic matter. The opposing party was represented by opposing counsel (Attorney Doe). At issue was whether Respondent's client was a fit parent. Respondent sent the following email to her opposing counsel, questioning Attorney Doe's assessment of his client's fitness as a parent in light of the fact that Attorney Doe's daughter apparently had a drug problem:

"I have a client who is a drug dealer on . . . Street down town [sic]. He informed me that your daughter, [redacted] was detained for buying cocaine and heroine [sic]. She is, or was, a teenager, right? This happened at night in a known high crime/drug area, where alos [sic] many shootings take place. Lucky for her and the two other teens, they weren't charged. Does this make you and [redacted] bad parents? This incident is far worse than the allegations your client is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack head at night on or near . . . Street. Think about it. Am I right?"

- (2) Attorney Doe's wife (also a lawyer) initiated the complaint against Respondent.
- (3) Respondent contended that the civility clause contained within the lawyer's oath is unconstitutionally vague and overbroad.
- (4) The Supreme Court of South Carolina disagreed, noting:

"The interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other personally in the manner in which Respondent attacked

Attorney Doe. Such conduct not only compromises the integrity of the judicial process, it also undermines a lawyer's ability to objectively represent his or her client. There is no substantial amount of protected free speech penalized by the civility oath in light of the oath's plainly legitimate sweep of supporting the administration of justice and the lawyer-client relationship. Thus, we find the civility oath is not unconstitutionally overbroad."

- (5) According the Supreme Court of South Carolina, a lawyer "must act in a dignified and professional manner, with proper respect for the parties, witnesses, opposing counsel, and for the Court. When a lawyer fails to conduct himself appropriately, he brings into question the integrity of the judicial system, and, as well, disserves his client." *In re Goude*, 296 S.C. 510, 512, 374 S.E.2d 496, 497 (1988).
- (6) "We agree with the Panel that Respondent's e-mail was conduct tending to bring the legal profession into disrepute and was prejudicial to the administration of justice. By sending the ... e-mail to Attorney Doe, Respondent was doing a disservice to Respondent's client. An e-mail such as the one sent by Respondent can only inflame the passions of everyone involved, make litigation more intense, and undermine a lawyer's ability to objectively represent his or her client. This kind of personal attack against a family member of opposing counsel with no connection to the litigation brings into question the integrity of the judicial system and prejudices the administration of justice."
- (7) The Supreme Court of South Carolina issued a Letter of Caution and published its Opinion as a warning so "as to provide guidance to the bar. We caution the bar that henceforth, this type of conduct could result in a public sanction." (Emphasis added).

g. Texas

- i. *In re First City Bancorporation of Texas, Inc.*, 282 F.3d 864 (5th Cir. 2002)
 - (1) Attorney Greenfield threatened in deposition to have the deponent indicted and accused the other lawyer of having been fired by a previous employer. Greenfield called the

other attorneys a "stooge," a "puppet," a "deadhead" who "had been mentally dead for ten years," and "an underling who graduated from a 29th tier law school."

- (2) The bankruptcy court imposed sanctions against Greenfield in the sum of \$25,000 for engaging in behavior that the Fifth Circuit described as "egregious, obnoxious, and insulting,"
- (3) Greenfield appealed, arguing (in the Fifth Circuit's words) "that this deplorable and wholly unprofessional conduct helped him recover more money for his clients," that the behavior "serves him well in settlement negotiations" and is "therefore appropriate."
- (4) The Fifth Circuit rejected Greenfield's argument and upheld the \$25,000 sanctions award.

STICKS AND STONES MAY BREAK YOUR BONES,
BUT YOUR OWN WORDS (AND CONDUCT)
MIGHT *REALLY* HURT YOU

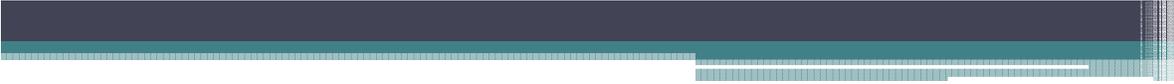
- Hon. Lawrence H. Cho: Judge, Superior Court of Los Angeles County
- Hon. Holly Fujie: Judge, Superior Court of Los Angeles County; Former President, State Bar of California
- Ellen Pansky: Partner, Pansky Markle Ham LLP, South Pasadena, epansky@panskymarkle.com
- Wendy Wen Yun Chang: Co-Moderator; Vice Chair, Committee on Professional Responsibility and Conduct; Partner, Hinshaw & Culbertson, LLP, Los Angeles, wchang@hinshawlaw.com
- Alison Buchanan: Co-Moderator; Member, Committee on Professional Responsibility and Conduct; Shareholder, Hoge, Fenton, Jones & Appel, Inc., San Jose, APB@hogefenton.com

some lawyers practice like this



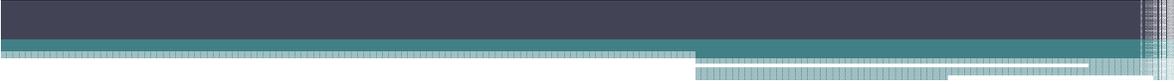
“Civility is not a sign of
weakness”

- John F. Kennedy



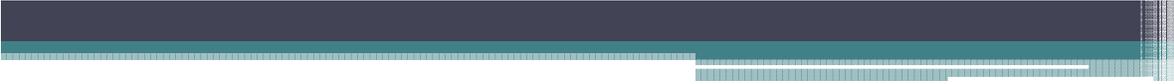
People v. Chong
(1999) 76 Cal. App. 4th 232, 243

“... it is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law. In order to instill public confidence in the legal profession and our judicial system, an attorney must be an example of lawfulness, not lawlessness.”



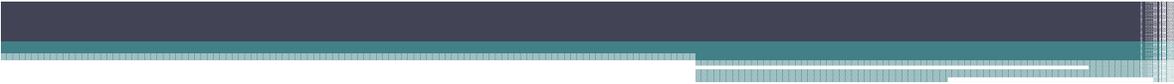
People v. Chong (cont.)
(1999) 76 Cal. App. 4th 232, 243

“Accordingly, an attorney ‘however zealous in his client’s behalf, has, as an officer of the court, a paramount obligation to the due and orderly administration of justice...’ [citation.] An attorney must not willfully disobey a court’s order and must maintain a respectful attitude toward the court. [Citations.]”



Former Business & Professions Code 6068(f)

It is the duty of an attorney to “abstain from all offensive personality.”



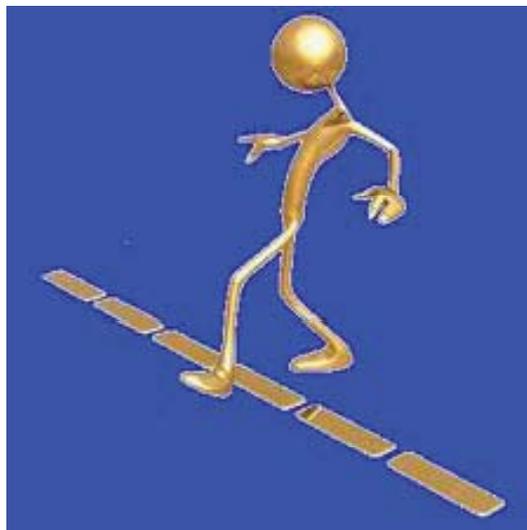
Current Business & Professions Code 6068(f)

It is the duty of an attorney “(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.”

California Attorney Guidelines of Civility and Professionalism, Adopted July 20, 2007

- “As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.”

Zealousness or Misconduct?



“Aspirational goals are nice,
but my clients want me to win!”



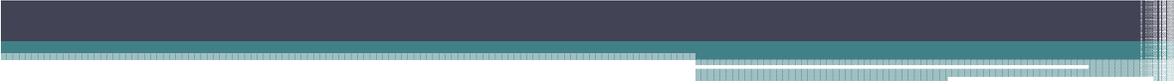
“It is time to stop talking about the problem and act on
it.” Acting P.J. Bedsworth in *Kim v. Westmoore*



Recent Appellate Decisions

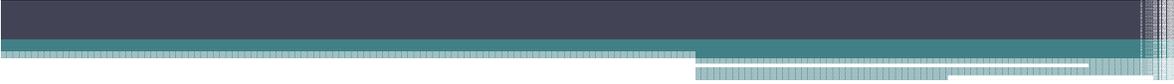


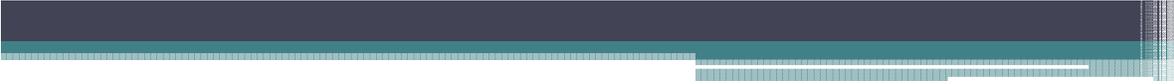
Overturing the Ruling



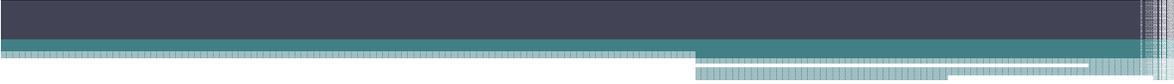
Ahanchian v. Xenon Pictures, Inc.,
624 F.3d 1253 (9th Cir. 2010)

- Defense MSJ filed in a way that left only 5 business days for Opposition.
- Plaintiff counsel asks to move proceedings out 1 week. Defense denies request.
- Plaintiff's counsel moves to extend dates 1 week; Court denies extension, denies Motion to Accept Late Opposition, which was filed 3 days late, and grants the defense MSJ.
- Ninth Circuit reverses.

- 
- “Such uncompromising behavior is not only inconsistent with general principles of professional conduct, but also undermines the truth-seeking function of our adversarial system.”
 - “Our adversarial system relies on attorneys to treat each other with a high degree of civility and respect.”

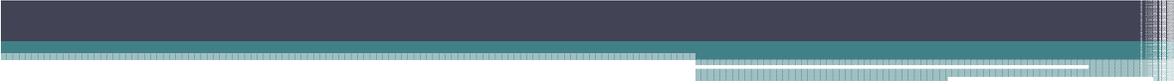


Monetary Sanctions



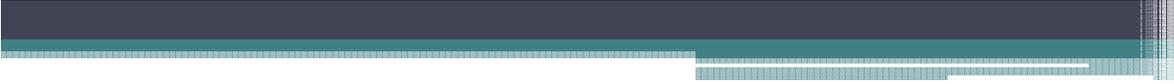
Scott C. Moody, Inc. v. Staar Surgical Co.
(2011) 195 Cal. App. 4th 1043

- Counsel violated court order not to question witness about a subject .
- \$1500 sanctions affirmed.
- Court of Appeal held Attorney made a calculated decision to violate the Court's order, and took his chances that an apology would cure his violation.



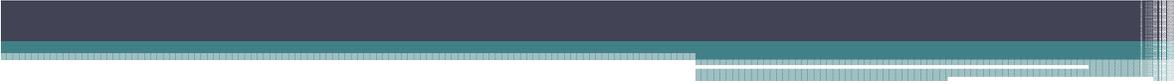
In Re Marriage of Davenport (2011) 194 Cal. App. 4th 1507

- Family law appeal of Family Code 271 award; award affirmed.
- Abusive, rude, hostile, and/or disrespectful language in correspondence; scorched earth litigation tactics.
- Family Code 271 sanctions of \$100,000 ordered payable from Petitioner to Respondent.
- Respondent awarded \$307,387.00 in attorneys fees.



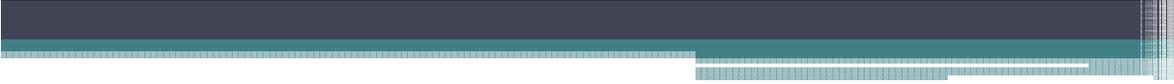
November 22, 2006 letter

- "Regarding your client's failure to appear once again for his continued deposition, we too regret that your client chose not to appear....Once again, you offer the same tired, old, and shopworn excuse. Your continued blustering about mutually agreeable dates, efficiency and promptness, and convenience is pathetic when your client's actions negate any semblance of cooperation. Talk is cheap. Actions speak louder than words. Your credibility is at stake here."



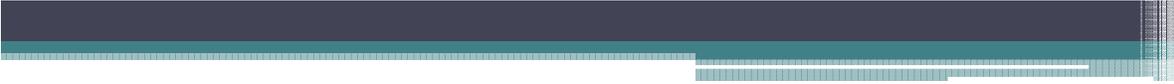
March 13, 2007 letter

- "Enough already with the delays."
- "We don't accept your implication that you didn't already have [the Request to Inspect].... Perhaps you didn't look hard enough,..."
- "This seems like a case of the `pot calling the kettle black.'"
- "In your last paragraph, your first suggestion is illusory...."
- "Your last paragraph rings hollow."



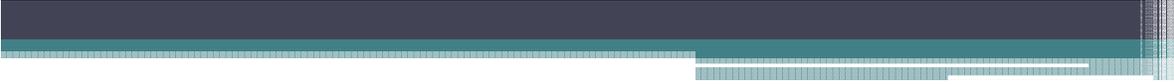
Counsel Was Unrepentant at Oral Argument

- "These are not attorneys not able to do lawyering because of unpleasant letters from a baby lawyer on the other side."
- Explained his behavior as merely intemperate, justified by his youth as an attorney, and by his frustration in "searching truth."
- Charged that if Appellate Court affirmed with published decision, it would have a chilling effect on family law advocacy.



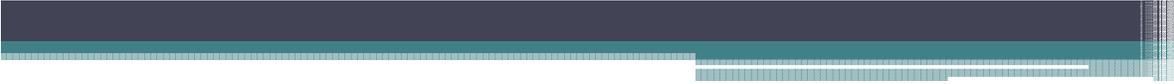
Violation of duty to both client and opposing party

- “With no background in either civil or family law litigation, Mr. Andrew Watters admitted to the Court that he was taught to litigate this case with unbridled aggression. These uncooperative and uncivil courses of action have caused Mrs. Davenport unnecessary delays and unnecessary attorney fees and costs. Both Mr. and Mrs. Davenport deserve justice and fairness in the Court.”



Kim v. Westmoore Partners Inc. (2011) 201 Cal. App. 4th 267

- Extension of time to file appellate brief sought under false pretences.
- Brief later filed was boilerplate and a virtual copy of a brief counsel had filed in another case before the same court, which had included a boilerplate accusation of misconduct and boilerplate request for sanctions. (Appellants asserted the differences in the two briefs were only 15 words.)



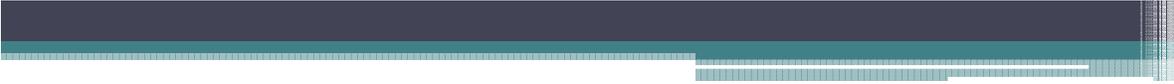
\$10,000 Non-Discovery Sanctions = Referral to State Bar

- Counsel's response to notice of potential sanctions was "truculent and dismissive," and asserted Court of Appeal must have issued notice in error.
- Counsel sent another in his place to sanctions hearing who did not know sanctions were being considered.

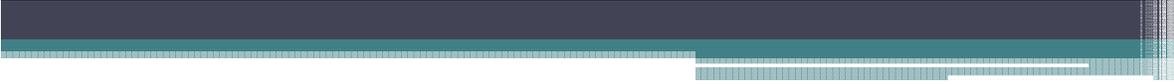


Violation of Rules of Court

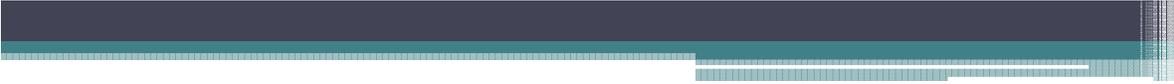
- False Statements in the Request for Extension
- "Boilerplate" requests for sanctions improper
 - A request for sanctions can never be so lightly considered as to be copied word for word from another brief.
 - A request for sanctions should be reserved for serious violations of the standard of practice, not used as a bullying tactic.



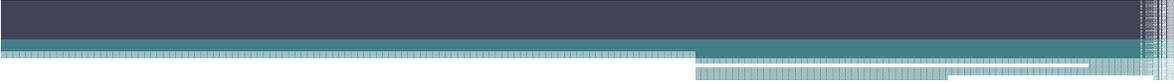
“Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy.”



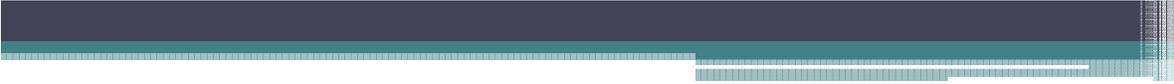
“It is time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions.”



“We are loath to act in a way that would seem to encourage courts to impose sanctions for mistakes or missteps. But for serious and significant departures from the standard of practice, for departures such as dishonesty and bullying, such steps are necessary... It is time to make it clear that there is a price to pay for cynical practices.”

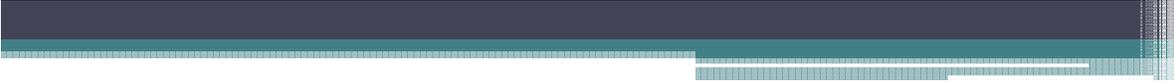


Referral to the State Bar



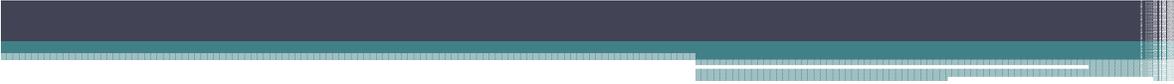
People v. Whitus (2012) 209 Cal. App.
4th Supp. 1

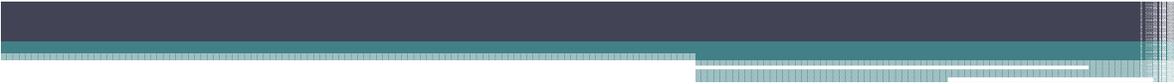
- Appeal from \$750 sanctions order issued for counsel's repeated failure to appear at trial readiness conference.
- Sanctions affirmed.
- Court of Appeal went on to refer the Opinion to the State Bar .



“Appellant’s oral argument...a parade
of insults and affronts”

- Repeated disparagement of trial and appellate judges.
- Rude behavior.
- Counsel referred to Court of Appeal as “fox [watching] the hen house.”
- Confrontational, accusatory and disdainful tone.

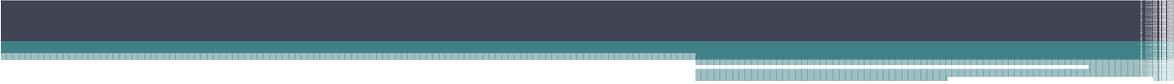
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- When asked about the record, “I don’t need to give you the universe of evidence in the proceedings... You don’t need a transcript.”
 - When asked about a case citation, “It must have been a while since you read the brief.”



Demanded disclosure from each appellate justice if the judge has discussed the case with the trial judge

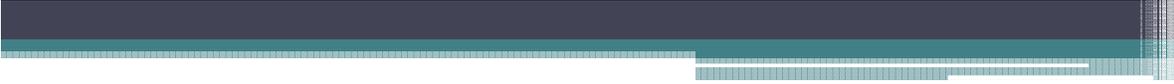
Counsel said:

“But it’s common knowledge in the legal community, and you would be insulting me if you suggested otherwise, for us to believe that you judges don’t talk like women in a sewing circle about us lawyers. You do. I know you do.”



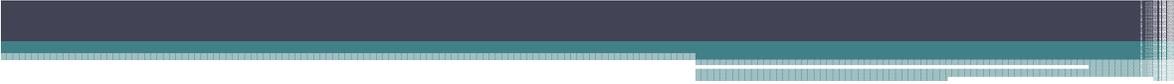
Repeatedly referred to trial judge by first name

Counsel said: “OK. Well, hereinafter, I will honor your request [not to address trial judge by first name]. But before I proceed to honor your request, I’ll tell you that in the 33 years that I’ve practiced law, I’ve appeared in front of many great men and women judges, including you three. And I’ve appeared in front of a few who are an embarrassment to our profession and [trial judge] is one of those people.”



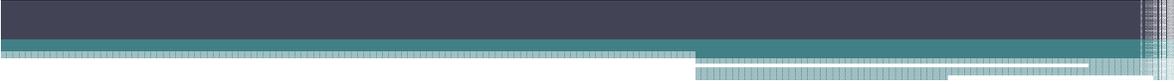
Veiled threats

- Counsel stated in oral argument “a human mind is a lot like a parachute. If it doesn’t open, it will get you killed someday.”



Why the Court rejected additional monetary sanctions in favor of bar referral

- “Something more therapeutic needs to be done.”
- No place for this type of argument in court.
- Demeans profession.
- Lowers public respect.
- *Conveys the impression that it is acceptable behavior, perhaps even effective advocacy.*



Thank you for attending.

Judge Cho, Judge Fujie,
Ellen, Alison, and Wendy

CIVILITY TOOLBOX

The State Bar California
180 Howard Street
San Francisco, CA 94105

116

July 17, 2009



THE STATE BAR OF CALIFORNIA

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180 Howard Street, San Francisco, California 94105 TEL: (415) 538-2000

July 17, 2009

“As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.”

[California Attorney Guidelines of Civility and Professionalism]

Dear Bar Leader:

During my tenure as President of the Board of Governors of the State Bar of California in 2007, the Board took a giant stride forward to address issues of civility in the practice of law in California by adopting the *California Attorney Guidelines of Civility and Professionalism*. The *Guidelines* provide best practices of civility in the practice of law and are offered to promote both the effectiveness and the enjoyment of the practice of law and economical client representation. As we all know, uncivil or unprofessional conduct not only disserves the individuals involved, it demeans the profession as a whole and our system of justice. A growth in uncivil conduct in the legal profession caused me to initiate the effort for Board adoption of civility and professionalism guidelines.

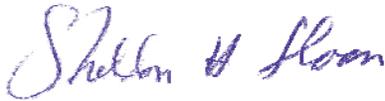
I hope you will join me in encouraging California attorneys to engage in best practices of civility by making the *Guidelines* their personal standards and goals. Attorneys in your organization can do this by taking the pledge that appears at the end of the *Guidelines*. And I hope your bar association will join the State Bar by adopting the *Guidelines* and implementing them for your membership. If your organization already has a code of professionalism, the *California Attorney Guidelines of Civility and Professionalism* should be complementary to what you have.

The Attorney Civility Task Force, which drafted the *Guidelines* for the Board of Governors, has created a **Civility Toolbox** to assist bar associations and California attorneys in the ongoing effort to promote civility and professionalism in the practice of law. Resources include the *Guidelines*, the attorney pledge, a sample resolution for bar associations and local court order. Since we are finding that the *Guidelines* have been a popular MCLE subject, we have also included a sample PowerPoint presentation for an MCLE program. The **Civility Toolbox** is located on the State Bar's Web site at www.calbar.ca.gov, under:

- [Reports](#) (Published reports in 2007);
- [Member Benefits>Member Services Center](#);
- [Ethics](#) (Ethics Information); and
- [Attorney Resources>Law Practice Management](#)

In closing, I encourage you to step forward and support this effort to promote civility in the legal profession, and I hope the **Civility Toolbox** will be useful for this purpose.

Sincerely,

A handwritten signature in blue ink that reads "Sheldon H Sloan". The signature is written in a cursive, flowing style.

President of the Board of Governors
October 2006 - September 2007

Attorney Civility Task Force

Hon. Marguerite Downing (CHAIR)
Monterey Park, CA

Mary Alexander San Francisco, CA	Donald F. Miles Los Angeles, CA
Terry Bridges Riverside, CA	Francis S. Ryu Los Angeles, CA
Michael W. Case Ventura, CA	Sherry M. Saffer Los Angeles, CA
Richard L. Crabtree Chico, CA	Cynthia Sands Los Angeles, CA
Dean Dennis Los Angeles, CA	Thomas G. Stolpman Long Beach, CA
Hon. Richard L. Fruin, Jr. Los Angeles, CA	Hon. Brian C. Walsh San Jose, CA
Hon. Everett A. Hewlett, Jr. San Francisco, CA	Lei-Chala I. Wilson San Diego, CA
Diane L. Karpman Los Angeles, CA	Alan S. Yochelson Los Angeles, CA
Hon. Loren E. McMaster Sacramento, CA	
Mary Yen (Staff) Office of General Counsel State Bar of California San Francisco, CA	Teri Greenman (Staff) Office of the Executive Director State Bar of California San Francisco, CA

Guidelines Timeline

- 
- August 2006
 - Attorney Civility Initiative

JULY 28, 2006 | LAW PRACTICE

Let's Open Wide the Pipeline to Diversity of Legal Profession

Forum Column

By Sheldon Sloan

"Civility and courtesy ... are expected and not to be equated with weakness."

Confession: I stole that from the Santa Clara County Bar's Code of Professionalism. However, like many of you, I see it as just plain old common sense - and also as an excellent starting point for a year in which I hope we can bring some measure of civility and courtesy back to our practices, both in our courtrooms as well as in our interactions with each other.

When I ran three years ago for a seat on the State Bar Board of Governors, I hoped to improve the image and welfare of lawyers and help the public see all the good things that lawyers do. While serving on the board, I came to see more clearly that, as lawyers, we hold our image in our own hands - that if we practice our profession in a more civil manner, then the public will be more open to assessing what we do rather than how badly or inappropriately we behave while we're doing it.

Some may call me old-fashioned, but I say to them: You can practice the law and do a good job for your client without being rude and aggressive and causing a lot of trouble for everybody. That's why I hope to make my upcoming term as State Bar president a year in which we bring back professionalism, and along with it some public respect.

This should not be difficult. Most of us just need to hearken back to what our moms and dads and schoolteachers tried to instill in us when we were kids and apply it to our chosen profession: A good lawyer doesn't need to schedule depositions when an opponent is out of town on vacation.

A good lawyer doesn't need to serve documents in a way that unfairly limits the other party's opportunity to respond.

Big firm lawyers don't need to try to crush opposing sole practitioners by papering them to death.

And no lawyer should ever make false, misleading or exaggerated statements while grandstanding for the cameras or any other means of reaching the public.

As I said, all just plain common sense. And all, I note, included in different sections of Santa Clara's excellent Code of Professionalism.

During my years as a lawyer, on the bench and on the State Bar board, there is one excellent life lesson I can say I have learned well: Don't try to reinvent the wheel - and certainly don't spend State Bar dues doing it - when you have such good friends in Santa Clara County, and elsewhere, who already have done most of the work.

This code hits all the important points: responsibilities to the public and to the client; scheduling; continuances and extensions of time; service of papers; punctuality; writings submitted to the court; communications with adversaries; discovery; motion practice; dealing with nonparty witnesses; ex parte communications with the court; settlement and ADR; trials and hearings; default; social relationships; privacy; and communication about the legal system and with participants. I commend you to read the full document: www.scbba.com. I've also been sent another excellent one, this one done by the legislative section of the State Bar, and can be found at www.calbar.ca.gov/litigation.

No doubt other excellent, all-inclusive codes also exist. I intend that we take Santa Clara's, the State Bar litigation section's and any others, form a task force and tweak the existing documents into a statewide code to be approved by the new board of governors. We can do this in the first few months of the new board year that starts at our annual meeting in early October if the board of governors approves my idea.

Then our real work begins. It is our job as stewards of the State Bar to figure out how to get the lawyers of California to sign on to a pledge to our new statewide code of professionalism and institute these ideals into action. This will be the real test. If we fail to get the word out, or fail to motivate our membership to sign on, our work will go for naught and our avenue to public understanding and respect will narrow even more.

It would be a great shame if our effort to gain more public respect falters just as the State Bar's other excellent ongoing project, Pipeline to Diversity, is beginning to come to fruition.

Sheldon Sloan is president-elect of the State Bar of California. A former municipal court judge, he is of-counsel for Lewis, Brisbois, Bisgaard & Smith in Los Angeles.

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- 
- February 2007
 - [Informal Feedback and Public Hearings on Proposed California Attorney Civility Standards](#)

- May 2007
 - [Proposal for California Attorney Guidelines of Civility and Professionalism: Request authorization for 30-day public comment period](#)

- July 2007
 - [Proposal for “California Attorney Guidelines of Civility and Professionalism” – Return From 30-day Public Comment and Recommendation For Adoption](#)

- 
- July 20, 2007
 - [State Bar Approves Civility Guidelines](#)

CIVILITY GUIDELINES OVERVIEW

March 20, 2009

SUMMARY

At the request of Shelly Sloan, then President-Elect of the Board of Governors of the State Bar, the Board appointed the Attorney Civility Task Force in August 2006 to study and recommend aspirational civility guidelines for adoption by the Board. After extensively vetting draft guidelines throughout the state, in May 2007 the task force reported to the Board Committee on Member Oversight (MOC) with a request for public comment on a proposed new set of voluntary guidelines called the “California Attorney Guidelines of Civility and Professionalism”. MOC authorized publication of the proposal for a 30-day public comment period.

After reviewing the public comments, the task force further revised the Guidelines. In July 2007, the Board adopted the Guidelines as best practices of civility in the practice of law in California.

Since the Board’s adoption of the Guidelines in 2007, ongoing interest throughout the state has resulted in adoption and implementation of the Guidelines at local levels.

BACKGROUND

In 1995, the Commission on the Future of the Legal Profession and the State Bar of California (“Futures Commission”) issued its report, “The Future of the California Bar”. Among other things, this report made recommendations to promote professionalism¹. Recommendation 58 stated that the California legal profession should consider adoption of an aspirational, statewide code of professionalism containing a broad list of aspirational goals and precatory duties, which would define the desired goals and aims of the legal profession and the desired qualities of proper professional practice. The report noted there is some concern that an aspirational code would create confusion regarding its binding effect or precedential value and result in “grey letter” rules of conduct. However, the Commission believed that a code of professionalism would send an important message to the membership with a long-range salutary effect. The Futures Commission viewed attorney civility as a central tenet of professionalism and that the absence of civility undermines the proper administration of justice. The commission believed that civility is especially important given our adversarial system of justice.²

In 1997, the State Bar and the American Bar Association co-sponsored a “Conference on Professionalism for the 21st Century.” Unfortunately, veto of the State Bar’s dues bill in the Fall of 1997 caused an interruption in the Bar’s work on professionalism.

THE ATTORNEY CIVILITY TASK FORCE

In mid-2006, Sheldon Sloan was elected the next President of the Board of Governors. President-Elect Sloan voiced concern about a perceived decline in civility in the practice of law.

¹ The Futures Commission viewed professionalism as encompassing ethical practice, competence, civility, service to the public, and self-regulation. (Futures Commission final report, pp. 101-102.)

² Futures Commission final report, pp. 106, 108.

At his urging, the Board appointed an Attorney Civility Task Force³ and charged it with considering whether it is more appropriate to recommend one set of voluntary, aspirational civility goals or to recommend an alternative, such as a sample selection of existing civility goals.

The task force quickly reached consensus to recommend one set of civility guidelines that could be applicable anywhere in the state on a voluntary basis. The task force believed it appropriate to recommend two versions as a package-- the entire text of guidelines with detailed examples and a shortened 2-page version without the examples. The task force synthesized provisions from other codes and added text for additional subjects in order to make the scope of the draft guidelines broad enough for statewide application, regardless of location or area of practice.

The task force strongly believed the guidelines should reflect a wide range of views. In February and March of 2007, the draft guidelines were circulated for informal vetting and feedback, which included two public hearings, vetting at bar association MCLE programs and law school classes, and feedback from approximately thirty individuals and bar organizations. The task force incorporated suggestions from the feedback into every section of the guidelines.

“CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM”

In May 2007, MOC authorized a 30-day public comment period for the proposed “California Attorney Guidelines of Civility and Professionalism”. The Guidelines were published in the California Bar Journal, online, by e-blast to voluntary bar associations in California, and were sent to 200 individuals and organizations that had requested the earlier draft in February and March.

Introduction

The Introduction to the Guidelines sets their context and states the intention that the Guidelines foster a level of civility and professionalism as the standard of civility in the practice of law in California. The Introduction states that the Guidelines are not mandatory rules of professional conduct, nor rules of practice or standards of care, and that the Guidelines are not to be used as the independent basis for disciplinary charges or claims of professional negligence. This kind of statement is considered important for the Guidelines. Because these are Guidelines of a mandatory integrated state bar, it is important to distinguish between the mandatory Rules of Professional Conduct, which must be approved by the California Supreme Court for disciplinary purposes, and voluntary civility guidelines adopted by the Board of Governors without additional approval by the Supreme Court for disciplinary purposes.⁴

Twenty-one Sections of the Guidelines

³ Task force members were: Marguerite Downing (chair); Mary Alexander; Terry Bridges; Michael W. Case; Richard L. Crabtree; Dean Dennis; Hon. Richard L. Fruin., Jr.; Forentino R. Garza; Hon. Everett A. Hewlett, Jr.; Diane L. Karpman; Hon. Loren E. McMaster; Donald F. Miles (individually, not as a State Bar Court judge); Richard Rubin; Francis S. Ryu; Sherry M. Saffer; Cynthia Sands; Thomas G. Stolpman; Hon. Brian C. Walsh; Lei-Chala I. Wilson; and Alan S. Yochelson.

⁴ For this reason, “guidelines” was selected over “code”, “standards”, “rules”, or other words having a mandatory connotation.

Twenty-one sections address civility issues in client relations and responsibilities to the profession, public and administration of justice, in addition to civility issues and responsibilities in attorney-attorney relationships.

- * Section 1 [Responsibilities to the Justice System]
- * Section 2 [Responsibilities to the Public and the Profession]
- * Section 3 [Responsibilities to the Client and Client Representation]
- * Section 4 [Communications]
- * Section 5 [Punctuality]
- * Section 6 [Scheduling, Continuances and Extensions of Time]
- * Section 7 [Service of Papers]
- * Section 8 [Writings submitted to the Court, Counsel or Other Parties]
- * Section 9 [Discovery]
- * Section 10 [Motion Practice]
- * Section 11 [Dealing with Nonparty Witnesses]
- * Section 12 [Ex Parte Communication with the Court]
- * Section 13 [Settlement and Alternative Dispute Resolution]
- * Section 14 [Conduct in Court]
- * Section 15 [Default]
- * Section 16 [Social Relationships with Judicial Officers, Neutrals and Court Appointed Experts]
- * Section 17 [Privacy]
- * Section 18 [Negotiation of Written Agreements].
- * Section 19 [Additional provision for Family Law Practitioners]
- * Section 20 [Additional provision for Criminal Law Practitioners].
- * Section 21 [Court Proceedings]

Many of the sections are for civil litigation practice. In addition, since the Guidelines are intended for all California attorneys, some sections cover other subjects or areas of law. To avoid unwieldiness, there was a limit on the number of other areas of law that could be covered. To the extent that guidelines could apply to other areas of practice, the spirit of the Guidelines would permit extending the guidelines as appropriate.

Attorney Pledge

An optional pledge appears at the end of the Guidelines for attorneys who wish to take the pledge.

Adoption by the Board of Governors

In July 2007, after the task force made further revisions to incorporate suggestions made in public comment, the Board of Governors adopted the “California Attorney Guidelines of Civility and Professionalism” as a model set of guidelines for members, voluntary bar associations and courts to use and implement in a way that is effective for the local legal community.

IMPLEMENTATION OF THE GUIDELINES

Since their adoption by the Board, there has been on-going interest in the educational value of the Guidelines as a model of best practices of civility in the practice of law in California. That interest has been expressed in a variety of activities, including the following:

- March 18, 2008, the Board of Directors of the Riverside County Bar Association approved and adopted the Guidelines.

- March 26, 2008, the Board of Directors of the Leo A. Deegan Inn of Court adopted a resolution approving and adopting the Guidelines.
- April 24, 2008, the San Diego County Bar Association introduced an updated Attorney Code of Conduct. The Attorney Code of Conduct was a cornerstone of the bar association's 2008 Campaign on Civility, Integrity and Professionalism.
- September 2008, a program on the Guidelines was given at the State Bar's annual meeting in Monterey, California. A similar program had been given at the annual meeting in 2007.
- June 11, 2008, the Joseph B. Campbell Inn of Court adopted the Guidelines.
- July 1, 2008, the Sacramento Superior Court recognized the existence of the Guidelines, effective this date. (Local rule 9.22)
- January 2009, the Schwartz/Levi American Inn of Court presented a program in civility in the practice of law.
- March 18, 2009, a program on the judge's role in ensuring civility and professionalism civility opened the 2009 Civil Law Institute sponsored by the California Center for Judicial Education and Research.

California Attorney Guidelines of Civility and Professionalism

FAQs (July 2009)

1. What are the California Attorney Guidelines of Civility and Professionalism?

The Guidelines are voluntary goals of best practices of civility in the practice of law in California.

2. Why are California Attorney Guidelines of Civility and Professionalism necessary?

Uncivil or unprofessional conduct not only disserves the individuals involved, it demeans the profession as a whole and our system of justice. The Guidelines promote both the effectiveness and the enjoyment of the practice of law and economical client representation by providing best practices of civility in the practice of law.

3. How were the Guidelines developed?

In 2007, the Board of Governors appointed a task force of attorneys and judges from every State Bar district. The task force recommended the California Attorney Guidelines of Civility and Professionalism to the Board after studying civility codes of other organizations, adapting provisions from those codes and creating new provisions for practice in California, and incorporating feedback from members, judicial officers, the public, organizations and others in two periods of public comment and two public hearings.

4. Why are there two sets of Guidelines?

The two versions are complementary. The version with examples gives detail to illustrate problem areas and best practices for the subject of the Section. The two-page version is a concise summary that can be conveniently carried by the attorney when out of the office.

5. Do the Guidelines create standards of conduct or standards of care?

No. The Introduction says they do not create standards of conduct or standards of care, and they do not supplant any rules or laws that govern attorney conduct. The Guidelines are not an independent basis for imposition of discipline or a finding of malpractice.

6. How are the Guidelines different from the Rules of Professional Conduct or laws on the practice of law in California?

Unlike the California Rules of Professional Conduct, the Supreme Court of California has not approved the Guidelines or mandated that California attorneys follow the Guidelines. Similarly, the Guidelines do not have the force of legislative enactments.

7. Are the Guidelines mandatory?

The Guidelines are cast in terms of “should”, not “must”. The State Bar follows the usage conventions of the California Supreme Court, which is that “should” expresses a preference, a nonbinding recommendation or non-mandatory conduct.

8. If they are not mandatory, why should an attorney abide by the Guidelines?

Civility in the practice of law promotes effectiveness and enjoyment of the practice of law. They also promote economical client representation. Conversely, uncivil conduct not only disserves clients, it demeans the profession and the American system of justice.

9. Are these Guidelines for statewide, local, law firm or individual use?

The Guidelines may be adopted for use by any or all of these. Courts, too, may adopt or endorse the Guidelines as best practices to be followed.

10. If the guidelines are adopted by our local bar association or law firms, what should be done to implement them?

Entities implement the Guidelines in a variety of ways to keep them viable, alive, and relevant. The Guidelines can be implemented by a number actions, including the following: through MCLE programs; by publicizing in bar association directories those attorneys who have taken the pledge; through local courts endorsement of the Guidelines; publicly posting the Guidelines and signed pledge; writing news articles on the subject of civility and professionalism; and through a mentor system for best practices of civility in the profession.

11. My organization already has a code of professionalism. How do the Guidelines relate to my organization’s code of professionalism?

The Guidelines are intended to be complementary with codes of professionalism adopted by bar associations in California.

12. Do the Guidelines denigrate an attorney’s duty of zealous representation?

No. Attorneys are officers of the court with responsibilities to the administration of justice, the courts, the public, and other counsel, in addition to attorneys’ duties to their clients. Civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation are all essential to the fair administration of justice and conflict resolution.

13. Why do some Guidelines seem redundant to local rules of court or some rules of professional conduct?

The Guidelines address problems in conduct that have been observed as arising from a local rule of court or other prescribed rule. The examples given in the Guidelines illustrate what do to, or not do, to address a particular situation.

14. There is no statement that the Guidelines are enforceable through sanctions. Is this intentional?

Yes. Sanctions can be expected to lead to a less collegial relationship among counsel, and tend to undermine the civility effort. Sanctions also tend to increase the costs and expenses of the case.

15. Section 16 seems to diverge from existing law. What is the reason for this?

When an attorney has any close, personal relationships with judicial officers, neutrals and court appointed experts, the law places a burden of disclosure on the judicial officer. The Guidelines go beyond that burden, so that as a matter of courtesy and to avoid a waste of court resources, an attorney should notify an opposing counsel of party if the attorney has a close, personal relationship with one of these categories of people.

16. There is nothing in the Guidelines for my area of law. Do they apply to me?

Yes, they could. The Guidelines are potentially applicable to all California attorneys. To avoid becoming unwieldy, the Guidelines do not cover all areas of law. However, to the extent that the guidelines could apply to areas of practice that are not mentioned, the spirit of the Guidelines would permit extending them as appropriate.

California Attorney Guidelines of Civility and Professionalism



**The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639**

**Adopted by the Board of Governors on
July 20, 2007**

TABLE OF CONTENTS

ENTIRE GUIDELINES WITH EXAMPLES

Introduction.....	3
Responsibilities to the Justice System.....	4
Responsibilities to the Public and the Profession.....	4
Responsibilities to the Client and Client Representation.....	4
Communications.....	4
Punctuality.....	5
Scheduling, Continuances and Extensions of Time.....	5
Service of Papers.....	6
Writings Submitted to the Court, Counsel or Other Parties.....	7
Discovery.....	7
Motion Practice.....	9
Dealing with Nonparty Witnesses.....	10
Ex Parte Communication with the Court	10
Settlement and Alternative Dispute Resolution.....	10
Conduct in Court.....	11
Default.....	12
Social Relationships with Judicial Officers, Neutrals and Court Appointed Experts.....	12
Privacy.....	12
Negotiation of Written Agreements.....	13
Additional Provision for Family Law Practitioners.....	13
Additional Provision for Criminal Law Practitioners.....	14
Court Proceedings.....	14
Attorney’s Pledge.....	15

ABBREVIATED GUIDELINES WITHOUT EXAMPLES..... 16

**CALIFORNIA ATTORNEY
GUIDELINES OF CIVILITY AND PROFESSIONALISM**
(Adopted July 20, 2007)

INTRODUCTION

As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.

These are guidelines for civility. The Guidelines are offered because civility in the practice of law promotes both the effectiveness and the enjoyment of the practice and economical client representation. The legal profession must strive for the highest standards of attorney behavior to elevate and enhance our service to justice. Uncivil or unprofessional conduct not only disserves the individual involved, it demeans the profession as a whole and our system of justice.

These voluntary Guidelines foster a level of civility and professionalism that exceed the minimum requirements of the mandated Rules of Professional Conduct as the best practices of civility in the practice of law in California. The Guidelines are not intended to supplant these or any other rules or laws that govern attorney conduct. Since the Guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence.

The Guidelines are intended to complement codes of professionalism adopted by bar associations in California. Individual attorneys are encouraged to make these guidelines their personal standards by taking the pledge that appears at the end. The Guidelines can be applicable to all lawyers regardless of practice area. Attorneys are encouraged to comply with both the spirit and letter of these guidelines, recognizing that complying with these guidelines does not in any way denigrate the attorney's duty of zealous representation.

SECTION 1
RESPONSIBILITIES TO THE JUSTICE SYSTEM

The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice.

SECTION 2
RESPONSIBILITIES TO THE PUBLIC AND THE PROFESSION

An attorney should be mindful that, as individual circumstances permit, the goals of the profession include improving the administration of justice and contributing time to persons and organizations that cannot afford legal assistance.

An attorney should encourage new members of the bar to adopt these guidelines of civility and professionalism and mentor them in applying the guidelines.

SECTION 3
RESPONSIBILITIES TO THE CLIENT AND CLIENT REPRESENTATION

An attorney should treat clients with courtesy and respect, and represent them in a civil and professional manner. An attorney should advise current and potential clients that it is not acceptable for an attorney to engage in abusive behavior or other conduct unbecoming a member of the bar and an officer of the court.

As an officer of the court, an attorney should not allow clients to prevail upon the attorney to engage in uncivil behavior.

An attorney should not compromise the guidelines of civility and professionalism to achieve an advantage.

SECTION 4
COMMUNICATIONS

An attorney's communications about the legal system should at all times reflect civility, professional integrity, personal dignity, and respect for the legal system. An attorney should not engage in conduct that is unbecoming a member of the Bar and an officer of the court.

For example, in communications about the legal system and with adversaries:

- a. An attorney's conduct should be consistent with high respect and esteem for the civil and criminal justice systems.
- b. This guideline does not prohibit an attorney's good faith expression of dissent or criticism made in public or private discussions for the purpose of improving the legal system or profession.

- c. An attorney should not disparage the intelligence, integrity, ethics, morals or behavior of the court or other counsel, parties or participants when those characteristics are not at issue.
- d. Respecting cultural diversity, an attorney should not disparage another's personal characteristics.
- e. An attorney should not make exaggerated, false, or misleading statements to the media while representing a party in a pending matter.
- f. An attorney should avoid hostile, demeaning or humiliating words.
- g. An attorney should not create a false or misleading record of events or attribute to an opposing counsel a position not taken.
- h. An attorney should agree to reasonable requests in the interests of efficiency and economy, including agreeing to a waiver of procedural formalities where appropriate.
- i. Unless specifically permitted or invited by the court or authorized by law, an attorney should not correspond directly with the court regarding a case.

Nothing above shall be construed as discouraging the reporting of conduct that fails to comply with the Rules of Professional Conduct.

SECTION 5 PUNCTUALITY

An attorney should be punctual in appearing at trials, hearings, meetings, depositions and other scheduled appearances.

For example:

- a. An attorney should arrive sufficiently in advance to resolve preliminary matters.
- b. An attorney should timely notify participants when the attorney will be late or is aware that a participant will be late.

SECTION 6 SCHEDULING, CONTINUANCES AND EXTENSIONS OF TIME

An attorney should advise clients that civility and courtesy in scheduling meetings, hearings and discovery are expected as professional conduct.

For example:

- a. An attorney should consider the scheduling interests of the court, other counsel or party, and other participants, should schedule by agreement whenever possible, and should send formal notice after agreement is reached.

- b. An attorney should not arbitrarily or unreasonably withhold consent to a request for scheduling accommodations or engage in delay tactics.
- c. An attorney should promptly notify the court and other counsel of problems with key participants' availability.
- d. An attorney should promptly notify other counsel and, if appropriate, the court, when scheduled meetings, hearings or depositions must be cancelled or rescheduled, and provide alternate dates when possible.

In considering requests for an extension of time, an attorney should consider the client's interests and need to promptly resolve matters, the schedules and willingness of others to grant reciprocal extensions, the time needed for a task, and other relevant factors.

Consistent with existing law and court orders, an attorney should agree to reasonable requests for extensions of time that are not adverse to a client's interests.

For example:

- a. Unless time is of the essence, an attorney should agree to an extension without requiring motions or other formalities, regardless of whether the requesting counsel previously refused to grant an extension.
- b. An attorney should agree to an appropriate continuance when new counsel substitutes in.
- c. An attorney should advise clients that failing to agree with reasonable requests for time extensions is inappropriate.
- d. An attorney should not use extensions or continuances for harassment or to extend litigation.
- e. An attorney should place conditions on an agreement to an extension only if they are fair and essential or if the attorney is entitled to impose them, for instance to preserve rights or seek reciprocal scheduling concessions.
- f. If an attorney intends that a request for or agreement to an extension shall cut off a party's substantive rights or procedural options, the attorney should disclose that intent at the time of the request or agreement.

SECTION 7 SERVICE OF PAPERS

The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

For example:

- a. An attorney should serve papers on the attorney who is responsible for the matter at his or her principal place of work.
- b. If possible, papers should be served upon counsel at a time agreed upon in advance.
- c. When serving papers, an attorney should allow sufficient time for opposing counsel to prepare for a court appearance or to respond to the papers.
- d. An attorney should not serve papers to take advantage of an opponent's absence or to inconvenience the opponent, for instance by serving papers late on Friday afternoon or the day preceding a holiday.
- e. When it is likely that service by mail will prejudice an opposing party, an attorney should serve the papers by other permissible means.

SECTION 8
WRITINGS SUBMITTED TO THE COURT, COUNSEL OR OTHER PARTIES

Written materials directed to counsel, third parties or a court should be factual and concise and focused on the issue to be decided.

For example:

- a. An attorney should not make ad hominem attacks on opposing counsel.
- b. Unless at issue or relevant in a particular proceeding, an attorney should avoid degrading the intelligence, ethics, morals, integrity, or personal behavior of others.
- c. An attorney should clearly identify all revisions in a document previously submitted to the court or other counsel.

SECTION 9
DISCOVERY

Attorneys are encouraged to meet and confer early in order to explore voluntary disclosure, which includes identification of issues, identification of persons with knowledge of such issues, and exchange of documents.

Attorneys are encouraged to propound and respond to formal discovery in a manner designed to fully implement the purposes of the Civil Discovery Act.

An attorney should not use discovery to harass an opposing counsel, parties, or witnesses. An attorney should not use discovery to delay the resolution of a dispute.

For example:

- a. As to Depositions:

1. When another party notices a deposition for the near future, absent unusual circumstances, an attorney should not schedule another deposition in the same case for an earlier date without opposing counsel's agreement.
 2. An attorney should delay a scheduled deposition only when necessary to address scheduling problems and not in bad faith.
 3. An attorney should treat other counsel and participants with courtesy and civility, and should not engage in conduct that would be inappropriate in the presence of a judicial officer.
 4. An attorney should remember that vigorous advocacy can be consistent with professional courtesy, and that arguments or conflicts with other counsel should not be personal.
 5. An attorney questioning a deponent should provide other counsel present with a copy of any documents shown to the deponent before or contemporaneously with showing the document to the deponent.
 6. Once a question is asked, an attorney should not interrupt a deposition or make an objection for the purpose of coaching a deponent or suggesting answers.
 7. An attorney should not direct a deponent to refuse to answer a question or end the deposition without a legal basis for doing so.
 8. An attorney should refrain from self-serving speeches and speaking objections.
- b. As to Document Demands:
1. Document requests should be used only to seek those documents that are reasonably needed to prosecute or defend an action.
 2. An attorney should not make demands to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.
 3. If an attorney inadvertently receives a privileged document, the attorney should promptly notify the producing party that the document has been received.
 4. In responding to a document demand, an attorney should not intentionally misconstrue a request in such a way as to avoid disclosure or withhold a document on the grounds of privilege.
 5. An attorney should not produce disorganized or unintelligible documents, or produce documents in a way that hides or obscures the existence of particular documents.
 6. An attorney should not delay in producing a document in order to prevent opposing counsel from inspecting the document prior to or during a scheduled deposition or for some other tactical reason.

- c. As to Interrogatories:
 - 1. An attorney should narrowly tailor special interrogatories and not use them to harass or impose an undue burden or expense on an opposing party.
 - 2. An attorney should not intentionally misconstrue or respond to interrogatories in a manner that is not truly responsive.
 - 3. When an attorney lacks a good faith belief in the merit of an objection, the attorney should not object to an interrogatory. If an interrogatory is objectionable in part, an attorney should answer the unobjectionable part.

**SECTION 10
MOTION PRACTICE**

An attorney should consider whether, before filing or pursuing a motion, to contact opposing counsel to attempt to informally resolve or limit the dispute.

For example:

- a. Before filing demurrers, motions to strike, motions to transfer venue, and motions for judgment on the pleadings, an attorney should engage in more than a pro forma effort to resolve the issue.
- b. In complying with any meet and confer requirement in the California Code of Civil Procedure, an attorney should speak personally with opposing counsel and engage in a good faith effort to resolve or informally limit an issue.
- c. An attorney should not engage in conduct that forces an opposing counsel to file a motion and then not oppose the motion.
- d. An attorney who has no reasonable objection to a proposed motion should promptly make this position known to opposing counsel, who then may file an unopposed motion or avoid filing a motion.
- e. After opposing a motion, if an attorney recognizes that the movant's position is correct, the attorney should promptly advise the movant and the court of this change in position.
- f. Because requests for monetary sanctions, even if statutorily authorized, can lead to the destruction of a productive relationship between counsel or parties, monetary sanctions should not be sought unless fully justified by the circumstances and necessary to protect a client's legitimate interests and then only after a good faith effort to resolve the issue informally among counsel.

**SECTION 11
DEALING WITH NONPARTY WITNESSES**

It is important to promote high regard for the profession and the legal system among those who are neither attorneys nor litigants. An attorney's conduct in dealings with nonparty witnesses should exhibit the highest standards of civility.

For example:

- a. An attorney should be courteous and respectful in communications with nonparty witnesses.
- b. Upon request, an attorney should extend professional courtesies and grant reasonable accommodations, unless to do so would materially prejudice the client's lawful objectives.
- c. An attorney should take special care to protect a witness from undue harassment or embarrassment and to state questions in a form that is appropriate to the witness's age and development.
- d. An attorney should not issue a subpoena to a nonparty witness for inappropriate tactical or strategic purposes, such as to intimidate or harass the nonparty.
- e. As soon as an attorney knows that a previously scheduled deposition will or will not, in fact, go forward as scheduled, the attorney should notify all counsel.
- f. An attorney who obtains a document pursuant to a deposition subpoena should, upon request, make copies of the document available to all other counsel at their expense.

**SECTION 12
EX PARTE COMMUNICATION WITH THE COURT**

In a social setting or otherwise, an attorney should not communicate ex parte with a judicial officer on the substance of a case pending before the court, unless permitted by law.

**SECTION 13
SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION**

An attorney should raise and explore with the client and, if the client consents, with opposing counsel, the possibility of settlement and alternative dispute resolution in every matter as soon as possible and, when appropriate, during the course of litigation.

For example:

- a. An attorney should advise a client at the outset of the relationship of the availability of informal or alternative dispute resolution.
- b. An attorney should attempt to evaluate a matter objectively and to de-escalate any controversy or dispute in an effort to resolve or limit the controversy or dispute.

- c. An attorney should consider whether alternative dispute resolution would adequately serve a client's interest and dispose of the controversy expeditiously and economically.
- d. An attorney should honor a client's desire to settle the dispute quickly and in a cost-effective manner.
- e. An attorney should use an alternative dispute resolution process for purposes of settlement and not for delay or other improper purposes, such as discovery.
- f. An attorney should participate in good faith, and assist the alternative dispute officer by providing pertinent and accurate facts, law, theories, opinions and arguments in an attempt to resolve a dispute.
- g. An attorney should not falsely hold out the possibility of settlement as a means for terminating discovery or delaying trial.

SECTION 14 CONDUCT IN COURT

To promote a positive image of the profession, an attorney should always act respectfully and with dignity in court and assist the court in proper handling of a case.

For example:

- a. An attorney should be punctual and prepared.
- b. An attorney's conduct should avoid disorder or disruption and preserve the right to a fair trial.
- c. An attorney should maintain respect for and confidence in a judicial office by displaying courtesy, dignity and respect toward the court and courtroom personnel.
- d. An attorney should refrain from conduct that inappropriately demeans another person.
- e. Before appearing in court, an attorney should advise a client of the kind of behavior expected of the client and endeavor to prevent the client from creating disorder or disruption in the courtroom.
- f. An attorney should make objections for legitimate and good faith reasons, and not for the purpose of harassment or delay.
- g. An attorney should honor an opposing counsel's requests that do not materially prejudice the rights of the attorney's client or sacrifice tactical advantage.
- h. While appearing before the court, an attorney should address all arguments, objections and requests to the court, rather than directly to opposing counsel.

- i. While appearing in court, an attorney should demonstrate sensitivity to any party, witness or attorney who has requested, or may need, accommodation as a person with physical or mental impairment, so as to foster full and fair access of all persons to the court.

SECTION 15 DEFAULT

An attorney should not take the default of an opposing party known to be represented by counsel without giving the party advance warning.

For example an attorney should not race opposing counsel to the courthouse to knowingly enter a default before a responsive pleading can be filed. This guideline is intended to apply only to taking a default when there is a failure to timely respond to complaints, cross-complaints, and amended pleadings.

SECTION 16 SOCIAL RELATIONSHIPS WITH JUDICIAL OFFICERS, NEUTRALS AND COURT APPOINTED EXPERTS

An attorney should avoid even the appearance of bias by notifying opposing counsel or an unrepresented opposing party of any close, personal relationships between the attorney and a judicial officer, arbitrator, mediator or court-appointed expert and allowing a reasonable opportunity to object.

SECTION 17 PRIVACY

An attorney should respect the privacy rights of parties and nonparties.

For example:

- a. An attorney should not inquire into, attempt or threaten to use, private facts concerning any party or other individuals for the purpose of gaining an advantage in a case. This guideline does not preclude inquiry into sensitive matters relevant to an issue, as long as the inquiry is pursued as narrowly as possible.
- b. If an attorney must inquire into an individual's private affairs, the attorney should cooperate in arranging for protective measures, including stipulating to an appropriate protective order, designed to assure that the information revealed is disclosed only for purposes relevant to the pending litigation.
- c. Nothing herein shall be construed as authorizing the withholding of information in violation of applicable law.

SECTION 18 NEGOTIATION OF WRITTEN AGREEMENTS

An attorney should negotiate and conclude written agreements in a cooperative manner and with informed authority of the client.

For example:

- a. An attorney should use boilerplate provisions only if they apply to the subject of the agreement.
- b. If an attorney modifies a document, the attorney should clearly identify the change and bring it to the attention of other counsel.
- c. An attorney should avoid negotiating tactics that are abusive; that are not made in good faith; that threaten inappropriate legal action; that are not true; that set arbitrary deadlines; that are intended solely to gain an unfair advantage or take unfair advantage of a superior bargaining position; or that do not accurately reflect the client's wishes or previous oral agreements.
- d. An attorney should not participate in an action or the preparation of a document that is intended to circumvent or violate applicable laws or rules.

In addition to other applicable Sections of these Guidelines, attorneys engaged in a transactional practice have unique responsibilities because much of the practice is conducted without judicial supervision.

For example:

- a. Attorneys should be mindful that their primary goals are to negotiate in a manner that accurately represents their client and the purpose for which they were retained.
- b. Attorneys should successfully and timely conclude a transaction in a manner that accurately represents the parties' intentions and has the least likely potential for litigation.
- c. With client approval, attorneys should consider giving each party permission to contact the employees of the other party for the purpose of promptly and efficiently obtaining necessary information and documents.

SECTION 19 ADDITIONAL PROVISION FOR FAMILY LAW PRACTITIONERS

In addition to other applicable Sections of these Guidelines, in family law proceedings an attorney should seek to reduce emotional tension and trauma and encourage the parties and attorneys to interact in a cooperative atmosphere, and keep the best interest of the children in mind.

For example:

- a. An attorney should discourage and should not abet vindictive conduct.
- b. An attorney should treat all participants with courtesy and respect in order to minimize the emotional intensity of a family dispute.
- c. An attorney representing a parent should consider the welfare of a minor child and seek to minimize the adverse impact of the family law proceeding on the child.

**SECTION 20
ADDITIONAL PROVISION FOR CRIMINAL LAW PRACTITIONERS**

In addition to other applicable Sections of these Guidelines, criminal law practitioners have unique responsibilities. Prosecutors are charged with seeking justice, while defenders must zealously represent their clients even in the face of seemingly overwhelming evidence of guilt. In practicing criminal law, an attorney should appreciate these roles.

For example:

- a. A prosecutor should not question the propriety of defending a person accused of a crime.
- b. Appellate counsel and trial counsel should communicate openly, civilly and without rancor, endeavoring to keep the proceedings on a professional level.

**SECTION 21
COURT PROCEEDINGS**

Judges are encouraged to become familiar with these Guidelines and to support and promote them where appropriate in court proceedings.

California Attorney Guidelines of Civility and Professionalism

(Abbreviated Without Examples)



The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Adopted by the Board of Governors on
July 20, 2007

California Attorney Guidelines of Civility and Professionalism (Abbreviated, adopted July 20, 2007)

INTRODUCTION. As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.

These are guidelines for civility. The Guidelines are offered because civility in the practice of law promotes both the effectiveness and the enjoyment of the practice and economical client representation. The legal profession must strive for the highest standards of attorney behavior to elevate and enhance our service to justice. Uncivil or unprofessional conduct not only disserves the individual involved, it demeans the profession as a whole and our system of justice.

These voluntary Guidelines foster a level of civility and professionalism that exceed the minimum requirements of the mandated Rules of Professional Conduct as the best practices of civility in the practice of law in California. The Guidelines are not intended to supplant these or any other rules or laws that govern attorney conduct. Since the Guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence.

The Guidelines are intended to complement codes of professionalism adopted by bar associations in California. Individual attorneys are encouraged to make these guidelines their personal standards by taking the pledge that appears at the end. The Guidelines can be applicable to all lawyers regardless of practice area. Attorneys are encouraged to comply with both the spirit and letter of these guidelines, recognizing that complying with these guidelines does not in any way denigrate the attorney's duty of zealous representation.

SECTION 1. The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice.

SECTION 2. An attorney should be mindful that, as individual circumstances permit, the goals of the profession include improving the administration of justice and contributing time to persons and organizations that cannot afford legal assistance.

An attorney should encourage new members of the bar to adopt these guidelines of civility and professionalism and mentor them in applying the guidelines.

SECTION 3. An attorney should treat clients with courtesy and respect, and represent them in a civil and professional manner. An attorney should advise current and potential clients that it is not acceptable for an attorney to engage in abusive behavior or other conduct unbecoming a member of the bar and an officer of the court.

As an officer of the court, an attorney should not allow clients to prevail upon the attorney to engage in uncivil behavior.

An attorney should not compromise the guidelines of civility and professionalism to achieve an advantage.

SECTION 4. An attorney's communications about the legal system should at all times reflect civility, professional integrity, personal dignity, and respect for the legal system. An attorney should not engage in conduct that is unbecoming a member of the Bar and an officer of the court.

Nothing above shall be construed as discouraging the reporting of conduct that fails to comply with the Rules of Professional Conduct.

SECTION 5. An attorney should be punctual in appearing at trials, hearings, meetings, depositions and other scheduled appearances.

SECTION 6. An attorney should advise clients that civility and courtesy in scheduling meetings, hearings and discovery are expected as professional conduct.

In considering requests for an extension of time, an attorney should consider the client's interests and need to promptly resolve matters, the schedules and willingness of others to grant reciprocal extensions, the time needed for a task, and other relevant factors.

Consistent with existing law and court orders, an attorney should agree to reasonable requests for extensions of time that are not adverse to a client's interests.

SECTION 7. The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

SECTION 8. Written materials directed to counsel, third parties or a court should be factual and concise and focused on the issue to be decided.

SECTION 9. Attorneys are encouraged to meet and confer early in order to explore voluntary disclosure, which includes identification of issues, identification of persons with knowledge of such issues, and exchange of documents.

Attorneys are encouraged to propound and respond to formal discovery in a manner designed to fully implement the purposes of the California Discovery Act.

An attorney should not use discovery to harass an opposing counsel, parties or witnesses. An attorney should not use discovery to delay the resolution of a dispute.

SECTION 10. An attorney should consider whether, before filing or pursuing a motion, to contact opposing counsel to attempt to informally resolve or limit the dispute.

SECTION 11. It is important to promote high regard for the profession and the legal system among those who are neither attorneys nor litigants. An attorney's conduct in dealings with nonparty witnesses should exhibit the highest standards of civility.

SECTION 12. In a social setting or otherwise, an attorney should not communicate ex parte with a judicial officer on the substance of a case pending before the court, unless permitted by law.

SECTION 13. An attorney should raise and explore with the client and, if the client consents, with opposing counsel, the possibility of settlement and alternative dispute resolution in every case as soon possible and, when appropriate, during the course of litigation.

SECTION 14. To promote a positive image of the profession, an attorney should always act respectfully and with dignity in court and assist the court in proper handling of a case.

SECTION 15. An attorney should not take the default of an opposing party known to be represented by counsel without giving the party advance warning.

SECTION 16. An attorney should avoid even the appearance of bias by notifying opposing counsel or an unrepresented opposing party of any close, personal relationships between the attorney and a judicial officer, arbitrator, mediator or court-appointed expert and allowing a reasonable opportunity to object.

SECTION 17. An attorney should respect the privacy rights of parties and non-parties.

SECTION 18. An attorney should negotiate and conclude written agreements in a cooperative manner and with informed authority of the client.

In addition to other applicable Sections of these Guidelines, attorneys engaged in a transactional practice have unique responsibilities because much of the practice is conducted without judicial supervision.

SECTION 19. In addition to other applicable Sections of these Guidelines, in family law proceedings an attorney should seek to reduce emotional tension and trauma and encourage the parties and attorneys to interact in a cooperative atmosphere, and keep the best interests of the children in mind.

SECTION 20. In addition to other applicable Sections of these Guidelines, criminal law practitioners have unique responsibilities. Prosecutors are charged with seeking justice, while defenders must zealously represent their clients even in the face of seemingly overwhelming evidence of guilt. In practicing criminal law, an attorney should appreciate these roles.

SECTION 21. Judges are encouraged to become familiar with these Guidelines and to support and promote them where appropriate in court proceedings.

ATTORNEY'S PLEDGE. I commit to these Guidelines of Civility and Professionalism and will be guided by a sense of integrity, cooperation and fair play.

I will abstain from rude, disruptive, disrespectful, and abusive behavior, and will act with dignity, decency, courtesy, and candor with opposing counsel, the courts and the public.

As part of my responsibility for the fair administration of justice, I will inform my clients of this commitment and, in an effort to help promote the responsible practice of law, I will encourage other attorneys to observe these Guidelines.

ATTORNEY'S PLEDGE

I commit to these Guidelines of Civility and Professionalism and will be guided by a sense of integrity, cooperation and fair play.

I will abstain from rude, disruptive, disrespectful, and abusive behavior, and will act with dignity, decency, courtesy, and candor with opposing counsel, the courts and the public.

As part of my responsibility for the fair administration of justice, I will inform my clients of this commitment and, in an effort to help promote the responsible practice of law, I will encourage other attorneys to observe these Guidelines.

(Signature)

(Date)

(Print Name)

RESOLUTION OF [_____]
APPROVING AND ADOPTING CALIFORNIA ATTORNEY
GUIDELINES OF CIVILITY AND PROFESSIONALISM

RECITALS

- A. As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.
- B. Civility and professionalism have been affected by a number of factors, as a result of which there is a need for attorneys to recommit themselves to the principles of civility and professionalism.
- C. On July 20, 2007, the Board of Governors of the State Bar of California adopted California Attorney Guidelines of Civility and Professionalism.
- D. The Board of Directors of [_____] are of the unanimous opinion that the Guidelines will be of significant assistance in encouraging members of [_____] to continue to enhance their reputation and commitment to civility and professionalism.

RESOLUTION

The Board of Directors of [_____] hereby approves and endorses the California Attorney Guidelines of Civility and Professionalism and recommends that all members of [_____] commit to and agree to be guided by such Guidelines.

Dated: _____

[_____]

By: _____

California Attorney Guidelines of Civility and Professionalism

Sample Court Order

1. The Court expects counsel to be familiar with and follow the California Guidelines of Civility and Professionalism. A copy may be obtain on the web at this URL:
<http://calbar.ca.gov/calbar/pdfs/reports/Atty-Civility-Guide.pdf>

Uncivil or unprofessional behavior will not be tolerated.

2. The Court expects parties to resolve all disputes regarding scheduling or time extensions without the necessity of Court involvement.

AGENDA ITEM

JULY 136

Proposal for new “California Attorney Guidelines of Civility and Professionalism – Return from Public Comment

Date: July 20, 2007

TO: Members, Board Committee on Member Oversight
Members, Board of Governors

FROM: Attorney Civility Task Force

SUBJECT: Proposal for “California Attorney Guidelines of Civility and Professionalism” – Return From 30-Day Public Comment And Recommendation For Adoption

Executive Summary

The Attorney Civility Task Force was appointed this Board year to study and recommend to the Board one or more model sets of aspirational civility guidelines.

At the May 2007 meeting, the task force reported to the Board Committee on Member Oversight (MOC) with a recommendation for a new voluntary set of guidelines called the “California Attorney Guidelines of Civility and Professionalism”. MOC authorized publication of the proposal for a 30-day public comment period.

This agenda item returns the proposal from public comment. In response to public comments, the task force further revised the Guidelines and now recommends their adoption, as set forth in Attachments 1 and 2.

Questions or comment may be directed to Mary Yen at mary.yen@calbar.ca.gov or (415) 538-2369.

This agenda item reflects the Attorney Civility Task Force’s recommendation for guidelines of civility and professionalism, following public comment. No additional public comment period is required because modifications were only made in response to comments and do not raise new topics. The recommended Guidelines are at Attachments 1 and 2.

BACKGROUND

In 1995, the Commission on the Future of the Legal Profession and the State Bar of California (“Futures Commission”) issued “The Future of the California Bar”. Among other things, this report made recommendations intended to promote professionalism¹.

¹ The Futures Commission viewed professionalism as encompassing ethical practice, competence, civility, service to the public, and self-regulation. (Futures Comm’n final report, pp. 101-102.)

Recommendation 58 stated that the California legal profession should consider adoption of an aspirational, statewide code of professionalism containing a broad list of aspirational goals and precatory duties, which would define the desired goals and aims of the legal profession and the desired qualities of proper professional practice. The report noted there is some concern that an aspirational code would create confusion regarding its binding effect or precedential value and result in “grey letter” rules of conduct. However, the Commission believed that a code of professionalism would send an important message to the membership with a long-range salutary effect. The Futures Commission viewed attorney civility as a central tenet of professionalism and that the absence of civility undermines the proper administration of justice. The commission believed that civility is especially important given our adversarial system of justice.²

In 1997, the State Bar and the American Bar Association (ABA) co-sponsored a “Conference on Professionalism for the 21st Century.” Chief Justice Ronald George of the California Supreme Court gave opening remarks. He emphasized that professionalism is a key component of public confidence in the justice system and encouraged further study of professionalism issues.³ Unfortunately, later in 1997 the State Bar’s dues bill was vetoed, which interrupted the Bar’s work on this subject.

Since the Futures Commission’s report was issued in 1995, various local, state and national bar organizations have adopted or updated civility guidelines. Currently, at least ten of the larger voluntary bar associations in California, and many of the mandatory integrated Bars of other states, have adopted civility guidelines⁴.

² Futures Commission final report, pp. 106, 108.

³ A report from the “Conference on Professionalism for the 21st Century” includes the Chief Justice’s opening remarks in which he said:

“The ability of the justice system to perform its role in our society rests in large part on the consent and confidence of those it serves. Whether the lack of faith that we see is grounded in actual flaws or in misguided perceptions, we must take seriously the public’s views and work on many fronts to improve our relationship with those we serve. . . .
¶ Whether based on the cost of litigation, undue emphasis on the business end of practice, or unrestrained advocacy, many members of the public perceive lawyers as part of the problem, not part of the solution. And within the profession itself, many lawyers decry what they see as a decline in civility and collegiality, an increase in sharp practices, and the resulting low public opinion and loss of respect.”

⁴ California bar associations that have civility and professionalism guidelines include: Alameda County Bar Association; Beverly Hills Bar Association; Contra Costa County Bar Association; Los Angeles County Bar Association; Marin County Bar Association; Orange County Bar Association; Sacramento County Bar Association; San Diego County Bar Association; Santa Clara County Bar Association; and Ventura County Bar Association.

Among the mandatory Bars that have adopted civility guidelines are: the Alabama State Bar; the State Bar of Arizona; The Florida Bar; the Hawaii State Bar; the Louisiana State Bar; the Mississippi State Bar; the Missouri Bar; the State Bar of Montana; the Nebraska State Bar; the Nevada State Bar; the State Bar of New Mexico; the Oregon State Bar; the Rhode Island Bar; the Virginia Bar; the Washington State Bar; and the West Virginia State Bar.

THE ATTORNEY CIVILITY TASK FORCE

The Attorney Civility Task Force⁵ was charged with considering whether it is more appropriate to recommend one set of voluntary, aspirational civility goals or to recommend an alternative, such as a sample selection of existing civility goals. Either version could be used by individual members or by local bars, especially those have not adopted civility guidelines. The thought was that the Board would adopt guidelines, then assume responsibility for publicizing them and encouraging attorneys to take a civility pledge.

The task force met six times. It quickly reached consensus to recommend one set of civility guidelines that could be applicable statewide on a voluntary basis. The task force believed it appropriate to recommend two variations of essentially the same set of guidelines. One version contains the entire text of guidelines with detailed examples. The task force believed that a 2-page version, without the examples, is useful too. Therefore, this recommendation is for two versions as a package. The task force synthesized provisions from other codes into it an existing code of professionalism and drafted text for remaining subjects.⁶

The task force wanted its proposal to reflect a broad range of views. The schedule was adjusted to incorporate a period of informal vetting and feedback in February and March. Approximately 30 individuals and bar entities submitted written feedback. Six attorneys also spoke at two public hearings. The draft standards were vetted at bar association MCLE programs and law school classes where task force members participated. In response to the feedback, the task force incorporated suggestions into virtually every Section of the draft.

PROPOSED “GUIDELINES OF CIVILITY AND PROFESSIONALISM”

In light of the informal feedback period, MOC authorized a 30-day comment period at its May 2007 meeting. The proposed Guidelines were published in the *California Bar Journal*, online, and were sent by e-blast to all voluntary bar associations in California and to 200 individuals and organizations that had requested the earlier draft in February and March.

Recent activity in adopting or updating civility guidelines include: in 2006 the ABA’s Family Law Section and the State Bar’s Litigation Section each adopted civility codes; in 2005 the Pennsylvania Bar updated its civility code; in 2004 the Hawaii State Bar and Supreme Court amended their professionalism and civility guidelines; and in 2003 the Alameda County Bar Association amended its Statement of Professionalism and Civility.

⁵ The task force consists of: Marguerite Downing (chair); Mary Alexander; Terry Bridges; Michael W. Case; Richard L. Crabtree; Dean Dennis; Hon. Richard L. Fruin., Jr.; Forentino R. Garza; Hon. Everett A. Hewlett, Jr.; Diane L. Karpman; Hon. Loren E. McMaster; Donald F. Miles (individually, not as a State Bar Court judge); Richard Rubin; Francis S. Ryu; Sherry M. Saffer; Cynthia Sands; Thomas G. Stolpman; Hon. Brian C. Walsh; Lei-Chala I. Wilson; and Alan S. Yochelson.

⁶ The task force is indebted to the Santa Clara Bar Association whose Code of Professionalism was relied upon as the starting point. The task force drew from approximately 20 civility and professionalism codes, including the American Academy of Matrimonial Lawyers, the American Board of Trial Advocates, and others.

The Introduction sets the context and states the intention that the Guidelines foster a level of civility and professionalism as the standard of civility in the practice of law in California. The Introduction states that the Guidelines are not mandatory rules of professional conduct, nor rules of practice or standards of care, and that the Guidelines are not to be used as the independent basis for disciplinary charges or claims of professional negligence. This kind of statement is typically found in introductions to codes of professionalism and is considered important for these Guidelines. Because these will be Guidelines of a mandatory integrated state bar, it is important to distinguish between the mandatory rules of professional conduct that must be approved by the California Supreme Court for disciplinary purposes, and voluntary civility guidelines adopted by the Board of Governors without additional approval by the Supreme Court for disciplinary purposes.⁷

The Introduction is followed by 21 sections, as listed below. These address civility issues in client relations and responsibilities to the profession, public and administration of justice, in addition to attorney-attorney relationships. An optional Attorney Pledge appears at the end.

- * Section 1 [Responsibilities to the Justice System]
- * Section 2 [Responsibilities to the Public and the Profession]
- * Section 3 [Responsibilities to the Client and Client Representation]
- * Section 4 [Communications]
- * Section 5 [Punctuality]
- * Section 6 [Scheduling, Continuances and Extensions of Time]
- * Section 7 [Service of Papers]
- * Section 8 [Writings submitted to the Court, Counsel or Other Parties]
- * Section 9 [Discovery]
- * Section 10 [Motion Practice]
- * Section 11 [Dealing with Nonparty Witnesses]
- * Section 12 [Ex Parte Communication with the Court]
- * Section 13 [Settlement and Alternative Dispute Resolution]
- * Section 14 [Conduct in Court]
- * Section 15 [Default]
- * Section 16 [Social Relationships with Judicial Officers, Neutrals and Court Appointed Experts]
- * Section 17 [Privacy]
- * Section 18 [Negotiation of Written Agreements].
- * Section 19 [Additional provision for Family Law Practitioners]
- * Section 20 [Additional provision for Criminal Law Practitioners].
- * Section 21 [Court Proceedings]

Many of the guidelines are for civil litigation practice. Since the Guidelines are intended for all California attorneys, other areas of law are included too. Still other areas of law could be covered, but the task force did not want the Guidelines to become unwieldy. To the extent that guidelines could apply to other areas of practice, the spirit of the Guidelines would permit extending the guidelines as appropriate.

⁷ For this reason, and in response to feedback, the word “guidelines” was selected in order to avoid using “code”, “standards” or “rules”, which have a mandatory connotation.

PUBLIC COMMENT RECEIVED

The proposal received 31 written comments, as indicated briefly below. A longer summary of the comments is at Attachment 5. Actual comments will be available at your meeting.

Christine J. Kim, Deputy County Counsel, County of Tehama. The Guidelines are long overdue, comprehensive and clear. Offers a suggestion for Section 19.

Thomas J. Lincoln, Attorney, The Guidelines look good.

David Casselman, Attorney. Nice work. Offers a couple of suggestions.

Jonathan Weiss, Attorney. Observed two attorneys in court who demonstrated the sort of professionalism proposed in the Guidelines.

Linda A. Iannelli, Attorney. The Guidelines are fine. Would like a guideline for civility at voluntary bar association events.

Jim Flanagan, Attorney. The Guidelines are common sense. They can be implemented through law schools, continuing education and publication in general newspapers.

J. Daniel Holsenback and Christopher Healey, Attorneys. The Guidelines are well written and reflect careful consideration of the issues. Offers a suggestion for Section 9 and suggests language to encourage law firms to include professional and civil conduct in their training for new lawyers.

Corrine Bielejeski, law clerk to Hon. Edward Jellen, U.S. Bankruptcy Court. The Guidelines cover a variety of subjects and cover them well. Offers editorial suggestions.

Jonathan G. Stein, Attorney. The Guidelines need an enforcement mechanism.

Clarke Stone, President, Santa Clara County Bar Association (SCCBA). SCCBA supports the Guidelines. They should be promoted as a model set of Guidelines for voluntary bar associations to use and implement in a way that is effective for the local legal community and bench. Promoting the Guidelines as a model will reduce confusion that the Guidelines are mandatory and eliminate any impression that they are disciplinary rules, or will be used for disciplinary purposes, or are being promoted for use by the bench as a basis for sanctions. SCCBA offers suggestions for the Introduction and specific Sections. SCCBA also offers an alternative viewpoint that the Guidelines are overly general and broad, that they duplicate Rules of Professional Conduct, and that they will result in a potential disciplinary standard without procedural due process in implementation.

Jason Bezis, Attorney. The short version is concise and will facilitate practitioners' internalization of the goals. The Guidelines will not reign in uncivil attorneys. The Bar should discipline attorneys for uncivil conduct as well as adopt Guidelines.

Philip Andreen, Attorney. Suggests three specific guidelines for adoption.

William Hansult, Attorney. The Guidelines need teeth, like sanctions. Asks that a specific situation be covered.

Leonard J. Umina, Nonattorney. The Guidelines should be enforceable with penalties for violation.

John Amberg, Chair of COPRAC. The Guidelines are still too long, too detailed and too general. Some topics are covered by the Rules of Professional Conduct, the State Bar Act, and civility codes of voluntary bar associations and courts. The Guidelines appear to create duties that are inconsistent and confusing, and may lead to unintended consequences. Substantial bodies of rules and statutes already occupy this field. To the extent the Guidelines duplicate existing rules, they will be confusing. The Guidelines set standards that may be inconsistent with fiduciary duties to clients and the law. The Attorney Pledge is unnecessary. Assuming Guidelines will be adopted, COPRAC offers specific comments for the Introduction and specified Sections.

Gerald McNally, Attorney. Opposes the Guidelines in any form but Aspirational. These rules could be interpreted as a limit on an attorney's duty of zealous representation.

Patrick Byrne, Attorney. The long version is too long and detailed. Most of the guidelines are common sense to those who learned them from senior partners over the years. Suggests a few adages to add.

Scott Kays, President, California Judges Association. Commends the task force. If CJA's board has comments, they will be forwarded. (Note - none received)

Karen Fletcher, J.D. Revise California's Rules of Discovery to mirror the Federal Rules of Civil Procedure. Discovery in federal court require attorneys to be more civil.

Ronald S. Mintz, Attorney. Sends an example of uncivil conduct.

Martin Grayson, Attorney. Sends an article he wrote on civility.

Evan Jenness, Attorney. Opposes both versions. Even as advisory rules, these will increase the complexity of analyzing issues of professionalism and ethics, and promote confusion. Other rules, ethics opinions, court rules and judicial decisions already delineate the standard of conduct for lawyers. Many of the proposed standards of conduct are redundant, vague and amenable to conflicting interpretations. The guidelines will be further fodder for attorney misconduct claims. The standards could be inconsistent with attorneys' duties under certain circumstances. He questions the propriety of encouraging judges to become familiar with the Guidelines and promote them.

Joseph Chairez, President, Orange County Bar Association. Local civility guidelines are more appropriate. Teaching civility should be left to law schools, local bar associations, and MCLE programs. With the State Bar's imprimatur, the Guidelines are likely to be cited in an adversary context, and may be subverted into standards of conduct from which a standard of care arises. The Guidelines duplicate existing rules or statutes and may be inconsistent with them. Many of the guideline areas are best left to local standards

and to an extant body of law. The guidelines are vague. If guidelines are necessary to reign in uncivil behavior, forward the Guidelines to the Rules Revision Commission for consideration. That will lead to conformity and less confusion. Comments on specific Sections are offered.

Louisa Lau, Chair, Los Angeles County Bar Association's Professional Responsibility and Ethics Committee (LACBA's PRE Committee). The committee unanimously recommends against adoption. They are concerned the Guidelines will be used in discipline and civil litigation to establish a standard of care. "Should" and "should not" suggests obligations, not mere recommendations. The Guidelines impose on all attorneys standards that may be irrelevant to them. Local bar associations can better formulate civility standards. Professional conduct standards should be left to an existing extensive body of law. Civility is best taught in law schools, voluntary bar organizations, or MCLE. Forward the guidelines to the Rules Revision Commission to consider whether any of the proposals should be incorporated into ethics rules. If the State Bar elects to proceed, offers several comments, including that the long version is too long, detailed and repetitive; the Guidelines should be revised to be consistent with standards of conduct; many guidelines are vague and amenable to conflicting interpretations. Also offers suggestions for specific guidelines.

Patricia Daehnke, Chair, LACBA's Litigation Section. The Executive Committee unanimously recommends against adoption. They agree with the comments of LACBA's PRE Committee. The guidelines do little to advance civility and would create confusion as lawyers bounce from one standard to another. The Attorney Pledge resembles a loyalty oath and should be eliminated.

Robin Yeager, Chair, LACBA's Individual Rights Section. The Guidelines are not necessary. The Introduction states the Guidelines are not to be used for discipline or professional negligence, however, they may be used as a standard when a statute is being prosecuted. The Guidelines clash with lawyer's First Amendment rights to speak.

Janet Levine, President, Los Angeles chapter of the Federal Bar Association. Opposes adoption. The chapter is not convinced the Guidelines would further the cause of justice. The chapter adopts the comments of LACBA's PRE Committee, and joins the Orange County Bar Association and LACBA's Litigation Section in opposing adoption.

Stephanie Patterson, Investigator, Dep't of Consumer Affairs, Los Angeles County. Disagrees with the proposal.

Tim Jensen, Attorney. The proposal is ridiculous. You will never effectively change the behavior of attorneys.

G. Kirk Ellis, Attorney. This is a bad joke and will add to the cost of legal representation.

Tim Kelleher, Attorney. This will not change human behavior. It will create another layer of regulation for the unwary.

TASK FORCE'S RESPONSE TO COMMENTS

The task force considered all written comments. Major responsive revisions are listed below. No additional public comment period is required because the modifications were only made in response to comments and do not raise new topics. Revisions are shown in legislative style at Attachments 3 and 4.

1. Introduction:
 - * replace “standards” with “best practices” of civility⁸
 - * replace “minimal” with “minimum” Rules of Professional Conduct
 - * replace the last sentence of the Introduction
 - * insert the Introduction into the 2-page version of the Guidelines to clarify their context
2. Section 4:
 - * delete unnecessary language in example (g)
 - * simplify the language in example (i)
3. Section 9⁹:
 - * add the words “parties, or witnesses” to the guideline.
 - * delete former example (5) as redundant
4. Section 12:
 - * clarify that the guideline applies in social settings as well as in court
5. Section 15:
 - * reformat the example
6. Section 18:
 - * consistent with the examples, apply the section to litigation as well as transactional practice and reorganize the examples accordingly
7. Section 19:
 - * consistent with the title, change the guideline text to apply to family law practice generally rather than to specific areas of family law practice
 - * reduce redundancy and delete former example (b)
8. Section 20:
 - * consistent with the guidelines being best practices and not duties, replace “special duties” with “unique responsibilities”
 - * delete former examples (a) and (b), which duplicate other guidelines

⁸ Some public comments equate the guidelines with duties, rules or standards. This modification further distinguishes the guidelines as best practices, not standards.

⁹ Section 9 has been criticized as being too detailed and as overlapping with existing requirements for the practice of law. Each example has been reviewed multiple times to assure that an issue of civility justifies it.

The task force offers these comments on three suggestions that were not accepted:

First, the task force retains the word “should” in order to conform to the State Bar’s use of “should” in other contexts, such as in the project to rewrite State Bar rules into a simpler, unified set of rules. The State Bar follows the Judicial Council’s use of “should”. The Introductory Statement to the California Rules of Court states that the Judicial Council’s rules and standards use “should” to indicate a nonbinding recommendation, that “should” indicates nonmandatory conduct.

Second, several reviewers thought that Section 16 diverges from existing law, which places a burden of disclosure on the judicial officer. The task is aware of existing law and recommends the guideline in order to provide opposing counsel with an early opportunity to bring a motion to disqualify. This is a matter of courtesy, avoids wasting court resources, and does not diverge from existing law.

Third, the task force recommends against enforcement through sanctions. The task force holds the view that sanctions would lead to a less collegial relationship among counsel and would tend to undermine civility efforts. In addition, if members thought they would be subject to sanctions for taking the pledge, they would likely be hesitant to take it.¹⁰

Finally, there is on-going interest in the educational value of the Guidelines as a model of best practices of civility in the practice of law in California. The task force continues to receive requests for speakers at bar association and law school educational programs, some of which will take place into the next Board year.¹¹

FISCAL IMPACT

None known.

BOARD BOOK IMPACT

There is no impact on the Board Book.

¹⁰ Interest in sanctions for uncivil conduct traces back to *U.S. v. Wunsch* (9th Cir.1996), 84 F.3d 1110, which held that a provision in Bus. and Prof. Code §6068 (f) was unconstitutionally vague. That provision used to state, in relevant part, that it is the duty of an attorney to abstain from an “offensive personality”. After *Wunsch*, it became difficult to find a basis in discipline for conduct that had been deemed offensive under section 6068(f). The State Bar’s Commission on the Revision of the Rules of Professional Conduct is proposing to address uncivil conduct through a new rule 8.4, which would state: “It is professional misconduct for a lawyer to: ... (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice.”

¹¹ Santa Barbara Women Lawyers, Orange County Bar Association, the Federal Bar Association, and Western State School of Law, have asked for speakers at MCLE programs to be given between August and November.

RECOMMENDED RESOLUTIONS

Should the Board Committee on Member Oversight concur with the recommendation of the Attorney Civility Task Force, it would be appropriate to adopt the following resolution:

RESOLVED that, following consideration of public comment, the Board Committee on Member Oversight recommends that the Board of Governors adopt the proposed California Attorney Guidelines of Civility and Professionalism, in the form attached at Attachments 1 and 2.

Should the Board of Governors concur with the recommendation of the Board Committee on Member Oversight, it would be appropriate to adopt the following resolution:

RESOLVED that, following consideration of public comment and upon recommendation of the Board Committee on Member Oversight, the Board of Governors hereby adopts the California Attorney Guidelines of Civility and Professionalism, in the form attached at Attachments 1 and 2.

- Attachments: 1) California Attorney Guidelines of Civility and Professionalism (14-page version, clean)
- 2) California Attorney Guidelines of Civility and Professionalism (2-page version, clean)
- 3) California Attorney Guidelines of Civility and Professionalism (14-page version, with legislative style edits)
- 4) California Attorney Guidelines of Civility and Professionalism (2-page version, with legislative style edits)
- 5) Chart of public comment received

**Loose Lips Sink Ships: Media,
Confidentiality and Trial Publicity**

LOOSE LIPS SINK SHIPS: MEDIA, CONFIDENTIALITY & TRIAL PUBLICITY

Wendy L. Patrick, Panel Moderator

San Diego, CA

Wendy Patrick is the immediate past Chair and current Advisor of the California State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC), a past Chair of the San Diego County Bar Association's (SDCBA) Ethics Committee, and is an accomplished public speaker on the topic of ethics both nationally and internationally. She teaches ethics around the country on a regular basis for various legal and business organizations, is an Institute of Criminal Investigation certified instructor for law enforcement, and teaches upper division business ethics at San Diego State University. Ms. Patrick is a San Diego County Deputy District Attorney named by her peers as one of the Top Ten criminal attorneys in San Diego by the San Diego Daily Transcript. She has completed over 150 trials ranging from hate crimes, to domestic violence, to first-degree murder. In her current assignment in the Sex Crimes and Stalking Division she prosecutes cases involving vice, human trafficking, child molestation, and sexually violent predators. Ms. Patrick is published on a regular basis. She is co-author of the revised version of the New York Times bestseller *Reading People* (Random House 2008), and was a contributing author to the *Encyclopedia of Race and Racism* (Macmillan Reference 2007), and *Hate Crimes: Causes, Controls, and Controversies* (SAGE 2004). She has had her own ethics column in the San Diego Daily Transcript for over a decade and writes and publishes for a variety of other publications. Ms. Patrick received her PhD from the University of Wales Trinity Saint David, her Master of Divinity degree summa cum laude from Bethel Seminary San Diego, her law degree from California Western School of Law, and her Bachelor's degree in psychology with honors from the University of California Los Angeles. On a personal note, Ms. Patrick holds a purple belt in Shorin-Ryu karate, is a concert violinist with the La Jolla Symphony, and plays the electric violin professionally with a rock band, performing both locally and in Hollywood.

Honorable Judith C. Chirlin, Ret.

Los Angeles, CA

Judge Judith Chirlin, currently the Executive Director of the Western Justice Center and a part-time neutral with Judicate West, was appointed to the Los Angeles Superior Court in 1985. She is a graduate of The George Washington University (BA in Political Science), Rutgers University (MA in Politics from the Eagleton Institute of Politics) and the USC Law School (JD). She is a past Chair of the American Judicature Society, a national organization dedicated to improving the justice system. She has held numerous positions in the Women Lawyers Association of Los Angeles, California Women Lawyers, National Association of Women Judges and the International Association of Women Judges. She served as Vice Chair of the California Gender Bias Task Force and as a member of a Blue Ribbon Panel investigating the Problems of Women in Prison, both by virtue of appointment by the Chief Justice of California. She is a member of the Board of the American Bar Association's Center for Rule of Law Initiatives ("ROLI"). In 2011, she served as vice-chair of a Blue Ribbon Panel appointed by L.A. Mayor Antonio Villaraigosa to investigate and report on safety and security at LAX. She recently served as a member of the Strategic Evaluation Committee appointed by the Chief Justice of California to evaluate and make recommendations regarding the functioning of the Administrative Office of the Courts. Judge Chirlin has traveled extensively, consulting on court reform and teaching programs for foreign judges, lawyers, police officers and other legal professionals. In 2003 she was the ABA's representative on a delegation of the International Legal Assistance Consortium ("ILAC") that traveled to Baghdad in August of 2003 to assess the Iraqi legal system and make recommendations regarding what ILAC's member organizations could do help the Iraqi justice system. Both the former (Interim) Justice Minister of Iraq and the first judge in the trial of Saddam Hussein were participants in the first session of the Iraqi courses. Judge Chirlin retired from the Los Angeles Superior Court, effective September 30, 2009. She currently works in private dispute resolution; she has started a non-profit foundation to support justice system improvement projects that enhance the rule of law. In November of 2011, she became Executive Director of the Western Justice Center in Pasadena, California.

Mark Geragos**Los Angeles, CA**

Mark Geragos, the Principal of the law firm Geragos & Geragos, cemented his national reputation as a trial lawyer fifteen years ago with back-to-back state and federal court jury trial acquittals for renowned Whitewater figure Susan McDougal. Mark Geragos has represented some of the most prominent figures in the world. His client list has included former Congressman Gary Condit, former first brother Roger Clinton, Academy Award-nominated actress Winona Ryder, pop star Michael Jackson, Nicole Richie, singer Chris Brown, hip hop stars Nathaniel "Nate Dogg" Hale and Sean "Diddy" Combs (a.k.a. "Puff Daddy"). Geragos is one of two lawyers ever named "Lawyer of the Year" in both the criminal and civil arenas. California Law Business Magazine named Geragos "One of the 100 Most Influential Attorneys in California" three years in a row, and Geragos has repeatedly been voted by his peers as one of Los Angeles' SuperLawyers. His \$59 million jury verdict in a trade secrets case against pharmaceutical giant Pfizer Corporation was both "Top Ten Verdicts in 2008 in California" by the Daily Journal, as well as "Top Fifty Verdicts in the United States" by the National Law Journal. In the last two years, he has won ten straight jury trials, both civil and criminal, including three multi-million dollar jury verdicts. In 2012, he was once again awarded Top Verdicts of the year for his \$8 million jury verdict in a bad faith insurance case. Geragos also serves as a frequent commentator on CNN, ABC and NBC.

Laurie L. Levenson**Los Angeles, CA**

Laurie Levenson is the David W. Burcham Chair in Ethical Advocacy at Loyola Law School where she teaches ethics, evidence, criminal law, criminal procedure, anti-terrorism, and white collar crime. She served as Loyola's Associate Dean for Academic Affairs from 1996-1999. Professor Levenson is also the Director of the Loyola Center for Ethical Advocacy and Loyola's Project for the Innocent. Prior to joining the Loyola Law School faculty in 1989, Professor Levenson served for eight years as an Assistant United States Attorney in Los Angeles. While a federal prosecutor, Professor Levenson tried a wide variety of federal criminal cases. She served as Chief of the Training Section and Chief of the Criminal Appellate Section of the U.S. Attorney's Office. In 1988, she received the Attorney General's Director's Award for Superior Performance and commendations from the FBI, IRS, U.S. Postal Service, and DEA. Professor Levenson received her J.D. in 1980 from UCLA School of Law and her undergraduate degree from Stanford University in 1977. In law school, she was the Chief Article Editor of the Law Review. After graduation, she clerked for the Honorable Judge James Hunter, III, of the U.S. Court of Appeals for the Third Circuit. Professor Levenson has published a dozen books and over 200 articles. She lectures regularly throughout the country and internationally for the Federal Judicial Center, National Judicial College, international bar associations, community groups and legal societies. She also testifies before the Senate Judiciary Committee, the California Legislature and the U.S. Sentencing Commission. Professor Levenson has been a legal commentator for CBS, CNN, ABC, NBC and NPR. She has commented on a wide range of high-publicity cases.

LOOSE LIPS SINK SHIPS: MEDIA, CONFIDENTIALITY & TRIAL PUBLICITY

LIST OF WRITTEN MATERIALS

1. Panel Outline by Mark Geragos
2. “Beyond the Headlines - Ethical Trial Publicity” by Wendy Patrick
3. “Prosecutorial Sound Bites - When Do They Cross the Line” by Laurie Levenson



GERAGOS & GERAGOS
A PROFESSIONAL CORPORATION

By Mark J. Geragos

I. MEDIA COVERAGE OF SUPERSIZED TRIALS

- A. What drives saturation media coverage?
 - 1. The public's insatiable appetite for sensational criminal trials
 - 2. The advent of reality television, cable news networks, and tabloid magazines
 - 3. The trend of "advocacy journalism" because that's what drives ratings
- B. Some examples of the extent of the media's insinuation into the judicial process
 - 1. Media outlets going to court seeking autopsy and coroner's photos and reports even over the victim's family's objections
 - 2. TV show hosts starting campaigns to have jurors removed for "pro-defense" bias
 - 3. Media producers following dismissed or excused jurors offering them inducements to speak

II. DANGERS OF UNFAIR ADVERSE PUBLICITY

- A. Denies the criminal defendant a fair trial and creates a presumption of guilt
- B. Creates urban legends, distorts the facts and taints the jury pool
- C. Motivates "stealth jurors" to lie their way onto the jury

III. GAG ORDERS: WHO DO THEY REALLY PROTECT?

- A. Gag orders, or protective orders, were originally designed as a means to protect the defendant from unrelenting prejudicial publicity
- B. Gag orders have actually become a weapon in the prosecution's arsenal
- C. The seminal U.S. Supreme Court case, *Sheppard v. Maxwell*, 384 U.S. 333 (1966), which held that the First Amendment right to freedom of press must give way when a defendant's Sixth Amendment right to a fair trial is prejudiced by pretrial publicity, is now quaint
 - 1. Prosecution usually seeks a gag order **after** it has held a press conference emphasizing the most prejudicial (and often inadmissible) evidence in the case

2. Gag orders serve to muzzle the defense from responding to the prosecution's poisoning of the well
 3. A "safe harbor" clause in a gag order allows the attorney to respond publicly to correct inaccuracies and mitigate substantial prejudicial publicity
- D. Leaks often occur despite the gag order largely due to the reporter's shield laws that protect journalists from compelled disclosure of their sources and law enforcement's symbiotic relationship to the press

IV. ETHICAL RULES THAT MUZZLE THE DEFENSE

- A. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991), a divided Court held that a state may constitutionally restrict attorney speech upon a showing of "substantial likelihood of material prejudice" (even though the Court held the particular rule in that case was void for vagueness)
- B. Several years later, following the media coverage of the double murder trial of O.J. Simpson, California enacted Professional Conduct Rule 5-120. Rule 5-120 provides that "[a] member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a **substantial likelihood of materially prejudicing** an adjudicative proceeding in the matter." CAL. RULES OF PROF'L CONDUCT R. 5-120(A) (emphasis added). However, the Rule provides a limited exception. Rule 5-120(C) allows the attorney to protect his/her client from the "substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client" by authorizing a statement by the attorney "limited to such information as is necessary to mitigate the recent adverse publicity." *Id.* R. 5-120(C).
- C. ABA Model Rule 3.6 provides a nearly identical rule on the general prohibition on trial publicity as well as a nearly identical exception allowing the attorney to respond when necessary. See ABA MODEL RULE 3.6(a), (c). However, ABA Model Rule 3.6 broadens the general prohibition on trial publicity by not only restricting the statements of the attorney directly involved with the matter, but by also including those attorneys associated with that particular attorney: "No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a)." ABA MODEL RULE 3.6(d).

V. THE REPORTER'S SHIELD LAW AND THE MEDIA'S PROTECTION OF ITS SOURCES

- A. Unlike lawyers who are regulated by strict professional codes and guidelines enforced by their state bars, the press's code of ethics is voluntarily followed with no formal enforcement mechanism and law enforcement is nonexistent
- B. California has incorporated a broad shield law into the California Constitution which provides that members of the press may not be "adjudged in contempt by a judicial, legislative, or administrative body . . . for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication." CAL. CONST. art. I, § 2(b).

VI. CURRENT (AND OUTDATED) TOOLS TO COMBAT ADVERSE TRIAL PUBLICITY

- A. Judicial tools to combat adverse trial publicity
 - 1. Juror questionnaires and jury voir dire to exclude biased jurors
 - 2. Change of venue to a place not so permeated with publicity
 - 3. Granting a continuance until the publicity dies down
 - 4. Imposing a gag order on trial participants
 - 5. Jury sequestration to reduce jurors' exposure to publicity
 - 6. Admonishing the jury to ignore publicity surrounding the trial
- B. Saturation coverage has rendered most of these tools ineffective in an age of mass communications

VII. SO WHAT'S THE SOLUTION?

- A. Contempt of Court Act similar to that enacted in England
 - 1. Authorizes civil or criminal punishments against journalists who publish stories that present a danger of compromising the fairness of a trial
 - 2. Allows courts to effectively curb the dissemination of prejudicial information by the news media
- B. Eliminate trials and just vote for guilt or innocence online

Beyond the Headlines

Ethical Trial Publicity

By Wendy L. Patrick, Esq.
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INTRODUCTION

You are getting ready for work and have the morning news on in the background. Your ears perk up as you recognize the name of your big case on the news. As you look at the television, to your horror, you see your opposing counsel holding a press conference on the courthouse steps, blasting your side of the case and your witnesses. Incensed at the unfair and untrue statements you just heard, you can't wait to get a hold of the press to tell them the *real* story. But legally and ethically, can you do that?

Attorneys who have represented celebrities can relate to the pros and cons of trying to prepare a case in the limelight. When cases generate a large amount of publicity, as the trial date draws near the media follows the lawyers in and out of court, wanting to know *everything* they are willing to tell them about their case. The legal commentators often jump into the fray and add their two cents as well. But as many lawyers know, you don't need a celebrity client to end up on the evening news. Many cases are interesting to the community simply by virtue of their facts, others may *become* interesting suddenly if something unusual happens during the course of the case. Lawyers should therefore be prepared ahead of time to know how and when to respond do request for trial publicity. They should also keep in mind that there are ethical rules that will apply to their postings and discussion of pending cases on social networking sites such as Facebook and LinkedIn as well.

Discussing a case out of court implicates legal and ethical rules, as well as civil liability concerns for the practitioner. A working knowledge of these issues will protect the lawyer from legal and ethical liability, as well as protect their personal finances from a lawsuit by a party or member of the public.

California lawyers are bound by California Rule of Professional Conduct (CRPC) 5-120, Trial Publicity, as well as the mandates of California Business and Professions Code Section 6068(a), Duties as an Attorney. The American Bar Association (ABA) provides guidance in this area through Model Rule of Professional Conduct 3.6 - Trial Publicity, as well as through other ABA Model Rules and through the guidelines in the ABA Standards for Criminal Justice Prosecution Function and Defense Function.

I. PRELIMINARY CONSIDERATIONS

A. Should You Discuss Your Case with the Press?

Many lawyers never reach the ethical dilemmas presented by trial publicity because they maintain a strict policy of never discussing their case outside the courtroom. They do not want to risk prejudicing their case, and prefer to explain their clients' position in court. Pamela Robillard Mackey, the lawyer who defended basketball star Kobe Bryant, is a member of this camp. She believes that the most important audience she can influence pre-trial is the judge.¹ She defines the lawyer's role as advocate, not public relations agent, and advises attorneys to remember the case is about their clients, not themselves.² She urges lawyers "to fight your battles in the courtroom, not in the press and to have faith that the people who will serve on your juries will judge the case by the evidence not by the press reports."³

Lawyers who choose not to discuss their case out of court, however, should remember that simply telling reporters "no comment" may not be the best way to handle media requests. There is no downside to forging positive relationships with members of the press, even if you choose not to discuss your case. Many attorneys suggest using an explanation along the lines of "due to attorney-client privilege I am unable to discuss the facts of the case out of court, but you are welcome to attend the [next court hearing]." Other lawyers prefer to cooperate by educating the press about issues relating to "these types of cases generally," without revealing any specific facts of their case. While it is true we are never "off the record" with the media, many members of the press will appreciate any information you can provide them that will be of assistance. Along these lines, they do not have an interest in making you look bad, because you may be a valuable source of legal information for them in the future.

Laurie Levenson, Professor and Director of the Center for Ethical Advocacy at Loyola law school, advises lawyers to think carefully before talking about their cases with the press. She points out that not only does speaking to the press result in a battle being fought now both inside and outside of the courtroom, but many lawyers foolishly give away their trial strategies when they talk to the media. As a law professor, she also recognizes that most lawyers have not been trained to interact with the media, a reality that is glaringly obvious through the fact that many lawyers "speak in drone."

Notwithstanding the downsides, it is certainly possible to present an impressive synopsis of your case to the press that is both effective and ethical. It is with this goal in mind that we turn to the legal and ethical rules that govern what you say about your case to the press. We will begin with the history of the trial publicity rules, an examination of which provides a look at the evolution of ethical standards leading up to the current trial publicity rule we follow in California.

¹ Pamela Robillard Mackey, *Five Rules for Use in High-Profile Cases* (The Benchers 2005.) (written version of remarks delivered to the annual Joint Kansas City, Topeka and Lawrence American Inns of Court meeting in Lawrence, Kansas, 2005.)

² *Id.*

³ *Id.*

B. The Birth of the Gag Order: *Sheppard v. Maxwell*

“A circus environment” was an appropriate description of the atmosphere of massive pre-trial publicity surrounding the murder trial of Dr. Sheppard in *Sheppard v. Maxwell* ((1966) 384 U.S. 333). This is the landmark case where the United States Supreme Court balanced the constitutional right to free speech against the right to a fair trial. The *Sheppard* Court concluded that the massive publicity surrounding the trial of Dr. Sheppard, who stood accused of murdering his pregnant wife, violated his due process right to a fair trial. The Court stated that the trial court should have prohibited out of court statements by the attorneys or parties that discussed prejudicial matters. The holding of *Sheppard* became the standard for gag orders, designed to prevent prejudicial trial publicity. Ethics rules nationwide have been modeled after the legal principles decided in *Sheppard*. Most rules on the subject now prohibit attorneys from making statements which would have a “substantial likelihood of prejudicing an adjudicative proceeding.”

C. The Evolution of California Rule of Professional Conduct (CRPC) 5-120

After the *Sheppard v. Maxwell* decision, the ABA established its Model Code of Professional Conduct which included Disciplinary Rule (DR) DR 7-107 governing trial publicity. In 1983 the ABA came out with Model Rule 3.6 governing trial publicity. The original version of Rule 3.6 prohibited the same type of statements that were listed in DR 7-107. These prohibited statements included references to the character, criminal record or credibility of the defendant, the identity of anticipated witnesses and their expected testimony, admissions and confessions of the defendant or the defendant’s failure to cooperate, the results of tests or the defendant’s refusal to take them, and opinions on the defendant’s guilt. When Rule 3.6 was amended in 1994, the prohibited statements were moved to the Comment. Although no longer expressly prohibited, the disfavored statements are now referred to as “certain subjects which are more likely than not to have a material prejudicial effect on a proceeding . . .” (Rule 3.6 Comment [5].) Another way to read this is that these are statements you would be wise to avoid making unless absolutely necessary.

II. CALIFORNIA RULES

A. California Rule of Professional Conduct 5-120 - Trial Publicity

California Rule of Professional Conduct 5-120(A) states that “A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”

Subsection (B) provides some exceptions to the Rule: “Notwithstanding paragraph (A), a member may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) the information contained in a public record;
- (3) that an investigation of the matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (a) the identity, residence, occupation, and family status of the accused;
 - (b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
 - (c) the fact, time, and place of arrest; and
 - (d) the identity of investigating and arresting officers or agencies and the length of the investigation.”

When faced with unfair trial publicity from the opposing party, subsection (C) permits a reasonable reply statement: “Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.”

The **Discussion** section of this Rule specifies that it applies equally to prosecutors and criminal defense attorneys. It also explains that whether or not an out-of-court statement violates this Rule depends on many factors. These factors include:

- (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue;
- (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d);
- (3) whether the extrajudicial statement violates a lawful “gag” order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and
- (4) the timing of the statement.

B. California Business and Professions Code Sections

The issues involved in pretrial publicity may also implicate California Business and Professions Code **Section 6068**, which outlines the “Duties as an Attorney.” Subsection (a) states that one of the duties of an attorney is to obey the law and the Constitution. Improper and unethical public dissemination of non public information that is likely to prejudice an upcoming trial may violate not only CRPC 5-120 but also may violate the right to a fair trial that is guaranteed to *both sides* in a criminal case, *Cal. Constitution*, Art. I, Section 29. Therefore, counsel’s failure to “obey the law and the Constitution” by releasing the above described offending material to the media for publication could arguably be a violation of the duties as an attorney under BP 6068(a).

In protecting a defendant’s right to a fair trial, *Sheppard v. Maxwell* is a case about Constitutional law. BP 6068(a) mandates that an attorney support the Constitution. So even if a statement is permissible under RPC 5-120(C), for example if an attorney tells a reporter something that he or she said in court on the record, if the statement is so prejudicial that its dissemination will have a “reasonable likelihood of prejudicing” the trial, it may be unconstitutional, and therefore arguably violate BP 6068(a). Becoming aware of the interaction between the different rules in this area may save you countless hours of heartache and possible litigation down the road.

Lest anyone take a violation of an attorney’s duties lightly, the California Business and Professions Code contains a section that spells out the potential punishment. **BP 6103** states that:

“A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.”

In addition, a lawyer’s duty of candor follows them outside the courtroom. **California Business and Professions Code Section 6106** states in pertinent part that: “the commission of *any act* involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension” (emphasis added). Again, this rule governs what a lawyer says about his or her case inside and outside of the courtroom.

And **Section 6128** imposes misdemeanor criminal liability on a lawyer who engages in or consents to any deceit or collusion “with intent to deceive the court or any party.” (BP 6128(a)) Punishment for violating this section is up to a six-month jail sentence or a fine of up to \$2,500.00 or both.

California lawyers should know these rules, as **California Business and Professions Code Section 6067** requires a lawyer “faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability.”

III. ABA RULES

A. ABA Model Rule of Professional Conduct 3.6 - Trial Publicity

This rule states in pertinent part that “(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”

The rule contains language that is similar to California’s rule 5-120 in paragraph (b) which states that notwithstanding the proscriptions in paragraph (a), a lawyer is permitted to state “(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest.” Subsection (b)(7) gives additional guidance when a lawyer is handling a criminal case. It says that in addition to what is permissible per paragraphs (b)(1)-(6), a lawyer may also state “(i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.”

One of the most cited provisions in ABA 3.6 is the famous so-called “reply statement” provision, which applies when a lawyer is faced with unfair undue prejudice from publicity not initiated by the lawyer. This is codified in ABA 3.6 paragraph (c) which states that: “Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.”

Regarding the duties of the lawyer’s law firm colleagues, paragraph (d) states that “No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).”

Accordingly, ABA Rule 3.6 is virtually identical to CRPC 5-120, except that it contains the additional subsection, (d). While the ABA Rules are not binding authority in California, several of the Rule 3.6 Comment sections provide additional guidance on the issue of discussing your case outside of court.

Rule 3.6 Comment [1]: This section recognizes the difficulty in balancing “the right to a fair trial and safeguarding the right of free expression.” Recognizing that the available information about a case must be suppressed to some extent with a jury trial pending, it is also true that “there

are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves.” And more generally, the public has a stake in remaining informed, and “has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern.”

Rule 3.6 Comment [4]: This Comment points out that subsection (b) “identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a).” Note that subsection (b) is not an exhaustive list.

Rule 3.6 Comment [5]: This instructive Comment recognizes that there are certain subject areas that are dangerous. This Comment characterizes the following areas as “certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

- (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
- (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
- (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.”

Note: These examples are critically important to take note of, as they represent subjects that were previously off limits under the previous ABA Canon DR 7-107, but are now permissible topics to discuss. However, although these areas are now permissible to discuss, this Comment recognizes that these areas represent sensitive subjects that may be more likely than other areas to get a lawyer into trouble, and should potentially be avoided if possible .

Rule 3.6 Comment [8] refers to Rule 3.8(f) regarding the additional duties that prosecutors have in connection with out of court statements about their cases. **Rule 3.8, Special Responsibilities**

of a Prosecutor, allows in subsection (f), statements that “are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose.” This section also specifies that a prosecutor in a criminal case shall not make out of court statements about their cases “that have a substantial likelihood of heightening public condemnation of the accused.” The Rule goes even further, however, and states that a prosecutor must “exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.”

Rule 3.8 Comment [6] specifies that subsection (f) “requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor.” The Comment does, however, provide some further guidance on satisfying this responsibility, as it states that “[o]rdinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.”

B. ABA Model Rules of Professional Conduct 4.1 – Truthfulness in Statements to Others

Regarding out of court statements about a case, Model Rule 4.1 is also instructive. It states in pertinent part that “[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.”

C. ABA Model Rules of Professional Conduct 8.4 – Misconduct

This Rule states that it is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

IV. TRIAL PUBLICITY RULES APPLY EQUALLY TO DEFENSE ATTORNEYS

A. Case Law

The usual complaints in the pre-trial publicity arena are against prosecutors for making inflammatory statements that prejudiced a defendant's right to a fair trial. What result when it is not the prosecutor but the defense attorney on the courthouse steps who is making inflammatory statements? The United States Supreme Court tackled this issue in *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030. Attorney Dominic Gentile was a defense attorney, author, and a former associate dean of the National College for Criminal Defense Lawyers and Public Defenders. (*Id.* at 1041.) He held a press conference shortly after one of his clients was criminally indicted. (*Id.* at 1033.) Gentile's decision to hold a press conference, the first of his career, was planned and deliberate. (*Id.* at 1042.) He was motivated by a desire to rebut news reports about the case released by the police and prosecution. (*Id.*) Before he held the press conference, he and two colleagues thoroughly researched Nevada's trial publicity ethics rule and applicable case law in order to make sure his comments were proper. (*Id.* at 1044.) In his comments he proclaimed his client's innocence and stated that Las Vegas, unlike other named cities, was not "honest enough to indict the people who did it; the police department, crooked cops." (*Id.* at 1059 Appendix A.) In particular, Gentile stated that the most likely suspect in the case was not his client, but Detective Steve Scholl. (*Id.*) The Court in discussing his press conference also mentioned that Gentile "also strongly implied that Steve Scholl could be observed in a videotape suffering from symptoms of cocaine use." (*Id.* at 1045.) Only a small portion of Gentile's comments, however, reached the public via the media, which also reported the prosecution's comments and a press conference by the police. (*Id.*) In fact, the police department declared the innocence of their officers who were originally suspected, including the fact that they "have been cleared by polygraph tests." (*Id.* at 1046.)

After his client was acquitted by a jury six months later, the Nevada State Bar filed a complaint against Gentile for violating pre trial publicity Rule 177, which proscribes a lawyer from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."⁴ (*Id.*) Rule 177(3) contained a safe harbor provision that listed permissible statements notwithstanding the balance of the Rule. (*Id.*) After a hearing, Gentile was found to be in violation of the rule and a private reprimand was recommended. (*Id.*)

The United States Supreme Court reversed the case, holding that Nevada Supreme Court Rule 177 is void for vagueness. (*Id.* at 1048.) Its safe harbor provision listed in 177(3) led Gentile to believe he was permitted to make the statements he gave at the press conference. (*Id.*) Given the Rule's wording and the lack of any clarifying case law, the Rule "fails to provide 'fair notice to those to whom [it] is directed.'" (*Id.* [citing *Grayned v. City of Rockford* (1972) 408 U.S. 104, 112].) The fact that Gentile came to this belief after studying Rule 177 and making an effort to comply with its provisions "shows that Rule 177 creates a trap for the wary as well as the

⁴ Nevada's Trial Publicity Rule 177 was nearly identical to ABA Model Rule 3.6. (*Id.*)

unwary.” (*Id.* at 1051.) In fact, when Gentile was answering questions during the press conference, his reply to a request to elaborate on the credibility of government witnesses was “*I can’t because ethics prohibit me from doing so.*” (*Id.* at 1049 [italics in original].) The Court further found that Gentile’s comments seemed to be covered by Rule 177(3) and found the decision by Nevada to impose discipline therefore raised “concerns of vagueness and selective enforcement.” (*Id.* at 1034.)

B. ABA Standards for Criminal Justice Defense Function

Standard 4-1.4 -Public Statements:

Defense counsel should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if defense counsel knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

The **Commentary** section to 4-1.4 recognizes that while there is an interest in preserving the right to a fair trial, “there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. An accused may never be more in need of the First Amendment right of freedom of speech than when officially labeled a wrongdoer by indictment or information and, perhaps, by the media before family, friends, neighbors, and business associates.”

There is an almost identical section for Prosecutors, **Standard 3-1.4 – Public Statements**

V. THE GAG ORDER

There is a difference of opinion regarding which side is prejudiced more by pretrial publicity. Particularly in a criminal case, some feel a defendant’s celebrity status will ingratiate him or her to the jury, many of who might be fan club members. Others, however, feel that jurors will judge celebrities more harshly and hold them to a higher standard. Whatever the truth in your case, there are certain measures a court may take in order to attempt to control the adverse trial publicity.

In response to pervasive pre-trial publicity, some judges will issue a gag order, which will usually direct parties and witnesses not to talk to the media about the case. Unfortunately, however, many gag orders are not followed. Trial attorney Mark Geragos, who has tried numerous high profile cases and has been gagged repeatedly by judges, describes many gag orders as “naïve.” He explains that there are always leaks of information surrounding high profile cases, and gag orders often end up being a disadvantage for the celebrity defendant. Another common issue is the *scope* of a gag order. This situation often arises when a witness in a criminal case is represented by independent counsel on a concurrent civil action involving the same facts, as was the case in the Scott Peterson murder trial where attorney Gloria Allred represented a witness in a separate civil proceeding. This scenario raises the question of whether

the gag order on the *criminal* case prevents the *civil* lawyer from talking to the media. If it does not, the civil lawyer could potentially make statements about the facts of the case, and the criminal lawyers trying the case, who are in the best position to know the true facts, would be unable to respond to any reported inaccuracies due to the gag order. For the public, this may create a dangerously unfair view of the case.

VI. CIVIL LIABILITY

If you decide to discuss your case with the press, there are some key factors that you must consider. In addition to complying with the applicable legal and ethical rules, there are other important considerations that should guide you in this arena. Some of these have to do with potential civil liability concerns, such as the torts of defamation, invasion of privacy, and intentional or negligent infliction of emotional distress.

A. Defamation

As the saying goes, it's easier to tell the truth. When talking to a reporter, you can avoid allegations of civil liability by sticking to the unadulterated, unembellished facts of your case. Defamation consists of libel and slander.

Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. (California Civil Code Section 45.)

Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which: Charges any person with crime, or with having been indicted, convicted, or punished for crime; Imputes in him the present existence of an infectious, contagious, or loathsome disease; Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; Imputes to him impotence or a want of chastity; or Which, by natural consequence, causes actual damage. (California Civil Code Section 46.)

1. Your Opinion May Be Worth More Than You Think

When discussing your case outside of court, be aware of the difference between making statements of fact, and statements of opinion. In *Weiner v. San Diego County* (9th Cir. 2000) 210 F.3d 1025, 1031, the court found that the district attorney's statement to the press that "this case just proves that cases, unlike fine wine, get worse rather than better, with age[.]" was a statement of opinion and would not support a California state-law action for defamation. The court defined opinions, which enjoy First Amendment protection, as "statements that cannot reasonably be

interpreted as stating actual facts.” (*Id.* at 1031 [citing *Gilbrook v. City of Westminster* (9th Cir. 1999) 177 F.3d 839, 861 (internal quotation marks omitted)].)

To decide whether a statement is one of opinion or fact, courts look to the “totality of circumstances” surrounding the statement “including (1) the broad context of the statement, (2) the specific context and content of the statement, and (3) ‘whether the statement itself is sufficiently factual to be susceptible of being proved true or false.’” (*Weiner, supra*, at 1031 [citing *Underwager v. Channel 9 Australia* (9th Cir. 1995) 69 F.3d 361, 366].) The *Weiner* court found that all three *Underwager* factors pointed to the district attorney’s statement being one of opinion, not fact. (*Weiner, supra*, at 1031-32.)

2. “In My Opinion” May Not Always Save Your Statement

Prefacing statements with lead-ins such as “it is my opinion that,” may not save them from defamation claims if they are made in such a way to insinuate that they are supported by undisclosed facts. Some false statements are so harmful that they cannot be saved even when prefaced with “in my opinion.”⁵ As noted in *Partington v. Bugliosi* (9th Cir. 1995) 56 F.3d 1147, 1156 [citing *Haynes v. Alfred A. Knopf, Inc.* (7th Cir. 1993) 8 F.3d 1222, 1227], “[a] statement of fact is not shielded from an action for defamation by being prefaced with the words ‘in my opinion,’ but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.”

The point to remember is that you are always more likely to be protected when you have taken the time to verify your information to the best of your ability before you talk about your case. The time spent investigating and checking your facts will be well worth the countless hours of potential litigation you can avoid by making sure that your information is correct.

3. California Civil Code Section 47

California Civil Code Section 47 (2009) states in pertinent part: “A privileged publication or broadcast is one made:

- (a) In the proper discharge of an official duty.
- (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, [exceptions and subsection (c) omitted.]
- (d) (1) By a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint

⁵ See *Milkovich, supra* [statements such as “In my opinion John Jones is a liar” may still imply false assertion of facts and may cause just as much damage to reputation].

made by any person to a public official, upon which complaint a warrant has been issued. (2) Nothing in paragraph (1) shall make privileged any communication to a public journal that does any of the following:

- (A) Violates Rule 5-120 of the State Bar Rules of Professional Conduct.
 - (B) Breaches a court order.
 - (C) Violates any requirement of confidentiality imposed by law.
- (e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.”

CCC 47's Application in a Criminal Case

In *Kilgore v. Younger* (1982) 30 Cal.3d 770, the California Supreme court held that California Civil Code Section 47 subdivision 1 provided an absolute privilege for publications made by an Attorney General in the discharge of an official duty.

In *Kilgore*, Attorney General Evelle J. Younger had an organized crime commission compile a written report to study criminal conspiracies and criminal procedural controls. (*Id.* at 774.) The commission delivered to Younger a report which included plaintiff Kilgore's name as one of 92 persons suspected in various types of criminal activity including bookmaking, narcotics, arson, prostitution, pornography, and murder. (*Id.*)

In addition to Kilgore's name, the report contained his address, picture, and detailed information implicating him in criminal activity. (*Id.* at 774-75.) The day the report was delivered, Younger held a press conference where he adopted the report and provided copies to the news media. (*Id.* at 775.) Several newspapers subsequently published the story. (*Id.*)

Kilgore brought actions against Younger as well as news media defendants for defamation, invasion of privacy, and intentional infliction of emotional distress. In addressing the claim against Younger, the court cited from Civil Code Section 47 subdivision 1: “a privileged publication is one made ‘[in] the proper discharge of an official duty.’” (*Id.* at 778.) “The absolute privilege is extended to ‘high-ranking state and federal officials, such as the President of the United States, the governor of any state or territory, cabinet officers of the United States and the corresponding officers of any state or territory’ (*Id.* [quoting *Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 412]), on the rationale that their ability to function would be impaired and society adversely affected if they were not absolutely free of the threat of suit by the defamed seeking recompense for injury.” (*Id.*) The court recognized that the privilege applied despite malicious or other improper motivation, and applied to actions such as defamation, but did not apply to malicious prosecution. (*Id.*) “For the absolute privilege to attach, the public official need only be properly discharging an official duty.” (*Id.*)

The court found that Younger's press conference constituted an “official duty.” (*Id.* at 779.) Applying Civil Code Section 47, subdivision 1, the court held that “[h]aving been made within

the proper scope of the Attorney General’s authority, that is, in the ‘proper discharge of an official duty,’ the challenged publication is absolutely privileged.” (*Id.* at 783.)

CCC 47’s Application in a Civil Case

In *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, the Court held that CCC Section 47(b)’s litigation privilege did not extend to private attorneys⁶ “litigating in the press.”

Rothman was retained to represent a minor boy in an action against singer Michael Jackson for alleged tortious conduct against the boy. (*Id.* at 1138.) A psychological evaluation of the boy, which contained charges against Jackson, was leaked to the press causing enormous publicity. (*Id.*) The defendants responded by accusing Rothman of making false charges in order to extort money from Jackson. They made these accusations in a press conference and in other media statements. (*Id.* at 1139.) The extortion charges damaged Rothman’s professional reputation. (*Id.*)

The court stated that “a communication is privileged under section 47 subdivision (b) if made in, or in anticipation of, litigation by litigants or other authorized participants to achieve the objects of the litigation, and if the communication has some connection or logical relation to the action.” (*Id.* at 1145.) Although the communications at issue were made by potential participants in a possibly forthcoming criminal prosecution, the court did not find that the charges against Rothman possessed the required “logical relation” to the subsequent litigation. (*Id.*) Further, the court did not believe that the statements were made to “achieve the objects of the litigation” merely because they related to the same subject matter and were geared to exculpate Jackson in the public eye, in the same manner that they intended to exculpate him in court. (*Id.*)

The court held that the “connection or logical relations” test that the communication must pass in order to be privileged is a “*functional* connection.” (*Id.* at 1146) (emphasis in original) The “*communicative act . . . must function as a necessary or useful step in the litigation process and must serve its purposes.*” (*Id.*) (emphasis in original)

The court further dismissed the contention that the defendant’s statements in the press were covered by California Rule of Professional Conduct 5-120(C). (*Id.* at 1149, fn. 5.) “[T]he rule does not provide, or even imply, that defamatory statements made by attorneys in extrajudicial statements in defense of their clients should be privileged and thus not subject to redress in a court of law.” (*Id.*) The court thus declined to extend the litigation privilege to “litigating in the press.” (*Id.*)

The point to remember is that you are always more likely to be protected when you have taken the time to verify your information to the best of your ability before you talk about your case. The time spent investigating and checking your facts will be well worth the countless hours of potential litigation you can avoid by making sure that your information is correct.

⁶ The court contrasted the “official duty” privilege found in Section 47(a), which applies to public officials and district attorneys. (*Id.* at 1149, fn. 6.)

B. Invasion of Privacy

In addition to concerns about the accuracy of your information, you should also consider important privacy issues. Information you share about your cases must not invade the privacy rights of others. Privacy concerns often accompany the handling of sensitive evidence, and even accomplished trial lawyers must be wary of the hidden pitfalls in this area. The dissemination and misuse of personal information of victims, witnesses, and parties may cause an attorney to become the subject of a civil suit.

1. The Constitutional Right of Privacy

In *Susan S. v. Israels* (1997) 55 Cal.App.4th 1290, defense attorney Israels served a subpoena duces tecum to obtain a sexual battery victim's mental health records; the records were accidentally sent directly to the defense attorney. Although the attorney was aware of their confidential nature, he nonetheless read the records, gave them to the psychiatrist used by the defense, and used them in cross-examination of the victim. Israels did this "in order to intimidate, embarrass, and humiliate [the victim]." The victim sued Israels for invasion of privacy. (*Id.* at 1294.)

In deciding the case the court outlined the elements of an invasion of privacy claim under Cal. Constitution art. I, section 1: "1) a legally protected privacy interest, 2) a reasonable expectation of privacy in the circumstances, and 3) conduct by the defendant constituting a serious invasion of privacy." (*Id.* [citing *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40].) The court found that the victim had a valid privacy interest in her mental health records. Although that interest was subject to a balancing test by a court to determine whether any of the information should be disclosed, such a determination was never made in the instant case. (*Id.* at 1295-96.) The *Susan S.* court therefore held that the victim had a constitutional invasion of privacy action against attorney Israels. The invasion occurred when Israels read the mental health records and passed them on to the defense psychiatrist. (*Id.* at 1302.)

2. Practical Application

The foregoing case law does not mean that prior criminal acts or mental health issues of parties and witnesses are automatically off limits. To the contrary, such information is often very relevant to credibility issues. Prior criminal convictions and other acts involving moral turpitude are routinely ruled to be admissible to impeach a witness if their probative value outweighs any undue prejudice. Regarding mental health issues, such information may be relevant to the issue of witness competence as well as the ability to perceive and recount an event. However, a court should be the one to make the determination regarding what evidence is subject to disclosure, and how much will be permitted to be used in cross-examination.

Returning to the trial publicity issues, the discussion of privacy also relates directly to the first element of lawfulness; whatever you say about your case must not violate a right of privacy, or be derived from a violation of privacy rights. In a world where we are constantly bombarded with information through every news medium imaginable, many of us increasingly value our privacy. Unnecessary invasions of this important Constitutional right are taken very seriously.

CONCLUSION

Handling a high profile case can be both exhilarating and exhausting. All attorneys owe a duty of loyalty to their clients and should by all means work diligently on their cases and engage in faithful advocacy. When dealing with the media, however, they must also have a working knowledge of the applicable legal and ethical rules that govern their statements, and they must also exercise good judgment in deciding when to talk about a case out of court and what to say, being mindful of the applicable civil liability issues that might arise. Regardless of the facts of your case, a working knowledge of the applicable legal and ethical rules will permit you to represent your client diligently and effectively, as well as ethically and professionally. Good luck!

*This article does not constitute legal advice. Please shepardize all case law before using.

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PROSECUTORIAL SOUND BITES: WHEN DO THEY CROSS THE LINE?

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I. INTRODUCTION

In the immortal words of the Apollo 13 crew, "Houston, we have a problem." n1 When even the most respected prosecutors appear to be crossing ethical lines governing pretrial publicity, it is time to reevaluate whether we have correctly set the standards prescribing prosecutorial behavior.

In the last few years, there have been several examples of prosecutors whose public comments have crossed the line between striking "hard blows" and "foul ones." n2 In 2006, now disgraced and disbarred District Attorney Michael Nifong, in the infamous "Duke Lacrosse case," commented, "I'm convinced there was a rape" and "the guilty will stand trial." n3 As it turned out, the defendants were not guilty and the prosecutor actually knew that the scientific evidence in the case did not support his claim. n4 Yet, Nifong's untrue and intemperate remarks cast a cloud of suspicion over these [*1023] defendants for a year until the real facts of their case were discovered. n5

More recently, California Attorney General Jerry Brown called a press conference to declare that two doctors, accused of illegally providing prescription medication to Anna Nicole Smith, should be likened to "drug dealers on the street corner." n6 Put aside that the defendants were accused of multiple felonies; put aside that the defendants had not yet been tried; put aside that they had a presumption of innocence. The chief prosecutor for the State nonetheless proclaimed on national television that the defendants were attracted by the celebrity of Ms. Smith: "My hope . . . is that the message goes out that doctors do not have a license to pump innocent and often vulnerable people full of dangerous chemicals. . . . She was a very famous person but the abuse in this case is serious." n7

The third example is probably most surprising of all. United States Attorney Patrick Fitzgerald, who has earned the reputation as an ethical, hardworking, and committed federal prosecutor, n8 [*1024] also got carried away when he held a press conference after the arrest of former Illinois Governor Rod Blagojevich. n9 When asked about the charges against Blagojevich, Fitzgerald stated that "Lincoln [would] roll over in his grave." n10

These three examples represent a range of pretrial comments that can and do occur in criminal cases. They extend from the flagrant, prejudicial misstatements of District Attorney Nifong to the regrettable hyperbole of Attorney General Brown and U.S. Attorney Fitzgerald. While there are ethical rules governing a prosecutor's pretrial comments, n11 it is extraordinarily rare for prosecutors to be disciplined for violating those rules. n12 Thus far, the ethical rules have been fairly ineffective in restraining prosecutors from remarks that have a substantial possibility of affecting public opinion of the defendant before trial. n13 The issue this Article addresses is whether there is a better way to construct ethical rules that will guide prosecutors in their pretrial comments.

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Additionally, this Article addresses a related issue: When are prosecutors too personally involved and too personally invested to comment on a high-profile case? Is it possible to draw ethical lines that will

allow prosecutors to be zealous in their prosecution of a case, but not allow prosecutors' personal (as opposed to professional) interests to guide their judgment? Not surprisingly, the temptation to make intemperate pretrial comments about a case can be impacted by prosecutors' personal ties to the case. When prosecutors are personally involved in a case, are they representing just the community or their own interests as well? This conflict can easily lead prosecutors to cross the line of pretrial rhetoric. n14

While much has been written about ethical rules for prosecutors, n15 the ordinary approach of most state ethical rules is to proclaim in vague, general terms that a prosecutor "shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter," n16 followed by a standard list of comments that the prosecutor may make. n17 It is left to the courts or disciplinary authority to identify when a prosecutor has made an improper statement that has a "substantial likelihood of materially [*1026] prejudicing an adjudicative proceeding." n18 The rules are constructed this way to comport with Supreme Court standards governing the First Amendment rights of lawyers n19 and also because the same ethical rule covers the conduct of both prosecutors and defense lawyers.

But prosecutors are different-their responsibilities are different and their challenges are different. n20 Thus, it is not unreasonable to consider a different construct for ethical rules governing pretrial comments by prosecutors. As the Code of Federal Regulations governing Department of Justice employees recognizes, there are certain hot-button issues that are more likely to prejudice the [*1027] defense before or during trial. n21 Those areas should be identified in the ethical rules and extra precautions should be taken to prevent prosecutors from commenting on those issues unless there is a compelling reason to do so.

In constructing rules on pretrial publicity, it is always important to consider First Amendment concerns. Yet, First Amendment rights are not absolute. Thus, while prosecutors may have First Amendment rights, their responsibility to seek justice can trump those rights. n22 Ethical rules must accurately reflect both the rights and responsibilities of prosecutors. States should model their own rules after the Code of Federal Regulations. If there are to be ethical rules, they must offer real guidance to prosecutors in their remarks, instead of leaving them to guess when they are crossing the ethical line.

Part II of this Article sets forth the current approach of pretrial publicity rules for prosecutors. It analyzes the current standards under the American Bar Association Model Rules of Professional Conduct (ABA Model Rules) and state ethical rules for evaluating prosecutors' pretrial comments. Currently there is a general prohibition against prejudicial pretrial remarks, but often the rules themselves only identify in detail what comments are permissible. The current approach has shied away from the approach taken for centuries in other ethical and legal rules, where the rule provides a [*1028] "thou shalt not" list of prohibited categories of comments. In contrast to the current approach of the ABA Model Rules, the Code of Federal Regulations (CFR) takes a "thou shalt not" approach. The CFR identifies subject matter on which personnel of the Department of Justice "should refrain from making" comments. n23 These prohibitions provide much more guidance for federal prosecutors and more protection for defendants, who can be prejudiced by either intentional or unintentional pretrial comments.

Part III revisits whether the CFR's approach to the ethical rules has targeted the areas most likely to lead prosecutors into prejudicial pretrial comments. It explains why certain areas are most likely to be prejudicial. Not surprisingly, they are the same areas of criminal law that have created the greatest risk for wrongful convictions: (1) extrajudicial comments regarding a defendant's alleged confession or admission; (2) pretrial release of DNA results; and (3) extrajudicial discussion of alleged eyewitness identifications. Additionally, and as discussed in more detail in Part III.f, there is a particular risk that prosecutors will make improper remarks when they have a personal connection to a case. Even in the most difficult cases, a prosecutor must maintain the highest level of objectivity. Thus, the more personally involved in a case, the more a prosecutor must be on guard not to make prejudicial pretrial remarks. Finally, prosecu-

tors must be careful not to violate a defendant's other constitutional rights by their public comments. This may occur, for example, by prosecutorial leaks of information protected by the Fifth Amendment privilege against self-incrimination or the Sixth Amendment right to counsel. n24

Finally, Part IV offers a perspective rarely considered by prosecutors, but perhaps a helpful guide for deciding what comments to make regarding cases, especially high-publicity matters. Both journalists and prosecutors have a duty to refrain from interjecting their opinions regarding a case into their professional duties. The Code of Ethics of the Society of Professional Journalists offers fascinating and helpful guidance for prosecutors who struggle with [*1029] the details of what comments they may make about a case outside the courtroom. n25

Unquestionably, an overwhelming number of prosecutors seek to act according to the highest professional standards. Yet, we have betrayed them by not providing ethical rules that help them accomplish that goal. The purpose of this Article is to set forth an approach to the ethical rules on pretrial publicity that will guide prosecutors as they are besieged by the media during trial. Even though there have been prior attempts to create new rules, there is a need to engage in this effort again as we continue to examine how far zealous advocacy should go, especially in high-profile cases.

Zealous advocacy is not just about what happens inside the courtroom. In the courtroom, there are controls to guide the presentation of the evidence to the jury. The judge wields a mighty gavel. n26 However, outside the courtroom, controls are less effective. Prosecutors face pressure to appear confident and committed to their cases. Judges are not looking over their glasses reminding the prosecutors of the rules of professional conduct. There are few colleagues who will tell their fellow prosecutors to control their enthusiasm. That is why clear ethical rules on pretrial and trial publicity must be a prosecutor's guide.

II. THE CURRENT MODEL OF ETHICAL RULES FOR PROSECUTORS

The current model for ethical rules governing prosecutors' public statements is based upon the Supreme Court's ruling in *Gentile v. State Bar of Nevada*. n27 In *Gentile*, the Court held that a lawyer's right to free speech may be limited only if counsel's remarks create a "substantial likelihood of material prejudice" in an adjudicative [*1030] proceeding. n28 Five justices held that the "safe harbor" provisions of the state ethics rule prohibiting extrajudicial statements were "void for vagueness." n29

In August 1994, the American Bar Association amended Model Rule 3.6 governing pretrial publicity to comply with the *Gentile* decision. n30 As currently written, ABA Model Rule 3.6(a) provides:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. n31

The Rule then details what statements lawyers may make notwithstanding paragraph (a). n32 The Rule also contains a tit-for-tat [*1031] provision that allows a lawyer to "make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." n33 Within this Rule, there are no special directions for prosecutors other than a Comment noting that "[c]riminal jury trials will be most sensitive to extrajudicial speech." n34

The ABA Model Rules also include a rule relating to the special responsibilities of a prosecutor. Rule 3.8, entitled "Special Responsibilities of a Prosecutor," provides, in pertinent part:

The prosecutor in a criminal case shall:

. . .

- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening [*1032] public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule. n35

Again, this rule speaks only in generalities and provides very little direction to prosecutors as to which subject areas are likely to lead to prejudicial pretrial publicity. The only guidance provided is in a general warning in Comment 5, "Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused." n36

Similarly, the ABA Standards for Criminal Justice take a generic approach to warning prosecutors about unfair pretrial publicity. Standard 3-1.4 follows the general model of the ABA Model Rules, providing:

- (a) A prosecutor should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.
- (b) A prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under this Standard. n37

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Even though this rule is designed particularly for prosecutors, it does not attempt to detail what kind of remarks are likely to unfairly prejudice a criminal proceeding. Prosecutors—from the least experienced to the most ambitious—are left to make that determination themselves. Until they cross the line, there are no guidelines to caution prosecutors as to what subjects are most likely to prejudice a defendant's right to a fair trial. n38

Building from the ABA Model Rules, some states have tried to provide more guidance to prosecutors and defense counsel as to when their extrajudicial statements are likely to prejudice proceedings. For example, Georgia and California adopted the ABA Model Rules language that an attorney "who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding," n39 and added a Discussion section explaining what factors will impact whether an out-of-court statement will violate the ethical rules. The California rule simply identifies:

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- (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue;
- (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate [the] Business and Professions Code . . . ;

(3) whether the extrajudicial statement violates a lawful "gag" order, or protective order . . . ; and (4) the timing of the statement. n40

More importantly, the ABA Model Rules' comments attempt to identify situations where counsel's statements are likely to have a material prejudicial effect. Specifically, Comment 5 identifies the following subject areas that are dangerous for discussion:

- (1) the character, credibility, reputation or criminal record of a party . . . ;
- (2) . . . contents of a confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (3) the performance or results of any examination or test [and the] nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant . . . ;
- (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial . . . ;
- (6) the fact that a defendant has been charged with a crime, unless a statement explaining that the charge is merely an [*1035] accusation and that the defendant is presumed innocent until and unless proven guilty. n41

While these cautions are generally on the right track, they are somewhat outdated because we now have a better sense of what specific subject areas are likely to lead to prejudicial remarks. Confessions and scientific tests continue to be a sensitive area, but so are eyewitness identifications. A better model to look to is the guidelines for the Department of Justice as incorporated in the CFR.

In 1971, 28 *C.F.R.* § 50.2 was issued to control release of information by Justice Department personnel in criminal and civil proceedings. n42 The regulation begins by making clear that "the release of information for the purpose of influencing a trial is, of course, always improper," n43 but adds that there are "valid reasons for making available to the public information about the administration of the law." n44 Thus, there is a constant balancing of the need to protect individuals accused of crimes and the need to educate the public regarding the government's effort to administer the laws.

Then, the regulation seeks to provide more specific guidance as to how that balance should come out depending on the type of information to be provided. Thus, for example, background information, such as the name of the suspect or the text of the charges, may be released. n45 While one can question whether everything listed as a permissible topic belongs in that category, n46 the regulation makes some attempt to let the prosecutor know what information is safest to disclose. Moreover, even these categories are accompanied with a general warning,

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[d]isclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public. n47

If the regulation just ended there, however, the federal rules would be indistinguishable from the ethical rules in most states. It is the next section, 28 *C.F.R.* § 50.2(b)(6), that provides the real guidance for prosecutors. Prosecutors can always concoct an argument why details of an arrest or investigation serve a law enforcement function. At a minimum, disclosure might deter others from engaging in similar activity. Also, "highly prejudicial" is in the eye of the beholder. Prosecutors are well-trained to argue that the prejudicial impact of information is only so because the information is highly probative. n48

The regulation recognizes that in order for a rule of pretrial publicity to have any real effect, it must also give a list of the "shall nots" that prosecutors should refrain from saying. The regulation lists off-limit categories, including (i) observations about a defendant's character; (ii) a defendant's admission or confession, or refusal to make a statement; (iii) references to forensic tests, including fingerprints, polygraphs, ballistic tests, and other laboratory tests; (iv) statements concerning the identity, testimony, or credibility of prospective witnesses; (v) statements concerning evidence or argument in the case; and (vi) opinions as to the accused's guilt or the possibility of a plea or a lesser charge. n49 Except for category (v), which [*1037] seems rather oblique, the list of off-limit categories seems to provide better warnings for prosecutors than the general admonition against saying anything that would "have a substantial likelihood of materially prejudicing an adjudicative proceeding." n50

In his recent article, *Integrity Ethics*, Professor Fred Zacharias discusses the need for ethical codes that are "designed to ensure that lawyers behave as ordinary human beings would behave if they were put into the same position as lawyers and understood the demands upon them." n51 He also acknowledges that the unique role of lawyers, including prosecutors, imposes special constraints on them in order to comply with professional standards. n52 Although Professor Zacharias does not specifically discuss the rules on pretrial publicity, he generally advocates rules that are written with a view toward precise implementation: "Rules of role need to be clear and enforceable." n53 The federal regulation takes an appropriate step toward that goal.

The United States Attorneys' Manual (USAM) policies on media relations complement these regulations. n54 The guidelines parallel the federal regulation by listing—with some detail—subject matters that may be discussed and those that are off-limits. n55 The USAM guidelines have been updated so as to specifically caution against discussion of DNA testing. n56 While the general approach of the USAM is to provide specific guidance on prosecutors' pretrial remarks, there are noticeable additions that open the door to remarks that might not be countenanced by the federal regulation. For example, USAM 1-7.520 authorizes high-level officials of the Department of Justice, such as the "United States Attorney or Assistant Attorney General," to [*1038] discuss "the public policy significance of a case" if it is "[i]n the interest of furthering law enforcement goals." n57 Nonetheless, the USAM is far more specific than what is provided in most state ethical codes or the ABA Model Rules.

Assuming that specificity is helpful, it is critical to evaluate whether the federal system has correctly identified those areas where prosecutors' comments are likely to prejudice a defendant's right to a fair trial. n58 As Part III discusses, there are two reasons to limit prosecutorial speech in certain substantive areas related to criminal cases: (1) because these areas have been demonstrated to most likely lead to wrongful convictions, and (2) because these topics are also most likely to prejudice potential juries.

III. PROSECUTORS BEWARE: HOT-BUTTON ISSUES FOR PRETRIAL PUBLICITY

It is no great mystery what problems in prosecuting criminal cases are most likely to lead to wrongful convictions. The Innocence Project has identified several key problems in the prosecution of cases, especially cases resulting in capital punishment. n59 As Part III reviews some of these problems, it is interesting to note how they align with the off-limits topics provided in the federal regulation. n60

A. Comments Regarding a Defendant's Character and Race

First, there continues to be a significant problem with the extent to which race plays a role in the prosecution of defendants. n61 Racial [*1039] profiling persists in the United States. n62 Police targeting of people of color has led to a disproportionate number of minorities being prosecuted in the United States. n63 The result is a settled belief by many that people of color are more likely to commit crimes. n64 Prosecutors can intentionally or unintentionally exploit this stereotype by focusing on the suspect's race in the prosecutor's extrajudicial remarks. n65 Unless a suspect or defendant's race is critical to the

issues in a case, prosecutors should not discuss the suspect's race because it is essentially a sub rosa attack on the defendant's character. n66

Few prosecutors appreciate the negative impact of discussing a defendant's race publicly before a trial. As Professor Taslitz has documented:

[T]he offender's race leads to an increased likelihood of interpreting a crime as especially reprehensible, [*1040] meriting greater punishment. Observers are also better able to recall incriminating evidence and less able to recall exculpatory evidence when the offender is a racial minority. This "confirmation bias," by making negative information more salient than positive, makes it harder to overcome racial stereotypes. n67

If our goal is to ensure that the parties start a trial on an equal playing field so that jurors will decide the case on the basis of the evidence, and not on assumptions and speculation, then it is critical that prosecutors refrain from commenting on defendants' character, including their race. n68

The recent high-profile Duke lacrosse scandal is an example of how pretrial comments about race can distort the criminal justice process and unfairly prejudice defendants. n69 In that case, while the alleged rape was still under investigation, District Attorney Michael Nifong publicly stated that he was "not going to allow Durham's view in the mind of the world [to] be a bunch of lacrosse players from Duke raping a black girl in Durham." n70 Indicating that he would personally supervise the investigation, Nifong led the press to focus on the racial overtones of the case. The press quickly picked up on that message and framed the case in black and white terms—that is, "the accuser [was] black, a mother and a student at North Carolina Central; the Duke lacrosse team [was] virtually all white" n71

It is particularly dangerous for prosecutors to play the "race card" during their pretrial comments. The broad stereotypes that are [*1041] affiliated with race have a high risk of affecting the public's and potential jury pool's attitude about a case. Another example of this occurred during the prosecution of the "Jena Six." Six black high school students in Jena, Louisiana were accused of attempted second-degree murder in 2006 for allegedly beating a white classmate to death. n72 The case was laden with racial tensions because no white students were charged with hanging two nooses from a tree in the center of the campus square. n73 The prosecutor's handling of the case came under national scrutiny and criticism. n74 Regardless of the merits of the prosecutor's approach to the case, one thing is for sure: Reed Walters, the District Attorney, only added fuel to the fire by publishing—while the case was still pending—an Op-Ed in *The New York Times* trying to explain his handling of the proceedings. n75 There was no way for him to address the racial aspects of the case without directly or indirectly making comments that would tend to create negative pretrial publicity for the accused. At least one expert believed that by explaining why he would not prosecute the noose incidents, Walters heightened the risk of "white public condemnation" of the black defendants. n76

It is difficult for a prosecutor to rise above the public clamor, especially when the public dialogue is heated and involves race. Yet, that is precisely the time when a prosecutor must remain neutral in making public comments. Walters had a right to defend his actions; he did not have a right to do so at a time and in a manner that could materially prejudice the defendants on trial. Prosecutors who face [*1042] difficult race issues in a case must ensure that they respond to questions regarding their actions in, not out of, court. There, a judge can ensure that the discussion is handled in a manner that will not prejudice the right to a fair trial. Public debates about race, especially when a racially charged case is pending, are likely to lead to a distortion of the issues in a way that could impair the right to a fair trial. n77

B. Comments Regarding a Defendant's Admissions or Confessions

False confessions also regularly lead to wrongful convictions. The problem of false confessions has been so significant that the ABA passed a resolution encouraging all law enforcement agencies to videotape custodial interrogations of crime suspects in their entirety. n78 Much has been written about the

problem of false confessions. n79 Approximately 25% of the cases where there have been DNA exoneration were cases involving false confessions. n80

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There is a myriad of reasons for giving false confessions. n81 First, some law enforcement officers will use overly aggressive interrogation techniques. Since prosecutors are not present for the interrogation, they are not in the best position to evaluate the credibility of the confession, at least not until it has been fully evaluated during pretrial preparation. Overly aggressive interrogation techniques are particularly problematic in cases involving the most vulnerable suspects—those with mental deficiencies, youth, and those from different cultural backgrounds.

Second, false confessions arise because law enforcement officers make improper promises to the suspects that are not reflected in the recording of the confession. Again, this is the type of information that the prosecutor is unlikely to uncover in the earliest stage of trial preparation and certainly will not have available at the time initial comments are made to the press.

Third, some false confessions occur because defendants decide on their own that it will be better for them to take responsibility for a crime they did not commit so as to divert attention from the true suspect whom they fear or to whom they feel a strong loyalty. Thus, gang members will sometimes confess to crimes by fellow gang members to avoid being tagged as a cooperator or considered responsible for someone else's arrest.

Fourth, some criminals, particularly those in high-profile crimes, "crave attention, publicity, or fame." n82 For a few minutes in the spotlight, defendants are willing to falsely confess to crimes they did not commit. Because prosecutors must be committed to ensuring that the justice system convicts those truly responsible for the offense, not just the easiest target, it is wrong to exploit confessions even by those who make them for their own perverse reasons.

Finally, prosecutors may believe that suspects have confessed, even though no confession has actually been made. Law [*1044] enforcement officers, eager to get prosecutors to file a case, may exaggerate the importance of statements allegedly made by the defendant, telling the prosecutor that the defendant orally confessed when the defendant's statements were much less conclusive. For all of these reasons, it is extremely risky for prosecutors to comment on "confessions" or "admissions" prior to trial. Moreover, regardless of their accuracy, pretrial comments on confessions can significantly impact the defense's ability to obtain a fair and impartial jury.

The United States Supreme Court has recognized that confessions pose a special danger of prejudicial pretrial publicity for defendants. Perhaps the most flagrant violation of a defendant's right occurred in *Rideau v. Louisiana*. n83 Wilbert Rideau was arrested for robbing a bank, kidnapping three bank employees, and and killing one of them in Lake Charles, Louisiana, a town with a population of 150,000. n84 The next morning, police released a "moving picture film with a sound track" of Rideau's so-called "interview" with the sheriff. n85 On the film, Rideau made crucial admissions regarding the crime. n86 The first day, 24,000 people saw the broadcast. n87 The next day, an estimated audience of 53,000 people saw the same film. n88 The third day, another 29,000 people saw the "interview" on their television sets. n89 Although the exact number of people who watched the "confession" is unknown, n90 clearly the potential jury pool was saturated by the news coverage.

Rideau sought a change of venue, but his motion was denied, and he was convicted and sentenced to death. n91 The Supreme Court of Louisiana affirmed the conviction. n92 In reversing the Louisiana Supreme Court, Justice Clark of the United States Supreme Court noted that public broadcast of confessions can be, in a very real [*1045] sense, the trial that a defendant faces for his crime: "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle [can] be but a hollow formality." n93 Justice Clark went so far as to characterize a trial after such pervasive broadcast of a confession as a "kangaroo court proceeding" that violates a defendant's basic due process rights. n94

While the release of the confession in Rideau came from law enforcement and not directly from the prosecutors, n95 legally and ethically this fact does not make a difference. n96 The impact of such pretrial publicity remains the same. It has a corrosive impact on a defendant's right to a fair trial. For that reason, it is crucial that prosecutors not discuss alleged confessions by defendants before trial. n97 Before a court even decides whether law enforcement lawfully obtained a statement from a suspect, that defendant may be convicted in the court of public opinion. n98 Although the [*1046] prosecutors are not always the proper persons to blame, n99 ultimately they bear responsibility.

Prosecutors must recognize that reports of confessions or admissions by a defendant are among the most dangerous forms of pretrial publicity. While a defendant may have made a pretrial statement, it is ultimately up to the judge, not the prosecutor or police, to determine whether that statement will be admissible. n100 Confessions may be suppressed because they were obtained unconstitutionally n101 or in violation of statutory rules on interrogation. n102 A prosecutor who broadcasts or comments on a [*1047] confession before trial risks being seen as seeking to influence potential jurors with inadmissible evidence.

C. Comments About the Results of Scientific Tests, including DNA

Another category of evidence that poses a particular risk of prejudicial pretrial publicity includes reports of scientific tests in a case, including DNA results. Once again, wrongful conviction studies can help demonstrate how crucial such evidence often is to a case. According to the Innocence Project, at least 250 defendants have been exonerated by DNA evidence. n103 Many of the exonerations involve defendants on death row and some involve cases of prosecutorial misconduct. n104

However, just as scientific evidence has the power to exonerate, n105 it also has the potential to wrongfully convict. n106 DNA results that are tainted or contaminated, or based upon rushed or faulty science and assumptions, may lead to reports that falsely implicate defendants as the perpetrators of crimes. n107 In the public's mind, the report that law enforcement has found a DNA "match" between a defendant and a crime scene can have devastating effects on a [*1048] defendant's case. Faulty results may also influence eyewitness identifications, thereby tainting other evidence in a case. n108

In his article, *Beyond Bad Apples: Analyzing the Role of Forensic Science in Wrongful Convictions*, Professor William C. Thompson presents the case of Josiah Sutton. n109 In 1998, Sutton was arrested and charged with rape based upon the victim's mistaken identification. n110 Only sixteen years old, Sutton demanded to take a DNA test, but the results did not exonerate him. n111 Instead, the Houston Police Department Crime Laboratory claimed that the DNA results showed that Sutton's DNA pattern was found on the victim. n112 Hearing of the DNA results, the victim became more entrenched in her identification of the defendant as the rapist. n113 As it turned out, the results were wrong; an audit of the crime laboratory indicated that it had been doing shoddy work and misrepresenting findings in a number of DNA cases. n114

It is because DNA evidence can be so powerful that prosecutors must be extremely sensitive in how they discuss such evidence before trial. Pretrial reports can certainly influence public attitudes regarding the case, including those of potential jurors. Perhaps even more importantly, "the Sutton case illustrates how seemingly independent elements (eyewitness identification and DNA testing) can interact, such that a failure in one may precipitate, or at least reinforce, a failure in another." n115

DNA evidence is the very type of evidence that must be subject to the adversarial process in order to be reliable. n116 By exploiting it in [*1049] pretrial publicity, prosecutors may undermine that process and help contribute- wittingly or unwittingly- to wrongful convictions.

D. Eyewitness Identifications and Witness Credibility

It is now understood that eyewitness identifications may be untrustworthy evidence in a case. In its report, *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, an ad hoc committee of the Crim-

inal Justice Section of the ABA reported that approximately 75% of cases in which the defendants were wrongfully convicted and then exonerated by DNA evidence had involved mistaken eyewitness identifications. n117 In fact, the committee reported that "[e]yewitness misidentifications are the greatest cause of wrongful convictions." n118

Prosecutors and defense lawyers have been aware of the dangers of eyewitness identifications for years. n119 Moreover, there is a general understanding that jurors overly value the accuracy of eyewitness testimony. n120 A prosecutor who publicly announces prior to trial that there are eyewitness identifications of a defendant is likely to increase the possibility that eyewitnesses who have made a mistake will become more committed to their wrongful identification as the case proceeds to trial. In these situations, the prosecutor's pretrial statements not only run the risk of influencing the potential jury pool, but also of influencing the actual witnesses in the case.

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Regulations against publicly discussing the identity, testimony or credibility of prospective witnesses n121 protect both the witness n122 and the fairness of the proceedings against the defendant. By definition, it is misleading for a prosecutor to argue pretrial in favor of the credibility of a witness because that witness is yet to be subject to the very process the criminal justice system relies upon to establish credibility: cross-examination. The Supreme Court has emphasized in recent years the importance of a criminal defendant's right of confrontation n123 in ensuring the defendant a fair trial. n124 A prosecutor's pretrial touting of a witness's credibility or testimony undermines the role of cross-examination in evaluating that witness's account. It is relatively easy to get a witness to tell a prosecutor what he thinks the prosecutor wants to hear; it is quite another challenge to offer at trial a witness's testimony that will withstand adversarial scrutiny.

The infamous Duke lacrosse case provides a prime example of the dangers of having a prosecutor tout a witness's account before [*1051] trial. n125 In that case, District Attorney Michael Nifong accused three members of the Duke University lacrosse team of sexually assaulting a stripper who had been hired to entertain team members at an off-campus party. n126 On at least six different occasions, Nifong stated to the media that he believed the woman's account that a crime had occurred, and he offered explanations to fill holes in the woman's story. n127 Nifong became too invested in the witness and too invested in the case. At the same time, he demonized the defendants by calling them "a bunch of hooligans" and chastising them for not coming forward to support the woman's story. n128

Although prosecutors naturally want to support their witnesses, especially in sexual violence cases, it is dangerous for them to become committed to the witness's story until that story is tested. Once the accuser's story in the Duke lacrosse scandal was tested by scientific evidence and other witnesses' accounts, her account disintegrated. n129 Meanwhile, the reputation and lives of the accused students were devastated by the pretrial publicity. Nifong was ultimately disbarred, in part for making "public comments that he knew 'would prejudice a jury' and 'would heighten public condemnation of [the Duke defendants].'" n130 The proper place to comment on a witness's credibility is in the courtroom, and even there prosecutors cannot vouch for witnesses. n131

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E. Summary of Hot-Button Issues

Learning from the past, especially from cases where there have been wrongful accusations or convictions, one can easily create a list of the hot-button issues that prosecutors should avoid in their pretrial comments. No absolute prohibition exists against commenting on these issues because the Supreme Court has held that a lawyer's First Amendment rights cannot be restrained where the lawyer speaks "at a time or in a manner that neither in law nor in fact create[s] any threat of real prejudice to [the defendant's] right to a fair trial or to the State's interest in the enforcement of its criminal laws." n132 There are, however, some topics that prosecutors should presume are prejudicial and about which prosecutors should refrain

from commenting unless there is a compelling reason to do so. Self-restraint will not only protect the prosecutor from committing an ethical violation, but it will also ensure a fairer trial for the defendant. n133

The hot-button issues discussed thus far include topics that have historically led to wrongful convictions. These include comments regarding: (1) a defendant's race or character or both; (2) alleged confessions or admissions; (3) scientific testing results, including DNA; and (4) credibility of witness identifications. While there may be other topics prosecutors should avoid, n134 state ethics rules should at a minimum identify these "shall nots" for prosecutors. Moreover, [*1053] federal courts should enforce 28 *C.F.R. § 50.2(b)(6)*. Because the Gentile standard n135 is so amorphous, prosecutors currently feel free to comment liberally on cases with little fear of the consequences.

F. One Last Hot-Button Scenario: Conflicts of Interest and the Need to Depersonalize Prosecutions

Finally, prosecutors should consider one more scenario. Regardless of the issues and evidence in a case, prosecutors face an additional challenge in commenting on cases when they are too personally involved with the parties or the issues. Prosecutors must balance the duty to zealously represent the community with the constitutional duty to respect a defendant's right to a fair trial. n136 When a prosecutor has a personal connection to a case, maintaining this balance becomes particularly challenging. While the community certainly expects its prosecutor to be dedicated to a case, the prosecutor also has a duty to remain objective. n137 In the end, as is often quoted, the prosecutor's job is not simply to win, but to ensure "that justice shall be done." n138

A prosecutor who has a close connection to the parties in a case or its subject matter faces the particular challenge of maintaining his or her objectivity in dealing with the press. Although it can be done, a prosecutor's personal relationship to a case creates additional hot-button issues to be avoided during pre-trial publicity. In the 2006 prosecution of Brian Nichols for the murder of a judge, a court reporter, a sheriff's deputy, and a federal agent during his [*1054] rampage at a Fulton County Courthouse, defense counsel sought to disqualify the "entire Fulton County district attorney's office." n139 The defense claimed a variety of conflicts of interest and allegations of prosecutorial misconduct as its basis for the motion, including alleged improper communications with the news media. n140 In response to the motion, Senior Assistant District Attorney Christopher Quinn appropriately noted that "a 'public prosecutor is necessarily a partisan' to a criminal case." n141 Writing for the prosecution, Quinn stated:

Contrary to the Defendant's assertion that a prosecutor must be disinterested in order to be impartial, the law of the United States as well as Georgia conclusively show[s] that a prosecutor has a duty, indeed an obligation, to be deeply interested in urging the view that a defendant is guilty of the crimes charged or there would be an end to the conviction of criminals. n142

While prosecutors are expected to believe in their cases and be zealous advocates, this challenge is particularly acute if they must protect their or a close colleague's personal interests in doing so. Prosecutors face an added temptation to try to salvage their own reputation or that of a close friend by responding not only in court papers, but in the court of public opinion. Yet, these are precisely the types of cases where prosecutors should realize they are dealing with a hot-button issue and defer to court filings and court arguments to address conflicts raised by the defense. Moreover, if the conflict makes it unduly difficult for the prosecutor to maintain his objectivity, then the prudent approach would be to allow another [*1055] prosecutor or office to handle the case. n143 The prosecutor in this situation should certainly avoid trying the case in the press where the prosecutor and his or her background may become the focus of the media's story.

As with the other hot-button issues, the goal is to ensure that both sides receive a fair trial. Instead of relying on broad, general standards to guide prosecutors, a list of specific issues to avoid can better guide

and educate them, so they can avoid areas of commentary that are likely to prejudice the defense or even the prosecution's own case.

IV. OTHER ETHICAL MODELS FOR GUIDING PROSECUTORS' EXTRAJUDICIAL COMMENTS

As prosecutors look for guidance in dealing with the media, one place to look is to the Society of Professional Journalists Code of Ethics (SPJ Ethics Code), which guides journalists on ethical issues. n144 While the media, especially tabloids and talk shows, have earned their fair share of criticism for their coverage of criminal cases, their ethical standards can provide guidance to prosecutors who interact with the media, especially in high-publicity cases. Of course, reporters have a fundamentally different role when covering cases: their job is to "seek truth and report it." n145 Yet, they too find themselves in situations where personal involvement in a case can cloud their judgment.

The SPJ Ethics Code lists things that ethical journalists do to check themselves before they publish stories regarding criminal cases:

[*1056]

- (1) "Test the accuracy of information from all sources and exercise care to avoid inadvertent error [and deter] [d]eliberate distortion . . .[;]"
- (2) "Always question sources' motives[;]"
- (3) "Never distort the content of news photos or video[;]"
- (4) "Avoid misleading re-enactments or staged news events[;]"
- (5) "[A]void imposing [the journalist's own] values on others[;]"
- (6) "Avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status[;]"
- (7) "Distinguish between advocacy and news reporting[;]"
- (8) "Show compassion for those who may be affected adversely by news coverage[;]"
- (9) "Show good taste. Avoid pandering to lurid curiosity[;]"
- (10) "Balance a criminal suspect's fair trial rights with the public's right to be informed[;]"
- (11) "Avoid conflicts of interest, real or perceived[;]"
- (12) "Disclose unavoidable conflicts[;]"
- (13) "Admit mistakes and correct them promptly[;]"
- (14) "Expose unethical practices of journalists and the news media[;]" and
- (15) "Abide by the same high standards to which they hold others." n146

These ethical guidelines can clearly be applied to prosecutorial speech. Tailored to situations where the media is involved, the guidelines can remind prosecutors that they have an independent responsibility to test information before disclosing it; that if they make mistakes, they have an independent responsibility to correct [*1057] those mistakes; that conflicts of interests may distort the information the public receives; and that in interacting with the media, the prosecutor may be an advocate, but he or she still has a responsibility to act professionally and even with compassion. In other words, while much of the literature regarding prosecutorial ethics and pretrial publicity has focused on the constitutional thresholds for

limiting prosecutorial speech, journalistic codes of ethics can help prosecutors set aspirational standards that will provide even greater protection of a defendant's right to a fair trial.

As lawyers, we tend to think that we have a monopoly on ethical standards, but nothing could be further from the truth. Almost every type of profession has ethical rules to guide its members. n147 In contemplating why some of the best prosecutors in the nation have still crossed the line into improper pretrial comments, it is worthwhile to examine other codes of ethics.

One particularly interesting code of ethics is the code of ethics for court reporters. n148 Once again, court reporters have a very different task and different role in the criminal justice system than do prosecutors; yet, the simplicity and universality of some of their rules are helpful reminders to all professionals. Among their "Tenets of Ethics" are:

Tenet One: Provide impartial and evenhanded treatment of all persons;

Tenet Two: Demonstrate the highest standards of personal integrity, honesty, and truthfulness . . . ;

Tenet Three: Behave toward all persons with respect, courtesy, and responsiveness, acting always to promote public esteem in the court system;

Tenet Four: Safeguard confidential information . . . ;

Tenet Five: Refrain from any actual impropriety . . . ;

[*1058]

Tenet Six: Avoid any appearance of impropriety that might diminish the honor and dignity of the court;

Tenet Seven: Serve the citizens of [the jurisdiction] . . . ;

Tenet Eight: Furnish accurate information . . . ;

Tenet Nine: Improve personal performance . . . ;

Tenet Ten: Guard against and, when necessary, repudiate any act of discrimination or bias based on race, gender, age, religion, national origin, language, appearance, or sexual orientation;

Tenet Eleven: Renounce any use of positional or personal power to harass another person. . . . n149

This Article does not suggest that these tenets can easily translate into firm rules for prosecutors. What we need, however, is not additional rules but additional understanding of the scope of the current rules, n150 the specific hot-button areas that are likely to raise problems, n151 and what basic professional beliefs should guide a prosecutor when dealing with those areas. n152 For the third goal, ethical standards from other professions can be a useful teaching tool to sensitize prosecutors to their broader ethical duties. n153

V. CONCLUSION

Houston, we may have a problem, but there are solutions. The answers lie in both clear rules for prosecutors regarding pretrial publicity and a clearer understanding of why rhetorical flourishes, although tempting, threaten to undermine those rules. n154 No [*1059] prosecutor, especially one who must run for office, wants to leave the impression that he is not committed to his case. n155 Moreover, given concerted efforts by some defense counsel to try their cases in the press, as well as safety concerns for the

community, there may be valid reasons for prosecutors to make public statements. n156 Certainly, this Article does not advocate an absolute rule against prosecutors' pretrial comments.

Yet, there is a need for more focused standards than those used by many jurisdictions today. The problem with a general standard that prohibits comments posing "a substantial likelihood of materially prejudicing an adjudicative proceeding" is that it does not remind prosecutors of the dangers of pretrial comments regarding certain aspects of a case. Given that we now know that certain types of evidence and attacks pose a concrete risk of wrongful convictions, prosecutors should commit to not commenting on those areas unless there is a compelling reason to do so. n157

What would be such a compelling reason? Again, the long-ignored federal regulation 28 C.F.R. § 50.2(b)(5) offers some guidance. It provides:

[*1060]

Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include only information which is clearly not prejudicial. n158

In other words, prosecutors must have a clear, articulable reason that it is in the public's interest-not just the prosecutor's strategic interest-to release pretrial information. Such reasons may include a request for assistance from the public; information necessary to protect public safety; and matters in the public record, such as the text of a public filing. n159 Although the federal regulations allow prosecutors to publicly discuss the circumstances immediately surrounding an arrest, including a description of the physical items seized, n160 prosecutors should be wary of press conferences whose primary purpose is to taint the defense with images of, for example, guns and narcotics seized during an arrest. While prosecutors are allowed to make statements regarding seizures, it is much more inflammatory to stage press conferences with rows and rows of seized items. n161

Pretrial publicity is not a science. Yet, that does not mean certain standards cannot be established and honored. Continued discussion of the issue serves as a valuable reminder that even (or perhaps, especially) in the highest profile cases, prosecutors must evaluate the purpose and effect of their remarks before talking to the press. n162 [*1061] If this is done, particularly with a focus on the hot-button issues that can lead to wrongful convictions, the trial in the court of public opinion is unlikely to prejudice the trial inside the courtroom.

FOOTNOTES:

n1 Although the actual words of the crew were, "Houston, we've had a problem here," see NASA Apollo Mission Apollo-13, <http://science.ksc.nasa.gov/history/apollo/apollo-13/apollo-13.html> (last visited Mar. 2, 2010), the memorable phrase has been popularized in film as "Houston, we have a problem." Apollo 13 (Universal Pictures 1995).

n2 *Berger v. United States*, 295 U.S. 78, 88 (1935). As Justice Sutherland stated, The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

n3 Id. Amended Complaint, paras. 84, 90, *N.C. State Bar v. Nifong* (Jan. 24, 2007) (No. 06 DHC 35) (internal quotation marks omitted), available at [http://www.ncbar.com/Nifong rele ase.pdf](http://www.ncbar.com/Nifong%20rele%20ase.pdf). Nifong further exacerbated the situation by telling ESPN reporter George Smith that "one would wonder why one needs an attorney if one was not charged and had not done anything wrong." Id. paras. 40-41 (internal quotation marks omitted). Then he detailed the alleged attack for the media, describing how he alleged the assault was committed: "Somebody had an arm around her like this, which she then had to struggle with in order to be able to breathe . . . [.] She was struggling just to be able to breathe." Id. para. 73 (internal quotation marks omitted).

n4 Susan Hanley Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 34 *Ohio N.U. L. Rev.* 755, 760-61 (2008) (noting Nifong's statements about defendants' test results and that DNA evidence later exculpated defendants).

n5 See *id.* at 761 (noting detrimental consequences of Nifong's allegations); Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 *Geo. Mason L. Rev.* 257, 228 (2008) (noting harmful effects of Nifong's public statements); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 *B.U. L. Rev.* 1, 12 n.49 (2009) (discussing improper tactics used by Nifong).

n6 Steven Mikulan, *The Anna Nicole Smith Indictments and Jerry Brown's Contact High with the Political Power Grid*, L.A. *Wkly.*, Mar. 19, 2009 (internal quotation marks omitted), available at <http://www.laweekly.com/2009-03-19/columns/the-anna-nicole-smith-indictments-and-jerry-brown-39-s-contact-high-with-the-political-power-grid/>.

n7 Id. (internal quotation marks omitted). The remarks were so inflammatory that the California Pharmacist Association urged Attorney General Brown to retract his statement that "[p]eople in white smocks in pharmacies and with their medical degrees are a growing threat." *The California Pharmacists Association Denounces Attorney General Brown's Characterization of Pharmacists as Drug Dealers*, *Bus. Wire*, Mar. 17, 2009 (internal quotation marks omitted).

n8 For a brief biography of Mr. Fitzgerald, see Stephen J. Carrera, Patrick J. Fitzgerald, *N.Y. Times*, Jan. 17, 2010, available at http://topics.nytimes.com/top/reference/timestopics/people/f/patrick_j_fitzgerald/index.html. As described, Fitzgerald drew national headlines as the special prosecutor in the leak trial against I. Lewis Libby Jr. . . . [H]e is equally noted in Chicago for a dizzying list of prosecutions of the city's powerful, people many there said would surely never be taken to court at all: a former Republican governor, aides to the Democratic mayor, a media mogul, the city's reputed mobsters, and on and on. Id. See also 1600 Pennsylvania Avenue with David Gregory (MSNBC television broadcast Dec. 10, 2008) (noting that even those who are prosecuted by Fitzgerald admire his integrity; for example, Matt Cooper, who was formerly held in contempt of court by Fitzgerald for refusing to testify in the Valerie Plame matter, described Fitzgerald as "a determined, serious guy, [who] does his own homework. . . . I don't think he's a vengeful guy.").

n9 See *Former Illinois Gov. Blagojevich, His Brother, Two Former Top Aides, Two Businessmen Indicted*, *U.S. Fed. News*, Apr. 4, 2009, available at 2009 WLNR 6342614 (announcing indictment). The nineteen-count indictment against Blagojevich includes felony counts of "racketeering conspiracy, wire fraud, extortion conspiracy, attempted extortion and making false statements to federal agents." Id. The charges are the result of "Operation Board Games"-a public corruption investigation of pay-to-play politics. Id. Blagojevich is accused of "conspir[ing] to sell or trade Illinois' U.S. Senate seat" vacated by President Obama, agreeing to use the office of governor for financial gain, threatening to withhold funds from the Tribune Company "to induce the firing of Chicago Tribune editorial board members sharply critical of Blagojevich," and bribery and extortion of campaign funds. Id. Blagojevich allegedly even "delayed a \$ 2 million grant to a public charter school while trying to extort White House Chief of Staff

Rahm Emanuel." Rick Pearson & Jeff Coen, *Feds Widen Net: U.S. Says Blagojevich, Crew Ran State as Racket*, Chi. Trib., Apr. 3, 2009, at 8.

n10 Illinois Governor Arrested on Corruption Charges, *All Things Considered* (National Public Radio Dec. 9, 2008). Even Fitzgerald's admirers have criticized this particular remark. See James Podgers, *Abner Mikva Chastises Prosecutors for Publicity in High-Profile Cases*, ABA Chi., July 30, 2009, available at http://www.abajournal.com/news/article/abner_mikva_chastises_prosecutors_for_publicity_in_high-profile_cases_abach/ (stating that several panel members had criticized Fitzgerald).

n11 These rules are discussed in detail *infra* Part II of this Article.

n12 Occasionally, judges will admonish prosecutors for crossing the ethical line by commenting about a defendant, witnesses in the case, or other matters prohibited by a court order. See, e.g., *United States v. Koubriti*, 305 F. Supp. 2d 723, 757 (E.D. Mich. 2003) (admonishing Attorney General for his extrajudicial comments in high-profile terrorism case).

n13 See Richard W. Holmes, Comment, *Prosecutorial Dealing with the Media: Duties, Remedies, and Liability*, 28 *J. Legal Prof.* 177, 180 (2003) (noting lack of sanctions for prosecutors' ethical violations regarding media).

n14 Cf. Laurie L. Levenson, *High-Profile Prosecutors & High-Profile Conflicts*, 39 *Loy. L.A. L. Rev.* 1237, 1240 (2006) (discussing dangers of personal conflicts in prosecutions).

n15 For some examples of this literature, see generally Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* 143-61 (2007); Bennett L. Gershman, *Prosecutorial Misconduct* (2d ed. 2000); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 *U. Ill. L. Rev.* 1573; Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 *Wis. L. Rev.* 399; Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 *Geo. J. Legal Ethics* 427 (2009); Ernest F. Lidge III, *Perp Walks and Prosecutorial Ethics*, 7 *Nev. L.J.* 55 (2006); Scott M. Matheson, Jr., *The Prosecutor, The Press, and Free Speech*, 58 *Fordham L. Rev.* 865 (1990); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecutorial Discipline Seriously*, 8 *UDC/DCSL L. Rev.* 275, 288 (2004); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 *N.C. L. Rev.* 721 (2001); Holmes, *supra* note 13; Casey P. McFaden, Note, *Prosecutorial Misconduct*, 14 *Geo. J. Legal Ethics* 1211 (2001).

n16 Model Rules of Prof'l Conduct R. 3.6 (2008). For example, Georgia has adopted a trial publicity rule that is almost identical. Ga. Rules of Prof'l Conduct R. 3.6 (2009).

n17 E.g., Ga. Rules of Prof'l Conduct R. 3.6 cmt. 5B (2009). The comments to the rule may also provide a standard list of "subjects which are more likely than not to have a material prejudicial effect on a proceeding . . ." E.g., *id.* cmt. 5A.

n18 *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1033 (1991); see also *United States v. Munoz-Franco*, 487 F.3d 25, 68 (1st Cir. 2007) (deciding that because evidence against defendants was overwhelming, prosecutor's comments to media that defense counsel "lied to the court" could not have denied defendants their rights to due process); *In re Gansler*, 889 A.2d 285, 287-88 (D.C. Cir. 2005) (reprimanding prosecuting attorney for making statements that had substantial likelihood of depriving three defendants of their due process rights, including State's Attorney Gansler's statement to media that defendant had confessed to murder and given authorities "incredible details that only the murderer would have known" (internal quotation marks omitted)); *United States v. Sutton*, No. CR 05-826-TUC-CKJ(BPV), 2007 WL 2572348, at *4 (D. Ariz. Sept. 4, 2007) (ordering attorneys to refrain from making any public comments regarding trial until after completion of jury selection).

n19 See *Gentile*, 501 U.S. at 1051-52 (discussing balance that must be struck between state's interest in regulation of legal profession and lawyer's First Amendment rights); Timothy J. Dacey, *Does a Lawyer Check First Amendment Rights at the Courthouse Door?*, Boston B.J., May/June 2006, at 16, 17 (dis-

curring balance between First Amendment and fair proceedings); Robert Hardaway & Douglas B. Tumminello, Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong, *46 Am. U. L. Rev.* 39, 79-80 (1996); Beth A. Wilkinson & Steven H. Schulman, When Talk Is Not Cheap: Communications with the Media, the Government and Other Parties in High Profile White Collar Criminal Cases, *39 Am. Crim. L. Rev.* 203, 206-07 (2002) (discussing scope of "gag orders" that courts might issue in high-profile cases).

n20 See *Berger v. United States*, 295 U.S. 78, 88 (1935) (discussing distinct role of United States Attorney). Justice Jackson noted that a prosecutor "can have no better asset than to have his profession recognize that his attitude toward those who feel his power has been dispassionate, reasonable and just." Robert H. Jackson, The Federal Prosecutor, 31 *J. Am. Inst. Crim. L. & Criminology* 3, 4 (1940) at 4. While their dispassion is to be valued, Jackson noted that there are times when the law also becomes personal: It is in this realm-in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself. *Id.* at 5.

n21 28 *C.F.R.* § 50.2 (2009) (listing statements of character, admissions or lack thereof, and references to test results, to name a few).

n22 As Professor Matheson noted even before the Supreme Court decided the seminal case of *Gentile*, "The prosecutor does not relinquish free speech rights by virtue of being a prosecutor. . . . [T]he prosecutor merits free speech shelter. However, his role in the criminal justice system and the accused's fair trial and other rights complicate the first amendment analysis." Matheson, *supra* note 15, at 870 (footnote omitted). Similarly, Justice Stewart, leading scholars, and lower courts have observed, "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *In re Sawyer*, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring); see also *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 253 (7th Cir. 1975) ("Those attorneys involved in the investigation for the Government are in a different position. They have the ability to influence and ensure proper governmental procedure without resort to public opinion. Moreover, they know what charges may be brought and are a prime source of damaging statements."); Erwin Chemerinsky, Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment, 47 *Emory L.J.* 859, 859 (1998) ("Restrictions on lawyers' speech are increasingly common."); Kathleen M. Sullivan, The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights, 67 *Fordham L. Rev.* 569, 569 (1998) (noting several ways in which attorneys' free speech rights are regulated).

n23 28 *C.F.R.* § 50.2(b)(6).

n24 The occurrence of such leaks has led some courts in high-profile cases to issue specific orders barring the release of protected information. For one such instance, see *United States v. McVeigh*, 931 F. Supp. 756, 760 (D. Colo. 1996).

n25 Soc'y Prof'l Journalists Code of Ethics (1996) [hereinafter SPJ Code], available at <http://www.spj.org/pdf/ethicscode.pdf>.

n26 The judge has the power to control both the admissibility of evidence and conduct in the courtroom. "[C]ourts of justice are universally acknowledged to be vested . . . with power to impose silence, respect and decorum in their presence, . . . and as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution." *Anderson v. Dunn*, 19 U.S. (6 *Wheat.*) 204, 226 (1821).

n27 501 U.S. at 1033-34 (reversing Nevada State Bar Disciplinary Board's actions against Dominic Gentile, defense attorney who gave brief "opening statement" at press conference six months prior to defendant's trial, finding disciplinary actions violated attorney's First Amendment rights).

n28 *Id. at 1075.*

n29 *Id. at 1048.*

n30 As detailed by the American Bar Association (ABA) in its history of the Rule, the amendment changed the rule in several ways: (1) [it] modified paragraph 3.6(a) to apply only to a lawyer who is participating in or has participated in the investigation or litigation of a matter; (2) the list of statements ordinarily likely to have a prejudicial effect, originally contained in paragraph 3.6(b), was moved to the Comment section of the rule; (3) the list of ordinarily acceptable statements, originally contained in paragraph 3.6(c), was moved to paragraph 3.6(b), with changes that eliminated the terms "without elaboration" and "general nature;" (4) a new paragraph 3.6(c) provided for a lawyer's limited right of response to protect a client from substantial and undue prejudicial effect of recent publicity not initiated by the lawyer or the client; and (5) a new paragraph 3.6(d) was added, making the Rule applicable to other lawyers in the lawyer's firm or government agency. Cornell University Legal Information Institute, ABA Model Rules of Professional Conduct (pre-2002): History, <http://www.law.cornell.edu/ethics/aba/2001/history.htm> (last visited Mar. 2, 2010); see also Esther Berkowitz-Caballero, In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules, 68 *N.Y.U. L. Rev.* 494, 537-38 (1993) (noting that ABA had begun drafting new rule in wake of Gentile); Michael W. McTigue Jr., Comment, Court Got Your Tongue? Limitations on Attorney Speech in the Name of Federalism: *Gentile v. State Bar*, 72 *B.U. L. Rev.* 657, 668-69 (1992) (analyzing probable consequences of Gentile decision); Joseph M. Moses, Note, Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion, 95 *Colum. L. Rev.* 1811, 1826-28 (1995) (noting various interests at play in Gentile).

n31 Model Rules of Prof'l Conduct R. 3.6(a) (2002).

n32 ABA Model Rule 3.6(b) reads: Notwithstanding paragraph (a), a lawyer may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and (7) in a criminal case, in addition to subparagraphs (1) through (6): (i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation. *Id.*

n33 *Id.* 3.6(c). The Rule further provides, "A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity." *Id.*; see also Victor Streib, Media Misuse: Criminal Lawyer Advertising and Prosecutor Campaigning Under the Guise of the Public's Need to Know, 34 *Ohio N.U. L. Rev.* 703, 709-10 (2008) (expounding types of permitted and forbidden public statements).

n34 Model Rules of Prof'l Conduct R. 3.6 cmt. 6.

n35 *Id.* 3.8(f).

n36 *Id.* 3.8 cmt. 5.

n37 Standards for Criminal Justice, Prosecution Function & Def. Function Standards § 3-1.4 at 12-13 (1993).

n38 The combination of the Sixth Amendment guarantees of a fair, speedy, and public trial with the First Amendment guarantees of freedom of speech and the press make it difficult for judges to ensure a fair trial for defendants. Trial courts must take remedial measures to nullify the impact of pretrial or trial publicity to ensure a fair trial if potential jury members become biased because of exposure to that publicity. See *Sheppard v. Maxwell*, 384 *U.S.* 333, 358 (1965) (suggesting steps trial judge should have taken to

minimize pretrial publicity). Prosecutorial comments run the risk of being even more prejudicial because of the public perception of the prosecutor as an agent of the government. See, e.g., *Williams v. State*, 369 S.E.2d 232, 239 (Ga. 1988) ("In determining whether an improper statement of the prosecutor as to the defendant's guilt requires his disqualification, the courts have taken into consideration whether such remarks were part of a calculated plan . . . to prejudice the defendant in the minds of the jurors . . ."); *State v. Hohman*, 420 A.2d 852, 855 (Vt. 1980) (positing that extrajudicial statements of prosecutor could warrant disqualification because bias of prosecutor threatens defendant's right to fair trial), overruled by *Jones v. Shea*, 532 A.2d 571, 572 (Vt. 1987). For an examination of the conflict between the First and Sixth Amendment rights with respect to fair trials, see generally Hardaway & Tumminello, *supra* note 19, at 50-76; and Thomas F. Liotti, *Closing the Courtroom to the Public: Whose Rights Are Violated?*, 63 *Brooklyn L. Rev.* 501, 504-33 (1997).

n39 Model Rules of Prof'l Conduct R. 3.6(a); see also Cal. Rules of Prof'l Conduct R. 5-120(A) (2009) ("A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."); *supra* note 16 and accompanying text.

n40 Cal. Rules of Prof'l. Conduct R. 5-120 discussion. Ga. Rules of Prof'l Conduct R. 3.6 (2009) prefaces its list with this comment: "There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a . . . criminal matter, or any other proceeding that could result in incarceration." *Id.* cmt. 5A; see also *supra* note 17.

n41 Model Rules of Prof'l Conduct R. 3.6 cmt. 5.

n42 Release of Information by Personnel of Department of Justice Relating to Criminal and Civil Proceedings, 36 *Fed. Reg.* 21028 (Nov. 3, 1971) (codified at 28 *C.F.R.* § 50.2).

n43 28 *C.F.R.* § 50.2(a)(2) (2009).

n44 *Id.*

n45 *Id.* § 50.2(b)(3).

n46 For example, the authorization to discuss in detail the circumstances of the arrest, including the use of weapons or other physical items at the scene, has undoubtedly led to the spectacle of press conferences where federal law enforcement agents provide photo opportunities to the press of tables full of guns and drugs while discussing the apprehension of particular suspects. See discussion *infra* note 161 and accompanying text.

n47 28 *C.F.R.* § 50.2(b)(3)(iv).

n48 Indeed, one of the most frequently argued rules of evidence, *Federal Rule of Evidence* 403, requires that evidence not be excluded merely because it is prejudicial so long as its prejudice is due to the highly probative nature of the evidence. See, e.g., *United States v. Abel*, 469 U.S. 45, 49 (1984) (holding evidence of defendant's and one of his witness's membership in prison gang was highly prejudicial, but was nonetheless admissible because it was extremely probative of witness's bias).

n49 28 *C.F.R.* § 50.2(b)(6)(i)-(vi). Of course, the fact that there are specific rules does not mean they will not be breached. For example, the regulation has a specific prohibition against aiding news media in photographing or televising a defendant or accused person being held or transported in federal custody. *Id.* § 50.2(b)(7). Yet, "perp walks" have become commonplace, and prosecutors have not been disciplined for these actions. See Lidge, *supra* note 15 *passim* (describing use of perp walks by police officers and prosecutors).

n50 Model Rules of Prof'l Conduct R. 3.6 (2002).

n51 Fred C. Zacharias, Integrity Ethics, 22 *Geo. J. Legal Ethics* 541, 541 (2009).

n52 See *id.* at 578-79 (discussing Supreme Court's holding in *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976), that prosecutorial misconduct is controlled through professional discipline as opposed to tort liability).

n53 *Id.* at 587.

n54 Dep't of Justice, United States Attorneys' Manual, available at [http://www.justice.gov/usao/eousa/foia reading room/usam/](http://www.justice.gov/usao/eousa/foia%20reading%20room/usam/) (last visited Mar. 12, 2010).

n55 See *id.* § 1-7.500 (describing non-disclosable information); *id.* § 1-7.520 (listing disclosable items).

n56 *Id.* § 1-7.550(C).

n57 *Id.* § 1-7.520(D).

n58 Interestingly, there are no recorded cases of violations of 28 *C.F.R.* § 50.2 resulting in sanctions or disciplinary action. Rather, when prosecutors are disciplined courts tend to automatically cite the ethical rules restricting a lawyer's speech, not the federal regulation. See, e.g., *Attorney Grievance Comm'n v. Gansler*, 835 A.2d 548, 569 (Md. 2003) (determining that prosecutor's public reference to suspect's confession violated Model Rule 3.6).

n59 See The Innocence Project - Understand the Causes, <http://www.innocenceproject.org/understand/> (last visited Mar. 2, 2010) (listing "seven of the most common causes of wrongful convictions: Eyewitness Misidentification[,] Unvalidated or Improper Forensic Science[,] False Confessions/Admissions[,] Government Misconduct[,] Informants or Snitches[,] and] Bad Lawyering").

n60 See *supra* note 49 and accompanying text.

n61 See Andrew E. Taslitz, Wrongly Accused: Is Race a Factor in Convicting the Innocent?, 4 *Ohio St. J. Crim. L.* 121, 121-22 (2006) (identifying lack of scholarship addressing how race plays a role in wrongful convictions); Andrew E. Taslitz, Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example, 37 *Sw. U. L. Rev.* 1091, 1091-92 (2008) [hereinafter Taslitz, Redux] (arguing that anonymous informants are affected by racial bias and calling for reform in investigation tactics).

n62 Some professors refer to this as the "selection effect." Taslitz, Redux, *supra* note 61, at 1099.

n63 For excellent discussions of racial disparities in the criminal justice system, see David Cole, No Equal Justice: Race and Class in the American Criminal Justice System (1999); Racial Issues in Criminal Justice: The Case of African Americans (Marvin D. Free, Jr. ed., 2003); and Developments in the Law-Race and the Criminal Process, 101 *Harv. L. Rev.* 1472 (1988).

n64 Sociologists have documented how an observer's negative response to a criminal act is magnified when the offender is African-American. See, e.g., Patricia G. Devine & Andrew J. Elliot, Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited, 21 *Personality & Soc. Psychol. Bull.* 1139, 1146 (1995) (discussing stereotype assessment results suggesting that Americans associate certain racial groups with criminal behavior).

n65 In speaking to the press, prosecutors should be aware that "[m]edia stereotypes consist of recurring messages that associate persons of color with traits, behaviors, and values generally considered undesirable, inferior, or dangerous. In the context of crime coverage, there is considerable evidence that media portray blacks and Latinos as criminal and violent." Robert M. Entman & Kimberly A. Gross, Race to Judgment: Stereotyping Media and Criminal Defendants, 71 *Law & Contemp. Probs.* 93, 97 (Fall 2008). This awareness alone may lead some prosecutors to understand why self-restraint regarding racial com-

ments is imperative, regardless of the actual restrictions embodied in the ethical rules and tempered by the prosecutor's First Amendment rights.

n66 See 28 C.F.R. § 50.2(b)(6) (2009) (cautioning "personnel of the Department" to refrain from releasing information about "defendant's character").

n67 Taslitz, Redux, supra note 61, at 1103-04 (citation omitted).

n68 As with all of these categories, I am not proposing an absolute rule. There are cases where a defendant's or victim's race relates directly to the charges, such as hate crimes. In such cases, the government's interest in publicly referring to these racial characteristics may outweigh the possible negative consequences. Nonetheless, as envisioned by the federal regulation, there should be an initial presumption that such observations are particularly problematic and should not be made unless there is a legitimate government interest in doing so.

n69 For more details regarding the case, see James R. Devine, The Duke Lacrosse Matter as a Case Study of the Right to Reply to Prejudicial Pretrial Extrajudicial Publicity Under Rule 3.6(c), 15 *Vill. Sports & Ent. L.J.* 175, 185-91 (2008); and Office of Att'y Gen. of N.C., Summary of Conclusions, Case File Nos. 06 CRS 4332-4336, 5582- 5583.

n70 Gina Pace, Politics Playing Role in Duke Case?, CBS News, Apr. 13, 2006, <http://www.cbsnews.com/stories/2006/04/13/earlyshow/main1495346.shtml>.

n71 Rick Lyman & Joe Drape, Duke Players Practice While Scrutiny Builds, N.Y. Times, Mar. 30, 2006, at D1.

n72 See Andrew E. Taslitz & Carol Steiker, Introduction to the Symposium: The Jena Six, the Prosecutorial Conscience, and the Dead Hand of History, 44 *Harv. C.R.-C.L. L. Rev.* 275, 275-79 (2009) (providing background on Jena Six case).

n73 *Id.* at 276-77.

n74 See Anthony V. Alfieri, Prosecuting the Jena Six, 93 *Cornell L. Rev.* 1285, 1290 (2008) (describing political protest surrounding prosecution of Jena Six).

n75 Reed Walters, Op-Ed, Justice in Jena, N.Y. Times, Sept. 26, 2007, at A27. The Jena Six case was not concluded until June 26, 2009, when five of the six Jena Six pled no contest to misdemeanor simple battery and received seven days of probation. Nat'l Briefing, Louisiana: Pleas End Jena Six Case, N.Y. Times, June 27, 2009, at A8. Walters further engendered criticism when he published a statement in The Jena Times on December 13, 2006, declaring that the Jena Six defendants would "be prosecuted to the fullest extent of the law and with the harshest crimes that the facts justify." D.A. Issues Statement Concerning JHS Incident, Jena Times, Dec. 13, 2006, at 1, quoted in Angela J. Davis, The Legal Profession's Failure to Discipline Unethical Prosecutors, 36 *Hofstra L. Rev.* 275, 308 (2007).

n76 Alfieri, supra note 74, at 1294-95.

n77 For more discussion of how racial stereotypes affect a person's ability to judge those of another race, see generally Mark Peffley, Jon Hurwitz & Paul M. Sniderman, Racial Stereotypes and Whites' Political Views of Blacks in the Context of Welfare and Crime, 41 *Am. J. Pol. Sci.* 30 passim (1997).

n78 See ABA House of Delegates, Resolution 8A (2004) (issuing resolution and giving report about practice of recording confessions).

n79 See, e.g., Sharon L. Davies, The Reality of False Confessions-Lessons of the Central Park Jogger Case, 30 *N.Y.U. Rev. L. & Soc. Change* 209, 212 (2006) (arguing trial courts should have stricter "gate keeping responsibilities" to keep false confessions out of evidence); Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 *N.C. L. Rev.* 891 passim (2004) (analyzing 125 cases of proven false confessions induced by interrogation); Richard A. Leo & Richard J. Ofshe, The

Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 *J. Crim. L. & Criminology* 429, 429 (1998) (noting confessions are "likely to dominate all other case evidence and lead a trier of fact to convict the defendant"); Richard J. Ofshe & Richard A. Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 *Denv. U. L. Rev.* 979, 984 (1997) (arguing current interrogation techniques are used improperly by police and thus elicit false confessions); Welsh White, False Confessions in Criminal Cases, 17 *Crim. Just.* 5, 10 (Winter 2003) (arguing that defense counsel should be permitted to use expert testimony concerning "police-induced false confessions" to demonstrate inadmissibility of such evidence at trial).

n80 See Jim Dwyer et al., Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted 246 (2000) (discussing Innocence Project's 1999 finding that false confessions were involved in 24% of exonerations); C. Ronald Huff, Wrongful Conviction: Causes and Public Policy Issues, 18 *Crim. Just.* 14, 18 (Spring 2003) (discussing study that showed false confessions were involved in about one out of every four DNA exonerations).

n81 The five following points come from Saul Kassin's and Lawrence Wrightsman's 1985 categorization of false confessions. See generally Saul M. Kassin & Lawrence S. Wrightsman, Confession Evidence, in *The Psychology of Evidence and Trial Procedure* 67 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985).

n82 Julie E. Bear & Scott A. Bresler, Overshadowing Innocence: Evaluating and Challenging the False Confession, 31 *Champion* 16, 17 (2007).

n83 373 *U.S.* 723 (1963).

n84 *Id.* at 723-24.

n85 *Id.* at 724.

n86 *Id.*

n87 *Id.*

n88 *Id.*

n89 *Id.*

n90 The facts of the case do not clarify whether the audiences each day consisted of entirely new viewers. At minimum, however, 35% of the parish's population saw the confession, and if the audiences each day were separate, possibly as high as 70% viewed it.

n91 373 *U.S.* at 724-25.

n92 *Id.* at 725.

n93 *Id.* at 726.

n94 *Id.*

n95 Of course, in the end, prosecutors are also responsible for statements by law enforcement regarding their cases. ABA Standard for Criminal Justice 3-1.4(b) expressly provides: "A prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under this Standard." Standards for Criminal Justice, Prosecution Function and Def. Function Standards § 3-1.4(b) at 12-13 (1993). Similarly, ABA Model Rule 3.8(f) specifically states: The prosecutor in a criminal case shall: (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments . . . and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor

in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule. Model Rules of Prof'l Conduct R. 3.8(f) (2009).

n96 It also does not make a difference if the prejudicial statements come from the prosecutor's supervisor. See, e.g., *United States v. Coast of Maine Lobster, Co.*, 538 F.2d 899, 902-03 (1st Cir. 1976) (new trial granted because of improper public statements by prosecuting attorney's supervisor while trial was pending).

n97 At least one prosecutor has been disciplined for making extrajudicial statements regarding a defendant's confession, the possibility of a defendant's guilty plea, and his opinion as to the guilt of two criminal defendants. See *Attorney Grievance Comm'n v. Gansler*, 835 A.2d 548, 569, 575 (Md. 2003) (disciplining prosecutor by public reprimand).

n98 See also *Irvin v. Dowd*, 366 U.S. 717, 725-26 (1961) (finding defendant was denied fair trial because of release of prejudicial pretrial publicity including defendant's alleged confession and offer to plead guilty if promised ninety-nine-year sentence).

n99 As Justice Frankfurter noted in his concurrence in *Irvin*, the fault for pretrial publicity may lie as much with those who choose to publish prejudicial pretrial information as with those who release it. [T]his is, unfortunately, not an isolated case that happened in Evansville, Indiana, nor an atypical miscarriage of justice due to anticipatory trial by newspapers instead of trial in court before a jury. More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception. *Id.* at 729-30. While Justice Frankfurter pointed a harsh finger at the media for being a constitutionally protected "poisoner . . . plying his trade," the media would generally not have access to such information without the cooperation of law enforcement or prosecution officials. *Id.* at 730. Thus, as the Supreme Court has recognized, lawyers have a responsibility to ensure that their comments and actions do not pose a substantial possibility of materially prejudicing the right to a fair trial. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1031 (1991) (noting that "substantial likelihood of material prejudice" standard balances attorneys' First Amendment interest with state's interest in fair trials).

n100 See *Fed. R. Evid. 104(a)* (stating that preliminary questions of admissibility are determined by court).

n101 For examples of suppressing confessions for this reason, see *Arizona v. Fulminante*, 499 U.S. 279, 310-12 (1991) (Fifth Amendment violation); *Brewer v. Williams*, 430 U.S. 387, 397-98 (1977) (violation of Sixth Amendment right to counsel); *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966) (violation of Fifth Amendment right to remain silent).

n102 See, e.g., *18 U.S.C. § 3501* (2006) (discussing admissibility of evidence obtained by prohibited interrogation).

n103 The Innocence Project-250 Exonerated Too Many Wrongfully Convicted, <http://www.innocenceproject.org/news/250.php> (last visited Mar. 12, 2010) ("On February 4, 2010, Innocence Project client Freddie Peacock became the 250th person exonerated through DNA testing in the United States); see also Myrna S. Raeder, Introduction to Wrongful Convictions Symposium, 37 *Sw. U. L. Rev.* 745, 746-47 (2008) (discussing Innocence Project's exonerations).

n104 Raeder, *supra* note 103, at 746.

n105 See Adam Liptak, *Houston DNA Review Clears Convicted Rapist, and Ripples in Texas Could Be Vast*, *N.Y. Times*, Mar. 11, 2003, at A14 (discussing retesting of DNA evidence, which set innocent man free).

n106 See Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, *86 N.C. L. Rev.* 163, 163 (2007) (noting "scientific fraud or junk science" is often responsible for wrongful convictions); Kevin C. McMunigal, *Prosecutors and Corrupt Science*, *36 Hofstra L. Rev.* 437, 437-38 (2007) (noting that corrupt scientific evidence has led to many wrongful convictions); William C. Thompson, *Beyond Bad Apples: Analyzing the Role of Forensic Science in Wrongful Convictions*, *37 Sw. U. L. Rev.* 1027, 1027 (2008) (describing systemic failures of DNA laboratories).

n107 See Simon LeVay, *When Science Goes Wrong: Twelve Tales from the Dark Side of Discovery* 181-98 (2008) (discussing faulty DNA testing's role in conviction of innocent man in rape case).

n108 See discussion *infra* Part III.d.

n109 Thompson, *supra* note 106, at 1033.

n110 *Id.*

n111 *Id.*

n112 *Id.*

n113 *Id.* at 1034.

n114 *Id.* at 1036.

n115 *Id.* at 1050.

n116 Of course, similar dangers apply to other types of forensic evidence. For example, laboratories examining explosives have also been found to be unreliable, and early release of their reports can have a prejudicial impact on public opinion of the case. See Office of Inspector General, U.S. Dep't of Justice, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* 516 (1997).

n117 *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, 2006 A.B.A. Sec. Crim. Just. Rep., reprinted in *37 Sw. U. L. Rev.* 763, 771 (2008) [hereinafter A.B.A. Report]. According to Barry Scheck, director of the Innocence Project, "[m]istaken eyewitnesses were a factor in 84[%] of the [wrongful] convictions." Dwyer et al., *supra* note 80, at 246.

n118 A.B.A. Report, *supra* note 117, at 775. The Supreme Court has long known that eyewitness identifications pose a particular risk for wrongful convictions. Forty years ago, in *United States v. Wade*, 388 U.S. 218, 228 (1967), the Court stated, "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."

n119 See A.B.A. Report, *supra* note 117, at 776 (stating that one of those dangers is that witnesses actually become more confident in their identifications over time solely because the prosecution supports them as they prepare for trial).

n120 *Id.*

n121 28 C.F.R. § 50.2(b)(6) (2009).

n122 Undoubtedly, there is a growing need for protection of witnesses in criminal cases, particularly in gang cases because "[t]he strongest weapon a criminal gang has is fear." Ed Johnson, *Fear of Gangs Makes Job of Police Harder*, *Asbury Park Press*, Oct. 13, 2008, at 1; see also Tara C. Kowalski, *Alvarado v. Superior Court: A Death Sentence for Government Witnesses*, *35 U.C. Davis L. Rev.* 207, 223 (2001)

(noting that witness intimidation has been increasing dramatically; in one year alone, there was a 50% increase in witness intimidation); Brendan L. Smith, Keeping a "Snitch" from Being Scratched: Witness Intimidation Is Gaining Even as the Murder Rate Declines, *94 A.B.A. J.* 20, 20 (Dec. 2008) ("Police and prosecutors across the country are confronting an alarming number of incidents involving threats, assaults and murders of witnesses.").

n123 U.S. Const. amend. VI.

n124 In the seminal decision of *Crawford v. Washington*, Associate Justice Antonin Scalia wrote: [T]he [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. Hale, *History and Analysis of the Common Law of England* 258 (1713) (adversarial testing "beats and bolts out the Truth much better"). *541 U.S.* 36, 61-62 (2004) (emphasis added).

n125 For an excellent account of the facts of the case, see Devine, *supra* note 69, at 185-91.

n126 3rd Duke Lacrosse Player Is Indicted on Rape Charges, *Chron. Higher Educ.*, May 15, 2006, <http://chronicle.com/article/3rd-Duke-Lacross-Player-1s/37034>.

n127 Devine, *supra* note 69, at 192-93.

n128 *Id.* at 201-02.

n129 *Id.* at 195-200.

n130 *Id.* at 221 (citing *The North Carolina State Bar vs. Michael B. Nifong*, WRAL.com, <http://www.wral.com/news/local/page/1506296> (last visited Mar. 30, 2008)). For further discussion of Nifong's misconduct in the case, see Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* *76 Fordham L. Rev.* 1337, 1348-79 (2007); Mosteller, *supra* note 5, at 290-306.

n131 A prosecutor may not express a personal opinion concerning the guilt of a defendant or the credibility of trial witnesses, because such personal assurances of guilt or vouching for the veracity of witnesses by the prosecutor "exceeds the legitimate advocates' role by improperly inviting the jurors to convict the defendant on a basis other than a neutral independent assessment of the record proof." *Pryor v. McKee*, No. 2:06-11667, *2007 WL 2002743*, at *7-8 (E.D. Mich. July 5, 2007) (quoting *Caldwell v. Russell*, *181 F.3d* 731, 737 (6th Cir. 1999)); see also *United States v. Kerr*, *981 F.2d* 1050, 1053 (9th Cir. 1992) (stating that prosecutor may not vouch for a witness "[i]n trying to bolster the witness's credibility"). Judges also have the power to limit counsel's comments regarding witness credibility by issuing specific orders, such as gag orders. See, e.g., *United States v. Koubriti*, *305 F. Supp. 2d* 723, 746-48 (E.D. Mich. 2003) (Attorney General violated court order by stating at press conference that prosecution witness's testimony had been of substantial value).

n132 *Gentile v. State Bar of Nev.*, *501 U.S.* 1030, 1033 (1991).

n133 *Id.* at 1058 ("The vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system. . . . A profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom.").

n134 These may include personal attacks against the defendant or his counsel. As with the first hot-button issue, personal attacks constitute character attacks on the defendant, but also implicate the defendant and his representative. These comments run the risk of leading jurors to decide a defendant's guilt

not on his actions and intent, but on his and his attorney's reputation. This very approach is contrary *Federal Rule of Evidence 404(a)*, which does not allow prosecutors to introduce bad character evidence unless it is used to rebut favorable character evidence presented by the defense.

n135 See supra note 18 and accompanying text.

n136 See Matheson, supra note 15, at 885 ("In a legal system based on party representation, the prosecutor does not represent a victim, the police, the mayor, or the governor. He represents the community, which includes the foregoing as well as the accused. That fact has a profound impact on his duty: 'A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.' " (quoting Model Rules of Prof'l Conduct R. 3.8 cmt. (1987))).

n137 For a more detailed discussion of the challenge of prosecutors handling conflicts in high-profile cases, see Levenson, supra note 14, at 1240.

n138 *Berger v. United States*, 295 U.S. 78, 88 (1935). See Bruce A. Green, Why Should Prosecutors "Seek Justice"?, 26 *Fordham Urb. L.J.* 607 passim (1999); and Catherine Ferguson-Gilbert, Comment, It is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?, 38 *Cal. W. L. Rev.* 283, 283-89 (2001) for an extended discussion of the prosecutor's duty to "do justice."

n139 Beth Warren, Nichols Lawyers Challenge Prosecution, Atlanta J.-Const. B3, Oct. 25, 2005, at B3.

n140 Greg Land, DA's Office Strikes Back, Claims Accused Courthouse Shooter's Lawyers Have Conflict, Law.com, July 16, 2008, <http://www.law.com/jsp/article.jsp?id=1202423010791>.

n141 Id. (quoting Christopher Quinn "[i]n his most recent filing").

n142 Id. (internal quotation marks omitted); see also Beth Warren, Prosecutors Argue to Stay on Nichols Case, Atlanta J.-Const., Nov. 3, 2005, at C3 (noting prosecutor's position that "prosecutors aren't supposed to be completely unbiased or disinterested" because "[t]hey are advocates for the state-fighting to punish the suspected criminal-and aren't expected to be impartial like the judge and jury").

n143 See Standards for Criminal Justice, Prosecution Function & Def. Function Standards, § 3-1.3(a), at 7 (1993) ("A prosecutor should avoid a conflict of interest with respect to his or her official duties."); id. § 3-1.3(f) ("A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests."). For example, in the prosecution of Terry Nichols for the Oklahoma City bombing events, the state district judge "ordered Oklahoma County District Attorney Bob Macy and his assistants off the case after ruling that some of Mr. Macy's pretrial comments were improper" and made clear that Macy needed "emotional distance" from the case. Arnold Hamilton, Prosecution Disqualified in Nichols Trial: Judge Says Pretrial Comments Improper, Dallas Morning News, Oct. 17, 2000, at 17A.

n144 SPJ Code, supra note 25.

n145 Id.

n146 Id. These guidelines are merely excerpts, mentioned in no meaningful order, from the SPJ Ethics Code's four categories of guidelines, which address seeking and reporting truth, minimizing harm, acting independently, and being accountable. Id.

n147 See Center for the Study of Ethics in the Professions: Code of Ethics Online, Ill. Inst. Tech., [http://ethics.iit.edu/index1.php/Programs/Codes of Ethics](http://ethics.iit.edu/index1.php/Programs/Codes%20of%20Ethics) (last visited Mar. 1, 2010) (noting there are over 850 codes on Web, including those of professional societies, corporations, and academic institutions).

n148 See, e.g., Cal. Official Court Reporters Ass'n Code of Ethics (2009), available at <http://cocra.org/pages/reporters-ref/prof-practice/code-of-ethics.html>.

n149 Id.

n150 See supra Part II.

n151 See supra Part III.

n152 See supra Part IV.

n153 Codes can be framed so that they do not necessarily provide a basis for discipline, but nonetheless "identify moral issues, promote moral introspection by lawyers about appropriate conduct, . . . and facilitate communication within the bar." Zacharias, supra note 15, at 771-72.

n154 Rhetorical flourishes also undermine a prosecutor's credibility and create distracting criticism. For example, while Assistant U.S. Attorney Fitzgerald had done a sterling job overall in his handling of the Blagojevich investigation, he found himself fending off criticism for his off-the-cuff remarks to the media. See Helen W. Gunnarsson, Did Pat Fitzgerald Say Too Much? Lawyers Disagree About Whether Prosecutor Fitzgerald Crossed the Line When He Said Rod Blagojevich's Conduct "Would Make Lincoln Roll over in His Grave," 97 Ill. B.J. 116, 116 (2009) (discussing considerable criticism Fitzgerald received for statements made regarding arrest of Blagojevich); Posting of John Steele, <http://www.legalethicsforum.com/blog/2008/12/patrick-fitzgeralds-pubic-comments.html> (Dec. 10, 2008, 13:11 EST) (discussing Department of Justice rules on public comments made by prosecutors); Ann Althouse, Victoria Toensing Thinks Patrick Fitzgerald Should Can the Emotional Theatrics, Althouse, Dec. 13, 2008, <http://althouse.blogspot.com/2008/12/victoria-toensing-thinks-patrick.html> (discussing media's response to Fitzgerald's extrajudicial comments).

n155 For more discussion of the political motivations of prosecutors to speak to the press, see Matheson, supra note 15, at 888.

n156 Bennett L. Gershman captured the dilemma for prosecutors: A prosecutor has a dual obligation in dealing with the media. As an elected law enforcement official, he has a duty . . . to inform the public about cases that are pending in his office. However, his duty to do justice requires that he make no extrajudicial statement that might impair a defendant's right to a fair trial. . . . Gershman, supra note 15, § 6:1.

n157 This Article does not take issue with the constitutional standard for limiting speech set forth by the Supreme Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). It only suggests that the standard articulated by the Court is often too vague to guide even conscientious prosecutors in how to tailor their pretrial remarks to avoid undue prejudice to a defendant.

n158 28 C.F.R. § 50.2(b)(5) (2009) (emphasis added).

n159 Id. § 50.2(b)(3).

n160 Id.

n161 Indeed, others have criticized the ethical rules for failing to curtail prosecutors' use of press conferences to blatantly influence prospective jurors' opinions about the guilt of the defendant. See R. Michael Cassidy, The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle, 71 Law & Contemp. Probs. 67, 81 (Autumn 2008) (noting Model Rule makes no distinction between evidence inextricably linked to defendant and general evidence seized-meaning prosecutor may use both).

n162 It may even be valuable for us to consider how other countries approach the issue of prosecutorial pretrial publicity, although it must always be remembered that the American approach is tied to a framework that is essentially designed to protect speech. See Giorgio Resta, Trying Cases in the Media: A Comparative Overview, 71 Law & Contemp. Probs. 33, 64-66 (Autumn 2008) (discussing three models for regulation of court-related speech and noting that comparative law might not provide best solution but could illuminate important value choices).

California Rules of Professional Conduct

CALIFORNIA RULES OF PROFESSIONAL CONDUCT

(Current rules as of January 1, 2013. The operative dates of select rule amendments are shown at the end of relevant rules.)

CHAPTER 1. PROFESSIONAL INTEGRITY IN GENERAL

Rule 1-100 Rules of Professional Conduct, in General

(A) Purpose and Function.

The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.

For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.

The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, §6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.

(B) Definitions.

(1) "Law Firm" means:

- (a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or

- (b) a law corporation which employs more than one lawyer; or

- (c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or

- (d) a publicly funded entity which employs more than one lawyer to perform legal services.

(2) "Member" means a member of the State Bar of California.

(3) "Lawyer" means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.

(4) "Associate" means an employee or fellow employee who is employed as a lawyer.

(5) "Shareholder" means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.

(C) Purpose of Discussions.

Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.

(D) Geographic Scope of Rules.

(1) As to members:

These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

RULES OF PROFESSIONAL CONDUCT

(2) As to lawyers from other jurisdictions who are not members:

These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

(E) These rules may be cited and referred to as “Rules of Professional Conduct of the State Bar of California.”

Discussion:

The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489].) The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324 [231 Cal.Rptr. 355].) These rules are not intended to supercede existing law relating to members in non-disciplinary contexts. (See, e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (motion for disqualification of counsel due to a conflict of interest); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (disqualification of member appropriate remedy for improper communication with adverse party).)

Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law. (Amended by order of the Supreme Court, operative September 14, 1992.)

[Publisher’s Note re Rule 1-100(A): Operative January 1, 2012, Business and Professions Code section 6010, in part, provides that the State Bar is governed by a board known as the board of trustees of the State Bar and that any provision of law referring to the “board of governors” shall be deemed to refer to

the “board of trustees.” In accordance with this law, references to the “board of governors” included in the current Rules of Professional Conduct are deemed to refer to the “board of trustees.”]

Rule 1-110 Disciplinary Authority of the State Bar

A member shall comply with conditions attached to public or private reprovals or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19, California Rules of Court. (Amended by order of the Supreme Court, operative July 11, 2008.)

Rule 1-120 Assisting, Soliciting, or Inducing Violations

A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.

Rule 1-200 False Statement Regarding Admission to the State Bar

(A) A member shall not knowingly make a false statement regarding a material fact or knowingly fail to disclose a material fact in connection with an application for admission to the State Bar.

(B) A member shall not further an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes.

(C) This rule shall not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to such admission.

Discussion:

For purposes of rule 1-200 “admission” includes readmission.

Rule 1-300 Unauthorized Practice of Law

(A) A member shall not aid any person or entity in the unauthorized practice of law.

RULES OF PROFESSIONAL CONDUCT

(B) A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

Rule 1-310 Forming a Partnership With a Non-Lawyer

A member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.

Discussion:

Rule 1-310 is not intended to govern members' activities which cannot be considered to constitute the practice of law. It is intended solely to preclude a member from being involved in the practice of law with a person who is not a lawyer. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 1-311 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

(A) For purposes of this rule:

(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(c), or California Rule of Court 9.31; and

(3) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.

(B) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the member's client:

(1) Render legal consultation or advice to the client;

(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) Appear as a representative of the client at a deposition or other discovery matter;

(4) Negotiate or transact any matter for or on behalf of the client with third parties;

(5) Receive, disburse or otherwise handle the client's funds; or

(6) Engage in activities which constitute the practice of law.

(C) A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:

(1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or

(3) Accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.

(D) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (B) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The

RULES OF PROFESSIONAL CONDUCT

member shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the member's employment with the client.

(E) A member may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

(F) Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.

Discussion:

For discussion of the activities that constitute the practice of law, see *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corporation* (1922) 189 Cal. 531, 535 [209 P. 363]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)

Paragraph (D) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a member's client is an organization, then the written notice required by paragraph (D) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600.)

Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 9.40, 9.41, 9.42, and 9.44 of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*. (Added by Order of Supreme Court, operative August 1, 1996. Amended by order of the Supreme Court, operative July 11, 2008.)

Rule 1-320 Financial Arrangements With Non-Lawyers

(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:

(1) An agreement between a member and a law firm, partner, or associate may provide for the payment of money after the member's death to the member's estate or to one or more specified persons over a reasonable period of time; or

(2) A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or

(3) A member or law firm may include non-member employees in a compensation, profit-sharing, or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement, if such plan does not circumvent these rules or Business and Professions Code section 6000 et seq.; or

(4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.

(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

RULES OF PROFESSIONAL CONDUCT

(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

Discussion:

Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 1-400 Advertising and Solicitation

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
- (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or
- (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or
- (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(B) For purposes of this rule, a "solicitation" means any communication:

- (1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and
- (2) Which is:
 - (a) delivered in person or by telephone, or

(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

(D) A communication or a solicitation (as defined herein) shall not:

- (1) Contain any untrue statement; or
- (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
- (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
- (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
- (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.
- (6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.

(E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof"

RULES OF PROFESSIONAL CONDUCT

means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

[Publisher's Note: Former rule 1-400(D)(6) repealed by order of the Supreme Court effective November 30, 1992. New rule 1-400(D)(6) added by order of the Supreme Court effective June 1, 1997.]

Standards:

Pursuant to rule 1-400(E) the Board has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.

(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which

does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.

(6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

(7) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A "communication" which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

(9) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.

(10) A "communication" which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.

(11) (Repealed. See rule 1-400(D)(6) for the operative language on this subject.)

RULES OF PROFESSIONAL CONDUCT

(12) A “communication,” except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.

(13) A “communication” which contains a dramatization unless such communication contains a disclaimer which states “this is a dramatization” or words of similar import.

(14) A “communication” which states or implies “no fee without recovery” unless such communication also expressly discloses whether or not the client will be liable for costs.

(15) A “communication” which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

(16) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or “yellow pages” section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication

expressly specifies a shorter period of time regarding the advertised fee. (Amended by order of Supreme Court, operative September 14, 1992. Standard (5) amended by the Board, effective May 11, 1994. Standards (12) - (16) added by the Board, effective May 11, 1994. Standard (11) repealed June 1, 1997)

[Publisher’s Note re Rule 1-400(D)(6) and (E): Operative January 1, 2012, Business and Professions Code section 6010, in part, provides that the State Bar is governed by a board known as the board of trustees of the State Bar and that any provision of law referring to the “board of governors” shall be deemed to refer to the “board of trustees.” In accordance with this law, references to the “board of governors” included in the current Rules of Professional Conduct are deemed to refer to the “board of trustees.”]

Rule 1-500 Agreements Restricting a Member’s Practice

(A) A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law, except that this rule shall not prohibit such an agreement which:

- (1) Is a part of an employment, shareholders’, or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or
- (2) Requires payments to a member upon the member’s retirement from the practice of law; or
- (3) Is authorized by Business and Professions Code sections 6092.5 subdivision (i), or 6093.

(B) A member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules.

Discussion:

Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.

RULES OF PROFESSIONAL CONDUCT

Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 1-600 Legal Service Programs

(A) A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.

(B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.

Discussion:

The participation of a member in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of these rules.

Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.

Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.

For purposes of paragraph (A), "a nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.

[Publisher's Note re Rule 1-600(B): Operative January 1, 2012, Business and Professions Code section 6010, in part, provides that the State Bar is governed by a board known as the board of trustees of the State Bar and that any provision of law referring to the "board of governors" shall be deemed to refer to the "board of trustees." In accordance with this law, references to the "board of governors" included in the current Rules of Professional Conduct are deemed to refer to the "board of trustees."]

Rule 1-650 Limited Legal Services Programs

(A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:

(1) is subject to rule 3-310 only if the member knows that the representation of the client involves a conflict of interest; and

(2) has an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm would have a conflict of interest under rule 3-310 with respect to the matter.

(B) Except as provided in paragraph (A)(2), a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.

(C) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

Discussion:

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue

RULES OF PROFESSIONAL CONDUCT

beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110. Except as provided in this rule 1-650, the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code § 6068(e)(1), are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (A)(2) imputes conflicts of interest to the member only if the member knows that another lawyer in the member's law firm would be disqualified under rule 3-310.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) imputes conflicts of interest to the participating member when the member knows that any lawyer in the member's firm would be disqualified under rule 3-310. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the

matter on an ongoing basis, rule 3-310 and all other rules become applicable. (Added by order of the Supreme Court, operative August 28, 2009.)

Rule 1-700 Member as Candidate for Judicial Office

(A) A member who is a candidate for judicial office in California shall comply with Canon 5 of the Code of Judicial Ethics.

(B) For purposes of this rule, "candidate for judicial office" means a member seeking judicial office by election. The determination of when a member is a candidate for judicial office is defined in the terminology section of the California Code of Judicial Ethics. A member's duty to comply with paragraph (A) shall end when the member announces withdrawal of the member's candidacy or when the results of the election are final, whichever occurs first.

Discussion:

Nothing in rule 1-700 shall be deemed to limit the applicability of any other rule or law. (Added by order of the Supreme Court, operative November 21, 1997.)

Rule 1-710 Member as Temporary Judge, Referee, or Court-Appointed Arbitrator

A member who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject under the Code of Judicial Ethics to Canon 6D, shall comply with the terms of that canon.

Discussion:

This rule is intended to permit the State Bar to discipline members who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law. (Added by order of the Supreme Court, operative March 18, 1999.)

[Publisher's Note: The California Code of Judicial Ethics is available on-line at the official website of the California Courts located at www.courtinfo.ca.gov. Select "Code of Judicial Ethics" in the "Rules" area of the website.]

RULES OF PROFESSIONAL CONDUCT

CHAPTER 2. RELATIONSHIP AMONG MEMBERS

Rule 2-100 Communication With a Represented Party

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a “party” includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party’s choice; or

(3) Communications otherwise authorized by law.

Discussion:

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and

investigators to conduct criminal investigations, as limited by the relevant decisional law.

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party’s counsel, seeks A’s independent advice. Since A is employed by the opposition, the member cannot give independent advice.

As used in paragraph (A), “the subject of the representation,” “matter,” and “party” are not limited to a litigation context.

Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)

Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 2-200 Financial Arrangements Among Lawyers

(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing

RULES OF PROFESSIONAL CONDUCT

that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Rule 2-300 Sale or Purchase of a Law Practice of a Member, Living or Deceased

All or substantially all of the law practice of a member, living or deceased, including goodwill, may be sold to another member or law firm subject to all the following conditions:

(A) Fees charged to clients shall not be increased solely by reason of such sale.

(B) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e), then;

(1) if the seller is deceased, or has a conservator or other person acting in a representative capacity, and no member has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer;

(a) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that

the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

(b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.

(2) in all other circumstances, not less than 90 days prior to the transfer;

(a) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

(b) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer provided that such consent shall be presumed until otherwise notified by the client if no response is

RULES OF PROFESSIONAL CONDUCT

received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller.

(C) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a member shall be taken.

(D) All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.

(E) Confidential information shall not be disclosed to a non-member in connection with a sale under this rule.

(F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

Discussion:

Paragraph (A) is intended to prohibit the purchaser from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing clients.

"All or substantially all of the law practice of a member" means, for purposes of rule 2-300, that, for example, a member may retain one or two clients who have such a longstanding personal and professional relationship with the member that transfer of those clients' files is not feasible. Conversely, rule 2-300 is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by subparagraph (B)(1)(a) or paragraph (D).

Transfer of individual client matters, where permitted, is governed by rule 2-200. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by rule 1-320. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice

(A) For purposes of this rule:

(1) "law practice" includes sole practices, law partnerships, law corporations, corporate and

governmental legal departments, and other entities which employ members to practice law;

(2) "knowingly permit" means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or

(2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

Discussion:

In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.

A complaint of misconduct based on this rule may be filed with the State Bar following a finding of

RULES OF PROFESSIONAL CONDUCT

unlawfulness in the first instance even though that finding is thereafter appealed.

A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard. (Added by order of Supreme Court, effective March 1, 1994.)

CHAPTER 3. PROFESSIONAL RELATIONSHIP WITH CLIENTS

Rule 3-100 Confidential Information of a Client

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the

criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

Discussion:

[1] *Duty of confidentiality.* Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr. 393].)

[2] *Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.* The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other

RULES OF PROFESSIONAL CONDUCT

proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.

[3] *Narrow exception to duty of confidentiality under this Rule.* Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business & Professions Code section 6068, subdivision (e)(1). Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception. Although a member is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

[4] *Member not subject to discipline for revealing confidential information as permitted under this Rule.* Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes is likely to result in death or substantial bodily harm to an individual. A member who reveals information as permitted under this rule is not subject to discipline.

[5] *No duty to reveal confidential information.* Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule 1-100(A).) A member may decide not to reveal confidential information. Whether a member chooses to reveal confidential information as permitted under

this rule is a matter for the individual member to decide, based on all the facts and circumstances, such as those discussed in paragraph [6] of this discussion.

[6] *Deciding to reveal confidential information as permitted under paragraph (B).* Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information as permitted under paragraph (B), the member must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:

- (1) the amount of time that the member has to make a decision about disclosure;
- (2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;
- (3) whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;
- (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and
- (6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur.

[7] *Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.* Subparagraph (C)(1)

RULES OF PROFESSIONAL CONDUCT

provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action – such as by ceasing the criminal act before harm is caused – the option for permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

[8] *Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.* Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant

circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.

[9] *Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).* A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the member's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the client's matter will involve information within paragraph (B);
- (6) the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and

RULES OF PROFESSIONAL CONDUCT

(7) the member's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

[10] *Avoiding a chilling effect on the lawyer-client relationship.* The foregoing flexible approach to the member's informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph [1].) To avoid that chilling effect, one member may choose to inform the client of the member's ability to reveal information as early as the outset of the representation, while another member may choose to inform a client only at a point when that client has imparted information that may fall under paragraph (B), or even choose not to inform a client until such time as the member attempts to counsel the client as contemplated in Discussion paragraph [7]. In each situation, the member will have discharged properly the requirement under subparagraph (C)(2), and will not be subject to discipline.

[11] *Informing client that disclosure has been made; termination of the lawyer-client relationship.* When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client's informed consent to the member's continued representation. The member must inform the client of the fact of the member's disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm.

[12] *Other consequences of the member's disclosure.* Depending upon the circumstances of a member's disclosure of confidential information, there may be other important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).

[13] *Other exceptions to confidentiality under California law.* Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the

confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)

Rule 3-110 Failing to Act Competently

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Discussion:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 3-120 Sexual Relations With Client

(A) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an

RULES OF PROFESSIONAL CONDUCT

intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

(B) A member shall not:

(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or

(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or

(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.

(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

(D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.

Discussion:

Rule 3-120 is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr. 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal.Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d

927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all client matters, a member is advised to keep clients' interests paramount in the course of the member's representation.

For purposes of this rule, if the client is an organization, any individual overseeing the representation shall be deemed to be the client. (See rule 3-600.)

Although paragraph (C) excludes representation of certain clients from the scope of rule 3-120, such exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including rule 3-110. (Added by order of Supreme Court, operative September 14, 1992.)

Rule 3-200 Prohibited Objectives of Employment

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

(A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

Rule 3-210 Advising the Violation of Law

A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

Discussion:

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the

RULES OF PROFESSIONAL CONDUCT

member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

Rule 3-300 Avoiding Interests Adverse to a Client

A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and

(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

Discussion:

Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 4-200.

Rule 3-300 is not intended to apply where the member and client each make an investment on terms offered to the general public or a significant portion thereof. For example, rule 3-300 is not intended to apply where A, a member, invests in a limited partnership syndicated by a third party. B, A's client, makes the same investment. Although A and B are each investing in the same business, A did not enter into the transaction "with" B for the purposes of the rule.

Rule 3-300 is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 3-310 Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;

(3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The member knows or reasonably should know that:

(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the member's representation; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

RULES OF PROFESSIONAL CONDUCT

(C) A member shall not, without the informed written consent of each client:

- (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
- (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
- (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

(F) A member shall not accept compensation for representing a client from one other than the client unless:

- (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
- (2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and
- (3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:
 - (a) such nondisclosure is otherwise authorized by law; or
 - (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written consent of the clients

RULES OF PROFESSIONAL CONDUCT

thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) (Amended by order of Supreme Court, operative September 14, 1992; operative March 3, 2003.)

Rule 3-320 Relationship With Other Party's Lawyer

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

Discussion:

Rule 3-320 is not intended to apply to circumstances in which a member fails to advise the client of a relationship with another lawyer who is merely a partner or associate in the same law firm as the adverse party's counsel, and who has no direct involvement in the matter. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 3-400 Limiting Liability to Client

A member shall not:

(A) Contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice; or

(B) Settle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

Discussion:

Rule 3-400 is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent a member from reasonably limiting the scope of the member's employment or representation. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 3-410 Disclosure of Professional Liability Insurance

(A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the member, that the member does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours.

(B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member

RULES OF PROFESSIONAL CONDUCT

subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.

(C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity.

(D) This rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.

(E) This rule does not apply where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance.

Discussion:

[1] The disclosure obligation imposed by Paragraph (A) of this rule applies with respect to new clients and new engagements with returning clients.

[2] A member may use the following language in making the disclosure required by Rule 3-410(A), and may include that language in a written fee agreement with the client or in a separate writing:

“Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance.”

[3] A member may use the following language in making the disclosure required by Rule 3-410(B):

“Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I no longer have professional liability insurance.”

[4] Rule 3-410(C) provides an exemption for a “government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity.” The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and

provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. (Added by order of the Supreme Court, operative January 1, 2010.)

Rule 3-500 Communication

A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

Discussion:

Rule 3-500 is not intended to change a member’s duties to his or her clients. It is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be disciplined for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, §6068, subd. (m).)

A member may contract with the client in their employment agreement that the client assumes responsibility for the cost of copying significant documents. This rule is not intended to prohibit a claim for the recovery of the member’s expense in any subsequent legal proceeding.

Rule 3-500 is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the member to provide work product to the client shall be governed by relevant statutory and decisional law. Additionally, this rule is not intended to apply to any document or correspondence that is subject to a protective order or non-disclosure agreement, or to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the member. (Amended by order of the Supreme Court, operative June 5, 1997.)

RULES OF PROFESSIONAL CONDUCT

Rule 3-510 Communication of Settlement Offer

(A) A member shall promptly communicate to the member's client:

- (1) All terms and conditions of any offer made to the client in a criminal matter; and
- (2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

(B) As used in this rule, "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

Discussion:

Rule 3-510 is intended to require that counsel in a criminal matter convey all offers, whether written or oral, to the client, as give and take negotiations are less common in criminal matters, and, even were they to occur, such negotiations should require the participation of the accused.

Any oral offers of settlement made to the client in a civil matter should also be communicated if they are "significant" for the purposes of rule 3-500.

Rule 3-600 Organization as Client

(A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

(B) If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(C) If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with rule 3-700.

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

(E) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

Discussion:

Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.

Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.

RULES OF PROFESSIONAL CONDUCT

Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.

Rule 3-700 Termination of Employment

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal.

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

(f) breaches an agreement or obligation to the member as to expenses or fees.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or

(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

RULES OF PROFESSIONAL CONDUCT

(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The client knowingly and freely assents to termination of the employment; or

(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

(D) Papers, Property, and Fees.

A member whose employment has terminated shall:

(1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and

(2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

Discussion:

Subparagraph (A)(2) provides that "a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients." What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.

Paragraph (D) makes clear the member's duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member "promptly" return unearned fees paid in advance. If

a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).

Paragraph (D) is not intended to prohibit a member from making, at the member's own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

CHAPTER 4. FINANCIAL RELATIONSHIP WITH CLIENTS

Rule 4-100 Preserving Identity of Funds and Property of a Client

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member shall:

(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt

RULES OF PROFESSIONAL CONDUCT

and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

(4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

(C) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

[Publisher's Note re Rule 4-100(C): Operative January 1, 2012, Business and Professions Code section 6010, in part, provides that the State Bar is governed by a board known as the board of trustees of the State Bar and that any provision of law referring to the "board of governors" shall be deemed to refer to the "board of trustees." In accordance with this law, references to the "board of governors" included in the current Rules of Professional Conduct are deemed to refer to the "board of trustees.".]

Standards:

Pursuant to rule 4-100(C) the Board adopted the following standards, effective January 1, 1993, as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3).

(1) A member shall, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintain:

(a) a written ledger for each client on whose behalf funds are held that sets forth:

(i) the name of such client,

(ii) the date, amount and source of all funds received on behalf of such client,

(iii) the date, amount, payee and purpose of each disbursement made on behalf of such client, and

(iv) the current balance for such client;

(b) a written journal for each bank account that sets forth:

(i) the name of such account,

(ii) the date, amount and client affected by each debit and credit, and

(iii) the current balance in such account;

(c) all bank statements and canceled checks for each bank account; and

(d) each monthly reconciliation (balancing) of (a), (b), and (c).

(2) A member shall, from the date of receipt of all securities and other properties held for the benefit of client through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written journal that specifies:

(a) each item of security and property held;

(b) the person on whose behalf the security or property is held;

(c) the date of receipt of the security or property;

(d) the date of distribution of the security or property; and

(e) person to whom the security or property was distributed.

[Publisher's Note: Trust Account Record Keeping Standards as adopted by the Board on July 11, 1992, effective January 1, 1993.]

RULES OF PROFESSIONAL CONDUCT

Rule 4-200 Fees for Legal Services

(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.

(B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

- (1) The amount of the fee in proportion to the value of the services performed.
- (2) The relative sophistication of the member and the client.
- (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
- (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
- (5) The amount involved and the results obtained.
- (6) The time limitations imposed by the client or by the circumstances.
- (7) The nature and length of the professional relationship with the client.
- (8) The experience, reputation, and ability of the member or members performing the services.
- (9) Whether the fee is fixed or contingent.
- (10) The time and labor required.
- (11) The informed consent of the client to the fee.

(Amended by order of Supreme Court, operative September 14, 1992.)

Rule 4-210 Payment of Personal or Business Expenses Incurred by or for a Client

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member:

- (1) With the consent of the client, from paying or agreeing to pay such expenses to third persons from funds collected or to be collected for the client as a result of the representation; or
- (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan; or
- (3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

(B) Nothing in rule 4-210 shall be deemed to limit rules 3-300, 3-310, and 4-300.

Rule 4-300 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(A) A member shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such member or any lawyer affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.

(B) A member shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the member or of another lawyer in the member's law firm or is an employee of the member or the member's law

RULES OF PROFESSIONAL CONDUCT

firm. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 4-400 Gifts From Client

A member shall not induce a client to make a substantial gift, including a testamentary gift, to the member or to the member's parent, child, sibling, or spouse, except where the client is related to the member.

Discussion:

A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence. The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

CHAPTER 5. ADVOCACY AND REPRESENTATION

Rule 5-100 Threatening Criminal, Administrative, or Disciplinary Charges

(A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(B) As used in paragraph (A) of this rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(C) As used in paragraph (A) of this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature

pending before a federal, state, or local governmental entity.

Discussion:

Rule 5-100 is not intended to apply to a member's threatening to initiate contempt proceedings against a party for a failure to comply with a court order.

Paragraph (B) is intended to exempt the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.

For purposes of paragraph (C), the definition of "civil dispute" makes clear that the rule is applicable prior to the formal filing of a civil action.

Rule 5-110 Performing the Duty of Member in Government Service

A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.

Rule 5-120 Trial Publicity

(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(B) Notwithstanding paragraph (A), a member may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) the information contained in a public record;

RULES OF PROFESSIONAL CONDUCT

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(a) the identity, residence, occupation, and family status of the accused;

(b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;

(c) the fact, time, and place of arrest; and

(d) the identity of investigating and arresting officers or agencies and the length of the investigation.

(C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Discussion:

Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.

Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d);

(3) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and (4) the timing of the statement.

Paragraph (A) is intended to apply to statements made by or on behalf of the member.

Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the member's duty to maintain client confidence and secrets. (Added by order of the Supreme Court, operative October 1, 1995.)

Rule 5-200 Trial Conduct

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

Rule 5-210 Member as Witness

A member shall not act as an advocate before a jury which will hear testimony from the member unless:

(A) The testimony relates to an uncontested matter; or

(B) The testimony relates to the nature and value of legal services rendered in the case; or

RULES OF PROFESSIONAL CONDUCT

(C) The member has the informed, written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal.

Discussion:

Rule 5-210 is intended to apply to situations in which the member knows or should know that he or she ought to be called as a witness in litigation in which there is a jury. This rule is not intended to encompass situations in which the member is representing the client in an adversarial proceeding and is testifying before a judge. In non-adversarial proceedings, as where the member testifies on behalf of the client in a hearing before a legislative body, rule 5-210 is not applicable.

Rule 5-210 is not intended to apply to circumstances in which a lawyer in an advocate's firm will be a witness. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 5-220 Suppression of Evidence

A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

Rule 5-300 Contact With Officials

(A) A member shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.

(B) A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:

- (1) In open court; or

(2) With the consent of all other counsel in such matter; or

(3) In the presence of all other counsel in such matter; or

(4) In writing with a copy thereof furnished to such other counsel; or

(5) In ex parte matters.

(C) As used in this rule, "judge" and "judicial officer" shall include law clerks, research attorneys, or other court personnel who participate in the decision-making process. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 5-310 Prohibited Contact With Witnesses

A member shall not:

(A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

Rule 5-320 Contact With Jurors

(A) A member connected with a case shall not communicate directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case.

RULES OF PROFESSIONAL CONDUCT

(B) During trial a member connected with the case shall not communicate directly or indirectly with any juror.

(C) During trial a member who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the member knows is a juror in the case.

(D) After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(E) A member shall not directly or indirectly conduct an out of court investigation of a person who is either a member of the venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.

(F) 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 the venire or a juror.

(G) A member shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the member has knowledge.

(H) This rule does not prohibit a member from communicating with persons who are members of a venire or jurors as a part of the official proceedings.

(I) For purposes of this rule, "juror" means any empanelled, discharged, or excused juror. (Amended by order of Supreme Court, operative September 14, 1992.)