BOARD AGENDA ITEM JULY 131

PROPOSED NEW AND AMENDED RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

(Adopted by the Board Committee on Regulation and Admissions on July 23, 2010.)
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Rule 1.0 Purpose and Scope of the Rules of Professional Conduct
(Commission's Proposed Rule – Clean Version)

(a) Purpose: The purposes of the following Rules are:

(1) To protect the public;

(2) To protect the interests of clients;

(3) To protect the integrity of the legal system and to promote the administration of justice; and

(4) To promote respect for, and confidence in, the legal profession.

(b) Scope of the Rules:

(1) These Rules, together with any standards adopted by the Board of Governors of the State Bar of California pursuant to these Rules, regulate the conduct of lawyers and are binding upon all members of the State Bar and all other lawyers practicing law in this state.

(2) A willful violation of these Rules is a basis for discipline.

(3) Nothing in these Rules or the comments to the Rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

(c) Comments: The comments following the Rules do not add obligations to the Rules but provide guidance for their interpretation and for acting in compliance with the Rules.

(d) Title: These Rules are the "California Rules of Professional Conduct."

COMMENT

[1] The Rules of Professional Conduct are Rules of the Supreme Court of California regulating lawyer conduct in this state. See *In re Attorney Discipline System* (1998) 19 Cal. 4th 582, 593-597 [79 Cal Rptr.2d 836]; *Howard v. Babcock* (1993) 6 Cal. 4th 409, 418 [25 Cal Rptr.2d 80]. The Rules have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court pursuant to Business and Professions Code sections 6076 and 6077. The Supreme Court of California has inherent power to regulate the practice of law in California, including the power to admit and discipline lawyers practicing in this jurisdiction. *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336 [178 Cal.Rptr. 801]; *Santa Clara County Counsel Attorneys Association v. Woodside* (1994) 7 Cal.4th 525, 542-543 [28 Cal.Rptr.2d 617]; and see Business and Professions Code section 6100.

[2] The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through discipline. See *Ames v. State Bar* (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489]. Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]; *Noble v. Sears Roebuck & Co.* (1973) 33 Cal.App.3d 654, 658 [109

Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1333 [231 Cal.Rptr. 355]. Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. See, *Stanley v. Richmond, supra*, 35 Cal.App.4th 1070, 1086 [41 Cal.Rptr.2d 768]; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571]. A violation of the rule may have other non-disciplinary consequences. See e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (disqualification); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (communication with represented party).

[3] These Rules are not the sole basis of lawyer regulation. Lawyers authorized to practice law in California are also bound by applicable law including the State Bar Act (Business and Professions Code section 6000 et. seq.), other statutes, rules of court, and the opinions of California courts. Although not binding, issued opinions of ethics committees in California should be consulted for guidance on proper professional conduct. Ethics opinions of other bar associations may also be considered to the extent they relate to rules and laws that are consistent with the rules and laws of California.

[4] Under paragraph (b)(2), a willful violation of a rule does not require that the lawyer intend to violate the rule. *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Business and Professions Code section 6077.

[5] For the disciplinary authority of this state and choice of law, see Rule 8.5.

Rule 1.1 Competence

(Commission's Proposed Rule – Clean Version)

(a) A lawyer 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 lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer may nonetheless provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, 2) acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes to be competent.

COMMENT

[1] It is the duty of every lawyer to provide competent legal services to the client.

[2] Competence under paragraph (b) includes the obligation to act with reasonable diligence on behalf of a client. This includes pursuing a matter on behalf of a client by taking lawful and ethical measures required to advance the client's cause or objectives. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may exercise professional discretion in determining the means by which a matter should be pursued. See Rules 1.2 and 1.4. The 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.

[3] It is a violation of this Rule if a lawyer accepts employment or continues representation in a matter as to which the lawyer knows or reasonably should know that the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence. It is also a violation of this Rule if a lawyer repeatedly accepts employment or continues representation in a matter when the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence.

[4] 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 or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances.

[5] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This provision applies to lawyers generally, including a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2

[6] This Rule does not apply to a single act of negligent conduct or a single mistake in a particular matter.

[7] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1(b) and 5.3(b) with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(Commission's Proposed Rule – Clean Version)

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) (1) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.

(2) Notwithstanding paragraph (d)(1), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g., Cal. Constitution Article I, section 16; Penal Code section 1018. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. Womancare, Inc*. (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].) Accordingly, the decisions specified in paragraph (a), such as whether to settle a civil matter or waive a jury trial in a civil matter, must also be made by the client. See Rule 1.4(c) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation. See Rule 1.14 and Comment [4] of this Rule.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the

matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1. Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.70-5.71 (limited scope rules applicable in family law matters).

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. For example, a lawyer may not draft or deliver documents that the lawyer knows are fraudulent; nor may the lawyer counsel how the wrongdoing might be concealed. The lawyer may not continue assisting a client in conduct that the lawyer originally believed was legally proper but later discovers is criminal, fraudulent, or the violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Rule 1.6 and Business and Professions Code section 6068(e). When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in the best lawful interest of the client, including counseling the client about possible corrective or remedial action. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.

[11] Paragraph (d)(2) authorizes a lawyer to counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule or ruling of a tribunal. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust.

[12] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(6).

Rule 1.4 Communication
(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which written disclosure or the client's informed consent, as defined in Rule 1.0(e), is required by these Rules or the State Bar Act;

(2) reasonably consult with the client about the means by which to accomplish the client's objectives in the representation;

(3) keep the client reasonably informed about significant developments relating to the representation;

(4) promptly comply with reasonable requests for information;

(5) promptly comply with reasonable client requests for access to significant documents necessary to keep the client reasonably informed about significant developments relating to the representation, which the lawyer may satisfy by permitting the client to inspect the documents or by furnishing copies of the documents to the client; and

(6) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall promptly communicate to the lawyer'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.

COMMENT

[1] Whether a particular development is significant will generally depend upon the surrounding facts and circumstances. For example, a change in lawyer personnel might be a significant development depending on whether responsibility for overseeing the client's work is being changed, whether the new attorney will be performing a significant portion or aspect of the work, and whether staffing is being changed from what was promised to the client. Other examples of significant developments may include the receipt of a demand for further discovery or a threat of sanctions, a change in a criminal abstract of judgment or re-calculation of custody credits, and the loss or theft of information concerning the client's identity or information concerning the matter for which representation is being provided. Depending upon the circumstances, a lawyer may also be obligated pursuant to paragraphs (a)(2) or (a)(3) to communicate with the client concerning the opportunity to engage in, and the advantages and disadvantages of, alternative dispute resolution processes. Conversely, examples of developments or circumstances that generally are not significant include the payment of a motion fee and

the application for or granting of an extension of time for a time period that does not materially prejudice the client's interest.

[2] A lawyer may comply with paragraph (a)(5) by providing to the client copies of significant documents by electronic or other means. A lawyer may agree with the client that the client assumes responsibility for the cost of copying significant documents the lawyer provides pursuant to paragraph (a)(5). A lawyer must comply with paragraph (a)(5) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. This Rule does not prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

[3] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

[4] As used in paragraph (c), "client" includes: (i) a person who possesses the authority to accept an offer of settlement or plea, (ii) representatives of an organizational client authorized by the client to communicate with the lawyer regarding an offer of settlement or plea, or, (iii) in a class action, all the named representatives of the class.

[5] Because of the liberty interests involved in a criminal matter, paragraph (c)(1) requires that counsel in a criminal matter convey to the client all offers, whether written or oral. As used in this Rule, "criminal matters" includes all legal proceedings where violations of criminal laws are alleged, and liberty interests are involved, including juvenile proceedings.

[6] Paragraph (c)(2) requires a lawyer to advise a client promptly of all written settlement offers, regardless of whether the offers are considered by the lawyer to be significant. Notwithstanding paragraph (c)(2), a lawyer need not inform the client of the substance of a written offer of a settlement in a civil matter if the client has previously instructed that such an offer will be acceptable or unacceptable, or has previously authorized the lawyer to accept or to reject the offer, and there has been no change in circumstances that requires the lawyer to consult with the client. See Rule 1.2(a).

[7] Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant.

[8] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

[9] In some circumstances, a lawyer may be justified in delaying or withholding transmission of information when the client would be likely to react imprudently to an immediate communication. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another

person. This Rule does not require a lawyer to disclose to a client any information or document that a court order or non-disclosure agreement prohibits the lawyer from disclosing to that client. This Rule is not intended to override applicable statutory or decisional law requiring that certain information not be provided to defendants in criminal cases who are clients of the lawyer. Compare Rule 1.16(e)(1) and Comment [9].

[10] This Rule is not intended to create, augment, diminish, or eliminate any application of the work product doctrine. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

Rule 1.4.1: Disclosure of Professional Liability Insurance

(Commission's Proposed Rule – Clean Version)

(a) A lawyer 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 lawyer, that the lawyer does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the lawyer's legal representation of the client in the matter will exceed four hours.

(b) If a lawyer does not provide the notice required under paragraph (a) at the time of a client's engagement of the lawyer, and the lawyer subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the lawyer shall inform the client in writing within thirty days of the date that the lawyer knows or should know that he or she no longer has professional liability insurance.

(c) This Rule does not apply to a lawyer who is employed as a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity, or to a court-appointed lawyer in a criminal or civil action or proceeding with respect to the matter in which the lawyer has been appointed.

(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 lawyer has previously advised the client under paragraph (a) or (b) that the lawyer does not have professional liability insurance.

COMMENT

[1] The disclosure obligation imposed by Paragraph (a) applies with respect to new clients and new engagements with returning clients.

[2] A lawyer may use the following language in making the disclosure required by paragraph (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 1.4.1, I am informing you in writing that I do not have professional liability insurance."

[3] A lawyer may use the following language in making the disclosure required by paragraph (b):

"Pursuant to California Rule of Professional Conduct 1.4.1, I am informing you in writing that I no longer have professional liability insurance."

[4] Paragraph (c) in part provides an exemption for a "government lawyer or in-house counsel when that lawyer 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 lawyer is not covered by professional liability insurance. If a lawyer 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 lawyer is or is not covered by professional liability insurance. The exemptions

for government lawyers and in-house counsels 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.

[5] Paragraph (c) also provides an exemption for “a court-appointed lawyer in a criminal or civil action or proceeding with respect to the matter in which the lawyer has been appointed.” A lawyer must provide notification in all other actions and proceedings as required by paragraphs (a) and (b).

Rule 1.5: Fees For Legal Services

(Commission's Proposed Rule XDraft 15 (7/25/10) – CLEAN VERSION)

(a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.

(b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the fee would amount to an improper appropriation of the client's funds because there has been an element of fraud or overreaching by the lawyer in negotiating or setting the fee, or the lawyer has failed to disclose the material facts. 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.

(c) Among the factors to be considered, where appropriate, in determining the conscionability of a fee or in-house expense are the following:

(1) the amount of the fee or in-house expense in proportion to the value of the services performed;

(2) the relative sophistication of the lawyer 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 lawyer;

(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 lawyer or lawyers performing the services;

(9) whether the fee is fixed or contingent;

(10) the time and labor required;

(11) whether the client gave informed consent to the fee or in-house expense.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the

client's interests unless the client is either represented with respect to the modification by an independent lawyer or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice.

COMMENT

Unconscionability of Fee

[1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy, (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed lawyer provides legal services. E.g., *Birbrower, Montalbano, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.

[1B] Paragraph (b) defines an unconscionable fee. See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513]. The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a). In-house expenses are charges by the lawyer or firm as opposed to third-party charges.

Basis or Rate of Fee

[2] In many circumstances, Business and Professions Code, sections 6147 and 6148 govern what a lawyer is required to include in a fee agreement, and provide consequences for a lawyer's failure to comply with the requirements. See, e.g., *In re Harney* (1995) 3 Cal. State Bar Ct. Rptr. 266.

Modifications of Agreements by which a Lawyer is Retained by a Client

[3] Paragraph (e) imposes a specific requirement with respect to modifications of agreements by which a lawyer is retained by a client, when the amendment is material and is adverse to the client's interests. A material modification is one that substantially changes a significant term of the agreement, such as the lawyer's billing rate or manner in which fees or costs are determined or charged. A material modification is adverse to a client's interests when the modification benefits the lawyer in a manner that is contrary to the client's interest. Increases of a fee, cost, or expense pursuant to a provision in a pre-existing agreement that permits such increases are not modifications of the agreement for purposes of paragraph (e). However, such increases may be subject to other paragraphs of this Rule, or other Rules or statutes.

[3A] Whether a particular modification is material and adverse to the interest of the client depends on the circumstances. For example a modification that increases a lawyer's hourly billing rate or the amount of a lawyer's contingency fee ordinarily is material and adverse to a client's interest under paragraph (e). On the other hand, a modification that reduces a lawyer's fee ordinarily is not material and adverse to a client's interest under paragraph (e). A modification that extends the time within which a client is obligated to pay a fee

ordinarily is not material and adverse to a client's interests, particularly when the modification is made in response to a client's adverse financial circumstances.

[3B] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms length transaction. *Setzer v. Robinson* (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement that are in addition to the requirements in paragraph (e). Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. See, e.g., *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; *Berk v. Twentynine Palms Ranchos, Inc.* (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212 [64 Cal.Rptr.915]. Depending on the circumstances, other rules and statutes also may apply to the modification of an agreement by which a lawyer is retained by a client, including, without limitation, Rule 1.4 (Communication), Rule 1.7 (Conflicts of Interest), and Business and Professions Code section 6106.

[3C] A modification is subject to the requirements of Rule 1.8.1 when the modification confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees.

Terms of Payment

[4] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. See Rule 1.16(e)(2) A fee paid in property instead of money may be subject to the requirements of Rule 1.8.1.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay.

Prohibited Contingent Fees

[6] Paragraph (d)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of balances past due under child or spousal support or other financial orders because such contracts do not implicate the same policy concerns.

Payment of Fees in Advance of Services

[7] Every fee agreed to, charged, or collected is subject to paragraph (a) and may not be unconscionable.

[8] A true retainer, which is sometimes known as a "general retainer," or "classic retainer," secures availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer. Concerning the lawyer's obligations with respect to the deposit of a true retainer in a trust account, see Rule 1.15, Comments [8] and [9].

[9] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2). To the extent a fee is unconscionable, it never can be considered to have been earned. In the event of a dispute relating to a fee, the lawyer must comply with Rule 1.15(d)(2).

Division of Fee

[10] A division of fees among lawyers is governed by Rule 1.5.1.

Rule 1.5.1: Fee Divisions Among Lawyers

(Commission's Proposed Rule – Clean Version)

(a) Lawyers who are not in the same law firm shall not divide a fee for legal services unless:

(1) The lawyers enter into a written agreement to divide the fee;

(2) The client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of the division; and

(3) The total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.

COMMENT

[1] A division of a fee under paragraph (a) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by or on behalf of a client. For a discussion of criteria for determining whether a division of a fee under paragraph (a) has occurred, see *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

[2] Paragraph (a) applies to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not in the same law firm. Paragraph (a) also applies to a division of a fee between lawyers who are not in the same law firm but who are working jointly for a client.

[3] Paragraph (a) requires both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of this Rule.

[4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and to obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to the client and that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.

[5] This Rule does not apply to a division of fees pursuant to court order.

[6] This Rule does not subject a lawyer to discipline unless the lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in paragraph (a).

[7] Under Rule 1.5, a lawyer cannot enter into an agreement for, charge, or collect an illegal or unconscionable fee. Under Rule 1.5 a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.

Rule 1.6 Confidentiality of Information

(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not reveal information protected by Business and Professions Code section 6068(e) unless the client gives informed consent or the disclosure is permitted by paragraph (b).

(b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068(e) to the extent that the lawyer reasonably believes the disclosure is necessary:

(1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c);

(2) to secure legal advice about the lawyer's compliance with the lawyer's professional obligations;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship;

(4) to comply with a court order; or

(5) to protect the interests of a client under the limited circumstances identified in Rule 1.14(b).

(c) *Further obligations under paragraph (b)(1).* Before revealing information protected by Business and Professions Code section 6068(e) in order to prevent a criminal act as provided in paragraph (b)(1), a lawyer 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 lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068(e) as provided in paragraph (b)(1).

(d) In revealing information protected by Business and Professions Code section 6068(e) as permitted by paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, secure confidential legal advice, establish a claim or defense in a controversy between the lawyer and a client, protect the interests of the client, or to comply with a court order given the information known to the lawyer at the time of the disclosure.

(e) A lawyer who does not reveal information protected by Business and Professions Code section 6068(e) as permitted by paragraph (b) does not violate this Rule.

Comment

[1] This Rule governs the disclosure by a lawyer of information protected by Business and Professions Code section 6068(e) during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal

information relating to the lawyer's prior representation of a former client, and Rules 1.8.2 and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

Policies Furthered by the Duty of Confidentiality

[2] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code section 6068(e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer'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 lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. 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 lawyer-client relationship, that, in the absence of the client's informed consent, a lawyer must not reveal information protected by Business and Professions Code section 6068(e). See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].

Information protected by Business and Professions Code section 6068(e).

[3] As used in this Rule, "information protected by Business and Professions Code section 6068(e)" consists of information gained by virtue of the representation of a client, whatever its source, that (a) is protected by the lawyer-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential. Therefore, the lawyer's duty of confidentiality as defined in Business and Professions Code section 6068(e) is broader than lawyer-client privilege. 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, 621 [120 Cal. Rptr. 253].

Scope of the Lawyer-Client Privilege

[4] The protection against compelled disclosure or compelled production that is afforded lawyer-client communications under the privilege is typically asserted in judicial and other proceedings in which a lawyer or client might be called as a witness or otherwise compelled to produce evidence. Because the lawyer-client privilege functions to limit the amount of evidence available to a tribunal, its protection is somewhat limited in scope.

Scope of the Duty of Confidentiality

[5] A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's protected information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the

duty so long as the lawyer acquires the information by virtue of being in the lawyer-client relationship. Information protected by Business and Professions Code section 6068(e) is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been established. Information that a lawyer acquires about a client before the relationship is established, but which is relevant to the matter for which the lawyer is retained, is protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client consultation, whether from the client or the client's representative, even if a lawyer-client relationship does not result from the consultation. See Rule 1.18. Thus, a lawyer may not reveal information protected by Business and Professions Code section 6068(e) except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.

Relationship of Confidentiality to Lawyer Work Product

[6] "Information protected by Business and Professions Code section 6068(e)" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not, by itself, render that information "generally known" and therefore outside the scope of this Rule. See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[7] Paragraph (a) prohibits a lawyer from revealing information protected by Business and Professions Code section 6068(e). This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the client's representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information protected by Business and Professions Code section 6068(e) that is related to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client as Permitted by Paragraph (b)(1)

[9] Notwithstanding the important public policies promoted by the duty of confidentiality, the overriding value of life permits certain disclosures otherwise prohibited under Business and Professions Code section 6068(e)(1). Paragraph (b)(1) is based on Business and Professions Code section 6068(e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code section 6068(e) even without client consent. Evidence Code section 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal protected 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.

Lawyer Not Subject to Discipline for Revealing Protected Information as Permitted Under Paragraph (b)(1)

[10] Paragraph (b)(1) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes is likely to result in death or substantial

bodily harm to an individual. A lawyer who reveals protected information as permitted under paragraph (b)(1) is not subject to discipline.

No Duty to Reveal Information protected by Business and Professions Code section 6068(e)

[11] Neither Business and Professions Code section 6068(e)(2) nor paragraph (b)(1) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code section 6068(e) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal protected information as permitted under this Rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in Comment [12].

Deciding to Reveal Protected Information as Permitted Under Paragraph (b)(1)

[12] Disclosure permitted under paragraph (b)(1) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing protected information as permitted under paragraph (b)(1), the lawyer 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 such information are the following:

(1) the amount of time that the lawyer 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 lawyer believes the lawyer'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 lawyer;

(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and

(6) the nature and extent of protected information that must be disclosed to prevent the criminal act or threatened harm.

A lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the protected information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the protected information without waiting until immediately before the harm is likely to occur.

Counseling Client or Third Person Not to Commit a Criminal Act Reasonably Likely to Result in Death of Substantial Bodily Harm

[13] Paragraph (c)(1) provides that, before a lawyer may reveal information protected by Business and Professions Code section 6068(e), the lawyer 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, including persuading the client to take action to prevent a third person from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of protected information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action – such as by ceasing the client's own criminal act or by dissuading a third person from committing or continuing a criminal act before harm is caused – the option for permissive disclosure by the lawyer would cease because 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 lawyer who contemplates making adverse disclosure of protected information may reasonably conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable under the circumstances, first advise the client of the lawyer's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the lawyer 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 lawyer has concluded that paragraph (b)(1) does not permit the lawyer to reveal protected information, the lawyer nevertheless is permitted to counsel the client as to why it might be in the client's best interest to consent to the lawyer's disclosure of that information.

Requirement under Paragraph (c)(2) to Inform Client of Lawyer's Ability or Decision to Reveal Protected Information

[14] A lawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 1.4 and Business and Professions Code section 6068(m). Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal protected information under paragraph (b)(1) 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 lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal protected information as provided in paragraph (b)(1) only if it is reasonable to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. See Comment [16]. 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 lawyer's contact with the client;

(3) the nature and length of the professional relationship with the client;

(4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;

(5) the likelihood that the client's matter will involve information within paragraph (b)(1);

(6) the lawyer'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

(7) the lawyer's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

Disclosure of Protected Information as Permitted by Paragraph (b)(1) Must Be No More Than is Reasonably Necessary to Prevent the Criminal Act

[15] Paragraph (d) requires that disclosure of protected information as permitted by paragraph (b)(1), when made, must be no more extensive than the lawyer reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the protected information to only those persons who the lawyer reasonably believes can act to prevent the harm. Under some circumstances, a lawyer 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 lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer'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 lawyer.

Avoiding a Chilling Effect on the Lawyer-Client Relationship

[16] The foregoing flexible approach to a lawyer informing a client of his or her ability or decision to reveal protected information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. See Comment [2]. To avoid that chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal protected information as early as the outset of the representation, while another lawyer may choose to inform a client only at a point when that client has imparted information that comes within paragraph (b)(1), or even choose not to inform a client until the lawyer attempts to counsel the client under Comment [13]. In each situation, the lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

Informing Client that Disclosure Has Been Made; Termination of the Lawyer-Client Relationship

[17] When a lawyer has revealed protected information under paragraph (b)(1), in all but extraordinary cases the relationship between lawyer and client that is based in mutual trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation, see Rule 1.16, unless the client has given his or her informed consent to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling reason for not informing the client, such as to protect the lawyer, the lawyer's family or a third person from the risk of death or substantial bodily harm, the lawyer must withdraw from the representation. See Rule 1.16.

Other Consequences of the Lawyer's Disclosure

[18] Depending on the circumstances of a lawyer's disclosure of protected information as permitted by this Rule, there may be other important issues that a lawyer must address. For example, a lawyer who is likely to testify in a matter involving the client must comply with Rule 3.7. Similarly, the lawyer must also consider the lawyer's duty of competence (Rule 1.1) and whether the lawyer has a conflict of interest in continuing to represent the client (Rule 1.7).

Disclosure as Permitted by Paragraphs (b)(2) through (b)(5)

[19] If a legal claim by a client or the client's representative alleges a breach of duty by the lawyer involving representation of the client or a disciplinary charge filed by or with the cooperation of the client or the client's representative alleges misconduct of the lawyer involving representation of the client, paragraph (b)(3) permits the lawyer to respond only to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving conduct or representation of a former client.

[20] A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[21] A lawyer may be ordered to reveal information protected by Business and Professions Code section 6068(e) by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer must assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the lawyer-client privilege or other applicable law. See, e.g., *People v. Kor* (1954) 129 Cal. App. 2d 436 [277 P.2d 94]. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of appeal. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

[22] Paragraph (d) permits disclosure as permitted by paragraphs (b)(2) through (b)(5) only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the protected information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[23] Paragraph (b) permits but does not require the disclosure of information protected by Business and Professions Code section 6068(e) to accomplish the purposes specified in paragraphs (b)(2) through (b)(5).

Acting Competently to Preserve Confidentiality

[24] A lawyer must act competently to safeguard information protected by Business and Professions Code section 6068(e) against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[25] When transmitting a communication that includes information protected by Business and Professions Code section 6068(e), the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include

the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[26] The duty of confidentiality continues after the lawyer-client relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Government Lawyers

[27] This Rule applies to lawyers representing governmental organizations. See Rule 1.13, Comment [15].

Rule 1.7 Conflict of Interest: Current Clients

(**Commission's Proposed Rule – Clean Version**)

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed written consent.

COMMENT

General Principles

[1] Undivided Loyalty and independent professional judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. See Comments [6]-[7], [8], [9], [10]-[12]. This Rule and the other conflict rules (1.8 through 1.8.11, 1.9, 1.10, 1.11, 1.18) seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. In addition to the duty of undivided loyalty and the duty to exercise independent professional judgment, the conflict rules are also concerned with (1) the duty to maintain confidential client information; (2) the duty to disclose to the client all material information and significant developments; and (3) the duty to represent the client competently and diligently within the bounds of the law. See Rule 1.2(a) regarding the allocation of authority between lawyer and client. For specific rules regarding certain concurrent conflicts of interest, see Rules 1.8.1 through 1.8.11. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "informed written consent," see Rule 1.0.1(e) and (e-1), and Comments [6] and [7] to that Rule.

[2] Resolution of a conflict of interest under this Rule requires the lawyer to: (1) clearly identify the client or clients; (2) determine the scope of each relevant representation of a client or proposed representation of a client; (3) determine whether a conflict of interest exists; (4) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether lawyer has the ability to obtain the client's consent to the conflict; and

(5) if so, consult with the clients affected under paragraph (a) and obtain their informed written consent. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed written consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. Whether a lawyer-client relationship exists or, having once been established, is continuing, is beyond the scope of these Rules.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed written consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to a client who becomes a former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comment [29].

[5] [RESERVED]

Paragraph (a)(1): Identifying Conflicts of Interest: Directly Adverse

[6] The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the lawyer-client relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Thus, a directly adverse conflict arises, for example, when a lawyer accepts representation of a client that is directly adverse to another client the lawyer currently represents in another matter. See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. Similarly, a directly adverse conflict under paragraph (a)(1) occurs when a lawyer, while representing a client, accepts in another matter the representation of a person or organization who, in the first matter, is directly adverse to the lawyer's client. Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. Other instances that ordinarily would not constitute direct adversity include: (1) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, for example, if a client is the landlord of, or a lender to, the non-client; (2) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (3) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent either client competently, as

might occur, *e.g.*, if the lawyer were advocating inconsistent positions in front of the same tribunal. See Comments [14]-[17A].

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed written consent of each client. Paragraph (a)(1) applies even if the parties to the transaction have a common interest or contemplate working cooperatively toward a common goal.

[7A] If a lawyer proposes to represent two or more parties on the same side of a negotiation or lawsuit, the situation is analyzed under paragraph (a)(2), not paragraph (a)(1). See Comments [29]-[33].

Paragraph (a)(2): Identifying Conflicts of Interest: Material Limitation

[7B] Conflicts of interest that create a significant risk that a lawyer's representation of one or more clients will be materially limited as provided in paragraph (a)(2) can arise from: (1) duties owed a former client or a third person (see Comment [9]); (2) a lawyer's personal interests (see Comments [10]-[12]); or (3) a lawyer's joint representation of two or more clients in the same matter (see Comments [29]-[33]).

[8] Even where there is no direct adversity, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent two or more clients in the same matter, such as several individuals seeking to form a joint venture, is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The conflict in effect forecloses alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent. The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of actions that reasonably should be pursued on behalf of each client. See Comments [29]-[33]. Depending on the circumstances, , various relationships a lawyer has may likewise create a significant risk that the lawyer's representation will be materially limited, for example, where (1) the lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; (2) the lawyer knows or reasonably should know that: (i) the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter, and (ii) the previous relationship would substantially affect the lawyer's representation; (3) the lawyer has or had a legal, business, financial, professional, or personal relationship with another person or entity and the lawyer knows or reasonably should know that either the relationship or the person or entity would be affected substantially by resolution of the matter; (4) a lawyer or law firm representing a party or witness in the matter has a lawyer-client relationship with the lawyer, the lawyer's law firm, or another lawyer in the lawyer's law firm; and (5) a lawyer representing a party or witness in the matter is a spouse, parent or sibling of the lawyer, or has an intimate personal relationship with the lawyer or with another lawyer in the lawyer's law firm.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] A lawyer's duties of undivided loyalty and independence of professional judgment may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director. See, e.g., *William H. Raley Co, Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on the representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give the client detached advice. A lawyer's legal, business, professional or financial interest in the subject matter of the representation might also give rise to a conflict under paragraph (a)(2), where, for example, (1) the lawyer is a party to a contract being litigated; (2) the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; or (3) the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rules 1.8.1 through 1.8.11 for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 3.7 concerning a lawyer as witness and Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, or when there is an intimate personal relationship between the lawyers, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer who is related to another lawyer, e.g., as parent, child, sibling or spouse, or who is in an intimate personal relationship with another lawyer, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed written consent. The prohibition on representation arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the lawyer-client relationship. See Rule 1.8.10.

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client gives informed written consent and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8.6. If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payor who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the lawyer has the ability to obtain the client's consent to the representation and, if so, whether the client has adequate information about the material risks of the representation. See Comments [14]-[17A].

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), in some situations a lawyer cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consent must be resolved as to each client.

[15] A lawyer's ability to obtain consent is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed written consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1.

[16] Paragraph (b)(2) describes conflicts to which a client cannot consent because the representation is prohibited by applicable law. For example, certain representations by a former government lawyer are also prohibited, despite the informed consent of the former client. See, e.g., Business and Professions Code section 6131.

[17] Paragraph (b)(3) describes conflicts for which client consent cannot be obtained because of the interests of the legal system in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. See, e.g., *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] (the lawyer of a family-owned business organization should not represent one owner against the other in a marital dissolution action); *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] (a lawyer may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict). Although paragraph (b)(3) does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0.1(m)), such representation may be precluded by paragraph (b)(1).

[17A] Under paragraph (b)(4), a lawyer must obtain the informed written consent of each affected client before accepting or continuing a representation that is prohibited under paragraph (a). If the lawyer cannot make the disclosure requisite to obtaining informed written consent, (see Rules 1.0.1(e) and 1.0.1(e-1)), without violating the lawyer's duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. See Rule 1.6 and Business and Professions Code section 6068(e). A lawyer might also be prevented from making a required disclosure because of a duty of confidentiality to former, current or potential clients, because of other fiduciary relationships such as service on a board of directors, or because of contractual or court-ordered restrictions. In addition, effective client consent cannot be obtained when the person who grants consent lacks capacity or authority. See Civil Code section 38; and see Rule 1.14 regarding clients with diminished capacity.

Disclosure and Informed Written Consent

[18] Informed written consent requires that the lawyer communicate in writing to each affected client the relevant circumstances and the actual and reasonably foreseeable adverse consequences of the conflict on the client's interests and the lawyer's representation and that the client thereafter gives his or her consent in writing. See Rules 1.0.1(e) (informed consent) and 1.0.1(e-1) (informed written consent) and Comments [6] and [7] to that Rule. The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the joint representation, including possible effects on loyalty, confidentiality and the lawyer-client privilege and the advantages and risks involved. See Comment [30] (effect of joint representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. See Comments [14]-[17A].

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client in writing. See Rule 1.0.1(n) (writing includes electronic transmission). The requirement of a written disclosure, (see Comment [18]), does not

supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Duration of Consent

[20A] A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the relevant facts and circumstances remain unchanged. With any material change, the lawyer may not continue the representation without making a new written disclosure to each affected client and obtaining a new written consent.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation of that client at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client, whether material detriment to the other clients or the lawyer would result, and the lawyer's confidentiality obligations to the client revoking consent.

Consent to Future Conflict

[22] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but a client's consent must be "informed" to comply with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not comply with this Rule. Determining whether a client's advance consent is "informed," and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comments [18]-[20] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comments [18]-[20] ordinarily requires. A lawyer's disclosure to a client must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, and whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on factors such as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client's degree of experience as a user of the legal services, including experience with the type of legal services involved in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was timely and effectively instituted and fully maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education, language skills, and the

client's familiarity with the particular type of conflict that is the subject of the consent. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, depending upon the extent to which the other enumerated factors set forth above are present, even a general and open-ended advance consent can be in compliance when: the consent was given by an experienced user of the type of legal services involved; and the client was independently represented regarding the consent or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice. In any case, advance consent will not be in compliance in the circumstances described in Comments [14]-[17A] (prohibited representations). See Rule 1.0.1(e) (informed consent) and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, joint representation of persons having similar interests in civil litigation is permitted if the requirements of paragraph (b) are satisfied.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be informed of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed written consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters to the extent permitted by Rule 1.16.

[24A] If permission from a tribunal to terminate a representation is denied, the lawyer is obligated to continue the representation notwithstanding the provisions of this Rule. See Rule 1.16(c).

[25] This Rule applies to a lawyer's representation of named class representatives in a class action, whether or not the class has been certified. For purposes of this Rule, an unnamed member of a plaintiff or a defendant class is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not typically need to get the consent of an unnamed class member before representing a client who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to

represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter. A lawyer representing a class or proposed class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters that are prohibited by paragraph (a)(1), see Comment [7]. Relevant factors in determining whether there is significant risk for material limitation as provided in paragraph (a)(2) include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present.

[28] [RESERVED]

Special Considerations in Joint Representation

[29] When a lawyer represents multiple clients in a single matter, the lawyer's duties to one of the clients can interfere with the performance of the lawyer's duties to the other clients. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the joint representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the joint representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake joint representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by joint representation is not likely. Other relevant factors include whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[29A] Examples of conflicts that arise under paragraph (a)(2) from representing multiple clients in the same matter and that will likely preclude a lawyer from accepting or continuing a joint representation unless the lawyer complies with paragraph (b) include the following situations: (1) the lawyer receives conflicting instructions from the clients and the lawyer cannot follow one client's instructions without violating another client's instruction; (2) the clients have inconsistent interests or objectives so that it becomes impossible for the lawyer to advance one client's interests or objectives without detrimentally affecting another client's interests or objectives; (3) the clients have antagonistic positions and the lawyer is obligated to advise each client about how to advance that client's position relative to the other's position; (4) the clients have inconsistent expectations of confidentiality because one client expects the lawyer to keep secret information that is material to the matter; (5) the lawyer has a preexisting relationship with one client that affects the lawyer's independent professional judgment on behalf of the other client(s); (6) the clients make inconsistent demands for the original file.

[30] A particularly important factor in determining the appropriateness of joint representation is the effect on lawyer-client confidentiality and the lawyer-client privilege. With regard to the lawyer-client privilege, although each client's communications with the lawyer are protected as to third

persons, as between jointly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation results between the joint clients, the privilege will not protect any such communications. See Evidence Code sections 952 and 962. In addition, because of the lawyer's obligations under Rule 1.4, the lawyer must inform each jointly represented client in writing of that fact and also that the client should normally expect that his or her communications with the lawyer will be shared with other jointly-represented clients. See also Comments [18]-[20].

[31] [RESERVED]

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the joint representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the joint representation has the right to the lawyer's undivided loyalty and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation who is also a member of its board of directors (or a lawyer for another type of organization who has corresponding fiduciary duties to it) should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the lawyer-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Insurance Defense

[36] 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 the predecessor to paragraph (a) was violated when a lawyer, retained by an insurer to defend one suit against an insured, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraph (a) does not apply to the relationship between an insurer and a lawyer when, in each matter, the

insurer's interest is only as an indemnity provider and not as a direct party to the action.

[37] Paragraph (a)(2) is not intended to modify the tripartite relationship among a lawyer, an insurer, and an insured that is created when the insurer appoints the lawyer to represent the insured under the contract between the insurer and the insured. Although the lawyer's appointment by the insurer makes the insurer and the insured the lawyer's joint clients in the matter, the appointment does not by itself create a significant risk that the representation of the insured, insurer, or both will be materially limited under paragraph (a)(2).

Public Service

[38] For special rules governing membership in a legal service organization, see Rule 6.3; for participation in law related activities affecting client interests, see Rule 6.4; and for work in conjunction with certain limited legal services programs, see Rule 6.5.

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client

(Commission's Proposed Rule – Clean Version)

A lawyer 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 that reasonably can be understood by the client; and

(b) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or is advised in writing by the lawyer to 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 and the lawyer's role in the transaction or acquisition, including whether the lawyer is representing the client in the transaction or acquisition.

COMMENT

Scope of Rule

[1] A lawyer's legal training and skill, and the relationship of trust and confidence that arises between a lawyer and client, create the possibility that a lawyer, even unintentionally, will overreach or exploit client information when the lawyer enters into a business transaction with the client or acquires a pecuniary interest adverse to the client. In these situations, the lawyer could influence the client for the lawyer's own benefit, could give advice to protect the lawyer's interest rather that the client's, and could use client information for the lawyer's benefit rather than the client's. This Rule is intended to afford the client the information needed to fully understand the terms and effect of the transaction or acquisition and the importance of having independent legal advice. See, e.g., *Beery v. State Bar* (1987) 43 Cal.3d 802, 813 [239 Cal.Rptr. 121]. This Rule also requires that the transaction or acquisition be fair and reasonable to the client.

[2] Except as set forth in Comment [5], this Rule does not apply when a lawyer enters into a transaction with or acquires a pecuniary interest adverse to a client prior to the commencement of a lawyer-client relationship with the client. However, when a lawyer's interest in the transaction or in the adverse pecuniary interest results in the lawyer having a personal interest in the subject matter in which the lawyer is representing the client, the lawyer is required to comply with Rule 1.7(a)(2).

Business Transactions With Clients

[3] This Rule applies even when the transaction is not related to the subject matter of the representation, as when a lawyer drafting a will for a client agrees to make a loan to the client to pay expenses that are not related to the representation. This Rule also applies when a lawyer sells to a client goods or non-legal services that are related to the practice of law, such as insurance, brokerage or investment products or services to a client.

[4] This Rule does not apply to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client, and the requirements of the Rule are unnecessary and impractical. Examples of such products and services include banking and brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. The Rule also does not apply to similar types of standard commercial transactions for goods or services offered by a lawyer when the lawyer has no advantage in dealing with the clients, such as when a client purchases a meal at a restaurant owned by the lawyer or when the client pays for parking in a parking lot owned by the lawyer. This Rule also ordinarily would not apply where the lawyer and client each make an investment on terms offered to the general public or a significant portion thereof as when, for example, a lawyer invests in a limited partnership syndicated by a third party, and the lawyer's client makes the same investment on the same terms. When a lawyer and a client each invest in the same business on the same terms offered to the public or a significant portion thereof, and the lawyer does not advise, influence or solicit the client with respect to the transaction, the lawyer does not enter into the transaction “with” the client for purposes of this Rule.

[5] This Rule does not apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees. An agreement by which a lawyer is retained by a client, and material modifications to such agreements that are adverse to the interests of the client, are governed in part by Rule 1.5. Even when this Rule does not apply to the negotiation of the agreement by which a lawyer is retained by a client, other rules, statutes and fiduciary principles might apply. See Rule 1.5, Comment [3B].

[6] This Rule does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future. This Rule also does not apply to an agreement with a client for a contingent fee in a civil case, unless the agreement confers on the owner an ownership, possessory, security, or other pecuniary interest adverse to the client.

Adverse Pecuniary Interests

[7] An ownership, possessory, security or other pecuniary interest adverse to a client arises when a lawyer acquires an interest in a client's property that is or may become detrimental to the client, even when the lawyer's intent is to aid the client. *Hawk v. State Bar* (1988) 45 Cal.3d 589 [247 Cal.Rptr. 599]. An adverse pecuniary interest arises, for example, when the lawyer's personal financial interest conflicts with the client's interest in the property; when a lawyer obtains an interest in a cause of action or subject matter of litigation or other matter the lawyer is conducting for the client; or when the interest can be used to summarily extinguish the client's interest in the client's property. See *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58]. An adverse pecuniary interest also arises when a lawyer acquires an interest in an obligation owed to a client or acquires an interest in an entity indebted to a client. See *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; *Kapelus v. State Bar* (1987) 44 Cal.3d 179 [242 Cal.Rptr. 196].

Full Disclosure to the Client

[8] Paragraph (a) requires that full disclosure be transmitted to the client in writing in a manner that reasonably can be understood by the client. Whether the disclosure reasonably can be understood by the client is based on what is objectively reasonable under the circumstances.

[9] Full disclosure under paragraph (a) requires a lawyer to provide the client with the same advice regarding the transaction or acquisition that the lawyer would provide to the client in a transaction with a third party. *Beery v. State Bar* (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]. It requires a lawyer to inform the client of all of the terms and all relevant facts of the transaction or acquisition, including the nature and extent of the lawyer's role and compensation in connection with the transaction or acquisition. It also requires the lawyer to fully inform the client of risks of the transaction or acquisition and facts that might discourage the client from engaging in the transaction or acquisition. See *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; *Clancy v. State Bar* (1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; *Brockway v. State Bar* (1991) 53 Cal.3d 51 [278 Cal.Rptr. 836]. The burden is always on the lawyer to show that the transaction or acquisition and its terms were fair and just and that the client was fully advised. *Hunniecutt v. State Bar* (1988) 44 Cal.3d 362 [243 Cal.Rptr. 699]; *Felton v. Le Breton* (1891) 92 Cal. 457, 469 [28 P. 490, 494].

[10] The risk to a client is heightened when the client expects the lawyer to represent the client in the transaction or acquisition itself. Under this Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction or acquisition, such as the risk that the lawyer will structure the transaction or acquisition or give legal advice in a way that favors the lawyer's interests at the expense of the client. Because the lawyer has a personal interest in the transaction or acquisition, the lawyer must also comply with Rule 1.7(a)(2). In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from representing the client in the transaction or acquisition.

[11] There are additional considerations when the lawyer-client relationship will continue after the transaction or acquisition. For example, if the lawyer and the client enter into a transaction to form or acquire a business, the client might expect the lawyer to represent the business or the client with respect to the business after the transaction is completed. When the lawyer knows or reasonably should know that the client expects the lawyer to represent the business or the client with respect to the business or interest after the transaction or acquisition is completed, the lawyer must act in either of two ways. Before entering into the transaction or making the acquisition, the lawyer must either (i) inform the client that the lawyer will not represent the business, or the client with respect to the business or interest, and must then act accordingly; or (ii) disclose in writing the risks associated with the lawyer's dual role as both legal adviser and participant in the business or owner of the interest. The client consent requirement in paragraph (c) includes a requirement that the client consent to the risks to the lawyer's representation of the client, which the lawyer has disclosed to the client as required by this Rule. A lawyer must also comply with the requirements of Rule 1.7(a)(2) when the lawyer has a personal interest in the subject matter of the representation as a result of the transaction or acquisition.

[12] Even when the lawyer does not represent the client in the transaction or acquisition, there may be circumstances when the lawyer's interest in the transaction or acquisition may interfere with the lawyer's

independent professional judgment or faithful representation of the client in another matter. When the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client, the lawyer must also disclose in writing the potential adverse effect on the lawyer-client relationship that may result from the lawyer's interest in the transaction or acquisition and must obtain the client's consent under paragraph (c). A lawyer must also comply with the requirements of Rule 1.7(a)(2) when the lawyer has a personal interest in the subject matter of the representation as a result of the transaction or acquisition.

Opportunity to Seek Advice of Independent Counsel

[13] Under paragraph (b), a lawyer must encourage the client to seek the advice of an independent lawyer and may not imply that obtaining the advice of an independent lawyer is unnecessary. An independent lawyer is a lawyer who (i) does not have a financial interest in the transaction or acquisition, (ii) does not have a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent, and (iii) represents the client with respect to the transaction or acquisition.

[14] A lawyer is not required to advise the client to seek the advice of independent counsel if the client already has independent counsel with respect to the transaction or acquisition; however, the lawyer must still afford the client a reasonable opportunity to seek the advice of the independent counsel. A lawyer is not required to provide legal advice to a client who is represented by independent counsel; however, the lawyer is still required under paragraph (a) to make full disclosure to the client in writing of all material facts related to the transaction or acquisition when the lawyer knows or reasonably should know that the client has not been informed of such facts. The fact that the client was independently represented in the transaction or acquisition is relevant in determining whether the terms of the transaction or acquisition are fair and reasonable to the client as paragraph (a) requires.

Rule 1.8.2 Use of Current Client's Information Protected by Business and Professions Code section 6068(e)

(Commission's Proposed Rule – XDraft5 (6/16/10) – CLEAN VERSION)

A lawyer shall not use a current client's information protected by Business and Professions Code section 6068(e) to the disadvantage of the client unless the client gives informed written consent, except as permitted by these Rules or the State Bar Act.

Comment

[1] Use of information protected by Business and Professions Code section 6068(e), whether or not confidential, to the disadvantage of the client violates the lawyer's duty of loyalty. See Rule 1.6, Comments [3] to [6]. This Rule applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer, to the disadvantage of the client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. This Rule prohibits disadvantageous use of information protected by Business and Profession's Code section 6068(e) unless the client gives informed written consent, except as permitted by these Rules or the State Bar Act. See Rules 1.6, 1.9(c), 4.1(a)(2), and Business and Professions Code section 6068(e).

Rule 1.8.3 Gifts From Client

(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not:

(1) induce or solicit a client to make a substantial gift, including a testamentary gift, to the lawyer or a person related to the lawyer, or

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client.

(b) For purposes of this Rule, related persons include "a person who is related by blood or marriage" as that term is defined in California Probate Code section 21350(b).

COMMENT

[1] Paragraph (a) prohibits a lawyer from persuading or influencing a client to give the lawyer any gift of more than nominal market value, except where the lawyer is related to the client. However, a lawyer does not violate this Rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate where impermissible influence occurs. See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].

[2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent representation by another lawyer in accordance with Probate Code, sections 21350 et seq. The sole exception is where the client is a relative of the donee.

[3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to Rule 1.7(a)(2). In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client
(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm will pay the personal or business expenses of a prospective or existing client, except that a lawyer may:

(1) pay or agree to pay such expenses to third persons, from funds collected or to be collected for the client as a result of the representation, with the consent of the client;

(2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written promise to repay the loan, provided the lawyer complies with Rule 1.8.1 before making the loan or agreeing to do so;

(3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. "Costs" within the meaning of this paragraph (a)(3) are limited to all reasonable expenses of litigation, including court costs, and reasonable expenses in preparing for litigation or in providing other legal services to the client; and

(4) pay court costs and reasonable expenses of litigation on behalf of an indigent or pro bono client in a matter in which the lawyer represents the client.

(b) A lawyer does not violate this rule by offering or giving a gift to a current client, provided that anything given was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.

COMMENT

[1] This Rule is intended to balance two competing concerns. One is that a lawyer's subsidization of a client's legal proceedings would give the lawyer a financial stake in the proceedings that might injuriously affect the performance of the duties owed to the client, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's personal interests. The second concern is that a prohibition on the lawyer providing financial assistance to the client might adversely affect the client's access to justice. The Rule is also intended to protect against the hidden transfer of funds to a client under the guise of a loan and to protect the lawyer against client demands for loans or gifts.

[2] Paragraph (a)(2) does not permit a lawyer to lend money, or to offer, promise or agree to lend money, to a prospective client. It does permit a lawyer to lend money to a client after the lawyer is retained, but the lawyer then must comply with Rules 1.7(b)(2) and 1.8.1. Nothing in this Rule shall be deemed to limit the application of Rule 1.8.9.

[3] "Costs," as defined in paragraph (a)(3), are not limited to those that are taxable or recoverable under any applicable statute or rule of court.

Rule 1.8.6 Third Party Payments

(Commission's Proposed Rule – Clean Version)

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

(a) the client gives informed written consent at or before the time the lawyer has entered into the agreement for, charged, or accepted compensation from one other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;

(b) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and

(c) information protected by Business and Professions Code section 6068(e) and Rule 1.6 is protected.

Comment

[1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This Rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7(a)(2) and Rule 1.7, Comments [29] through [33], regarding joint representations. The lawyer also must comply with Rule 1.7(b)(2) when there is a significant risk that the lawyer's representation of the client will be materially limited because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e) (concerning confidentiality) and Rule 5.4(c) (concerning interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).

[2] Paragraph (a) exemptions reflect policy decisions to not interfere with the functioning of (1) public agencies that provide legal services to other public agencies or the public, or (2) non-profit organizations that provide legal services to the indigent and to others. A lawyer who is exempt under paragraph (a) nevertheless must comply with paragraphs (b) and (c).

[3] This Rule does not apply to payment of a lawyer's fees by a third party pursuant to a settlement agreement or as ordered by a court or otherwise provided by law.

[4] This Rule 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]. Thus, a lawyer is not obligated to obtain the client's consent under paragraph (a) when appointed and paid by an insurer to represent an insured pursuant to the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever there is a significant risk that the represenation of the insured will be materially limited by the lawyer's responsibilities to the insurer. See Rule 1.7(a)(2) and Comments [36] and [37].

[5] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client. This also might happen in certain commercial settings, such as when a lawyer is retained by creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. When this occurs, paragraph (a) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.

Rule 1.8.7 [3-310(D)] Aggregate Settlements
(Commission's Proposed Rule – Clean Version)

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent. The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Comment

[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(a)(2) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule 1.2(a) to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or nolo contendere plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.

[2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. See Rule 1.4.

[3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule before accepting an opposing party's aggregate settlement offer or before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also Rule 1.0.1(e) (definition of informed consent).

[4] A lawyer's obligation to make a written disclosure and obtain written consent may be satisfied when the lawyer makes the required disclosure and the clients give consent in court and on the record. See the definition of "written" in Rule 1.0.1(n).

Rule 1.8.8 [3-400] Limiting Liability to Client

(Commission's Proposed Rule – Clean Version)

A lawyer shall not:

(a) Contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice; or

(b) Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:

(1) represented by independent counsel concerning the settlement; or

(2) advised in writing by the lawyer to 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.

COMMENT

[1] This Rule precludes a lawyer from taking unfair advantage of a client or former client in settling a claim or potential claim for malpractice.

[2] This Rule does not prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims. See, e.g., *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102 [63 Cal.Rptr.2d 261]; *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501 [256 Cal.Rptr. 6]. Nor does this Rule limit the ability of lawyers to practice in the form of a limited-liability entity.

[3] Paragraph (b) is not intended to override obligations the lawyer may have under other law. See, e.g., Business and Professions Code section 6090.5.

[4] This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably limiting the scope of the lawyer's representation. See Rule 1.2.

Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not directly or indirectly purchase property at a foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated with that lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian or conservator.

(b) A lawyer shall not represent the seller at a foreclosure, receiver's, trustee's, or judicial sale in which the purchaser is a spouse, relative or other close associate of the lawyer or of another lawyer in the lawyer's law firm.

(c) This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 and 1.7.

COMMENT

[1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.

Rule 1.8.10 Sexual Relations With Client

(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not engage in sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.

(b) For purposes of this Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

COMMENT

[1] This Rule prohibits 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 lawyer must keep clients' interests paramount in the course of the lawyer's representation. The paragraph (a) prohibition applies equally whether the lawyer is the moving force in causing the sexual relations to take place or the client encourages or begins the sexual relations.

[2] This Rule is not applicable to ongoing consensual sexual relations which predate the initiation of the lawyer client relationship because issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the lawyer-client relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be adversely affected by the relationship. See Rules 1.7(a)(2) (conflicts of interest)], 1.1 (competence) and 2.1 (independent judgment).

[3] When the client is an organization, this Rule is applicable to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. See Rule 1.13.

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9

(Commission's Proposed Rule – Clean Version)

While lawyers are associated in a law firm, a prohibition in Rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.

Comment

[1] A prohibition on conduct by an individual lawyer in Rules 1.8.1 through 1.8.9 also applies to all lawyers associated in a law firm with the personally prohibited lawyer. For example, one lawyer in a law firm may not enter into a business transaction with a client of another lawyer associated in the law firm without complying with Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. This Rule does not apply to Rule 1.8.10 since the prohibition in that Rule is personal and is not applied to associated lawyers.

Rule 1.9 Duties to Former Clients

(**Commission's Proposed Rule –Clean Version**)

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a law firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer, while at the former law firm, had acquired information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed written consent.

(c) A lawyer who formerly represented a client in a matter or whose present or former law firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to a former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known; or

(2) reveal information relating to a former client except as these Rules or the State Bar Act would permit with respect to a current client.

COMMENT

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to the former client. The lawyer may not (i) do anything that creates a substantial risk that it will injuriously affect his or her former client in any matter in which the lawyer represented the former client, or (ii) at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship. *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505] These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer by assuring that the client can entrust the client's matter to the lawyer and can confide to the lawyer information protected by Business and Professions Code section 6068(e) and Rule 1.6 without fear that any such information later will be used against the client. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] Paragraph (a) addresses both of these duties. It first addresses the situation in which there is a substantial risk that a lawyer's representation of another client would result in the lawyer doing work that would injuriously affect the former client with respect to a matter in which the lawyer represented the former client. For example, a lawyer could not properly seek to rescind on behalf of a new client a contract the lawyer drafted on behalf of the former client. A lawyer who has prosecuted an accused person could not represent the accused in a

subsequent civil action against the government concerning the same matter.

[3] Paragraph (a) also addresses the second of the two duties owed to a former client. It applies when there is a substantial risk that information protected by Business and Professions Code section 6068(e) and Rule 1.6 that was obtained in the prior representation would be used or disclosed in a subsequent representation in a manner that is contrary to the former client's interests and without the former client's informed written consent. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person ordinarily may not later represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in connection with the environmental review associated with the land use approvals to build a shopping center ordinarily would be precluded from later representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations that existed when the lawyer represented the client; however, paragraph (a) would not apply if the lawyer later defends a tenant of the completed shopping center in resisting eviction for nonpayment of rent if there is no substantial relationship between the land use and eviction matters.

[4] Paragraph (a) applies when the lawyer's representation is in the same matter as, or in a matter substantially related to, the lawyer's representation of the former client. The term "matter" for purposes of this Rule includes civil and criminal litigation, transactions of every kind, and all other types of legal representations. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. An underlying question is whether the lawyer was so involved in the earlier matter that the subsequent representation justly can be regarded as changing of sides in the matter in question. A lawyer might avoid the application of this Rule by limiting the scope of a representation so as to exclude matters on which the lawyer has a conflict of interest. See Rule 1.2(c) (limiting the scope of representation).

[5] The term "substantially related matter" as used in this Rule is not applied identically in all types of proceedings. In a disqualification proceeding, a court will presume conclusively that a lawyer has obtained confidential information material to the adverse engagement when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client that confidential information material to the current dispute normally would have been imparted to the attorney. *H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454 [280 Cal.Rptr. 614]. This disqualification application exists, at least in part, to protect the former client by avoiding an inquiry into the substance of the information that the former client is entitled to keep from being imparted to the lawyer's current client. See *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 592 [283 Cal.Rptr. 732]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934 [197 Cal.Rptr. 185]. In disciplinary proceedings, and in civil litigation between a lawyer and a former client, where the lawyer's new client is not present, the evidentiary presumption created for disqualification purposes does not apply and the lawyer can provide evidence concerning the information actually received in the prior representation.

[6] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial risk of a violation of one of the two duties to a former client described above in Comment [1]. This will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code

section 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

[7] Paragraph (a) applies when the new client's interests are materially adverse to the former client's interests. In light of the overall purpose of the Rule to protect candor and trust during the lawyer-client relationship, the term "materially adverse" should be applied with that purpose in mind. Accordingly, a client's interests are materially adverse to the former client if the lawyer's representation of the new client creates a substantial risk that the lawyer either (i) would perform work for the new client that would injuriously affect the former client in any manner in which the lawyer represented the former client, or (ii) would use or reveal information protected by Business and Professions Code section 6068(e) and Rule 1.6 that the former client would not want disclosed or in a manner that would be to the disadvantage of the former client.

Lawyers Moving Between Firms

[8] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer has actual knowledge of information protected by Rules 1.6, 1.9(c), and Business and Profession Code 6068(e). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[9] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm to which this Rule applies.

[10] A lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6, 1.9(c), and Business and Professions Code section 6068(e).

[11] Paragraph (c) provides that confidential information acquired by a lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the former client. See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect, and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. However, the fact that information can be discovered in a public record does not, by itself, render that information generally known. See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

Client Consent

[12] The provisions of this Rule are for the protection of former clients and can be waived if the former client gives informed written consent. See Rule 1.0.1(e-1). With regard to the effectiveness of an advance consent, see Comment [22] to Rule 1.7. With regard to the application of a lawyer's conflict to a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Rule 1.10: Imputation Of Conflicts Of Interest: General Rule
(Commission's Proposed Rule ALT1 – Clean Version)

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless

(1) the matter is the same as or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter.

(c) A prohibition under this Rule may be waived by each affected client under the conditions stated in Rule 1.7.

(d) The imputation of a conflict of interest to lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

COMMENT

Definition of "Firm"

[1] Whether two or more lawyers constitute a firm for purposes of this Rule can depend on the specific facts. See Rule 1.0.1(c), Comments [2] - [4].

Principles of Imputed Conflicts of Interest

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the duties of loyalty and confidentiality owed to the client as they apply to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing the duties of loyalty and confidentiality owed to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty and confidentiality owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation

by others in the firm, the firm should not be prohibited from further representation. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal prohibition of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation by others in the law firm if the lawyer is prohibited from acting because of events that occurred before the person became a lawyer, for example, work that the person did while a law student. In both situations, however, such persons must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0.1(k) and 5.3. See also Comment [9].

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a current client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c), .

[6] Rule 1.10(c) removes imputation with the informed consent of each affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and Comments [14A] to [17A], and that each affected client or former client has given informed written consent to the representation. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0.1(e).

[7-ALT1] Where a lawyer has joined a private firm or a government agency after having represented the government or another government agency, imputation is governed by Rule 1.11(b) and (c), not this Rule. Where a lawyer has become employed by a government agency after having served clients in private practice or other nongovernmental employment, the questions of whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation are matters of case law. See Rule 1.11, Comments [9B] and [9C].

[7-ALT2] Where a lawyer has joined a private firm or a government agency after having represented the government or another government agency, imputation is governed by Rule 1.11(b) and (c), not this Rule. Where a lawyer has become employed by a government agency after having served clients in private practice or other nongovernmental employment, imputation is governed by Rule 1.11(e).

[8] Where a lawyer is prohibited from engaging in certain transactions under Rules 1.8.1 through Rule 1.8.9, Rule 1.8.11, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Rule Not Determinative of Disqualification Motions

[9] This Rule does not limit or alter the power of a court of this State to control the conduct of lawyers and other persons connected in any manner with judicial proceedings before it, including matter pertaining to disqualification. See Code of Civil Procedure section 128(a)(5); Penal Code section 1424; In re Charlisse C. (2008) 45 Cal.4th 145; Rhaburn v. Superior Court (2006) 140 Cal.App.4th 1566.

[10] Rule 1.10 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (a) or (b). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law.

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

(Commission's Proposed Rule ALT1 – Clean Version)

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed written consent to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer who was a public officer or employee and, during that employment, acquired information that the lawyer knows is confidential government information about a person, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed written consent; or

(ii) negotiate for private employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is

participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to these Rules, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and conflicts resulting from duties to former clients as stated in Rule 1.9. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. See, e.g., Business and Professions Code section 6131. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0.1(e-1) for the definition of "informed written consent."

[2] Paragraphs (a)(1) and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Concerning imputation and screening within a government agency, see Comments [9B] and [9C], below.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later government or private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by paragraphs (a)(2) and (d)(2).

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional

functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus, a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent this Rule from imposing too severe an obstacle against entering public service. The limitations of representation in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than imputing conflicts to all substantive issues on which the lawyer worked, serves a similar function.

[4A] By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. Accordingly, unless the information acquired during government service is "generally known" or these Rules would otherwise permit its use or disclosure, the information may not be used or revealed to the government's disadvantage. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by Rule 1.11(a)(1). Paragraph (c) of this Rule adds further protections against exploitation of confidential information. Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public officer or employee, that the lawyer knows is confidential government information, from representing a private client whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage. A firm with which the lawyer is associated may undertake or continue representation in the matter only if the lawyer who possesses the confidential government information is timely screened. Thus, a purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the lawyer's subsequent private client from obtaining an unfair advantage because the lawyer has confidential government information about the client's adversary.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. Because the conflict of interest is governed by paragraphs (a) and (b), the latter agency is required to screen the lawyer. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13, Comment [14]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70 [209 Cal.Rptr. 159].

Screening of Former Government Lawyers Pursuant to Paragraphs (b) and (c)

[6] Paragraphs (b) and (c) contemplate a screening arrangement for former government lawyers. See Rule 1.0.1(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer

from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice to the appropriate government agency, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Consent required to permit government lawyer to represent the government in a matter in which the lawyer participated personally and substantially.

[9A] A government officer or employee may participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment only if: (i) the government agency gives its informed written consent as required by subparagraph (d)(2)(i); and (ii) the former client gives its informed written consent as required by Rule 1.9, to which the lawyer is subject by subparagraph (d)(1).

This Rule Not Determinative of Disqualification

[9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34]. Regarding prosecutors in criminal matters, see Penal Code section 1424.

[9C] This Rule leaves open the issues of: (1) whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation. These issues are a matter of case law.

Matter

[10] For purposes of paragraph (f) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

(Commission's Proposed Rule – Clean Version

(a) Except as stated in paragraph (e), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person, or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent.

(b) A lawyer shall not participate in discussions regarding prospective employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is participating, personally and substantially as a judge or other adjudicative officer, or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may participate in discussions regarding prospective employment with a party, or with a lawyer or a law firm for a party in a matter in which the clerk is participating personally and substantially, but only with the approval of the judge or other adjudicative officer.

(c) Except as provided in paragraph (d), if a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter.

(d) If a lawyer is disqualified by paragraph (a) because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal, no lawyer in a law firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

(e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

COMMENT

[1] This Rule generally parallels Rule 1.11. "Personally and substantially" includes the receipt or acquisition of confidential information that is material to the matter. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate, or acquire confidential information. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. Compare the comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in

which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed written consent. See Rule 1.0.1(e-1). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6 and Business and Professions Code section 6068(e), they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm.

[4] Paragraph (d) provides that conflicts of a lawyer personally disqualified because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal will be imputed to other lawyers in a law firm unless the conditions of paragraph (d) are met. Requirements for screening procedures are stated in Rule 1.0.1(k). Paragraph (d)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Rule 1.13 Organization as Client

(Commission's Proposed Rule – Clean Version)

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

(b) If a lawyer representing an organization knows that an officer, employee or other person associated with the organization is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all information protected by Business and Professions Code section 6068(e).

(d) If, despite the lawyer's actions in accordance with paragraph (b), the officer, employee or other person insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by any of these Rules, the consent shall be given by an appropriate official or body of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT

The Entity as the Client

[1] This Rule applies to all forms of legal organizations such as corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. This Rule also applies to governmental organizations. See Comment [14]. An organizational client cannot act except through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. Any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization for purposes of the authorized matter.

[2] When a lawyer is retained by an organization, the lawyer is required to take direction from and communicate with the constituent(s) authorized by the organization or by law to instruct or communicate with the lawyer with respect to the matter for which the organization has retained the lawyer.

[3] When a constituent of an organizational client communicates with the organization's lawyer in that constituent's organizational capacity, the communication is protected by Business and Professions Code section 6068(e) and Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by section 6068(e) and Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information protected by Business and Professions Code section 6068(e) and Rule 1.6 except as permitted by or by section 6068(e) and Rule 1.6.

[4] When constituents of an organization make decisions for it, a lawyer ordinarily must accept those decisions even if their utility or prudence is doubtful. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Rule 1.4 and Business and Professions Code section 6068(m). Paragraph (b) involves one aspect of that duty. It applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging, or has engaged in conduct that the lawyer knows or reasonably should know (i) violates a legal obligation to the organization or is a violation of law reasonably imputable to the organization, and (ii) is likely to result in substantial injury to the organization. In those circumstances, the lawyer must proceed as is reasonably necessary in the best lawful interest of the organization.

[5] Paragraph (b) applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in the conduct. Under this knowledge standard, a lawyer is not required to audit the client's activities or initiate an investigation to uncover the existence of such conduct. Nevertheless, knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. See Rule 1.0.1(f).

[6] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows or reasonably should know that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization. The "knows or reasonably should know" standard requires the lawyer to engage in the level of analysis that a lawyer of reasonable prudence and competence would undertake to ascertain whether the conduct meets the criteria that trigger the lawyer's obligations under paragraph (b).

[7] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. For the responsibility of a subordinate lawyer in representing an organization, see Rule 5.2.

[8] Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

[9] Even in circumstances where a lawyer is not obligated to proceed in accordance with paragraph (b), a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. For example, if a lawyer acting on behalf of an organizational client knows that an actual or apparent agent of the organization acts or intends or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is a violation of a legal duty to the organization or a violation of law reasonably imputable to the organization, but the lawyer does not know or reasonably should know that such conduct is likely to result in substantial injury to the organization, paragraph (b) does not apply. Nevertheless, in such circumstances, subject to Business and Professions Code section 6068(e), the lawyer may take such actions as appear to the lawyer to be in the best lawful interest of the organization. Such actions may include among others (i) urging reconsideration of the matter while

explaining its likely consequences to the organization; or (ii) referring the matter to a higher authority in the organization, including, if warranted by the seriousness of the matter, to the highest authority, as determined by applicable law, that can act on behalf of the organization.

[10] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal and the reason for the lawyer's discharge or withdrawal.

[11] Proceeding in the best lawful interest of the organization under this Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement. In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

Relation to Other Rules

[12] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.4, 1.6, 1.16, 3.3, or the 1.8 series of Rules.

[13] Absent circumstances that would require withdrawal under paragraph (d), the lawyer may continue to represent an organizational client if, despite the lawyer's actions under paragraph (b), the constituent continues to insist on or continues to act or refuse to act in a manner that triggers the application of paragraph (b). Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16. Where the lawyer continues to represent the organization, the lawyer must proceed as is reasonably necessary in the best lawful interests of the organization, including continuing to urge reconsideration, where appropriate. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1).

Governmental Organizations

[14] In representing governmental organizations, it may be more difficult to define precisely the identity of the client and the lawyer's obligations. However, those matters are beyond the scope of these Rules. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. In addition, duties of lawyers employed by

the government or lawyers in military service may be defined by statutes and regulations. This Rule does not limit that authority.

[15] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068(e) or Rule 1.6, a governmental organization has the option of establishing internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.

Clarifying the Lawyer's Role

[16] There are times when the lawyer knows or reasonably should know that the organization's interest may be or become adverse to those of one or more of its constituents or when the constituent with whom the lawyer is communicating mistakenly believes that the lawyer has formed a lawyer-client relationship with that constituent. Under paragraph (f), in such circumstances the lawyer must not mislead the constituent into believing that a lawyer-client relationship exists between the lawyer and the constituent when such is not the case and shall make a reasonable effort to correct a constituent's mistaken belief in that regard. In such circumstances, the lawyer must advise the constituent that the lawyer does not represent the constituent and that communications between the lawyer and the constituent are not confidential as to the organization and may be disclosed to the organization or used for the benefit of the organization. See Rule 4.3

Dual Representation

[17] Paragraph (g) allows lawyers to represent both an organization and a constituent of an organization in the same matter, so long as the lawyer complies with these Rules, including Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. Paragraph (g) requires that the organization's consent to dual representation of the organization and a constituent of the organization must be provided by someone other than the constituent who is to be represented. When there is no appropriate official of the organization to provide consent and the appropriate body of the organization is deadlocked, consent may be given by the shareholders of the organization to the extent allowed by law or by the rules or regulations governing the conduct of the organization's affairs. When there is no appropriate official, body or ownership group that can consent for the organization, the constituent to be represented in the dual representation may provide such consent in some cases. As used in this Rule, "shareholder" includes shareholders of a corporation, members of an association or limited liability company, or partners in a partnership.

[18] This Rule does not prohibit lawyers from representing both an organization and a constituent of an organization in separate matters, so long as the lawyer has addressed the conflicts of interest that may arise. In dealing with a close corporation or small association, lawyers commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law. See *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. Similar issues can arise in a derivative action. See *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].

Rule 1.14 Client with Diminished Capacity

(**Commission's Proposed Rule –Clean Version**)

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.

(b) Except where the lawyer represents a minor, a client in a criminal matter, or a person who is the subject of a conservatorship proceeding, when the lawyer reasonably believes

(1) that the client has significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation and further that, as a result of such significantly diminished capacity,

(2) the client is at risk of substantial physical, financial or other harm unless action is taken, and

(3) the client cannot adequately act in his or her own interest,

the lawyer may, but is not required to, notify an individual or organization that has the ability to take action to protect the client.

(c) Information relating to a client with diminished capacity is protected by Business and Professions Code section 6068(e) and Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under this Rule to reveal information about the client, but only to the extent the lawyer reasonably believes disclosure is necessary to protect the client's interest, given the information known to the lawyer at the time of the disclosure.

COMMENT

[1] The purpose of this Rule is to allow the lawyer to act competently on behalf of the client with diminished capacity, to further the client's goals in the representation, and to protect the client's interests. The normal lawyer-client relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client suffers from diminished mental capacity, however, maintaining the ordinary lawyer-client relationship may not be possible in all respects. In particular, a client with significantly diminished capacity may not be competent to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about many matters affecting the client's own well-being. For example, some persons of advanced age are capable of handling routine financial matters but may need special legal protection concerning major transactions. In addition to the obligations of a lawyer provided in this Rule, lawyers may be required to make reasonable accommodations for clients with disabilities that will permit them to enjoy the provision of full and equal legal services provided by the lawyer. See California Civil Code section 51 (Unruh Civil Rights Act).

[2] The fact that a client suffers from diminished capacity does not affect the lawyer's obligation to treat the client with attention and respect. Even if the client has a legal representative, the lawyer should as far as possible accord the represented person the full status of client, particularly in maintaining communication. As used in paragraph (a) of this Rule, the lawyer's obligation to "maintain a normal lawyer-client relationship with the client" may require the lawyer to use a manner and means of communication adapted to the client's ability to comprehend and deliberate.

[3] As used in paragraph (b), "significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation" shall mean that the client is materially impaired in his or her capacity to understand and appreciate the rights and duties affected by the decision and the significant risks, consequences and reasonable alternatives involved in the decision, as described in Probate Code section 812, by virtue of a deficit in mental function of the types described in Probate Code section 811. However, the reference herein to relevant portions of the Probate Code is intended only to provide guidance to a lawyer who seeks to take protective action pursuant to paragraph (b) and does not require the lawyer to seek a legal determination that the client meets the standards of incapacity under Probate Code section 811 et seq. In appropriate circumstances, lawyers are encouraged to seek guidance from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation. In addition, the lawyer should request the diagnostician to maintain the information disclosed in confidence.

[4] Before taking action pursuant to paragraph (b), the lawyer should take all reasonable steps to preserve client confidentiality and decision-making authority including explaining to the client the need to take such action and requesting the client's permission to do so. However, if the client refuses or is unable to give such permission, the lawyer may proceed under paragraph (b), (i) if no other action is available to the lawyer that is reasonably likely to protect the client from the harm the client faces; and (ii) the lawyer has taken into account such factors as:

(1) the amount of time that the lawyer has to make a decision about disclosure;

(2) whether the disclosure is likely to lead to proceedings such as involuntary commitment proceedings, which the client may perceive as adverse to her or his interests;

(3) whether the disclosure is likely to lead to proceedings which could have an effect on the client's rights under the Fourteenth Amendment to the United States Constitution or analogous rights and privacy rights under Article 1 of the Constitution of the State of California;

(4) the extent of any other adverse effects to the client that may result from disclosure contemplated by the lawyer; and

(5) the nature and extent of information that must be disclosed to prevent the risk of harm to the client.

A lawyer may also consider whether the prospective harm to the client is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the information without waiting until immediately before the harm is likely to occur.

[5] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally will not affect the applicability of the lawyer-client privilege. See Evidence Code section 952. However, the lawyer must keep the client's interests foremost and, except as authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[6] Paragraph (b) permits the lawyer to take protective measures deemed necessary to protect the client's interests. Such measures could include: consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; or using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any

protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of minimizing intrusion into the client's decision-making autonomy, maximizing client capacities and respecting the client's family and social connections.

[7] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of protecting a client with significantly diminished capacity who is at risk of substantial physical, financial or other harm if no action is taken. A lawyer who reveals information as permitted under paragraph (b) is not subject to discipline.

[8] Paragraph (b) does not authorize a lawyer to file a guardianship or conservatorship petition or to take similar action concerning the client, or to take any action that is adverse to the client. Nor does paragraph (b) authorize a lawyer to take such actions on behalf of another person where the lawyer would not otherwise be permitted to do so under Rule 1.7.

[9] Paragraph (b) applies to the representation of a client with significantly diminished capacity, except in the case of a client who is (1) a minor, (2) involved in a criminal matter or (3) under conservatorship or the subject of a conservatorship or protective proceeding. The rights of such persons are regulated under other statutory schemes. See Family Code section 3150, Welfare and Institutions Code sections 300, 602, 675 et seq.; Penal Code section 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code, Division 5, Part 1, sections 5000-5579; Probate Code, Division 4, Parts 1-8, sections 1400-3803.

[10] A lawyer is permitted to act under paragraph (b) but is never required to do so. A lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.

Rule 1.15: Handling Funds and Property of Clients and Other Persons

(Commission's Proposed Rule – Clean Version)

(a) Duty to deposit entrusted funds in trust account. A lawyer shall deposit all funds that the lawyer receives or holds for the benefit of a client or other person in connection with the performance of a legal service or representation by the lawyer, including an advance for costs and expenses, in one or more trust accounts in accordance with this Rule.

(b) Approved depositories for trust accounts. Except as provided in paragraph (l), or as expressly ordered by a tribunal, all trust accounts under this Rule shall be in depositories approved by the California Supreme Court in the State of California. All IOLTA trust accounts as defined in Business and Professions Code section 6211 shall be in depositories that are in compliance with the requirements of Business and Professions Code section 6212.

(c) Trust account designation. A lawyer shall designate each trust account as "Client Trust Account" or other identifiable fiduciary title.

(d) Advances for fees; deposit and accounting. A lawyer may, but is not required to, deposit an advance for fees in a trust account. Regardless of whether the lawyer has deposited an advance for fees in a trust account:

(1) subject to Business and Professions Code section 6068(e), the lawyer must account to the client or other person who advanced the fees; and

(2) if a client or other person disputes a lawyer's entitlement to a fee, any disputed portion of an advance for fees not yet fixed must be deposited in a trust account.

(e) Duties concerning maintenance and use of trust funds. A lawyer shall maintain inviolate all funds on deposit in a trust account and all property entrusted to the lawyer for the benefit of a client or other person until distributed in accordance with this Rule.

(f) Commingling of lawyer's funds and trust funds prohibited; exceptions. Funds belonging to a lawyer or law firm shall not be commingled with funds held in a trust account established under this Rule except:

(1) funds reasonably sufficient to pay bank charges;

(2) deposits for overdraft protection that compensate exactly for the amount that the overdraft exceeds the funds on deposit plus any bank charges;

(3) the lawyer's or law firm's funds deposited to restore entrusted funds that have been improperly withdrawn;

(4) funds in which the lawyer claims an interest but which are disputed by the client or other person; or

(5) funds belonging in part to a client or other person and in part, presently or potentially, to the lawyer, but which are claimed by a third party.

(g) Duties when lawyer's entitlement to funds or property becomes fixed or the lawyer's entitlement is disputed. In the case of property, or funds held in a trust account, that belong in part to a client or other person and in part to the lawyer, the lawyer shall withdraw or distribute the

portion belonging to the lawyer at the earliest reasonable time after the lawyer's interest in that portion becomes fixed, provided that:

(1) the client or other person may still dispute that the lawyer is entitled to the funds or property;

(2) when the right of a lawyer to receive a portion of entrusted funds or property is disputed by the client or other person, the lawyer shall distribute the undisputed portion in accordance with paragraph (k)(7), but shall not distribute the disputed portion until the dispute is finally resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order;

(3) a lawyer shall take reasonable steps promptly to resolve any dispute regarding entrusted funds or property in the circumstances of paragraph (g)(2); and

(4) if the client or other person disputes the lawyer's interest in entrusted funds or property after the lawyer's interest has become fixed and the lawyer has withdrawn the fixed portion, the lawyer shall have no duty to redeposit the disputed portion in a trust account.

(h) Duties when a client or other person disputes the other's entitlement to funds or property. When the right of a client or other person to receive a portion of entrusted funds or property is disputed by a client or other person, the lawyer shall not distribute the disputed portion of entrusted funds or property until the dispute is resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order, except that the lawyer shall make any distribution required by paragraph (k)(7).

(i) Duties when entitlement to funds or property is disputed by third party. When the right of a client or other person to receive a portion of entrusted funds or property (1) is disputed by a third party that has a security or ownership interest in the entrusted funds or property or (2) is subject to a court order, the lawyer shall not distribute the disputed portion until the dispute is resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order. Nevertheless the lawyer shall distribute any undisputed entrusted funds or property, as required by paragraph (k)(7).

(j) Credit card, debit, or other electronically transferred payments. A lawyer may establish a relationship with a merchant bank or electronic payment service so that a client or other person may use credit card, debit, or other electronically transferred payments to pay an advance for fees or costs directly into a trust account, provided that the contract with the merchant bank or electronic payment service requires that the lawyer's obligations for any charges, chargebacks and offsets be paid from a source that is not a trust account.

(k) Management, recordkeeping and accounting for funds and property held in trust. A lawyer shall:

(1) promptly notify a client or other person of the receipt of funds, securities, or other property in which the client or other person claims or has an interest and notify the client or other person of the amount of such funds or the identity or quantity of such property;

(2) identify and label securities and property of a client or other person promptly upon receipt, place them in a safe deposit box or other place of safekeeping as soon as practicable, segregate any securities or property from the lawyer's own securities or property of the same character, and notify the client or other person of the location of the property;

(3) maintain complete records of all funds and property of a client or other person coming into the possession of the lawyer;

(4) account to the client or other person for whom the lawyer holds funds or property. An accounting shall include, but is not limited to: (i) a statement of all funds and property received by the lawyer as of the date of the accounting, the source, amount of funds or description of property, and date received; (ii) a statement of all distributions of such funds and property, the date of distribution, the amount of funds or description of property distributed, the payee or distributee, and any trust account check number; and (iii) any balance remaining in the possession of the lawyer;

(5) preserve records of all entrusted funds or property for a period of no less than five years after final appropriate distribution of such funds or property;

(6) comply with any order for an audit of such records issued by the State Bar Court pursuant to the Rules of Procedure of the State Bar; and

(7) promptly distribute, as requested by a client or other person, any undisputed funds or property in the possession of the lawyer that the client or other person is entitled to receive.

(l) Scope and Application of Rule. This Rule does not apply to the following:

(1) A member of the State Bar of California residing and practicing law in a state other than California who (i) receives funds or property from a person who is not a resident of California, arising from or related to a legal representation not in California, and (ii) handles the funds or property in accordance with the law of the controlling jurisdiction. See Rule 8.5(b).

(2) Funds or property entrusted to a multi-jurisdictional law firm in locations outside of California by clients domiciled outside of California regarding disputes or matters arising or being litigated outside of California, even though the firm maintains an office in California.

(3) Lawyers practicing under California Rules of Court 9.47 or 9.48, regarding all matters involving a client or other person domiciled outside of California in which no other party to the matter, residing in California, claims an interest.

(4) At the request of the State Bar of California disciplinary agency, a member of the State Bar of California who is subject to subparagraphs (l)(1) and (2) shall provide information respecting the lawyer's or law firm's non-California bank or financial institution account holding client or third party funds,

including, but not limited to, requested bank or financial institution records.

(m) Board of Governors' Standards. 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 lawyers in accordance with paragraph (k)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

COMMENT

Definitions

[1] As used in this Rule, "property" means (a) a tangible or intangible asset, other than funds, in which a client or other person claims any ownership interest or right of possession or enjoyment. Property does not include a client's file except for anything in it that has pecuniary value (e.g., a negotiable instrument) or intrinsic value (e.g., a will or trust). Regarding the client's file, see Rule 1.16(e). All references in this Rule to "a client or other person" mean a client or other person for whose benefit the lawyer holds funds or property.

[2] As used in this Rule "in connection with the performance of a legal service or representation" means that there is a relationship between the actions of a lawyer in his or her capacity as a lawyer and the receipt or holding of funds from a client or other person. The provisions of this Rule are also applicable when a lawyer serves a client both as a lawyer and as one who renders nonlegal services. *Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298]. Although lawyers who provide fiduciary services that are not related to the performance of a legal service or representation may be required to handle funds in a fiduciary manner (e.g., when serving as an executor, escrow agent for parties to an escrow who are not clients, or as a trustee for a non-client), this Rule does not govern those activities. Because the latter fiduciary accounts are governed by other law, funds should be maintained in separate fiduciary accounts and not in a trust account established under this Rule. However, the failure to discharge fiduciary duties in relation to the provision of such services may result in discipline for other violations. See, e.g., Business and Professions Code section 6106.

[3] As used in this Rule "client" means a prospective, current, or former client for whom not all legal services have been completed, or as to whom not all funds or property have been distributed in accordance with this Rule.

[4] As used in this Rule "entrusted funds" means funds that have been put into the care of a lawyer, by or on behalf of a client or other person in connection with the performance of a legal service or representation, that are held for the benefit of the client or other person, regardless of whether the funds are deposited or held in a trust account. Entrusted funds do not include (i) an advance for fees unless there is an agreement between the lawyer and the client or other person that the advance for fees will be held in trust; (ii) funds belonging wholly to a lawyer or law firm; (iii) payments for undisputed past-due fees; or (iv) undisputed reimbursement by a client or other person for costs advanced by a lawyer or law firm.

[5] As used in this Rule, "advance for fees" means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client's behalf.

[6] As used in this Rule, "bank charges" include any administrative or service charges charged to a trust account by an approved depository for trust accounts but does not include merchant account charges, chargebacks, or offsets charged in connection with a merchant account that is attached to a trust account.

Application of Rule

[7] Funds do not take on a fiduciary status merely because they are deposited into a trust account. A lawyer's misuse of a client trust account can result in discipline. *In the Matter of McKiernan* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420 (deposit of non-client business operating funds in trust account was misconduct.)

Paragraph (a) – Application to true retainer fees

[8] Because a true retainer fee, as defined in Rule 1.5(f)(1), is earned on receipt and so is not held for the benefit of the client, a lawyer may not deposit it in a client trust account. *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164 [154 Cal.Rptr. 752].

[9] If any part of a true retainer fee is paid for or applied to fees for the performance of legal services, the entire amount loses its character as a true retainer fee and is converted to an advance for fees. *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn.4 [154 Cal.Rptr. 752]; *In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757. When this occurs, the lawyer must comply with paragraphs (d) and (k)(4) with respect to the entire fee. See also Comment [10].

Paragraph (d) – Advances for fees; accounting for advances for fees

[10] Although a lawyer has no duty to deposit an advance for fees in a trust account, the lawyer still has a duty under paragraph (d)(1) to account for all funds received as an advance for fees. In preparing an accounting as required under paragraph (d), a lawyer may follow the standards set forth in Business and Professions Code section 6148(b). *In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 756–758.

Paragraph (e) – Duty to hold funds inviolate

[11] Compliance with paragraphs (e) and (k)(4) requires that all withdrawals and disbursements from a trust account must be made in a manner that permits the recipient or payee of the withdrawal to be identified. Paragraphs (e) and (k)(4) do not prohibit electronic transfers or preclude a means of withdrawal that might be developed in the future, provided that the recipient of the payment is identified. When payment is made by check, the check should be payable to a specific person or entity.

Paragraphs (g) – (i) – Disputed fees

[12] Paragraph (g)(2) of this Rule applies even when the lawyer claims to have a valid lien on trust funds for the payment for services, costs and expenses.

[13] A lawyer may not withhold the undisputed portion of a client's or other person's funds because of a fee dispute. The undisputed amount must be paid promptly to the owner upon demand. *Friedman v. State Bar* (1990) 50 Cal.3d 235, 240–241 [266 Cal.Rptr. 632].

[14] A lawyer may not unilaterally withdraw disputed fees from a trust account. However, in circumstances coming within paragraphs (h) or (i), a lawyer may interplead the disputed funds or property.

Paragraph (k) – Duties to maintain records and account for receipt of trust funds or property

[15] A lawyer who receives client funds in which another person is known to have an interest (e.g., a medical provider lienholder), must also notify that person of the receipt. *In the Matter of Respondent P* (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632. Certain statutory liens may have statutory notice requirements applicable to lawyers. See, e.g., Welfare and Institutions Code section 14124.79.

[16] With respect to the timing and frequency of a lawyer's accounting under paragraph (k)(4), see Business & Professions Code section 6091.

Other Guidance

[17] Trust account practice assistance. For guidance concerning the management and administration of trust accounts under this Rule, see State Bar of California publication "Handbook on Trust Accounting for California Attorneys" and the "California Compendium on Professional Responsibility" Index.

Rule 1.16 Declining Or Terminating Representation

(Commission's Proposed Rule – Clean Version)

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the lawyer knows or reasonably should know that the representation will result in violation of these Rules or of the State Bar Act;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client competently; or

(3) the client discharges the lawyer.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud;

(3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;

(4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively;

(5) the client breaches a material term of an agreement with or obligation to the lawyer relating to the representation, and the lawyer has given the client a reasonable warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;

(6) the client knowingly and freely assents to termination of the representation;

(7) the lawyer believes in good faith that the inability to work with co-counsel makes it in the best interests of the client to withdraw from the representation;

(8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively;

(9) a continuation of the representation is likely to result in a violation of these Rules or the State Bar Act; or

(10) the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

(c) If permission for termination of a representation is required by the rules of a tribunal, a lawyer shall not terminate a representation before that tribunal without its permission.

(d) A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).

(e) Upon the termination of a representation for any reason:

(1) Subject to any applicable protective order, non-disclosure agreement or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and

(2) The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

COMMENT

[1] A lawyer should not accept a representation unless the lawyer reasonably believes the lawyer can complete the representation in compliance with these Rules and the State Bar Act. A lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule. This requirement applies, without limitation, to any sale under Rule 1.17. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *In the Matter of Shalant* 4 Cal. State Bar Ct. Rptr. 829.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that would violate these Rules or the State Bar Act. The references to these Rules and to the State Bar Act in paragraphs (a)(1) and (b)(3) reflect the primacy of the lawyer's duties, for example, under Business and Professions Code sections 6067, 6068, 6103, and 6106. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client might make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Depending on the circumstances, when the client's conduct permits the lawyer to withdraw, or to seek permission to withdraw where that is required, the lawyer might consider counseling the client regarding the client's conduct, limiting the scope of the representation, or aiding the client in rectifying the client's prior conduct. See Rules 1.2(c) and 1.4.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2.

[4] A lawyer is not subject to discipline for withdrawing under paragraph (a)(1) or (2) if the lawyer has acted reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong.

Optional Withdrawal

[5] Paragraph (b)(2) permits a lawyer to withdraw from a representation even if the lawyer is not asked to participate in or further a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct. Even when a withdrawal is in these circumstances, the lawyer must comply with his or her duties under Rule 1.6 and Business and Professions Code section 6068(e).

[6] Paragraph (b)(5) allows a lawyer to withdraw from a representation if the client refuses to abide by a material term of an agreement relating to the representation, such as an agreement concerning fees, court costs or other expenses, or an agreement limiting the objectives of the representation.

Scope of Withdrawal

[6A] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under Rule 1.7(a), but that conflict might not arise in other representations of the client.

Permission to Withdraw

[7] Lawyers must comply with their obligations to their clients under Rule 1.6 and Business and Professions Code 6068(e), and to the courts under Rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and Professions Code sections 6068(b) and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with Rules 3.36 and 5.71 of the California Rules of Court satisfies paragraph (c).

Assisting the Client upon Withdrawal

[8] Paragraph (d) requires the lawyer to take “reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client.” These steps 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 the lawyer has satisfied paragraph (e). The lawyer must satisfy paragraph (d) even if the lawyer has been unfairly discharged by the client.

[9] A lawyer's duties under paragraph (e)(1) arise after termination of a representation for any reason and include client papers and property held by a lawyer in any form or format. This obligation 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]. See Penal Code sections 1054.2 and 1054.10 for examples of statutory restrictions on whether a lawyer may release client papers. Other statutory provisions might require the lawyer to provide client papers to someone other than the client, and in those situations paragraph (e) applies equally to the duty to provide papers to that other person. See Penal Code section 1054.2(b). Paragraph (e) also requires the lawyer to “promptly” return

fees and expenses paid in advance that have not been earned or incurred; the question of what fees and expenses have been earned or incurred is governed in part by Rule 1.5. If a client disputes the amount to be returned, the lawyer shall comply with Rule 1.15.

[10] A lawyer's duty under paragraph (e)(1) to release “writings” to the client includes all writings as defined in Evidence Code section 250. A lawyer must comply with paragraph (e)(1) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding. Paragraph (e)(1) also does not affirmatively grant to the lawyer a right to retain copies of client papers or to recover the cost of copying them; these are issues that might be determined by contract, court order, or rule of law.

Rule 1.17: Purchase and Sale of a Law Practice
(Commission's Proposed Rule – Clean Version)

A lawyer or a law firm may sell or purchase a law practice, a substantive field of practice, or a geographic area of practice, including good will, only if the conditions set forth in paragraphs (a) through (g) are satisfied:

(a) The seller ceases to engage in the private practice of law entirely, or in the substantive field or geographic area in which the seller conducted the portion of the practice being sold.

(b) The seller makes the entire practice, or the entire substantive field or geographic area of the practice, available for sale to one or more lawyers or law firms.

(c) The purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice.

(d) If the purchase or 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(e) and Rule 1.6, then:

(1) If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, prior to the transfer, the purchaser:

(i) shall cause a written notice to be given to each of the seller's clients whose matters are included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and might have the right to act in his or her own behalf; that the client may take possession of any client papers and property in the form or format held by the lawyer as provided by Rule 1.16(e); and that, if no response is received to the notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client; and

(ii) shall obtain the written consent of the client, provided that the affected client's consent shall be presumed until the purchaser is otherwise notified by the client if the purchaser receives no response to the paragraph (d)(1)(i) notification within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90-day period.

(2) In all other circumstances, not less than 90 days prior to the transfer:

(i) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to each of the seller's clients whose matters are included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and might have the right to act in

his or her own behalf; that the client may take possession of any client papers and property in the form or format held by the lawyer as provided by Rule 1.16(e); and that, if no response is received to the notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the purchaser to act during the 90 day period, the purchaser may act on behalf of the client until otherwise notified by the client; and

(ii) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of each of the seller's clients whose matters are included in the sale, prior to the transfer, provided that the client's consent shall be presumed if neither the seller nor the purchaser receives a response to the paragraph (d)(2)(i) notice within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90 day period, unless either the seller or the purchaser is otherwise notified by the client.

(e) Fees charged to clients shall not be increased solely by reason of the purchase, and, unless the scope of the work is narrowed or expanded with the clients' informed consent, the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work.

(f) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.

(g) A lawyer shall not disclose confidential client information to a nonlawyer in connection with a purchase or sale under this Rule.

(h) This Rule does not apply to the 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.

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

[1A] As used in this Rule, a selling "lawyer" includes the personal representative of the estate of a deceased lawyer, the trustee of a trust of which a law practice is an asset, an attorney in fact under a lawyer's durable power of attorney, a conservator of the estate of a lawyer, or a lawyer appointed to act for the seller pursuant to Business and Professions Code sections 6180, 6185 and 6190.4.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of a substantive field or geographic area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the entire substantive field or geographic area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, or refuse to discharge the selling lawyer, therefore, does not result in a violation. If a client does not agree to retain the purchaser, the selling lawyer is

not relieved from responsibility for the representation unless the seller is permitted to withdraw from the representation. See Rule 1.16.

[2A] Return to private practice, or return to the practice in the substantive field or geographic area of the practice that was sold, as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold a practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns or retires from a judicial position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[3A] An agreement for sale of a law practice that otherwise complies with this Rule does not violate this Rule if it contains a provision for a reasonable transitional period during which the seller may continue to practice and represent clients for the purpose of facilitating the transition of consenting clients to the purchaser.

[4] This Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within this state or within a defined geographic area of this state. A seller does not violate this Rule by either (i) selling a California practice but continuing to practice in other jurisdictions; or (ii) selling a practice in one geographic area of this state but continuing to practice in another geographic area of this state, as agreed to by seller and purchaser. An agreement for the sale of a geographic area or areas of a law practice should state as precisely as possible the specific geographic area or areas being sold.

[5] This Rule also permits a lawyer or law firm to sell a substantive field of practice. If a substantive field of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the substantive field of practice that has been sold, either as counsel or co-counsel, or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5.1. For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer or law firm that sells the practice in this state or in a geographic area of this state must make the entire practice in this state or in the geographic area available for purchase, this Rule permits the seller to limit the sale to one or more substantive fields of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[6] This Rule requires that all or substantially all of the seller's entire law practice, or an entire geographic or substantive area of practice, be sold. The prohibition against sale of less than substantially all of an entire law practice, entire geographic area of practice or entire substantive field of practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the law practice, geographic area of practice, or substantive field of practice, subject to client consent or other contingencies. This requirement is satisfied, however, even if a purchaser is unable to undertake particular client matters because, for example, the purchaser has a

conflict of interest, a client decides not to retain the purchaser, or the purchaser lacks the ability to undertake a matter. Whether the purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice, is to be measured by taking into account only that portion of the practice that, in accordance with these Rules, should be transferred to the purchasers. For example, a sale of only a portion of a practice may satisfy this Rule if it includes all or substantially all of the practice excluding client matters subject to a conflict of interest, matters where the clients choose to retain other counsel, and, if the seller becomes employed as in-house counsel to a business that was a client, matters for such business.

Client Confidences, Consent and Notice

[7] Disclosures in confidence of client identities and matters during negotiations between seller and prospective purchaser for the purpose of ascertaining actual or potential conflicts of interest no more violate the confidentiality provisions of Business and Professions Code section 6068(e) and Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information protected by Business and Professions Code section 6068(e) and Rule 1.6 or to the file, however, requires client consent. This Rule provides that, before such information can be disclosed by the seller to the purchaser, the client must be given actual written notice of the contemplated sale, including the identity of the purchasing lawyer or law firm, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed. However, confidential information may be disclosed to the purchaser if necessary to protect a client from harm, damage or loss of rights, unless the client has made known that the client does not want to retain the purchaser or unless the seller and purchaser have ascertained that the purchaser has actual or potential conflicts of interest that preclude the purchaser from representing the client.

[8] [RESERVED]

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the law practice, a geographic area of the practice, or a substantive field of practice.

Fee Arrangements Between Client and Purchaser

[10] Paragraph (e) provides that the sale may not be financed solely by increases in fees charged the clients of the law practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser unless precluded by conflicts of interest, or unless the scope of work is changed with client consent. The purchaser may be required to enter into new fee agreements with each client. See, e.g., Business and Professions Code sections 6147 and 6148.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice, a geographic area of practice, or a substantive field of practice must act in accordance with all applicable ethical standards. These include, for example, the following: The purchaser is obligated to check for potential conflicts of interest so as to avoid conflicts of interest (see, e.g., Rule 1.7 regarding concurrent conflicts and Rule 1.9 regarding conflicts arising from past representations) and thereafter to provide legal services competently (see Rule 1.1). Following a sale, the seller is obligated to continue to protect confidential client information (see Business and

Professions Code section 6068(e) and Rule 1.6) and to avoid new representations that are in conflict with continuing duties to former clients (see Rule 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, the matter may be included in the sale, but the approval of the tribunal must be obtained before the seller is relieved of responsibility for the matter. See Rule 1.16.

[12A] Although the services of a broker may be used to assist in a purchase and sale under this Rule, the Rule does not permit such a sale to a broker or other intermediary. Whether a fee may be paid to a nonlawyer broker for arranging a sale or purchase of a law practice under this Rule is governed by the terms of the sale agreement and other law. Other Rules may also apply. See, e.g., Rule 5.4(a) (prohibiting sharing legal fees with a nonlawyer), and Rule 7.2(b) (prohibiting a lawyer from giving anything of value to a person for recommending the lawyer's services).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice of a deceased, impaired or disappeared lawyer, or by a trustee. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules, or the seller may be a lawyer acting in a fiduciary capacity. Because no lawyer may assist in a sale of a law practice that does not comply with this Rule, a nonlawyer fiduciary who is represented by counsel, a lawyer selling in a fiduciary capacity, and the purchasing lawyer must all comply with this Rule. See, e.g., Rule 8.4(a).

[14] [RESERVED]

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice, a geographic area of practice, or a substantive field of practice.

[15A] The purchase of a law practice in accordance with this Rule does not constitute the conveyance of value to a person for recommending the lawyer's services in violation of Rule 7.2(b).

[15B] Lawyers who engage in a transaction described in this Rule also must comply with Rules 1.5.1 and 5.4 when applicable.

[15C] If a lawyer whose practice is sold is deceased, his or her estate must also comply with Business and Professions Code section 6180, et seq., including but not limited to the notice requirements therein.

Rule 1.18: Duties to Prospective Client
(Commission's Proposed Rule ALT1 – Clean Version)

(a) A person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.

(b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal confidential information learned as a result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received confidential information from the prospective client that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if both the affected client and the prospective client have given informed written consent.

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Hence, although the range of a prospective client's information that is protected is the same as that of a client, a law firm is permitted, in the limited circumstances provided under paragraph (d), to accept or continue representation of a client with interests adverse to the prospective client in the subject matter of the consultation. See Comments [3] and [4]. As used in this Rule, prospective client includes an authorized representative of the client.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who by any means communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship or to discuss the prospective client's matter in the lawyer's professional capacity, is not a "prospective client" within the meaning of paragraph (a). Similarly, a person who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person in the lawyer's professional capacity would not have such a reasonable expectation. See *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]. In addition, a person who communicates information to a lawyer for purposes that do not include a good faith intention to retain the lawyer in the subject matter of the communication is not a prospective client within the meaning of this Rule.

[2A] Whether a lawyer's representations or conduct evidence a willingness to participate in a consultation is examined from the viewpoint of the

reasonable expectations of the prospective client. The factual circumstances relevant to the existence of a consultation include, for example: whether the parties meet by pre-arrangement or by chance; the prior relationship, if any, of the parties; whether the communications between the parties took place in a public or private place; the presence or absence of third parties; the duration of the communication; and, most important, the demeanor of the parties, particularly any conduct of the attorney encouraging or discouraging the communication and conduct of either party suggesting an understanding that the communication is or is not confidential.

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Sometimes the lawyer must investigate further after the initial consultation with the prospective client to determine whether the matter is one the lawyer is willing or able to undertake. Regardless of whether the lawyer has learned such information during the initial consultation or during the subsequent investigation, paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring information from a prospective client that would prohibit representation as provided in paragraph (c), a lawyer considering whether or not to undertake a new matter must limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rules 1.7 and 1.9, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter. See Rule 1.0.1(e) for the definition of informed consent. However, the lawyer must take reasonable measures to avoid exposure to more information that prohibits representation than is reasonably necessary to determine whether to represent the prospective client.

[6] Even in the absence of an agreement with the prospective client, under paragraph (c), the lawyer is not prohibited from either accepting or continuing the representation of a client with interests materially adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that is material to the matter. For a discussion of the meaning of "materially adverse" as used in paragraph (c), see Rule 1.9, Comment [7]. For a discussion of the meaning of "substantially related" as used in paragraph (c), see Rule 1.9, Comments [4] – [6].

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d), the consequences of imputation may be avoided if the lawyer obtains the informed written consent of both the prospective and affected clients.

[8] Rule 1.18 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (c). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Rule 2.4 Lawyer as Third-Party Neutral

(Commission's Proposed Rule – Clean Version)

(a) A lawyer serves as a third-party neutral when the lawyer is engaged to assist impartially two or more persons who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as a neutral arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

COMMENT

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, neutral arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer neutrals may also be subject to various codes of ethics, such as the Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

[3] Unlike non lawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] This Rule recognizes the inherent power of the Supreme Court of California to discipline a lawyer for conduct in which the lawyer engages either in or out of the legal profession. *In re Scott* (1991) 52 Cal.3d 968 [277 Cal.Rptr. 201]. The Supreme Court's inherent power is

not diminished simply because a lawyer acts as a third-party neutral as opposed to an advocate for a client. Nothing in this rule is intended to address the issue of whether a lawyer's conduct as a third-party neutral constitutes the practice of law.

[5] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[6] Lawyers who represent clients in alternative dispute resolution processes are governed by these Rules and the State Bar Act.

[7] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

[8] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator

(Commission's Proposed Rule – Clean Version)

A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to Canon 6D of the Code of Judicial Ethics, shall comply with the terms of that canon.

COMMENT

[1] This Rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial or quasi-judicial capacity pursuant to an order or appointment by a court.

[2] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

[3] This Rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See Rule 2.4.

Rule 3.1 Meritorious Claims and Contentions

(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not bring, continue or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

(b) A lawyer for the defendant in a criminal proceeding, or for the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law or fact for doing so that is not frivolous. See Business and Professions Code sections 6068(c) and (g), Civil Procedure Code section 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

[4] This Rule applies to proceedings of all kinds, including appellate and writ proceedings.

Rule 3.4 Fairness to Opposing Party and Counsel

(Commission's Proposed Rule – Clean Version)

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) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;

(c) falsify evidence or counsel or assist a witness to testify falsely;

(d) 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;

(e) offer an inducement to a witness that is prohibited by law, or 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 lawyer 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; or

(3) a reasonable fee for the professional services of an expert witness.

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

(g) in trial, assert personal knowledge of facts in issue except when testifying as a witness.

Comment

[1] The procedures of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose

commencement can be foreseen. See, e.g., Penal Code section 135; 18 United States Code section 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code section 132; 18 United States Code section 1519. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

[3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule. This Rule does not establish a standard that governs civil or criminal discovery disputes.

[4] Paragraph (e) permits a lawyer to pay a non-expert witness for the time spent preparing for a deposition or trial. Compensation for preparation time or for time spent testifying must be reasonable in light of all the circumstances and cannot be contingent upon the content of the witness's testimony or on the outcome of the matter. Possible bases upon which to determine reasonable compensation include the witness' normal rate of pay if currently employed, what the witness last earned if currently unemployed, or what others earn for comparable activity.

Rule 3.5 Impartiality and Decorum of the Tribunal
(Commission's Proposed Rule – Clean Version)

(a) Except as permitted by the Code of Judicial Ethics, a lawyer 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 lawyer and the judge, official, or employee is such that gifts are customarily given and exchanged. This Rule shall not prohibit a lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.

(b) Unless authorized to do so by law, the Code of Judicial Ethics, a ruling of a tribunal, or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:

(1) in open court;

(2) with the consent of all other counsel in the matter;

(3) in the presence of all other counsel in the matter;

(4) in writing with a copy thereof furnished promptly to all other counsel; or

(5) in ex parte matters as permitted by law.

(c) As used in this Rule, "judge" and "judicial officer" shall include law clerks, research attorneys, other court personnel who participate in the decisionmaking process, and neutral arbitrators.

(d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows to be a member of the venire from which the jury will be selected for trial of that case.

(e) During a trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.

(f) During a trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows is a juror in the case.

(g) A lawyer shall not communicate directly or indirectly with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate;

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(4) the communication is intended to influence the juror's actions in future jury service.

(h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.

(i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.

(j) A lawyer 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 lawyer has knowledge.

(k) This Rule does not prohibit a lawyer from communicating with persons who are members of a venire or jurors as a part of the official proceedings.

(l) For the purposes of this Rule, "juror" means any empaneled, discharged, removed, or excused juror.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Ethics and Code Civ. P. section 170.9, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order, but a lawyer who is serving as a temporary judge, referee or court-appointed arbitrator under Rule 2.4.1 may do so in the performance of that service. "Promptly" as used in paragraph (b)(4) of this Rule means that a copy of a communication to a judge should be sent to opposing counsel by means likely to result in receipt of the copy of the communication substantially simultaneously to its receipt by the judge.

[3] For guidance on permissible communications with a juror or prospective juror after discharge of the jury, see also Code of Civil Procedure, section 206.

[4] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

Rule 3.6: Trial Publicity
(Commission's Proposed Rule – Clean Version)

(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 (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), and to the extent permitted by Rule 1.6, 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 but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public; 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.

(c) 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.

(d) No lawyer associated in a law firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENT

[1] This Rule prohibits a lawyer who is participating or has participated in an adjudicative proceeding from making public statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing the adjudicative proceeding. The Rule is

intended to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. On one hand, publicity should not be allowed to adversely affect the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Although a lawyer involved in the litigation is often in an advantageous position to further these legitimate objectives, preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated prior to trial, particularly where trial by jury is involved. The Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[2] Paragraph (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). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[3] Whether an extrajudicial statement violates this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement is made for the purpose of influencing a trier of fact about a material fact in issue and presents information clearly inadmissible as evidence in the matter; (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) or Rule 3.3; and (3) the timing of the statement.

[4] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[5] Under paragraph (c), extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may lessen any resulting adverse impact on the adjudicative proceeding. Such responsive statements must be limited to information necessary to mitigate undue prejudice created by statements of others.

[6] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

[7] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule 3.4(f), which requires compliance with such rules.

Rule 3.7: Lawyer as Witness
(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not act as an advocate in a jury trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue or matter;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) the lawyer has obtained the informed written consent of the client. If the lawyer 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 lawyer is employed.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

COMMENT

[1] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7(b).

[2] A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the client gives consent, on the record in court before a licensed court reporter who transcribes the disclosure and consent. See the definition of "written" in Rule 1.0.1(n).

Rule 3.9 Advocate in Nonadjudicative Proceedings

(Commission's Proposed Rule – Clean Version)

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

COMMENT

[1] In representation before non-judicial bodies such as legislatures, city councils, boards of supervisors, commissions, and administrative agencies acting in a legislative, administrative or ministerial capacity (including without limitation a quasi-judicial proceeding, an administrative action, a rate-making proceeding, and a quasi-legislative proceeding, see Government Code sections 11440.60, 82002(a),(b),(c)), lawyers present facts, formulate issues and advance arguments regarding the matters under consideration. These governmental bodies are entitled to know that the lawyer is appearing in a representative capacity. Ordinarily the client will consent to being identified, but if not, such as when the lawyer is appearing on behalf of an undisclosed principal, the governmental body at least knows that the lawyer is acting in a representative capacity as opposed to advancing the lawyer's personal opinion as a citizen.

[1A] Rule 3.9 does not apply to adjudicative proceedings before a tribunal. Court rules and other law require a lawyer, in making an appearance before a tribunal in a representative capacity, to identify the client or clients and provide other information required for communication with the tribunal or other parties.

Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges

(Commission's Proposed Rule – Clean Version)

(a) A lawyer 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 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.

Comment

[1] This Rule prohibits a lawyer from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute and does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative, or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer's statement violates this Rule depends on the specific facts. See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr 670]. A statement that the lawyer will pursue "all available legal remedies," or words of similar import, by itself does not violate this Rule.

[2] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code sections 1377-78.

[3] Paragraph (b) exempts the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.

Rule 4.3 Dealing with Unrepresented Person

(Commission's Proposed Rule – Clean Version)

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of an unrepresented person are in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.

(b) In communicating with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In acting to correct a misunderstanding about the lawyer's role, a lawyer may disclose the client's identity if it is not confidential. Whether the lawyer identifies the lawyer's client, the lawyer shall explain, where necessary, that the client has interests opposed to those of the unrepresented person. For guidance when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] Paragraph (a) requires that a lawyer not mislead the person concerning the lawyer's role in the matter, or the identity or interest of the person whom the lawyer represents. For example, a lawyer may not falsely state or create the impression that the lawyer represents no one, or that the lawyer is acting impartially or that the lawyer will protect the interest of both the client and the unrepresented non-client. Paragraph (a) also requires that the lawyer not take advantage of the unrepresented person's misunderstanding.

[3] Paragraph (a) distinguishes between the situation in which a lawyer knows or reasonably should know that an unrepresented person has interests that are adverse to those of the lawyer's client and the situation in which the lawyer does not have that actual or presumed knowledge. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. A lawyer also does not give legal advice merely by negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may state a legal position on behalf of the lawyer's client, inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the

meaning of the document or the lawyer's view of the underlying legal obligations.

[4] Paragraph (b) prohibits a lawyer, in communicating with a person who is not represented by counsel, from seeking to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege, or is otherwise protected from disclosure by a legally cognizable duty owed by the unrepresented person. A lawyer who obtains information from an unrepresented person that the lawyer knows or reasonably should know is legally protected from disclosure might also violate Rules 4.4, 8.4(c) and 8.4(d).

[5] Paragraph (b) does not prohibit a lawyer from seeking to obtain information from an unrepresented person through the use of discovery in litigation or interrogation at trial.

[6] Paragraph (a) does not apply to lawful covert criminal or civil investigations by government or private lawyers.

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

(Commission's Proposed Rule – Clean Version)

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these Rules and the State Bar Act.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.

(c) A lawyer shall be responsible for another lawyer's violation of these Rules and the State Bar Act if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

Paragraph (a) – Duties Of Partners and Managers To Reasonably Assure Compliance with the Rules.

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a law firm. See Rule 1.0.1 (Law Firm definition).

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the law firm will comply with these Rules and the State Bar Act. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[3] Paragraph (a) is also applies to internal policies and procedures of a law firm that involve compensation and career development of lawyers in the law firm that may induce a violation of these Rules and the State Bar Act. See Rule 2.1 and Rule 8.4(a).

[4] Whether particular measures or efforts satisfy the requirements of paragraph (a) may depend upon the law firm's structure and the nature of its practice , including the size of the law firm, whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners engage in any ancillary business.

[5] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities, including lawyers with intermediate managerial responsibilities in a legal services organization, a law department of an enterprise or a governmental agency, may not be required to implement particular measures under paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. However, such a lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this Rule.

[6] Paragraph (a) also requires managers, including lawyers who are in charge of a public sector legal agency or the head of a legal department, to make reasonable efforts to assure that other lawyers in the agency or department comply with these Rules and the State Bar Act. The creation and implementation of reasonable guidelines relating to the assignment of cases and the distribution of workload among lawyers in the agency or department are examples of the kind of measures contemplated by the Rule. See, e.g., State Bar of California, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006).

[7] Paragraph (a) does not apply to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments. See comments [5] and [8].

Paragraph (b) – Duties of Lawyer as Supervisor

[8] Paragraph (b) applies to lawyers who have direct supervisory authority over the work of other lawyers whether or not the subordinate lawyers are members or employees of the law firm. Paragraph (b) applies to all supervisory lawyers including lawyers who are not partners in a partnership or shareholders in a professional law corporation. Paragraph (b) also applies to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments.

[9] A lawyer with supervisory responsibility over another lawyer has an obligation to make reasonable efforts to insure that the other lawyer complies with these Rules and the State Bar Act. Adequate supervision is particularly important when dealing with inexperienced lawyers.

[10] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact. A lawyer in charge of a particular client matter has direct supervisory authority over the work of other lawyers engaged in the matter.

Paragraph (c) – Responsibility for Another's Lawyer's Violation

[11] Paragraph (c)(1) applies to any lawyer who orders or knowingly ratifies another lawyer's conduct that violates these Rules and the State Bar Act.

[12] Under paragraph (c)(2) a partner or other lawyer having comparable managerial authority in a law firm, and a lawyer who has direct supervisory authority over performance of specific legal work by

another lawyer, may be responsible for the conduct of the other lawyer, whether or not the other lawyer is a member or employee of the law firm. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension consistent with the lawyers' duty not to disclose confidential information under Business and Professions Code section 6068, subdivision (e)(1).

[13] A supervisory lawyer may violate paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly directing or ratifying the conduct, or where feasible, failing to take reasonable remedial action.

[14] Paragraphs (a), (b) and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm. Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[15] This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct. See Rule 5.2(a).

Rule 5.2 Responsibilities of a Subordinate Lawyer

(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall comply with these Rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.

(b) A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

COMMENT

[1] The fact that a lawyer is under the supervisory authority of another lawyer does not excuse the subordinate lawyer from the obligation to comply with these Rules or the State Bar Act. Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acts at the direction of a supervisor, that fact may be relevant in determining whether the lawyer has violated the Rules or the Act. See Rule 8.4(a). For example, if a subordinate signs a frivolous pleading at the direction of a supervisor, the subordinate would not violate the Rules or the Act unless the subordinate knows of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes that the supervisor's proposed resolution of the arguable question of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

(Commission's Proposed Rule – Clean Version)

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and [knows] of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information relating to representation of the client, and should be responsible for their work product. See, e.g., Waysman v. State Bar (1986) 41 Cal.3d 452 [224 Cal.Rptr. 101]; 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 [177 Cal.Rptr. 670]; Black v. State Bar (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288]; Vaughn v. State Bar (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713]; Moore v. State Bar (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161]. The measures employed in instructing and supervising nonlawyers should take account of the fact that they may not have legal training.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with these Rules and the State Bar Act. See Comment [2] to Rule 5.1. Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in private law firms.

[3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer.

Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

(Commission's Proposed Rule – Clean Version)

(a) For the 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) "Member" means a member of the State Bar of California.

(3) "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(d)(1), or California Rule of Court 958(d); and

(4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.

(b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the lawyer'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 lawyer 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 good standing of the bar of a United States state in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the lawyer who will appear as the representative of the client.

(d) Prior to or at the time of employing a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer 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 State Bar may make such information available to the public. The lawyer 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 lawyer 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 lawyer's employment by the client.

(e) A lawyer 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 employment of a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer shall promptly serve upon the State Bar written notice of the termination.

COMMENT

[1] Paragraph (d) is not intended to prevent or discourage a lawyer 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 lawyer's client is an organization, then the written notice required by paragraph (d) shall be served upon the duly authorized officer, employee, or constituent overseeing the particular engagement. See Rule 1.13.

[2] Nothing in this Rule shall be deemed to limit or preclude any activity engaged in pursuant to Rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel] 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel *pro hac vice*], 9.41 [appearances by military counsel], 9.42 [certified law students], 9.43 [out-of-state attorney arbitration counsel program] and 9.44 [registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(Commission's Proposed Rule – Clean Version)

(a) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or

(2) knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

COMMENT

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. Paragraph (a) prohibits the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law.

[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. See, e.g., California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel pro hac vice], rule 9.41 [appearance by military counsel], 9.42 [certified law students], rule 9.43 [out-of-state attorney arbitration counsel program] and rule 9.44 [registered foreign legal consultant]. A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. See, e.g., 28 U.S.C. sections 515-519, 530C(c)(1); 35 U.S.C. section 32(b)(2)(D) and *Sperry v. Florida ex rel. Florida* Bar (1963) 373 U.S. 379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334.

Rule 5.6 Restrictions on a Lawyer's Right to Practice
(Commission's Proposed Rule – Clean Version)

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy

COMMENT

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area as such an agreement strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment. See *Howard v. Babcock* (1993) 6 Cal.4th 409, 425.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Rule 6.1: Voluntary Pro Bono Publico Service

(Commission's Proposed Rule – Clean Version)

Every lawyer, as a matter of professional responsibility, should provide legal services to those unable to pay. A lawyer should aspire to provide or enable the direct delivery of 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 expectation of compensation other than reimbursement of expenses to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that 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, particularly with the goal of increasing access to justice.

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

COMMENT

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the

provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in a qualified legal services program under Business and Professions Code section 6213 and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals under paragraph (a)(1) or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means under paragraph (a)(2). The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without compensation, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means. In addition, see Rule 5.4(a)(5) regarding a lawyer’s agreement to pay court awarded fees to a legal services organization,

[5] While it is preferable that a lawyer fulfill his or her annual responsibility to perform pro bono services through activities described in paragraphs (a)(1) and (2), the lawyer’s commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, claims under the California Fair Employment and Housing Act, and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, particularly those designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or

the profession, particularly with the goal of increasing access to justice, are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not enforceable through disciplinary process.

Rule 6.2: Accepting Appointments
(Commission's Proposed Rule – Clean Version)

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of these Rules, the State Bar Act, or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client.

COMMENT

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. See Business & Professions Code section 6068(h). Every lawyer, as a matter of professional responsibility, should assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients without expectation of compensation other than reimbursement of expenses. A lawyer may also be subject to appointment by a tribunal to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty, confidentiality, and competence, and is subject to the same limitations on the lawyer-client relationship, such as the obligation to refrain from assisting the client in violation of these Rules or the State Bar Act. See Rule 1.2(d).

[3] Paragraph (c) does not apply to public defenders or federal public defenders or a subordinate lawyer in their offices where appointment is governed by statute. See Cal. Government Code section 27706; Penal Code section 987.2(e); 18 U.S.C. section 3006A(g); Fed. R. Crim. Proc. 44. See also Rule 5.1, Comment [6].

Rule 6.3: Membership in Legal Services Organization

(Commission's Proposed Rule – Clean Version)

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7 or Business and Professions Code section 6068(e)(1); or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

COMMENT

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances, including assurances that confidential client information will be protected.

Rule 6.4 Law Reform Activities Affecting Client Interests

(Commission's Proposed Rule – Clean Version)

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer.

COMMENT

[1] Lawyers involved in organizations seeking law reform generally do not have a lawyer-client relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b).

Rule 6.5: Limited Legal Services Programs

(Commission's Proposed Rule – Clean Version)

(a) A lawyer 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 reasonable expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) has an imputed conflict of interest only if the lawyer knows that another lawyer associated with the lawyer in a law firm is prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.

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

COMMENT

[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 usually 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 check for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7 and 1.9.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, these Rules and the State Bar Act, including the lawyer's duty of confidentiality under Business and Professions Code section 6068(e)(1), Rule 1.6 and Rule 1.9, are applicable to the limited representation.

[3] A lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(1) requires compliance with Rules 1.7 and 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer. In addition, paragraph (a)(2) imputes conflicts of interest to the lawyer only if the lawyer knows that another lawyer in the lawyer's law firm would be disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer'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) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that any lawyer in the lawyer's firm is prohibited from representation by Rules 1.7 or 1.9(a). By virtue of paragraph (b), moreover, a lawyer's participation in a short-term limited legal services program will not be imputed to the lawyer's law firm or preclude the lawyer'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. However, once the conflict is identified, the member should be screened from the member's firm's representation of a client with interests adverse to a client that the member previously represented under the program's auspices.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7 and 1.9(a) become applicable.

Rule 7.1 Communications Concerning the Availability of Legal Services

(Commission's Proposed Rule – Clean Version)

(a) For purposes of Rules 7.1 through 7.5, "communication" means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's 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 lawyer or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or

(3) Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or

(4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.

(b) A lawyer shall not make a false or misleading communication as defined herein.

(c) A communication is false or misleading if it:

(1) Contains any untrue statement; or

(2) Contains a material misrepresentation of fact or law; or

(3) Contains any matter, or presents or arranges any matter in a manner or format that is false, deceptive, or that confuses, deceives, or misleads the public; or

(4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not materially misleading.

(d) The Board of Governors of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. 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" 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 lawyers.

COMMENT

[1] This Rule governs all communications about the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. The requirement of truthfulness in a communication under this Rule includes representations about the law.

[2] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead

a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client.

[3A] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not exclusive. For example, a lawyer's misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law.

Standards

Pursuant to paragraph (d), the Board of Governors has adopted the following standards related to paragraph (b) of this Rule:

(1) A "communication" that contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" that contains testimonials about or endorsements of a lawyer 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" that contains a dramatization unless such communication contains a disclaimer that states "this is a dramatization" or words of similar import.

(4) A "communication" that states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.

(5) A "communication" that states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer 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.

(6) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer 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 lawyer 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.

Rule 7.2 Advertising
(Commission's Proposed Rule – Clean Version)

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any written, recorded or electronic media, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is 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;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or non-lawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(5) offer or give a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm, 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.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

COMMENT

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through advertising. The public's need to know about legal services is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. Lawyers must be aware, however, that advertising by them entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly

represented; and other information that might invite the attention of those seeking legal assistance.

[3] This Rule permits advertising by electronic media, including but not limited to television, radio and the Internet. But see Rule 7.3(a) concerning real-time electronic communications with prospective clients.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as court-approved class action notices.

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] Paragraph (b)(2) permits a lawyer to pay the usual charges of a group or pre-paid legal service plan exempt from registration under Business and Professions Code section 6155(c). Paragraph (b)(2) permits a lawyer to pay the usual charges of a qualified 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. See Business and Professions Code, section 6155, and rules and regulations pursuant thereto. See also Rule 5.4(a)(4).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rules 5.3 and 5.4. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] Paragraph (b)(4) permits a lawyer to make referrals to another, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rule 5.4(c). A lawyer does not violate paragraph (b)(4) of this Rule by agreeing to refer clients or customers to another, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by arrangements made pursuant to paragraph (b)(4) are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within a law firm comprised of multiple

entities. A division of fees between or among lawyers not in the same law firm is governed by Rule 1.5.1.

Required information in advertisements

[9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to this Rule shall include the name and office address of at least one member of the group responsible for its content. See also Business and Professions Code section 6155(h). See also Business and Professions Code section 6159.1, concerning the requirement to retain any advertisement for one year.

Rule 7.3 Direct Contact with Prospective Clients
(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

COMMENT

[1] There is a potential for abuse inherent in direct in person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.

[2] This potential for abuse inherent in direct in person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and

recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from a lawyer to prospective clients, rather than direct in person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in paragraph (a) and the requirements of paragraph (c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] Even permitted forms of solicitation can be abused. Thus, any solicitation which (i) contains information which is false or misleading within the meaning of Rule 7.1, (ii) is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct within the meaning of paragraph (b)(2), or (iii) involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of paragraph (b)(1).

[6] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer.

[7] The requirement in paragraph (c) that certain communications be marked "Advertising Material" or with words of similar import does not apply to communications sent in response to requests of potential clients or their representatives. Paragraph (c) also does not apply to general announcements by lawyers, including but not limited to changes in personnel or office location, nor does it apply where it is apparent from the context that the communication is an advertisement.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact

is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See also Rules 5.4 and 8.4(a).

Rule 7.4 Communication of Fields of Practice and Specialization

(Commission's Proposed Rule – Clean Version)

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, subject to the requirements of Rule 7.1.

(b) A lawyer registered to practice patent law before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer is certified as a specialist 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

(2) the name of the certifying organization is clearly identified in the communication.

Rule 7.5 Firm Names and Letterheads

(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

COMMENT

[1] A firm may be designated by the names of all or some of its lawyers, by the names of deceased or retired lawyers where there has been a continuing succession in the firm's identity, by a distinctive website address, or by a trade name such as the "ABC Legal Clinic." Use of such names in law practice is acceptable so long as it is not misleading in violation of Rule 7.1. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," the firm may have to expressly disclaim that it is a public legal aid agency to avoid a misleading implication. It is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer. Lawyers associated with a lawyer who is disbarred or who resigns with charges pending must comply with Business and Professions Code section 6132.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. A lawyer may state or imply that the lawyer or lawyer's law firm is "of counsel" to another lawyer or a law firm only if 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.

Rule 8.1 False Statement Regarding Application for Admission to Practice Law

(Commission's Proposed Rule – Clean Version)

(a) An applicant for admission to practice law shall not knowingly make a false statement of material fact or knowingly fail to disclose a material fact in connection with that person's own application for admission.

(b) A lawyer shall not knowingly make a false statement of material fact in connection with another person's application for admission to practice law.

(c) An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known by the applicant or the lawyer to have created a material misapprehension in the matter, except that this Rule does not authorize disclosure of information otherwise protected by Rule 1.6.

(d) As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear pro hac vice; and any similar provision relating to admission or certification to practice law in California or elsewhere.

Comment

[1] A person who makes a false statement in connection with that person's own application for admission to practice law may be subject to discipline under this Rule after that person has been admitted.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of applicable state constitutions.

[3] A lawyer representing an applicant for admission to practice law is governed by the rules applicable to the client lawyer relationship, including Rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this Rule but is subject to the requirements of Rule 3.3.

[4] The examples in paragraph (d) are illustrative. As used in paragraph (d), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to practice law under Business and Professions Code section 6062; an application to appear as counsel pro hac vice under Rule of Court 9.40; an application by military counsel to represent a member of the military in a particular cause under Rule of Court 9.41; an application to register as a certified law student under Rule of Court 9.42; proceedings for certification as a Registered Legal Services attorney under Rule of Court 9.45 and related State Bar Rules; certification as a Registered In-house Counsel under Rule of Court 9.46 and related State Bar Rules; certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 9.43, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 9.44 and related State Bar Rules.

[5] This Rule shall not prevent a lawyer from representing an applicant for admission to practice in proceedings related to such admission. Other laws or rules govern the responsibilities of a lawyer representing an applicant for admission. See, e.g., Business and Professions Code sections 6068(c), (d) & (e)); Rule 3.3.

Rule 8.1.1 Compliance with Conditions of Discipline and Agreements in Lieu of Discipline

(Commission's Proposed Rule – Clean Version)

A member shall comply with the terms and conditions attached to any agreement made in lieu of discipline, disciplinary probation, and public or private reprovals.

Comment

[1] Other provisions also require a lawyer to comply with conditions of discipline. See, e.g., Business and Professions Code section 6068, subdivisions (k) & (l) and California Rules of Court, Rule 9.19.

Rule 8.2: Judicial and Legal Officials

(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not make a statement of fact that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the California Code of Judicial Ethics.

(c) A lawyer who seeks appointment to judicial office shall not make statements to the appointing authority that commit the lawyer with respect to cases, controversies, or issues that could come before the courts, or knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, present position, or any other fact concerning the lawyer. A lawyer commences to become an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer's duty to comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.

(d) For purposes of this Rule, "candidate for judicial office" means a lawyer seeking judicial office by election. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer's duty to comply with this Rule shall end when the lawyer announces withdrawal of the lawyer's candidacy or when the results of the election are final, whichever occurs first.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized. Lawyers also are obligated to maintain the respect due to the courts of justice and judicial officers. See Business and Professions Code section 6068(b).

Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation

(Commission's Proposed Rule – Clean Version)

(a) For purposes of this Rule:

(1) "knowingly permit" means a failure to advocate corrective action where the managerial or supervisory lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination prohibited in paragraph (b); and

(2) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes prohibiting discrimination on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.

(b) In the management or operation of a law practice , a lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability.

(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.

COMMENT

[1] Consistent with lawyers' duties to support the federal and state constitution and laws, lawyers should support efforts to eradicate illegal discrimination in the operation or management of any law practice in which they participate. Violations of federal or state anti-discrimination laws in connection with the operation of a law practice warrant professional discipline in addition to statutory penalties.

[2] This Rule applies to all managerial or supervisory lawyers, whether or not they have any formal role in the management of the law firm in which they practice. See Rule 5.1. But see also Rule 8.4(g). "Law practice" in this Rule means "law firm," as defined in Rule 1.0.1, a term that includes sole practices. It does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice, although lawyers always have a duty to uphold state and federal law, a breach of which may be cause for discipline. See Business and Professions Code section 6068(a).

[3] In order for discriminatory conduct to be sanctionable under this Rule, it first must 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.

[4] A complaint of misconduct based on this Rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding thereafter is appealed.

[5] This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(g).

Rule 8.5 Disciplinary Authority; Choice Of Law

(Commission's Proposed Rule – Clean Version)

(a) Disciplinary Authority. A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in California is also subject to the disciplinary authority of California if the lawyer provides or offers to provide any legal services in California. A lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply, unless the rules of the tribunal provide otherwise; and

(2) these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California, who is lawfully practicing in another jurisdiction, is required specifically by the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the citizens of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code section 6049.1.

Choice of Law

[2] A lawyer may potentially be subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only

to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be required specifically by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires different conduct.

[5] The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions preempt these rules.