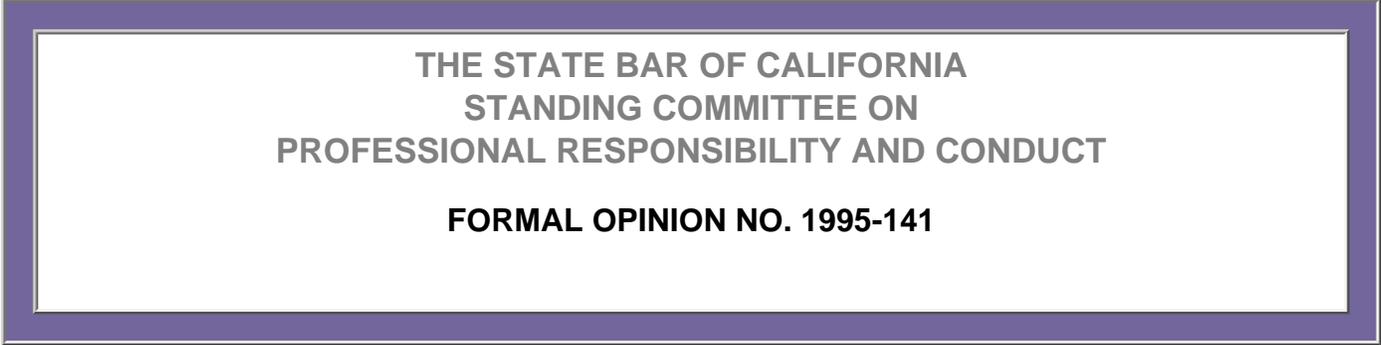


Editor's Note:

State Bar Ethics Opinions cite the applicable California Rules of Professional Conduct in effect at the time of the writing of the opinion. Please refer to the California Rules of Professional Conduct [Cross Reference Chart](#) for a table indicating the corresponding current operative rule. There, you can also link to the text of the current rule.

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THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 1995-141

ISSUE:

What are a lawyer's ethical responsibilities when rendering non- legal services to a client that are either (1) performed by the lawyer outside the scope of the lawyer's legal representation of the client, or (2) performed in connection with a lawyer or law firm's representation of the client or otherwise by someone employed by the lawyer or an entity owned in whole or in part by the lawyer?

DIGEST:

A lawyer or law firm may render non-legal services to a client directly, through a non-lawyer employee, or through an entity in which the lawyer has an ownership interest provided that the lawyer carefully complies with the Rules of Professional Conduct of the State Bar of California (hereinafter referred to as "rules"). Those duties apply not only to the lawyer's conduct in rendering legal services, but also to the lawyer's conduct in rendering non- legal services in a fiduciary capacity.

The provision of non-legal services to a client that arises out of the lawyer-client relationship or a fiduciary relationship arising out of a lawyer-client relationship is a business transaction with a client subject to rule 3-300. Additionally, compliance with rule 3-310(B) is required if the performance of non-legal services gives the lawyer a legal, business, financial or professional interest in the subject matter of a representation or if the person or entity performing the non-legal service is involved in or substantially affected by the lawyer's representation of the client.

The lawyer has a duty to make sure that the provision of non-legal services does not interfere with the lawyer's duty to maintain client confidences and secrets and to make sure that a client knows if communications in connection with the non-legal service will not be privileged. Compliance with rule 1-400 is required when a non- legal service is used to promote the legal services of the lawyer or firm.

Finally, in performing non-legal services, a lawyer or law firm cannot divide fees derived from legal services with non-lawyers and cannot allow an entity in which a lawyer or law firm has an ownership interest to engage in the practice of law.

AUTHORITIES

INTERPRETED:

Rules 1-310, 1-320, 1-400, 3-300, 3-310, 3-500 and 4-100 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code sections 6106, 6068 and 6165.

Corporations Code section 13401(C).

INTRODUCTION

This opinion addresses the ethical responsibilities of lawyers who render non-legal services to a client either directly, through a non-lawyer, or through an entity in which the lawyer or the lawyer's firm has an ownership interest. "Non-legal services" are services that are not performed as part of the practice of law and which may be performed by non-lawyers without constituting the practice of law.

There are many examples of situations in which a lawyer may render non-legal services.¹ A lawyer who is a licensed real estate broker may broker the sale of property for a client who the lawyer represents in other matters. A lawyer may provide business management or accounting services for a client and provide legal representation in other matters. Real estate brokerage, business management and accounting activities are all primarily non-legal services, and, in fact, are commonly performed by non-lawyers.²

Similar concerns may arise in situations where the non-legal services are rendered either by an entity owned by a lawyer or a law firm, individually or with others, or by a non-lawyer employed by the lawyer or the lawyer's firm. One example is where a lawyer employs a land planner, who is not a lawyer, to render planning services in connection with the lawyer's land use legal practice. Another example is where a law firm operates an underwriting company which performs services in connection with the firm's securities practice.

These practices raise ethical concerns in four areas: (1) conflicts of interest and undue influence; (2) maintenance of client confidences and secrets; (3) improper solicitation of clients; and (4) financial relationships between a lawyer and non-lawyers.³ This opinion addresses these concerns.

DISCUSSION

A. Applicability of the Rules of Professional Conduct to a Lawyer's Performance of Non-Legal

Services

Lawyers have historically been allowed to practice law and to pursue other business activities at the same time. (See C. Wolfram, *Modern Legal Ethics* (1986) pp. 897-898.) Although the current California Rules of Professional Conduct do not contain specific restrictions on dual practices, ethics opinions have warned dual practitioners that the rules place constraints on their activities in other businesses and professions. (See Cal. State Bar Formal Opn. Nos. 1982-69 and 1991-123; L.A. Cty. Bar Assn. Formal Opn. Nos. 331, 351, 446 and 477; San Diego Cty. Bar Assn. Opn. No. 1975-2.)

A lawyer's ethical obligations are not limited to activities undertaken in the course of rendering legal services. Any act involving moral turpitude, dishonesty or corruption by an attorney, whether the act is committed in the course of the practice of law or in the pursuit of other business activities, constitutes grounds for discipline. (Bus. & Prof. Code, § 6106; see *Marquette v. State Bar* (1988) 44 Cal.3d 253, 262 [242 Cal.Rptr. 886].)

The rules do not specifically regulate the conduct of lawyers who engage in business activities that do not involve the fiduciary relationship between lawyer and client, such as a dry cleaning business or a restaurant. However, "[a]n attorney's violation of the duty arising in a fiduciary or confidential relationship warrants discipline even in the absence of an attorney-client relationship." (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813 [239 Cal.Rptr. 121], citations omitted.) (See also *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 429 [121 Cal.Rptr. 467]; Cal. State Bar Formal Opn. No. 1982-69.) Thus, when rendering professional services that involve a fiduciary relationship, a member of the State Bar must conform to the professional standards of a lawyer even if the services performed could also be rendered by one licensed in a different profession. (*Sodikoff v. State Bar, supra*, 14 Cal.3d at p. 429; *Libarian v. State Bar* (1945) 21 Cal.2d 862, 865; *Jacobs v. State Bar* (1933) 219 Cal. 59; see Cal. State Bar Formal Opn. Nos. 1991-123 and 1982-69.)

With this background in mind, we next focus on the applicability of specific rules to the ethical concerns identified at the outset of this opinion.

B. Conflicts of Interest and Undue Influence.

A conflict of interest can be defined generally as a situation that interferes with a lawyer's ability to fulfill basic duties to a client. (See Cal. State Bar Formal Opn. No. 1982-69; L.A. Cty. Bar Assn. Formal Opn. 471.) One of those basic duties is to represent a client with undivided loyalty and to exercise independent judgment on a client's behalf. (*Ibid.*) These duties require a lawyer to render legal representation for the benefit of the client and to exercise judgment free of influences that are extraneous to the lawyer-client relationship. (*Anderson v. Eaton* (1930) 211 Cal. 113, 116.)

In addition, due to the fiduciary nature of the lawyer-client relationship, a lawyer may have the ability to exercise considerable influence over a client's decision to use the lawyer's non-legal service. Coupled with the lawyer's interest in the non-legal service, the potential is present for the lawyer to influence the client's decision in a way that may not be in the client's best interests.

The conflict of interest rules in the California Rules of Professional Conduct are designed, in part, to apply to situations that commonly interfere with a lawyer's independent judgment or involve the potential for undue influence. The rendition of non-legal services to a client by a lawyer, a non-lawyer employee, or an entity in which the lawyer has an ownership interest implicates two of those rules, rule 3-300 and rule 3-310.

1. Applicability of Rule 3-300.

Rule 3-300 imposes specific requirements whenever a lawyer enters into a business transaction with a client. The terms of the transaction must be fair and reasonable to the client and must be fully disclosed in writing to the client. The client must be advised in writing that he or she may seek the advice of independent counsel and must be afforded a reasonable opportunity to do so. The client must thereafter consent to the transaction in writing.

The provision of non-legal professional services to a client, such as real estate brokerage services or accounting services, is a business transaction with a client under rule 3-300. (See L.A. Cty. Bar Assn. Formal Opn. No. 477.) The applicability of rule 3-300 stems from the fiduciary nature of the lawyer-client relationship. (*Ibid.*) The relationship between an attorney and client is a fiduciary relationship of the highest character. (*Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) It is a relationship in which the lawyer is apt to have considerable influence over the client, especially in transactions which are a part of or intimately connected with the very business for which the lawyer-client relationship exists. (*Beery v. State Bar, supra*, 43 Cal.3d at p. 812.)

The California Supreme Court has observed that "[t]here is always a danger to the fiduciary relationship between an attorney and his client when the two enter into business dealings." (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 314 [256 Cal.Rptr. 381].) As a result, "[a]ll dealings between an attorney and his client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness." (*Ritter v. State Bar* (1985) 40 Cal.3d 595, 602 [221 Cal.Rptr. 134], quoting *Clancy v. State Bar, supra*, 71 Cal.2d at p. 146.) "The burden is on the attorney to show that the transaction between them was at 'arm's length.'" (*Id.* at p. 147.)

Rule 3-300 is intended to address transactions that arise out of the fiduciary relationship between lawyer and client. The Supreme Court has observed that the abuse of the trust arising from the lawyer-client relationship ". . . is precisely the type of overreaching that rule 5-101 [now rule 3-300] is designed to prevent." (*Hunnecutt v. State Bar* (1988) 44 Cal.3d 362, 370 [243 Cal.Rptr. 699].) Because part of the focus of rule 3-300 is on transactions that are beneficial to the lawyer, the rule not only applies to transactions with the lawyer directly, but also to transactions with entities in which the lawyer has an ownership interest. (See *Beery v. State Bar, supra*, 43 Cal.3d 802 [investment in a corporation in which the lawyer was a principal]; *Sodikoff v. State Bar, supra*, 14 Cal.3d 422 [acquisition of client property by lawyer-controlled corporation]; *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735 [transaction with a lawyer's corporation].)

However, not every transaction between a lawyer and client is subject to rule 3-300. Rule 3-300 is not

intended to apply to the agreement by which a member is retained to render legal services, unless the lawyer obtains an ownership, possessory, security, or other pecuniary interest adverse to the client. (See rule 3-300, Discussion; L.A. Cty. Bar Assn. Formal Opn. No. 477.) The rule is not intended to apply when the lawyer and client each make an investment on terms offered to the general public, such as when each purchases stock in a publicly traded company on the open market. (Rule 3-300, Discussion.)

In addition, the Supreme Court has directed the application of rule 3-300 and its predecessor, rule 5-101,⁴ to transactions in which there exists an actual or potential conflict of interest between the lawyer and the client. (See *Rose v. State Bar* (1989) 49 Cal.3d 646, 662-663 [262 Cal.Rptr. 702].) In light of the principles on which the rule is founded, it is apparent that the rule is intended to apply to transactions that arise out of the lawyer-client relationship or the trust and confidence reposed by the client in the lawyer as a result of the lawyer-client relationship. (See *Beery v. State Bar, supra*, 43 Cal.3d 802, 813; see also L.A. Cty. Bar Assn. Formal Opn. No. 477.)

Thus, the rule will ordinarily not apply when a lawyer purchases a meal at a restaurant owned by a client or when the client pays for parking in a parking lot owned by the lawyer, since these transactions do not typically involve the fiduciary relationship. However, where the rendition of non-legal professional services by the lawyer directly or through a non-lawyer employee or a lawyer or law firm owned entity involves a fiduciary relationship between the lawyer and the client, compliance with rule 3-300 will be required.

In those transactions that are governed by rule 3-300, the terms of the transaction must be fair and reasonable to the client. This requirement applies not only to elements of the transaction itself, but also the transaction's effect on the lawyer-client relationship. (*Rose v. State Bar, supra*, 49 Cal.3d at p. 663; see also *In the Matter of Lane, supra*, 2 Cal. State Bar Ct. Rptr. at p. 745.) Business transactions between a lawyer and a client may create the potential for disputes between them that undermine the lawyer-client relationship and interfere with the lawyer's ability to competently represent the client. Such consequences must be considered and disclosed to the client as part of the lawyer's compliance with rule 3-300.⁵

2. Applicability of Rule 3-310.

When a lawyer provides non-legal services that are related to or are involved in the lawyer's legal representation of a client, the lawyer may have a legal, business, financial, or professional interest in the subject matter of the representation that requires written disclosure to the client under rule 3-310(B)(4). For example, if a lawyer has been rendering accounting services for a client and later represents the client in litigation in which the accounting work is an issue, the lawyer would at least have a business or professional interest in the representation that warrants disclosure under the rule.⁶

If the non-legal service is provided by an entity that the lawyer owns or operates or by a non-lawyer employee, written disclosure is required under rule 3-310(B)(1) if the employee or an officer or employee of the entity is a party or witness in the matter in which the lawyer is representing the client. For example, if an officer or employee of the entity is expected to testify as an expert witness in litigation in which the lawyer represents the client, written disclosure is required under the rule. (L.A. Cty. Bar Assn. Formal Opn. No.

Written disclosure is also required under rule 3-310(B)(3) if the employee or the entity or one of its officers or employees would be affected substantially by a resolution of the representation. For example, if the entity's compensation will depend on the outcome of the representation, written disclosure under rule 3-310(B)(3) is required. If the entity faces a potential liability that will depend on the outcome of the representation, that too will require disclosure under the rule. (L.A. Cty. Bar Assn. Formal Opn. No. 477.)

When the lawyer or an entity in which the lawyer has an ownership interest is receiving compensation in connection with the lawyer's representation of a client, the lawyer has a financial interest in the representation. Here again, the lawyer is required to make written disclosure to the client under rule 3-310(B)(4).

Rule 3-310 is primarily directed to situations that commonly interfere with a lawyer's loyalty and independent judgment on behalf of a client. (L.A. Cty. Bar Assn. Formal Opn. No. 477.) When a lawyer's rendition of non-legal services becomes involved in the legal representation of a client, the lawyer's interest in justifying those services in one way or another may adversely affect the lawyer's judgment, and, in turn, the legal advice given. (*Ibid.*) Similarly, when a lawyer-owned or controlled entity provides non-legal services in connection with a legal representation, the lawyer may tend to favor the interests of the entity over the interests of the client through the referral of work to the entity, lack of objectivity about the entity's work product or in other ways. (*Ibid.*) In each case, there is at least a question whether the lawyer can represent the client with the same degree of loyalty and independent judgment that would be expected from a lawyer who did not have a relationship with the entity providing the non-legal service or who did not have an interest in the subject matter of the representation.

The written disclosure requirement in rule 3-310 requires the lawyer to inform the client about the existence and nature of the relationship or interest and about the reasonably foreseeable adverse consequences the relationship might have on the representation, including the potential adverse effects on the lawyer's loyalty and independent judgment. (See rule 3-310(A).) Rule 3-310(B) allows a client to choose whether to proceed with a representation in light of the disclosure.

While rule 3-310(B) generally allows a lawyer to represent a client after providing disclosure, there are some situations in which a lawyer may not represent a client even if disclosure has been made. These situations arise in extreme cases when the lawyer's relationship or interest is such that the lawyer cannot competently represent the client, when the lawyer cannot make adequate disclosure or when the client is unable to comprehend the disclosure. (See rule 3-310, Discussion; Cal. State Bar Formal Opn. No. 1982-69; see also L.A. Cty. Bar Assn. Formal Opn. No. 471.)

C. Maintaining Client Confidences.

Under Business and Professions Code section 6068 (e) a lawyer has a duty to maintain a client's confidence inviolate and preserve a client's secrets at every peril. As one court observed, ". . . the

protection of confidences and secrets is not a rule of mere professional conduct, but instead involves public policies of paramount importance" (*In re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal. Rptr. 371], quoting *In re Jordan* (1972) 7 Cal. 3d 930, 940-941 [103 Cal. Rptr. 949].) Part of that duty involves preserving the privileged nature of lawyer-client communications. The provision of non-legal services presents the potential for the erosion of the privilege and the loss of confidentiality resulting either from a blurring of the distinction between the provision of legal and non-legal services or from the rendition of services by non-lawyers.

In the first instance, a lawyer rendering non-legal services directly or through an employee or entity has a duty to make it clear whether and to what extent a lawyer-client relationship exists. (*Butler v. State Bar* (1986) 42 Cal.3d 323, 329 [228 Cal.Rptr. 499].) This is particularly true when a lawyer knows or reasonably should know that a person receiving non-legal services has an expectation that there is a lawyer-client relationship or that his or her communications will be privileged. This duty stems from a lawyer's duty to communicate with a client currently embodied in rule 3-500⁷, which requires a lawyer to keep a client reasonably informed of significant developments relating to the lawyer's employment by or representation of a client.⁸ (*Ibid.*)

Furthermore, when a lawyer is retained to provide legal services, that lawyer has a duty to structure and maintain a relationship with the client that preserves the client's confidences and secrets. That duty is encompassed in Business and Professions Code section 6068 (e). The duty in section 6068 (e) is violated whenever a lawyer allows the provision of non-legal services to undermine in any way the protection of client confidences and secrets in the attorney-client relationship.

D. Improper Solicitation of Clients.

A lawyer or law firm's performance of legal and non-legal services may involve the referral of business between the two areas of service. For example, a law firm or a law firm owned entity might first establish a relationship with a client through a non-legal service and, in connection with that service, promote the firm's legal services. In addition, a law firm might promote non-legal services to a client or prospective client.

Such practices raise issues under rule 1-400, which governs lawyer advertising and solicitation. Rule 1-400 contains two basic prohibitions. It bans solicitations and prohibits communications that are false, misleading or deceptive, which fail to state their true purpose, which are transmitted in an intrusive manner, or which involve vexatious or harassing conduct. (Rule 1-400(D).)

A "solicitation" is a communication regarding a lawyer or law firm's availability for professional employment communicated in person or by telephone or by any means to someone known to be represented by counsel in the matter which is the subject of the communication. Rule 1-400 bans such solicitations made by or on behalf of a lawyer or firm, except when made to someone with whom the lawyer has a family or prior professional relationship or when the solicitation is protected by the federal or state constitutions.⁹

A "communication" is any message concerning a lawyer or law firm's availability for professional

employment that is directed to any past, present or prospective client. (Rule 1-400(A).) It includes any use of stationery or firm name. (Rules 1-400(A)(1) and (A)(2).) The rule applies to communications made on behalf of a lawyer or law firm as well as communications by the lawyer or firm itself. (Rule 1-400(A).)

These rules have several applications in this context. First, rule 1-400 applies to solicitations and communications concerning the availability of legal services.¹⁰ It does not encompass solicitations and communications regarding the availability of purely non-legal professional services.¹¹

Second, the rule 1-400(C) ban on solicitations applies when legal employment is solicited of someone with whom the lawyer or firm does not have an existing or prior lawyer-client relationship. As a result, the rule applies when such solicitations occur in the course of rendering non-legal services.¹²

Third, rule 1-400 applies to solicitations and communications made on behalf of a lawyer or law firm by a non-lawyer employee or a lawyer or law firm owned entity. Thus, a law firm or lawyer cannot use a non-lawyer employee or a separate entity to solicit business for a lawyer or firm in a manner that violates rule 1-400. (See L.A. Cty. Bar. Assn. Formal Opn. No. 474.)

Based on these principles, rule 1-400 does not apply to solicitations or communications regarding the availability of non-legal services rendered by a lawyer, a non-lawyer employee or an entity owned by a lawyer or law firm. However, the rule does apply to solicitations and communications regarding the availability of legal services which are made by the lawyer or a non-lawyer employee in the course of rendering non-legal services or otherwise.¹³

E. Financial Relationships Between Lawyers and Non-Lawyers.

A lawyer providing non-legal services through non-lawyer employees or business entities in which non-lawyers also have an interest must also comply with the California Rules of Professional Conduct governing the financial relationships between lawyers and non-lawyers. First, a non-lawyer cannot obtain an ownership interest in a law firm. Rule 1-310 states that "[a] member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law." In the case of a law corporation, the State Bar Act requires each director, shareholder and officer to be a lawyer. (Bus. & Prof. Code, § 6165; Corp. Code, § 13401 (c).)¹⁴

Second, non-lawyers cannot share in the profits of a law practice. Rule 1-320 prevents a member from directly or indirectly sharing legal fees with a non-lawyer.¹⁵

Together, these rules require that both the structure of the business relationship and the division of income from non-legal services be separate and distinct from the lawyer's law practice. The entity owned by the lawyer and non-lawyer cannot engage in the practice of law. The two cannot share the legal fees from the lawyer's practice.

Another area of concern is where a non-lawyer in a business relationship with a lawyer to provide non-legal

services seeks to influence the conduct of a lawyer's legal practice through the referral of business or imposing other profit-related concerns on the legal practice.¹⁶ Under rule 1-320(B) responding to such influences is prohibited. A lawyer cannot "compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment . . ." of the lawyer or the lawyer's firm by a client under the rule. The rule encompasses situations in which a lawyer gives any financial benefit or compensation in exchange for the referral of business.¹⁷

CONCLUSION

As the preceding discussion demonstrates, the rendering of non- legal services by lawyers, law firms or entities in which either has an ownership interest raises a number of ethical concerns that must be carefully evaluated. Lawyers engaged in rendering such services must not only be aware of the ethical issues raised in this opinion, but must also watch for other ethical issues that may arise in the course of providing the service.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

¹ This opinion does not address the ethical responsibilities of lawyers who render services in the course of practicing law that may also be rendered by a non-lawyer. For example, in the course of practicing law, a lawyer may render financial advice that could be rendered by a non-lawyer. However, both the legal and financial advice may be provided as part of the practice of law. This opinion concerns services that are not rendered as part of the practice of law.

² The Committee recognizes that the fact situation presented in this opinion may raise an issue regarding the unauthorized practice of law. However, this opinion is not intended to address or opine on the issue of the unauthorized practice of law. Regarding activities undertaken by an individual who is not an active member of the State Bar, members should consider California Business and Professions Code sections 6125-6127. Members should also consider California Rules of Professional Conduct 1-300 (*Unauthorized Practice of Law*) and 1-310 (*Forming a Partnership With a Non-Lawyer*). Regarding what constitutes the practice of law in California, members should consider the following cases: *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 661]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corporation* (1922) 189 Cal. 531, 535 [209 P. 363]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].

³ The ethical issues addressed in this opinion are not the only ones that may arise in connection with

non-legal services. Other ethical issues may arise as well. For example, non-legal services rendered in connection with a law practice that involve the handling of client funds or property may be subject to rule 4-100. Other rules may be applicable as well depending on the circumstances.

⁴ Rule 3-300 first took effect on May 27, 1989 and was modified slightly when the revised California Rules of Professional Conduct took effect on September 14, 1992. Rule 3-300 superseded rule 5-101, which was in effect from January 1, 1975 until May 26, 1989. Although there are some differences between rule 3-300 and former rule 5-101, both require written disclosure to the client, an opportunity for the client to seek the advice of independent counsel, and client consent.

⁵ Rule 3-300 applies when a lawyer enters into a business transaction with a client. It does not apply when a lawyer-client relationship has not yet arisen; although it does apply to transactions that occur after a lawyer's representation of the client has concluded. (*Beery v. State Bar*, *supra*, 43 Cal.3d at pp. 811-812.) Thus, if a lawyer or the lawyer's entity is first retained to provide non-legal services and there is no pre-existing lawyer-client or other fiduciary relationship, rule 3-300 does not apply. However, if the lawyer has had a lawyer-client relationship with the client and later proposes to render non-legal services, rule 3-300 may be applicable based on the factors set forth in this opinion.

⁶ This opinion addresses the applicability of rule 3-310(B)(4) only in the context of non-legal services. The committee does not reach the question of whether rule 3-310(B)(4) applies in the same way when a lawyer's prior legal services are involved in the lawyer's subsequent representation of the client.

⁷ A similar duty is found in Business and Professions Code section 6068 (m), which requires a lawyer "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

⁸ A disclosure of this nature also may be required under rule 3-300. Rule 1-400 requires similar clarity in communicating the nature of the service a lawyer or law firm is providing. A communication concerning a lawyer or law firm's availability for professional employment would violate the rule if it falsely states or misleads a recipient into believing that legal services are being provided or that a lawyer-client relationship would exist when such is not the case. (Rule 1-400(A),(D)(1), and (D)(2).)

⁹ For a discussion of solicitations protected by the federal or state Constitutions, see Los Angeles County Bar Association Formal Opinion Number 474.

¹⁰ Although the term "professional employment" in rule 1-400(A) and (B) is not defined, the committee believes that the term is limited to professional employment as a lawyer. The committee believes this interpretation is warranted because in general, the California Rules of Professional Conduct regulate lawyer conduct in matters related to the rendition of legal services. The legislative history for rule 1-400 does not indicate that the rule was intended to have a broader application. In addition, the regulation of lawyer solicitations and communications under rule 1-400 may be more restrictive than what is constitutionally permitted in the regulation of other professions. (Cf. *Ohralik v.*

Ohio State Bar Assn. (1978) 436 U.S. 447 [98 S.Ct. 1912] (holding that a ban on in-person solicitations for legal employment is constitutional) with *Edenfield v. Fane* (1993) ___ U.S. ___ [113 S.Ct. 1792] (holding that a ban on in-person solicitations for accounting services is not constitutional.)

¹¹ This does not mean that a lawyer may engage in false or deceptive promotion of a non-legal service. (See Bus & Prof. Code, § 6106.) Lawyers are subject to injunctive relief and civil penalties under the California Unfair Practices Act when they engage in false or deceptive advertising. (See Bus. & Prof. Code, §§ 17203- 17205 and 17500; *Rubin v. Green* (1993) 4 Cal.4th 1187, 1204 [17 Cal. Rptr.2d 828].) A wilful violation of these laws would violate a lawyer's duty to support the laws of the state under Business and Professions Code section 6068 (a). In addition, in the situations where it applies, rule 3-300 requires full and comprehensible disclosure to a client about the non-legal service.

¹² The prohibition of solicitations in rule 1-400(C) excludes solicitations of persons with whom a lawyer has a prior professional relationship. The committee recognizes that the term "professional relationship" is broader than the term "professional employment." However, for the same reasons that the committee believes the term "professional employment" relates to legal employment, the committee believes that the term "professional relationship" pertains to relationships with a lawyer in his or her professional capacity as a lawyer and not in other professional capacities. Thus, on the one hand, a lawyer/realtor who renders only realty services to a client does not have a prior professional relationship for purposes of rule 1-400(C). On the other hand, a lawyer who has represented a corporation has a professional relationship with the individuals at the corporation involved in the representation for purposes of rule 1-400(C). In the former situation the lawyer may not solicit legal employment of the realty client, while in the latter scenario the lawyer may solicit legal employment from the corporate representatives.

¹³ For example, a lawyer who owns an accounting service is not subject to rule 1-400 when communicating about the availability of such services. However, the lawyer and the accounting service are subject to rule 1-400 when communicating about the availability of the lawyer's legal services to a prospective client of the lawyer.

¹⁴ There are a number of professional services that may be performed by both lawyers and non-lawyers, such as tax preparation or lobbying. A lawyer who forms a business with a non-lawyer to perform such services is not subject to rules 1-310 and 1-320 and Business and Professions Code section 6165 unless the provision of those services is deemed to be the practice of law. However, in conducting dual professional services, the lawyer may still be subject to those rules that apply to a lawyer's fiduciary obligations, as noted in the discussion on the scope of the rules at the outset of this opinion.

¹⁵ Rule 1-320 does not prevent a lawyer from compensating a non-lawyer employee. (Rule 1-320(A) (3).) The rule also allows a lawyer to include non-lawyer employees in profit-sharing and retirement plans provided the plan does not circumvent the California Rules of Professional Conduct or the State Bar Act. (*Ibid.*) At a minimum, the rule prohibits profit-sharing arrangements that would effectively give a non-lawyer an ownership interest in a law practice or would involve a division of fees. (See L. A. Cty. Bar Assn. Formal Opn. No. 457.)

¹⁶ This concern is not limited to referrals between a lawyer and a related non-legal service. The potential is present whenever there is a relationship involving an ongoing referral of business to a lawyer's practice.

¹⁷ To the extent that the non-lawyer would seek to influence the lawyer's judgement or conduct in a particular matter, written disclosure to the client would be required by rule 3-310(B)(3).

ETHICS OPINIONS