TWENTY-SECOND ANNUAL STATEWIDE
ETHICS SYMPOSIUM
THE STATE BAR OF CALIFORNIA – SAN FRANCISCO

- **Ethics Update – What You Need to Know**
- **Joint Defense Agreements: Intertwined Ethical and Strategic Considerations**
- **The Law and Ethics of Attorney Mistakes**
- **Prohibited Discrimination and Sexual Harassment in the Legal Profession**

April 2018

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

Twenty-Second Annual Statewide Ethics Symposium
Friday, April 6, 2018
State Bar of California – San Francisco

8:30 – 9:30 am **Registration**

9:30 – 9:45 am **Welcoming Remarks**
Andrew I. Dilworth: Chair, Committee on Professional Responsibility and Conduct
Michael G. Colantuono: Chair, State Bar of California Board of Trustees

9:45 – 11:00 am **Ethics Update – What You Need to Know**

Learn about recent developments involving core ethical principles affecting the day-to-day practice of lawyers. This panel will discuss several important decisions impacting how lawyers represent clients while fulfilling their professional obligations. Issues will include developments regarding the attorney-client privilege and confidentiality, disqualification and imputation, lawyer liability, and other fundamental principles related to the law governing lawyers.

Andrew I. Dilworth: Moderator; Chair, Committee on Professional Responsibility and Conduct; Partner, Cooper, White & Cooper LLP, San Francisco
Amy L. Bomse: Vice-Chair, Committee on Professional Responsibility and Conduct; Partner, Arnold & Porter, San Francisco
Suzanne Burke Spencer: Advisor, Committee on Professional Responsibility and Conduct; Managing Shareholder, Sall Spencer Callas & Krueger, Laguna Beach

11:00 – 11:15 am **Break**

11:15 am – 12:30 pm **Joint Defense Agreements: Intertwined Ethical and Strategic Considerations**

Joint defense agreements are useful tools. They allow parties with common interests to work collaboratively in civil and criminal litigation as well as transactional matters to strategize together to further their mutual goals. But these agreements raise numerous ethical and strategic issues that must be carefully navigated. During this roundtable conversation, this lively panel of experienced trial lawyers and ethics experts will discuss the ethical issues and strategic considerations that arise when working jointly with parties sharing a common interest, including those that arise if those parties' interests begin to diverge.

Ujvala Singh: Moderator**;** Member, Committee on Professional Responsibility and Conduct; Associate, Carlson, Calladine & Peterson LLP, San Francisco
James J. Brosnahan: Senior Counsel, Morrison & Foerster LLP, San Francisco
Karen M. Goodman: Founding Attorney, Goodman & Associates, Sacramento
Mary G. McNamara: Partner, Swanson & McNamara LLP, San Francisco
Ragesh Tangri: Partner, Durie Tangri LLP, San Francisco

12:30 – 1:30 pm **Lunch**

1:30 – 2:45 pm **The Law and Ethics of Attorney Mistakes**

This panel will address the legal and ethical issues that arise when a lawyer or law firm suspects that it may have made a harmful mistake. Among the questions that the panel will discuss are: What counts as a mistake? What may or must a lawyer do when she is concerned that a mistake may have occurred? When does a lawyer have a duty to tell the client that a mistake has been made and what should be said? When can a lawyer continue to represent a client after a mistake has been made? And how do these issues intersect with the law firm's duty of loyalty to the client, its obligations to its insurer, and the law of attorney-client privilege?

Stephen M. Bundy: Moderator; Member, Committee on Professional Responsibility and Conduct; Professor Emeritus, University of California at Berkeley; Attorney, Taylor & Patchen, LLP,
San Francisco
Merri A. Baldwin: Shareholder, Rogers Joseph O'Donnell, San Francisco
Ernest J. Galvan: Partner, Rosen, Bien, Galvan & Grunfeld, LLP, San Francisco
Tyler C. Gerking: Partner, Farella Braun + Martel, LLP, San Francisco

2:45 – 3:00 pm **BREAK**

3:00 – 4:15 pm **Prohibited Discrimination and Sexual Harassment in the Legal Profession**

In the era of #metoo, renewed scrutiny is being placed on sexual harassment claims, as we see more and more people speaking out about experiences with sexual harassment and discrimination. Will this movement cross into the legal profession, and if so, are there implications of that beyond employment litigation? Often criticized as the only profession without strong anti-discrimination and anti-harassment rules on the books, the California Rules Revision Commission recommended a stronger rule in proposed Rule of Professional Conduct Rule 8.4.1, which is pending before the California Supreme Court. This panel will explore the current Rule of Professional Conduct 2-400, analyze proposed rule 8.4.1, and discuss the role of the Rules of Professional Conduct in addressing prohibited discrimination and sexual harassment in the modern legal practice. This course offers 1.25 hours of MCLE credit in Recognition and Elimination of Bias.

Joel A. Osman: Moderator; Member, Committee on Professional Responsibility and Conduct; Senior Counsel and General Counsel, Parker Mills LLP, Los Angeles
Carole J. Buckner: Partner and General Counsel, Procopio, San Diego
Wendy Wen Yun Chang: Partner, Hinshaw & Culbertson, LLP, Los Angeles

Wi-Fi Network: SB_GUESTS
Open a web browser and you will be brought to the Authentication page.
At the bottom of the page, enter the following credentials:
Username: sbcguest
Password: StateBar (capital S & B)

Written materials can be downloaded at:
http://bit.ly/2018ESM

State Bar of California
Committee on Professional Responsibility and Conduct
2017-2018 Officers

Andrew I. Dilworth, Chair ***San Francisco, CA***

Drew Dilworth is a litigation partner with Cooper, White & Cooper LLP. Mr. Dilworth counsels lawyers and law firms in California and nationwide on issues of professional responsibility. His practice focuses on the law governing lawyers. His experience in professional responsibility matters includes handling State Bar investigations and disciplinary proceedings, admission issues, law firm break-ups and attorney departures, client fee disputes, conflicts of interests and disqualification motions, sanctions motions, anti-SLAPP motions, disputes regarding claims of attorney-client privilege or work product, and other matters that relate to the conduct of lawyers and law firms. Mr. Dilworth also counsels lawyers and law firms on risk management issues and compliance with the rules of professional conduct. Mr. Dilworth is the current Chair of the California State Bar's Committee on Professional Responsibility and Conduct. He is a past Chair of the Bar Association of San Francisco's Legal Ethics Committee. He is also a member of the Association of Professional Responsibility Lawyers and the ABA Center for Professional Responsibility and Conduct. He serves as an Adjunct Professor of Law for the University of San Francisco School of Law where he has taught Legal Ethics for more than twelve years. Mr. Dilworth also serves as special counsel to his law firm on professional responsibility issues.

Amy L. Bomse, Vice-Chair ***San Francisco, CA***

Amy Bomse is a commercial litigator whose practice focuses on business disputes and on representing lawyers, law firms and in-house legal departments. Ms. Bomse defends lawyers in malpractice and breach of fiduciary duty claims. She provides strategic advice to law firms and corporations on ethical issues including conflicts of interest. She also defends lawyers in California State Bar discipline matters. Ms. Bomse also has substantial trial experience in criminal and civil matters. She has tried matters involving intellectual property licenses, utility contracts and the break-up on a closely held company. Bomse is active in the legal community. She currently serves as the vice chair of the California State Bar Committee On Professional Responsibility And Conduct and serves on the Board of Legal Aid At Work. She has an active pro bono practice which focuses on reproductive health care and has represented Planned Parenthood on multiple matters.

Suzanne Burke Spencer, Advisor **Laguna Beach, CA**

Suzanne Burke Spencer is the managing shareholder of Sall Spencer Callas & Krueger, a business litigation firm in Laguna Beach, California. She practices in the areas of professional malpractice and attorney ethics as well as complex business and real estate litigation. Ms. Burke Spencer has frequently lectured on attorney fee disputes, legal ethics and risk management in public and private seminars, and has authored or contributed to numerous articles on attorney ethics. Ms. Burke Spencer was appointed to the State Bar of California’s Committee on Professional Responsibility and Conduct (COPRAC) in 2012, is the immediate past Chair and is currently serving as Advisor of that committee. She is co-Chair of the Orange County Bar Association's Committee on Professionalism and Ethics and a member of that Association's Civility Task Force. She is also a member of the Standing Committee on Discipline of the United States District Court for the Central District of California. A native of New Jersey, Ms. Burke Spencer relocated to California in 1995 and has lived and worked here ever since.

Special Guests

Michael G. Colantuono, Chair, State Bar of California ***San Francisco, CA***

Michael Colantuono is Chair of The State Bar of California Board of Trustees. He was appointed to the Board of Trustees by Assembly Speaker Jon Perez in 2012 and reappointed by Speaker Tony Atkins in 2015. He served as Treasurer of the Bar in 2014. He is a shareholder in Colantuono, Highsmith & Whatley, a municipal law firm with offices in Pasadena and Grass Valley. Chief Justice Ronald M. George presented him with the State Bar's 2010 Public Lawyer of the Year award. The Los Angeles Daily Journal named him one of "California's Top Municipal Lawyers" every year since its list began in 2011. The Bar has certified him as an Appellate Specialist and he is a member of the California Academy of Appellate Lawyers, a prestigious association of fewer than 100 of California's most distinguished appellate advocates. Michael is one of California's leading experts on municipal revenues and has appeared in all six Courts of Appeal in California. In addition, he has argued 7 public finance cases in the California Supreme Court since 2004 and briefed three others. He will argue another in the coming months. Michael graduated magna cum laude from Harvard College with a degree in Government and received his law degree from the University of California at Berkeley, graduating first in his class. He frequently posts comments on State Bar, local government and municipal finance topics to Twitter (@MColantuono) and LinkedIn (Michael Colantuono).

TAB 1

Ethics Update – What You Need to Know

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Andrew I. Dilworth, Moderator — ***San Francisco, CA***

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Ethics Update – What You Need to Know

2018 Ethics Symposium: New Case Update

1. ***Argentieri v. Zuckerberg*** (2017) 8 Cal.App.5th 768 [214 Cal.Rptr.3d 358]:

Protection under the fair and true reporting privilege. An action was brought against Facebook and Mark Zuckerberg in New York. After the suit was dismissed for fraud and spoliation, Facebook and Zuckerberg sued plaintiff's counsel, Argentieri, in California claiming malicious prosecution. A press release was issued by Facebook's General Counsel asserting that Argentieri knew plaintiff's lawsuit had been based on forged documents. In response, Argentieri sued Facebook and its General Counsel for defamation. Facebook and its General Counsel brought an anti-SLAPP motion (CCP § 425.16), which was granted by the trial court. Granting of the motion was affirmed on appeal. The appellate court rejected Argentieri's argument that he had demonstrated a probability of prevailing on the merits of his defamation claim. The appellate court also held that, although the statement in the press release that underlay Argientieri's defamation claim was not subject to the litigation privilege under Civil Code § 47(b), it was subject to the fair and true reporting privilege under Civil Code § 47(d).

2. ***Beachcomber Management Crystal Cove, LLC, et al., v. Superior Court of Orange County*** (2017) 13 Cal.App.5th 1105 [220 Cal.Rptr.3d 872]:

Holding: reversing disqualification of defense counsel in shareholder derivative suit in close corporation. Trial court held that defense counsel previously represented LLC in a substantially related matter and therefore could not represent LLC managing member adverse to LLC in fraud suit brought derivatively by investors. Court of appeal held that this rule did not apply to derivative suits concerning close corporations; instead a line of cases starting with Forrest v. Baeza hold that although company counsel cannot jointly represent insiders and company in derivative suit because they are adverse, company counsel may represent insiders despite having previously represented the company on substantially related matters because the insiders already know everything the lawyers know and could share the same information with any other lawyer so the company's confidential information cannot be protected from the insiders who possess that information as its managers.

3. ***Behunin v. Superior Court*** (2017) 9 Cal.App.5th 833 [215 Cal.Rptr.3d 475]:

Before the court in this case was whether the attorney-client privilege protected communications concerning pending litigation among an attorney, client and an outside public relations firm retained by the attorney. While leaving open the possibility that "[t]here may be situations in which an attorney's use of a public relations consultant to develop litigation strategy or a plan for maneuvering a lawsuit into an optimal position for settlement" could be necessary to the representation such that communications among the consultant, attorney and client were privileged, this was not such a case. Id. at 849-50. In this case, the lawyer for Behunin, who was a party in a pending lawsuit, hired an outside public relations firm to set up a website designed to put pressure on the opposing litigants to settle the case; but, according to Behunin, the attorney "merely acted as a liaison" between the client and public relations firm

"without knowledge of or connection to the substance of the website." Id. at 838. Behunin objected to discovery demands seeking production of the communications among Behunin, his attorney and the public relations firm on the grounds that they were privileged. The trial court, following the recommendations of the discovery referee, ordered production of those communications.

The Court of Appeals upheld the trial court's ruling. Finding there "is no 'public relations privilege' in California," the appellate court found that in order to be covered by the attorney-client privilege, Behunin had the burden of establishing either that the public relations firm's inclusion in the communications was reasonably necessary to accomplish the purpose for which the lawyer was consulted or that the public relations firm shared a common interest with Behunin in the representation. Id. at 845-46. Behunin had established neither. The court found that Behunin's argument that the public relations firm's presence was necessary "because the negative publicity would help get the [opposing parties] to the settlement table" extended the privilege too far. To maintain privilege, there must be some explanation and evidence of how the communications "assisted the attorney in developing a plan for resolving the litigation," without which Behunin could not establish that the communications were reasonably necessary to accomplish the lawyer's purpose in representing Behunin. Id. at 850. The Court further discussed a line of federal cases holding that the privilege may be extended to apply to communications between an attorney and a third party who is the "functional equivalent" of the client, such as employees of the client, but found them unpersuasive. There was no evidence or argument presented by Behunin that the PR firm there was the "functional equivalent" of an employee of Behunin or his company. Id. at 852-53. As to the common interest exception to waiver, Behunin failed to establish a common interest between the public relations firm and Behunin. The firm's interest in seeing its public relations campaign succeed was insufficient to establish a common interest that could protect communications among the attorney, Behunin and the PR firm. Id. at 854.

4. ***California Self-Insurer's Security Fund v. Superior Court*** (2018) 19 Cal.App.5th 1065 [228 Cal.Rptr.3d 546]:

Reversal of disqualification following departure of tainted lawyer. Nixon Peabody represented a nonprofit in a collection action against Healthcare Industry Self-Insurance Program. Defendants were represented by Michelson & Robinson. Defendants brought a motion to disqualify Nixon alleging that from 2009 to 2017 attorney Andrew Selesnick had served as the Chair of Michelson's Health Care Department, managing a team of attorneys representing clients in the healthcare industry. Defendants further alleged that since 2014, Michelson had served as counsel for the moving parties and several other defendants. The representation of those parties was handled primarily by four attorneys at the firm, including Selesnick, who purportedly received confidential information regarding the matter at issue. On or about February 1, 2017 Selesnick left Michelson and joined Nixon. On or about March 8, after Nixon was advised of a potential conflict, Selesnick left Nixon. Selesnick had been hired to work in Nixon's Los Angeles office, while the Nixon lawyers who were representing the nonprofit were working out of its San Francisco office. Each member of the Nixon team submitted a

declaration stating that Selesnick had not shared confidential information with them and that an "ethical wall" had been put into place. The trial court granted the disqualification motion concluding that disqualification was mandatory because Selesnick had "switched sides" and that under such circumstances an ethical wall could not save the representation.

On review, the court of appeal noted that there is no question that if Selesnick were seeking to represent the nonprofit he could not do so, and that had he continued to work at Nixon, the entire firm would be disqualified. Relying heavily on the decision in Kirk v. First American Title Ins. Co. (2010) 183 Cal.App.4th 776, however, the appellate court concluded that whether the remaining Nixon lawyers should be disqualified should be considered in light of all of the relevant facts, including that Selesnick no longer worked at Nixon and had been there for only a brief period of time, and that in proper circumstances the general presumption of imputed knowledge may be rebutted. Under the unique facts presented, the trial court should have conducted an analysis of whether confidential information was indeed transmitted from Selesnick to the Nixon attorneys working on the matter.

5. ***Fiduciary Trust International of California v. Klein*** (2017) 9 Cal.App.5th 1184 [216 Cal.Rptr.3d 61]:

Passing of attorney-client privilege to successor trustee. Beneficiary successfully petitioned to remove trustees. Trial court ordered that predecessor trustees could withhold from successor trustee some, but not all, documents identified on a privilege log submitted by the predecessor trustees. On appeal, the court held that in order to withhold allegedly privileged documents the predecessor trustees must show that they communicated with counsel in their personal capacity rather than a fiduciary capacity in order for the privilege not to pass to the successor trustee.

Where a trustee is asserting the privilege the "client" is the office of trustee rather than any particular trustee. Communications with counsel that occur when a trustee is seeking legal advice in his or her personal capacity may be subject to an assertion of privilege as to a successor trustee if there are affirmative steps taken by the predecessor trustee to distinguish between personal advice and advice obtained in a fiduciary capacity, such as where the predecessor trustee hires his or her own separate lawyer and pays for such advice out of his or her own personal funds. The focus should be on whether "the character of the relationship" between the predecessor trustee and counsel was personal or fiduciary, not on hindsight descriptions of the communications as "defensive" rather than "administrative." A trustee must scrupulously and painstakingly distinguish his or her own interests from those of the beneficiaries. Actual steps must have been taken by a predecessor trustee to have identified a communication as privileged at the time the communication was "sought" from the trustee's personal counsel, rather than downstream when the privilege is being "asserted" by the predecessor trustee.

6. ***Flake v. Neumiller & Beardslee*** (2017) 9 Cal.App.5th 223 [215 Cal.Rptr.3d 277]:

In this legal malpractice statute of limitations case, the Court of Appeal (Third District) applied the objectively reasonable expectation of the client test to determine when the attorney-client relationship ended. The former client in this case contended that the attorney-client relationship did not end for statute of limitations continuous representation tolling purposes (Cal. Civ. Proc. Code § 340.6(a)(2)) until an order on the attorney's motion to withdraw was granted. The attorney contended that the continuous representation tolling ended when the motion to withdraw from the representation was filed, not when an order on the motion was entered. Id. at 229-30. The trial court granted summary judgment in the attorney's favor, finding that the plaintiff could not have an objectively reasonable expectation that the attorney defendants would continue to perform legal services after the motion to withdraw was served on the client. The Court of Appeal affirmed. Id. at 228, 230. Key to the trial and appellate court's analysis was the fact that the motion to withdraw specifically stated that a new attorney had taken over the representation and would represent the client in the upcoming appeal.

The attorney in Flake had jointly represented a group of plaintiffs in a case arising from a real estate development dispute. One of the plaintiffs, Richard Carroll Sinclair ("Sinclair"), was himself an attorney. Id. at 226. The defendants represented the client group through trial, which they lost. Thereafter, on November 25, 2009, the attorney defendants filed a motion to be relieved as counsel, alleging in part "that Sinclair had agreed to handle the appeal and three postjudgment motions, and 'has been handling these motions.'" Id. at 226-27 (italics in original)). The motion was unopposed and granted on January 7, 2010. In a January 11, 2010 letter to the now former clients, the attorney defendants confirmed that they were no longer the attorneys of record and stated that a substitution of attorneys had previously been circulated by Sinclair and signed by all of the clients, but were never filed by Sinclair, thus necessitating the motion to withdraw. Id. at 227.

The Flake plaintiff sued for malpractice on January 6, 2011, which was within one year from the order granting the motion to withdraw, but more than one year from the date the motion was filed. The court found the claim was barred by the statute of limitations. Although the statute of limitations for malpractice claims is tolled during the period that a lawyer "continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred" (Cal. Civ. Proc. Code § 340.6(a)(2)), there is no "bright line" demarcating when the attorney-client relationship ends. Id. at 230. The formal act of withdrawing will not always demarcate the end of the relationship. Id. Rather, courts look to the objectively reasonable expectation of the client, and, in this case, because the motion "definitively informed Flake that Sinclair was already handling the pending postjudgment motions and would handle the appeal," any objectively reasonable client "would have understood on receipt of the motion to withdraw that [the withdrawing attorney] had stopped working on the case." Id. at 233. Summary judgment in favor of the attorneys was therefore affirmed.

7. ***Gotek Energy, Inc. v. SOCal IP Law Group, LLP*** (2016) 3 Cal.App.5th 1240 [208 Cal.Rptr.3d 428]:

Law firm missed patent filing deadline. It disclosed the mistake to client and the client informed lawyer it was asserting a claim. On 11/8/12 law firm responded by email that it was ending the rep[resentation. Client responded the day after that asking firm to transfer file. On 11/15, law firm confirmed "had terminated attorneys client relationship" and were transferring file. On 11/14/13, client sued. Lawyer asserted statute of limitations and court granted summary judgment. Court of appeal affirmed. Client argued that representation continued until the file was transferred but the court held that the representation ended either when client consented to the withdrawal (11/8) or the prior day when the firm informed client that it was withdrawing. The client could not have reasonably believe that there was an ongoing mutual relationship after the client had consented to withdrawal. Client argued on appeal that Rule 3-700 required the lawyer to continue representations the client until it had replaced its counsel. But that didn't work because on 11/8 the client had instructed that its files be transferred to new counsel.

8. ***Heller Ehrman LLP v. Davis Wright Tremaine LLP*** (2018) 411 P.3d 548 [229 Cal.Rptr.3d 371]:

In this most recent of the Jewel v. Boxer line of cases, the California Supreme Court resolved the question of whether a dissolved law firm retains a property interest in hourly legal matters that are pending, but not yet completed, at the time of a law firm's dissolution. The Court held it does not. Id. at 550. The case was decided at the request of the Ninth Circuit, in response to an appeal of a district court decision likewise holding that dissolved law firms do not have a property interest in hourly matters taken by departing partners to new firms. The case arose in the context of the dissolution and bankruptcy of Heller Ehrman, a global law firm that dissolved in 2008. The firm's dissolution plan included a "Jewel waiver," so named after the case of Jewel v. Boxer (1984) 156 Cal.App.3d 171, which had held that partners of dissolved law firms that took pending contingency cases with them to their new firms must share the attorney fees generated from those matters with their former partners "according to their right to fees in the former partnership, regardless of which former partner provides legal services in the case after the dissolution." Jewel, supra, 156 Cal.App.3d at 174.

The bankruptcy administrator in the Heller bankruptcy took the position that the Jewel waiver in the firm's dissolution plan constituted a fraudulent transfer under the Bankruptcy Code of the firm's "rights to postdissolution fees to its former shareholders, and from them, to their new firms." Heller Ehrman LLP, 411 P.2d at 551. The administrator brought adversary proceedings against the shareholders and their new firms for the fees incurred in hourly matters brought by the former Heller shareholders to those firms. The bankruptcy court found in favor of Heller. Id. at 551. The district court reversed, finding that Heller did not have a property interest in the hourly fee matters pending when Heller was dissolved and that no fraudulent transfer therefore occurred. Id. at 551. Heller appealed and the Ninth Circuit asked

the California Supreme Court to provide guidance, which it agreed to provide through this opinion.

The Supreme Court held that the dissolved firm's property interest does not extend to hourly fee matters pending at dissolution because the firm "has no more than an expectation that it may continue work on such matters, and that expectation may be dashed at any time by a client's choice to remove its business. As such, the firm's expectation – a mere possibility of unearned, prospective fees – cannot constitute a property interest." Id. at 550. The extent of the dissolved firm's claim is limited "to the work necessary for preserving legal matters so they can be transferred to a new counsel . . . , effectuating such a transfer, or collecting on work done pretransfer." Id.

9. ***In re Murray*** (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 479:

Intentional creation of false document warrants one year suspension. During plea negotiations in a child molestation case a prosecutor added two fabricated lines of testimony to defendant's transcribed statement that made it appear defendant had admitted having sexual intercourse with a 10-year old child. The prosecutor transmitted the false document to the public defender. When confronted, and despite several opportunities to correct the record, the prosecutor claimed it was all a "joke." The superior court found the conduct "egregious," "outrageous," "conscience-shocking" and in violation of defendant's right to counsel and a fair trial, and dismissed all charges. The court of appeal affirmed the dismissal. The matter was referred to the State bar.

A hearing judge found the prosecutor culpable of grossly negligent conduct (in a "joke-gone-bad") amounting to moral turpitude and recommended a 30-day actual suspension. On appeal, the Review Department found the prosecutor had "intentionally" created and inserted a fraudulent document into a criminal prosecution while actively negotiating a resolution by plea agreement. The altered evidence bore no indicia of being a "prank" and the prosecutor made no prompt effort thereafter to control the consequences. The Review Department recommended a one-year actual suspension to protect the public and to maintain integrity and confidence in the legal profession. The prosecutor did not disclose the fabrication for over a week (claiming he forgot about it), and then did so only after the public defender indicated he felt there might be some abnormality with regard to the new statements. The public defender's questioning of his client regarding the alleged statements had a prejudicial effect on the public defender's relationship with his client. The alleged joke was not followed up on before the public defender had an opportunity to act on the case with the fabricated admissions in mind. Such conduct was more than irresponsible or inattentive (as gross negligence would denote). The superior court and Court of Appeal rejected the "joke" defense, finding the acts intentional. The hearing judge acknowledged the prior decisions, but did not give them proper weight.

10. ***Leighton v. Foster*** (2017) 8 Cal.App.5th 467 [213 Cal.Rptr.3d 899]:

Lack of physical signature by client on electronically transmitted fee agreement rendered agreement voidable. Attorney Leighton sued Rochelle Forster for breach of an attorney fee contract and an account stated, seeking damages that exceeded $114,000. The trial court found that an engagement agreement the attorney emailed to Ms. Forster's husband was not a valid contract under Cal. Bus. & Profess. C. § 6148(a) because it was never signed. The Court of Appeal affirmed.

Attorney Leighton had a letter agreement as a contract attorney for another attorney (Robert James) who was a friend of Ms. Forster and her husband, pursuant to which Leighton provided services to Mr. James related to the Forsters' case, invoicing Mr. James. Mr. James became ill. Leighton exchanged emails with Mr. Foster and offered to assist him and his wife pending Mr. James' intent to ask a trial attorney to take over the case. Mr. James passed away on March 13, 2007. On March 15, Mr. Forster paid Leighton the amount of balance forward recorded on her March 2007 invoice to Mr. James. Thereafter Leighton started sending her invoices directly to Mr. Forster. Mr. Forster indicated that the Forsters would like Leighton to continue representing them in their matter in the same capacity as she had been doing. They engaged in subsequent email communications about arrangements on how to deal with past unpaid fees and future fees, after which Leighton said she would "draw up an engagement letter."

On May 2, 2007 Leighton sent an email to Mr. Forster with an attached letter stating her understanding of their agreement regarding her work for the Forsters (the "May 2007 Engagement Letter"). In the email she stated that if the letter was "fine as is" Mr. Forster did not need to sign and return it but could just let her know by email that he agreed with it. Mr. Forster sent a subsequent email stating that he would "review" the agreement, followed by several emails in which Leighton and Mr. Forster agreed on a per month payment schedule. Mr. Forster subsequently became ill and passed away. Leighton eventually brought the breach of contract and account stated action against Ms. Forster for outstanding fees.

The Court of Appeal concluded that there was no written fee contract under Cal. Bus. & Prof. C. § 6148 because the May 2007 Engagement Letter was never signed by the clients. The court rejected the argument that the lack of signature was a "technicality," stating it was "a material failure to comply" with a crucial statutory requirement that prophylactically seeks to ensure fair fee agreements and a client's informed understanding of the terms of representation and compensation. The court also rejected the argument that the May 2007 Engagement Letter had been "electronically accepted" by Ms. Forster in substantial compliance with § 6148(a), noting that the undisputed evidence showed she had never accepted "either electronically or in any other way" the agreement. The court also held that Mr. Forster's May 2, 2007 email stating he would "review" the 2007 Engagement Letter was not factually or legally an electronic acceptance. The court left undecided "whether an email or some other concrete evidence short of a full executed contract" could satisfy the requirements of § 6148(a). The court also rejected the argument that Ms. Forster's execution of Notices of Limited Scope Representation sent from Leighton, more than a year after the May 2007 Engagement Letter, satisfied §

6148(a)'s express requirement that "[a]t the time the contract is entered into, the attorney shall provide a duplicate copy of the contract signed by both the attorney and the client …."

11. ***Los Angeles County Board of Supervisors v. Superior Court*** (2016) 2 Cal.5th 282 [212 Cal.Rptr.3d 107]:

At issue in this case was whether attorney invoices for client work in pending litigation are attorney-client privileged or whether they were required to be disclosed in response to a Public Records Act ("PRA") request. The court held that the privilege "does not categorically shield everything in a billing invoice from PRA disclosure." Id. at 288. Finding that to fall within the Evidence Code's definition of the attorney-client privilege, "confidential" communication between lawyer and client must be for the purposes of the representation, invoices may not be covered because "[i]nvoices for legal services are generally not communicated for the purpose of legal consultation." Id. at 295. Every single communication between lawyer and client will not be privileged even if transmitted confidentially but rather "the heartland of the privilege protects those communications that bear some relationship to the attorney's provision of legal consultation." Id. at 294. Thus, the Court appeared to focus on the content of the commination in order to determine whether it is privileged. See id. at 297 ("what the inquiry turns on instead is the link between the content of the communication and the types of communication that the attorney-client privilege was designed to keep confidential"). That said, the Court ultimately holds that while each invoice itself may not be categorically privilege, the information contained in the invoice likely "lies in the heartland of the privilege" and is protected from disclosure. This includes descriptions of the work performed as well as more general information, such as aggregate figures showing the amounts of time spent. Id. at 297. Finally, the Court held that while a legal matter is pending, "the privilege encompasses everything in an invoice, including the amount of aggregate fees." Id. at 297. The Court, however, then suggests that after a matter concludes, it may be that the information contained in the invoice is eventually no longer privileged (id. at 298) – a novel concept in the law related to privilege.

12. ***Los Angeles County Board of Supervisors v. Superior Court*** (2017) 12 Cal.App.5th 1264 [219 Cal.Rptr.3d 674]:

On remand following the Supreme Court's somewhat controversial decision in County of Los Angeles Board of Supervisors v. Superior Court (2016) 2 Cal.5th 282, the court of appeal seemed to interpret out of the Supreme Court's decision some of its most controversial aspects. On remand in County of Los Angeles Board of Supervisors v. Superior Court 12 Cal.App.5th 1264 (2017), the ACLU demanded that the court inspect the redacted portions of invoices in concluded matters to determine whether the time entries revealed insight into legal strategy or the substance of legal consultation and were therefore privileged. The Court of Appeal declined. Although the Supreme Court's decision appeared to require courts to conduct a content-based analysis of attorney invoices to determine whether they were privileged, the trial court interpreted that portion of the decision as applying only to invoices for concluded matters, holding invoices related to pending or ongoing litigation are privileged such that a

content-based analysis was not required. The appellate court further found the Supreme Court's "conclusion that information in billing invoices is sometimes subject to PRA disclosure" was limited to disclosure of "fee totals." Id. at 1275. The other information contained in the billing entries or other aspects of attorney invoices remains privileged, and the trial court is not permitted to examine them to determine whether they reveal legal consultation or insight into strategy. However, whether fee totals in concluded matters reveal such privileged information is a question for the trial court, which, the court of appeal held, could be determined even without examination of the particular invoices in dispute.

13. ***Lynn v. George*** (2017) 15 Cal.App.5th 630 [223 Cal.Rptr.3d 407]:

Attorney cannot be disqualified based on a "potential attorney-client relationship" and providing information to an attorney for an entity in ones capacity as an employee or constituent of the entity does not create a confidential relationship between the lawyer and the individual who provides the information. Plaintiff was a real estate broker. She sued a real estate investment company and moved to disqualify longtime counsel for the company/Defendant on the grounds that he had represented her personally as a partner or had a confidential non-client relationship with plaintiff asa result of communications plaintiff had with the defendant's lawyer in connection with a property sale. The trial court found no attorney-client relationship but granted the motion to disqualify on the grounds that either there was a non-client confidential relationship or a potential attorney-client relationship. The court of appeal reversed. After examining the evidence of communications between the plaintiff and the lawyer, the court held that the plaintiff's communications were all in her capacity as a broker for defendant and therefore no confidential relationship could have been formed. Although the court did not spell it out, this is presumably because none of the information provided to or by plaintiff was confidential from the entity for which she worked as a broker.

14. ***McDermott Will & Emery v. Sup. Crt.*** (2017) 10 Cal.App.5th 1083 [217 Cal.Rptr.3d 47]:

Attorney who received privileged document that was forwarded by client to third party violated State Fund and was subject to disqualification. Case facts are complicated: Lawyer A sent email to client. Client forwarded email to a third party (A). A then forwarded to B, her husband, who was involved in mediating dispute between client and others. Email was further forwarded and ultimately ended up in the file of client's adversary/defendant. Adversary provided to its lawyer who used at deposition. Lawyer B for client objected that document was privileged. Defendants lawyer disagreed, stated that privilege was waived and that disclosure was not inadvertent. Client sought judicial determination that email was privileged and for disqualification of counsel. Court granted both. Court of appeal affirmed. Interesting holdings: State Farm set up 2 standards: (1) where attorney received material that is obviously privileged and it is reasonably apparent that the material was inadvertently disclosed, the attorney must refrain from examining more than necessary, notify the privilege holder, attempt to reach agreement or look to court for guidance and (2) where where attorney received material that are not obviously privileged but may be privilege materials that were inadvertently disclosed,

the attorneys duty is to notify the privilege holder at which point the burden shifts to the privilege holder. Oddly, after making this point, the court did not say which circumstance applied in the case. Although the court stated that two steps are required to trigger the State Fund rule (obviously privileged and reasonably apparent inadvertence), it also seems to suggest that the State Fund obligations kick in if the document is obviously privileged because the lawyer is not permitted to decide on its own whether the privilege was waived. Id at 1112. The fundamental important take-away is the following line from the close: "In close cases, prudence requires following the *State Fund* procedures." Id.

15. ***National Grange v. California Guild*** 2017 U.S. Dist. LEXIS 72991 (E.D. Cal. 2017); 2017 WL 2021731:

Presumption of imputation of conflict to other lawyers in a firm was rebutted through screening and other evidence. Since October 11, 2016 the Ellis Law Group had represented defendant in federal litigation over its alleged failure to comply with a court order requiring it to cease using plaintiff's trademark. On March 6, 2017 defendant filed a notice that one of its attorneys at Ellis (Amanda Griffith) would be withdrawing from the case and another Ellis attorney (Anthony Valenti) would remain one of its attorneys of record. Before being hired by the Ellis Law Group, Valenti had been employed by Porter Scott, plaintiff's counsel, from March 10 to October 6, 2014. During that time period Porter had represented plaintiff in a related action plaintiff had brought against defendant in superior court. While at Porter, Valenti had billed 26 hours working on the state action, which included assisting with discovery, drafting memorandum, performing case law research, and communicating by phone and email with plaintiff's former president regarding case-related matters.

Four days after defendant's March 6, 2017 notice, plaintiff brought a motion for disqualification. Defendant withdrew Valenti from the case the day the motion was filed. Ellis claimed that the rest of the firm should not be disqualified since Ellis had screened Valenti from working on the case since the day he was hired, and the listing of Valenti as an active attorney on the March 6, 2017 notice was a clerical error. In ruling on the motion, the district court noted that it remains "unsettled" under California law when vicarious disqualification of a firm is required, and when it is subject to a flexible case-by-case analysis, adopting the summary of vicarious disqualification law articulated in Kirk v. First Am. Title Ins. Co. (2010) 183 Cal.App.4th 776. The court held that because the case involved a conflict from a "related representation," and not a "side-switching" case, Kirk required the court to conduct a "case-by-case analysis." That involves a two-step burden shifting process whereby the party seeking disqualification must first establish that the attorney in question is tainted with confidential information adverse to the other party. After which, a rebuttable presumption arises that the tainted attorney shared such information with his or her firm. The non-moving party must then rebut the presumption of shared confidences by establishing that the attorney's firm imposed ethical screening that would effectively prevent the sharing of confidences in the particular case.

Here, the two actions were found to be substantially related, establishing Valenti's taint. But the court also found that the presumption of shared confidences with the rest of the Ellis firm

had been rebutted. Valenti had been screened from participating in the action since the beginning of his employment at Ellis. All employees assigned to the action had been instructed not to talk to Valenti about the respective matters, and he had been so instructed. Valenti had also been segregated from the files in the matter, which were stored in a war room to which he had no access. The court further found that although Valenti had been accidentally listed as an active attorney on the matter in question in the March 6, 2017 notice, and had also been copied on some scheduling emails by another attorney at Ellis involved in a separate action related to the plaintiff, such evidence did not establish that Valenti actively participated in the action at issue. Inclusion of Valenti on the March 6 notice was a clerical error. And his inclusion on the emails was the product of the name recognition function on Ellis' computer which had recognized part of another attorney's name, which had been typed in, to be Valenti's name, and therefore added Valenti to the emails without the emailing party's knowledge.

16. ***Parrish v. Latham & Watkins*** (2017) 3 Cal.5th 767 [221 Cal.Rptr.3d 432]:

Trial court's denial of defendant's summary judgment motion was an interim adverse judgment that precluded as a matter of law the finding that the plaintiff's case was maliciously prosecuted without merit. The fact that after a bench trial, the court held that the plaintiffs had brought the case in bad faith did not change the result. Bad faith did not require that any reasonable attorney would agree that the case lacked merit, the standard for malicious prosecution. Malicious prosecution plaintiffs (defendants in underlying case) argued that IAJ shouldn't apply because trial court denied summary judgment based on false expert declarations submitted by defendant to defeat summary judgment. The court of appeal rejected the argument, holding that the declarations were not proven to have been false, just uncompelling.

17. ***People v. Dekraai*** (2016) 5 Cal.App.5th 1110 [210 Cal.Rptr.3d 523]:

Disqualification of District Attorney's Office ("DAO") based on loyalty conflict to Sheriff's Department ("SD"). A trial court was well within its discretion, after conducting lengthy evidentiary hearings involving improper conduct of the prosecution team, to recuse the entire DAO from prosecuting criminal defendant Dekraii's penalty phase after Dekraii pled guilty to eight counts of murder.

Penal Code § 1424 grants a trial court authority to recuse a district attorney if he or she has a conflict of interest so severe it is unlikely the defendant will receive a fair trial. Testimony was provided concerning a "custodial" confidential informant program where deputy sheriffs placed confidential informants near represented defendants, including Dekraii, to obtain statements. Prosecutors were aware of the program and either expressly or implicitly promised confidential informants they would receive a benefit. Prosecutors also obtained permission from the SD to place a recording device in Dekraii's cell to obtain additional statements. Documents from the SD had not been produced related to the reasons for classification decisions and housing movements regarding inmates. The SD had secretly maintained for more than a decade a database that collected such information. Although there was no direct evidence the DAO knew of the database information, or actively participated in its concealment, the belated

disclosure of such records demonstrated that the DAO's "benign neglect" had resulted in a violation of Dekraii's constitutional and statutory rights.

The trial court's conclusion that the DAO's institutional relationship with the SD prevented it from supervising its law enforcement team was a conflict of interest well established in law. And the finding that the conflict was so grave it was unlikely Dekraii would receive a fair penalty phase was within the permissible range of options provided by section 1424. The DAO's loyalty to protect its primary law enforcement partner (the SD) and its work, interfered with the DAO's ability to discharge its constitutional and statutory obligations, i.e. it's duty to the rule of law and its duty to fairly prosecute the case against Dekraii. Not only did the DAO intentionally or negligently ignore the SD's violations of targeted defendants' constitutional rights, it also – on its own – violated targeted defendants' constitutional rights through its participation in the confidential informant program being carried out by the SD.

18. ***Sargon Enterprises, Inc. v. Browne George Ross LLP*** (2017) 15 Cal.App.5th 749 [223 Cal.Rptr.3d 588]:

The attorney-client fee agreement in this legal malpractice action had a binding arbitration clause encompassing malpractice actions which the defendant law firm, Browne George Ross LLP ("BGR"), claimed was breached when the client filed its malpractice lawsuit in court. BGR accordingly filed a petition to compel arbitration of the malpractice action and commenced separate arbitration proceedings against the former client, alleging a claim for damages for breach of contract and for declaratory relief as to the lack of merit of the trial court action for malpractice. The former client plaintiff opposed the petition to compel arbitration on the grounds that the arbitration agreement was entered into with the predecessor of BGR, not BGR itself. The trial court found that a binding arbitration clause in the retainer agreement existed and compelled the case to arbitration. At arbitration, the arbitrator entered an award in favor of BGR, finding the legal malpractice claims barred by a prior release and awarding $200,000 as damages on the law firm's breach of contract claim. The arbitrator found the client breached the fee agreement by filing the malpractice claim in court, in violation of the arbitration clause. The trial court confirmed the award.

The Court of Appeal reversed the trial court in part, confirming the award as to the merit of the malpractice claims, but reversing and "correcting" the award to deny the breach of contract claim. First, as to the malpractice claim, the Court upheld the validity of a release of any claims against BGR in a retainer agreement between it and the client entered into as the underlying litigation was coming to a close and fee disputes had arisen between the client and other lawyers. BGR said it would represent the client in the ensuing fee disputes only if the client released any claims against BGR that could have accrued prior to the effective date of the retainer agreement. Id. at 757. Second, as to the breach of contract claim, the Court of Appeal held the arbitrator's award violated the client's statutory right under the California Arbitration Act (CCP § 1280, et seq.) to "seek a preliminary determination of arbitrability from a court." Id. at 755 (emphasis in original). In so doing, the Court rejected BGR's argument that the parties had agreed to include in the arbitration clause issues of arbitrability. "Although parties to an

arbitration agreement may agree to delegate questions of arbitrability to the arbitrator, it is the court, not the arbitrator, that must decide the 'threshold issue' of 'the validity . . . of the precise agreement to arbitrate at issue . . . before ordering compliance with that agreement . . . ' [Citation.])" Id. at 763 n. 4 (quoting Tiri v. Lucky Chances, Inc. (2014) 226 Cal.App.4th 231, 241 n. 4) (emphasis in original)). This is because the California Arbitration Act specifically permits litigants to contest the validity or enforceability of an arbitration clause and to commence their claims in court, permitting the court to decide such issues. Sargon Enterprises, Inc., supra, 2 Cal.App.5th at 768-69. Because the arbitrator's decision was based on the finding that BGR's client violated the arbitration clause by commencing the action in court, it was subject to correction because "where an arbitrator's decision has the effect of violating a party's statutory rights or well-defined public policies – particularly those rights and policies governing the conduct of arbitration itself – that decision is subject to being vacated or corrected." Id. at 765 (emphasis in original).

19. ***Southern California Gas Company v. Flannery*** (2016) 5 Cal.App.5th 476 [209 Cal.Rptr.3d 842]:

Attorney enforcing attorney's lien usually must file separate action against client, but where defendant filed an interpleader action, the attorney's answer in the interpleader action was sufficient to place the existence, value and enforceability of the lien at issue.

20. ***Suarez v. Trigg Laboratories, Inc.*** (2016) 3 Cal.App.5th 118 [207 Cal.Rptr.3d 411]:

The appellate court in this case affirmed the trial court's order granting an anti-SLAPP motion, finding that a claim for rescission of a settlement agreement based on concealment of relevant facts material to the plaintiff's settlement decision an action based on is protected litigation activity. The underlying case arose out of a contract dispute between the plaintiff, Rafael Suarez ("Suarez"), a business consultant retained to assist the defendant and its principal owner to increase profits and growth, raise capital, and eventually sell the company, and the defendant company and its principal. Pursuant to an oral agreement, Suarez was to be paid a percentage of the amount of the sales price of the company. Id. at 120-21. A week after Suarez attempted to reduce this agreement to writing, his services were terminated. Suarez sued the company for quantum meruit ("Suarez I"), seeking recovery of the reasonable value of the services he provided to the company. Id. at 121.

After Suarez was terminated, the company hired other business consultants to assist it in a sale. In an exchange of emails, those consultants reported to the defendant company that a prospective investor would be sending a letter of intent to purchase the company. In response, the company's principal instructed the consultants not to send the letter to him directly, but rather to send it to his attorneys "'to keep the contents within attorney client privilege for the [Suarez I] case.'" Id. at 121. The company was not ultimately sold to that or any other buyer.

This exchange of emails about the potential sale occurred before mediation of the Suarez I case, but the potential sale of the company was not disclosed to Suarez. Suarez settled Suarez I for $175,000. Suarez was unaware of the potential sale of the company at the time he settled.

Id. at 121. Sometime later, Suarez learned of the email exchange and that there was a potential sale in the wings when he settled Suarez I. He filed a second suit against the company to rescind the settlement agreement based on alleged fraudulent concealment of the prospects for sale of the company. Id. at 122. In that second suit, the defendant company filed an anti-SLAPP motion. The trial court granted that motion, finding that the concealment was protected litigation activity and that Suarez had failed to show a likelihood of success on the merits. Id. The appellate court affirmed.

The appellate court found that Suarez's "alleged wrongdoing was concealing or failing to disclose the existence of a letter of intent to purchase [the company] in order to prevent [Suarez] from obtaining a more favorable settlement in Suarez I. The alleged wrongdoing was directed squarely at the underlying litigation" and was therefore protected litigation activity. Id. at 124. The appellate court did not reach the second prong of the anti-SLAPP analysis – likelihood of success on the merits – because that finding was not addressed by the appellant in his briefing. Id. at 126.

21. ***Tucker & Ellis v. Sup. Crt. (Nelson)*** (2017) 12 Cal.App.5th 1233 [220 Cal.Rptr.3d 382]:

Right to assert work product belongs to the firm for which the attorney worked at the time the work product was created and therefore law firm was not required to seek departed lawyer's consent to disclose departed attorney's work product.

22. ***United States v. Sierra Pac. Indus., Inc.*** (9th. Cir. 2017) 862 F.3d 1157:

Alleged misrepresentations in civil government litigation did not constitute "fraud on the court" under FRCP 60(d)(3), and judicial tweets did not require recusal. The United States brought a civil action against Sierra Pacific and other defendants to recover damages from a forest fire. The California Attorney General's Office brought a parallel state court action on behalf of Cal Fire. During pretrial discovery in the federal action the government produced a number of documents that led defendants to believe that the government had engaged in fraud during and after its investigation of the fire. The alleged fraud centered on information related to the investigation and, in particular, defendants' contention that discovery showed that early work by the investigators placed the "point of origin" of the fire in a different spot than identified in the Origin and Cause Investigation Report issued by the U.S. Forest Service and Cal Fire. The government moved in limine to exclude much of the evidence supporting defendants' theories of fraud. The motion was granted in part, but permitted defendants to introduce evidence that there was an attempt to conceal information from the public or the defense. Three days before trial the parties settled. Their settlement agreement included a provision that released "unknown claims." The parallel state court action continued. During those proceedings additional instances of alleged fraud and misrepresentation came to light. The state court case was ultimately dismissed with prejudice through terminating sanctions in which the trial court concluded Cal Fire's attorneys had engaged in "pervasive misconduct" and a "systematic campaign of misdirection with the purpose of recovering money from the Defendants."

Defendants in the settled federal action moved for relief from judgment under FRCP 60(d)(3) asserting that the government's alleged misrepresentations throughout the investigation and litigation constituted "fraud on the court." Defendants alleged not only the misrepresentations raised prior to settlement, but also alleged newly-discovered fraud. The district court denied the motion holding that purported fraud defendants knew about before settlement could not constitute a fraud on the court because the doctrine only allows relief from judgment for "after-discovered fraud." As to the alleged newly-discovered fraud, the court held that the specific terms of the settlement barred relief and, alternatively, that the new allegations were unsupported by the record. The same day the court denied the motion for relief from judgment, the U.S. Attorney's Office posted eight tweets about the outcome of the case on its Twitter account. A Twitter account allegedly owned by the district court judge presiding over the motion (but not bearing his name), which followed the U.S. Attorney's account, posted a tweet with a link to a news article about the fire. The tweet contained the tile of the news article "Sierra Pacific still liable for Moonlight Fire damages," as well as a link to the article itself. Defendants appealed the denial of the motion, arguing that the district court errored in denying the motion, and the judge should be retroactively recused based on the activity of his alleged Twitter account.

On appeal, the court affirmed the trial court ruling. Defendants' appeal was more than a year after the settlement, therefore they could not seek relief under FRCP 60(b)(3) based on "fraud …, misrepresentation, or misconduct" (which has a one year period of limitations) and instead had to seek relief under FRCP 60(d)(3) for "fraud on the court" which does not have such period of limitation. The appellate court emphasized that in determining whether fraud constitutes "fraud on the court" the relevant inquiry is not whether fraudulent conduct prejudiced the opposing party, but whether it harmed the integrity of the judicial process. The misrepresentations must also go to "the central issue in the case" and must "affect the outcome of the case." Relief from such fraud on the court is only available where the fraud was not known at the time of settlement or entry of judgment. A finding of fraud on the court is therefore reserved for material intentional misrepresentations that could not have been discovered earlier, even through due diligence. Thus, the alleged fraud discovered before settlement could not constitute fraud on the court. As to alleged fraud discovered after settlement, the appellate court agreed that the express terms of the settlement appeared to preclude any relief – even for newly discovered facts or evidence. Defendants bound themselves not to seek future relief, even for fraud on the court. The court also agreed that even if the settlement did not preclude relief, the district court properly concluded the allegations failed to rise to the level of fraud on the court.

As to the Twitter related allegations, the appellate court explained that many individuals, including high-up government officials use Twitter as an official means of communication, with the message intended for wide audiences and the fact that an account holder "follows" another Twitter user does not evidence a "personal relationship" and certainly not one that, without more, would require recusal. Nor does such fact constitute an improper ex parte communication outside the presence of the parties and their lawyers. The tweets from the U.S. Attorney were not to the judge, they were news items released to the general public.

Accordingly, the district court judge was not required to recuse himself because he "followed" the U.S. Attorney's office on Twitter. Nor did the tweets allegedly posted by the judge require recusal. The tweet only contained the title and link to a publicly available news article about the case from a local newspaper, without any commentary. The tweets expressed no opinion on the case or the linked news articles. The single challenged tweet did not amount to public comment on the merits of a pending matter. The tweets came from an account that did not publicly identify a member of the judiciary and therefore did not create an appearance of bias.

23. ***URS Corp v. Atkinson/Walsh Joint-Venture*** (2017) 15 Cal.App.5th 872 [223 Cal.Rptr.3d 674]:

Appeal of order granting disqualification automatically stays enforcement of the order but not all trial court proceedings. Court declined to rule on discretionary stay but encouraged parties to stipulate to a stay of trial court proceedings. By contrast, order denying disqualification motion is not automatically stayed.

24. ***Wadler v. Bio-Rad Laboratories, Inc., et al.*** (N.D. Cal. 2016) 212 F.Supp.3d 829:

Motion to preclude in-house counsel's use of privileged information in wrongful termination claim based on retaliation for whistleblower activity, in violation of Sarbanes-Oxley, was in effect a "dispositive" motion. An employee in such situations may, under federal common law, rely on privileged communications and confidential information reasonably necessary to any claim or defense. California's ethical rules regarding disclosure of privileged and confidential information were preempted by Sarbanes-Oxley Act regulations.

A former employee filed suit against his employer and its board of directors, claiming wrongful termination from his position as general counsel, in retaliation for his whistleblowing activities, in violation of the Sarbanes-Oxley Act, Dodd-Frank Act, and state law. On the eve of trial, defendants moved to exclude protected information from trial, including virtually all evidence and testimony the employee might rely on to prove his case. The court found that defendants' motion was an untimely "dispositive" motion that had not been brought by the deadline established for hearing dispositive motions. Defense counsel had indicated in advance of the deadline that they did not intend to file a dispositive motion. Ten days before the deadline, new counsel entered the case on behalf of defendant Bio-Rad. On the deadline for hearing dispositive motions new counsel filed a CMC Statement that identified only any intent to bring a motion to strike opposing expert(s). Roughly ten days later (after the deadline) new counsel attended a CMC and informed the court that Bio-Rad intended to bring a motion challenging plaintiff's ability to prosecute his claims in light of the attorney-client privilege that Bio-Rad contended applied to most, if not all, of the evidence plaintiff might rely on. The court advised defense counsel that Bio-Rad had failed to file a summary judgment motion and could not file a motion based on the theory that the case could no longer go forward because the case was predicated on privileged communications. The court also rejected the contention that the requested motion was a "garden variety" in limine motion, but allowed Bio-Rad to bring a motion to exclude that would have to "delineate with precision" the specific evidence (line by line) sought to be excluded. Bio-Rad instead, brought a motion that argued that if plaintiff

could not offer a detailed trial plan previewing all of the evidence he sought to introduce, and showing that the evidence is not protected, he should "accept that his case cannot fairly proceed." The court found that "there can be no dispute" that a motion with such argument seeks relief that is "dispositive," that good cause had not been established for relief from the dispositive motion hearing deadline, and that counsel had failed to comply with the court's instruction regarding the type of motion that could be filed.

The court further held that under FRE 501 federal common law governed claims of attorney-client privilege. The court considered the decision in General Dynamics Corp. v. Superior Court (1994) 7 Cal.4th 1164, but held that existing Ninth Circuit law suggested that the limitations on in-house counsel attempting to bring retaliatory discharge claims, discussed in that decision, do not apply under federal common law. The rules and limitations adopted by the California Supreme Court in General Dynamics as to the contours of the state law tort of retaliatory discharge in cases involving in-house counsel do not apply to a federal claim asserted under Sarbanes-Oxley. Rather, the little existing federal law on the issue supports the conclusion that plaintiff's retaliation claim could go forward, with appropriate protections, despite confidentiality concerns and that he could rely on privileged and confidential communications that he reasonably believed were necessary to prove his claims and defenses. The court also found that the standard set forth in ABA Model Rule 1.6, which provides that a lawyer may reveal information relating to the representation of a client to the extent reasonably necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, was the applicable standard under federal common law and therefore under FRE 501. The court further found that disclosures by Bio-Rad to the SEC and DOJ and during the course of the litigation, constituted waivers of privilege.

Finally, the court held that Bio-Rad's arguments that California ethical rules prohibited disclosure of client confidences were "preempted" by Sarbanes-Oxley regulations. The commentary to C.F.R. § 205.3(d)(1) makes clear that an attorney may use any records the attorney may have made in the course of fulfilling his or her reporting obligations under the section to defend him or herself against claims of misconduct, and that such authorization is equivalent to the "self-defense" exception to client confidentiality under Model Rule 1.6(b)(3). The court found that there was nothing in this rule that precludes offensive as well as defensive use of such records. Moreover, use of such records in a whistleblower action was not offensive in the traditional sense given that it is the attorney who is "defending" against the retaliation. In such situations fairness requires that a lawyer be able to present his or her defense or claim without handicap. The ability to do so is further supported in the remedial purposes of securities laws enacted to combat fraud. Also, the SEC had specifically addressed the possibility some state states might have stricter ethical rules regarding attorney disclosures that could prohibit an attorney from using a Part 205 Report in connection with a Sarbanes-Oxley retaliation claim. Section 205.1 provides that "[w]here the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern." The rule adopted by the SEC reflects an unambiguous intent to preempt state ethical rules that prevent attorneys from disclosing privileged information necessary to comply with Sarbanes-Oxley.

25. ***Yale v. Bowne*** (2017) 9 Cal.App.5th 649 [215 Cal.Rptr.3d 266]:

Giving of a contributory negligence jury instruction in a malpractice case is proper. Plaintiff went to estate planning attorney to update her trust. Despite her instruction that she wanted her separate property to remain her separate property, attorney created a trust that placed all property in community. She was forced to settle her divorce and then sued the estate planning attorney for negligence to recover the costs of her settlement with her ex-husband. The lawyer-defendant introduced evidence that plaintiff had read the words community property in the two deeds but did not ask any questions. She also later changed the vesting instructions on her investment account to her and her husband's name. The jury found the lawyer 90% liable and plaintiff 10% liable. On appeal, plaintiff argued that comparative fault was inapplicable in malpractice due to the disparity in knowledge between the lawyer and client. The court held that while in some cases that may be correct in some cases, it was not true in all cases (that is, as a matter of law).

Ethics Update – What You Need to Know

Ethics Opinions

1. California State Bar Formal Ethics Opinion 2016-195 (Publicly Available Confidential Information):

A lawyer is obligated under Cal. Bus. & Prof. C. § 6068(e) to maintain inviolate the confidence, and at very peril to himself or herself to preserve the secrets, of his or her client. Client secrets include not only confidential information that is communicated between an attorney and client, but also publicly available information that a lawyer obtains during the professional relationship that the client requests be kept secret or the disclosure of which would be detrimental or embarrassing to the client. The duty of confidentiality survives the attorney-client relationship. Even after the relationship has concluded, a lawyer may not disclose potentially embarrassing or detrimental information about a former client if that information was acquired by virtue of the lawyer's prior representation.

2. California State Bar Formal Ethics Opinion 2016-196 (Attorney Blogging):

Blogging by an attorney may be a communication subject to the Rules of Professional Conduct and the State Bar Act relating to lawyer advertising if the blog expresses the attorney's availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly through its description of the type and character of legal services offered by the attorney, detailed descriptions of case results, or both. A blog that is an integrated part of an attorney's or law firm's professional website will be a communication subject to the rules and statutes regulating attorney advertising to the same extent as the website of which it is a part. A stand-alone blog by an attorney, even if discussing legal topics within or outside the authoring attorney's area of practice, is not a communication subject to the requirements and restrictions of the Rules of Professional Conduct and the State Bar Act relating to lawyer advertising unless the blog directly or implicitly expresses the attorney's availability for professional employment. A stand-alone blog by an attorney on a non-legal topic is not a communication subject to the rules and statutes regulating attorney advertising, and will not become subject thereto simply because the blog contains a link to the attorney or law firm's professional website. However, extensive and/or detailed professional identification information announcing the attorney's availability for professional employment will itself be a communication subject to the rules and statutes.

3. Los Angeles County Bar Association Formal Ethics Opinion 528 [Insurance Defense Counsel Conflict]:

When an attorney engaged by an insurance carrier to defend the interests of an insured obtains information that could provide a basis for the insurance carrier to deny coverage, the attorney is ethically prohibited from disclosing that information to the insurance carrier. In such a situation, the attorney must withdraw from the representation.

4. **Los Angeles County Bar Association Formal Ethics Opinion 529 [Catfishing]**:

Every lawyer must act competently to protect confidential client information against inadvertent or other unauthorized disclosure. While lawyers always should be cautious about disclosing any information related to a client, on-line communications present particular risks. One example of such a risk arises when someone attempts to elicit information from a lawyer via social media pretexting. A lawyer's unguarded disclosure of client information might result in violations of the duties of competence and confidentiality and might cause the loss of the lawyer-client privilege and work product protection.

5. **San Diego County Bar Association Legal Ethics Opinion 2017-1:**

This opinion addresses the ethical obligations that arise where a law firm represents a client in litigation arising out of transactional work other attorneys at the same firm provided to the client. In the hypothetical facts, a class action is brought against a company client and some of its officers and directors for violations of securities laws arising from failures to disclose certain insider transactions in an IPO. The company's IPO and all related required disclosures was handled by the law firm that is representing the company and its officers and directors in the class action. During the course of the case, the transactional lawyer discovers certain notes he took during a pre-IPO meeting with the clients that concern the alleged insider transactions that are alleged in the class action. The opinion addresses the ethical obligations of the firm in undertaking to jointly represent the company and its officers and directors in the first instance and the ethical obligations triggered when the firm discovers the pre-IPO notes concerning the undisclosed insider transactions at issue.

As to the first issue, the opinion provides that the firm may jointly represent the company (its existing client) and the officers and directors, the putative clients, provided the firm obtains the informed written consent of the company, officers and directors and that the person consenting on behalf of the company is an appropriate constituent other than the officers and directors to be jointly represented. (Rules 3-310(C) and 3-600). In addition, because the firm provided the legal advice concerning the IPO upon which the class action is based, the firm has a financial or professional interest in the outcome of the litigation, requiring written disclosures under Rule 3-310(B). The firm's interest in the outcome would be based on its desire to see the propriety of the IPO documentation it prepared vindicated or to establish that it (the firm) did not know or should not have known of the undisclosed transactions by the defendant officers and director.

As to the second issue – the firm's obligations upon finding the notes of the lawyer's pre-IPO meeting with the client – the opinion provides that (1) the lawyers have a duty to communicate the discovery of the notes because it is a significant development in the representation (Rule 3-500 and Bus. & Prof. Code § 6068(m)) and (2) to the extent the notes show that the lawyer knew of, but did not advise the client to disclose in the IPO documentation, the transactions upon which the class action is based, the lawyer may have a duty to communicate "the facts that give rise to any legal malpractice claim against the lawyer." Opn. 2017-1 at 5. In this regard the lawyer should not advise the client whether there is a malpractice claim, as such

advice would concern the very matter upon which the conflict of interest exists, but must disclose the facts of malpractice because it is a significant development. Somewhat more controversially, the opinion further concludes that the client should be advised to consult independent counsel to get advice as to the potential impact the lawyer's error could have on the case the lawyer is handling and with respect to any malpractice claim. Id. at 8 (client should be advised to consult independent counsel "with respect to the potential impact of the error on the client's rights or claims and on any potential malpractice claim"). The opinion further appears to defer to independent counsel ("should the client consult that counsel") the decision of whether the firm can continue to represent the clients in the class action and suggests that, while not ethically required, "as a matter of risk mitigation and best practices," the firm may also itself wish to evaluate whether it should withdraw from the representation as a result of the impact its potential error has on the continued representation of the clients in the class action. Id. at 10 and n. 12. This seems somewhat at odds with the firm's independent duty of loyalty and the ethical duty to evaluate for itself whether it can continue to represent a client consistent with the firm's ethical duties when conflicts of interest arise.

6. San Diego County Bar Association Legal Ethics Opinion 2017-2:

This opinion addresses the issues of (1) whether an attorney representing a minor who believes that the appointed guardian ad litem ("GAL") is not acting in the child's best interests can take steps to have the GAL removed and (2) whether an attorney jointly representing two clients in the same matter can settle one client's claims against the wishes of the other client. In the hypothetical facts, a parent and child are injured in an automobile accident and hire attorney to jointly represent them. A GAL is appointed for the child and proper conflict waivers are signed by the parent and the GAL regarding the joint representation. As the case progresses, an offer to settle child's claim is made, which attorney believes is in the child's best interests to accept. The parent, however, has decided "to pursue a settlement position against advice of counsel" and GAL is following parent's lead. Attorney concludes that the GAL is not acting in the child's best interests but is instead being influenced by the GAL's personal friendship with parent.

Under these circumstances, the opinion concludes that the attorney could petition the court to remove the GAL because the attorney's duties are to the client, i.e., the child, not the GAL, although the attorney cannot reveal any confidential information in connection with making such a petition. The opinion further concludes that the attorney could not settle around the parent, unless the parent consents, but that attorney may need to withdraw unless the differing settlement positions of the child and the parent can be resolved.

TAB 2

Joint Defense Agreements: Intertwined Ethical and Strategic Considerations

Joint Defense Agreements:
Intertwined Ethical and Strategic Considerations

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Ujvala Singh is an associate at Carlson, Calladine & Peterson LLP in San Francisco (http://www.ccplaw.com/attorneys/ujvala-singh/), where her practice focuses on legal malpractice, professional ethics, corporate disputes and business litigation. Ms. Singh serves as a member of the State Bar of California's Standing Committee on Professional Responsibility and Conduct. Ms. Singh also serves as an arbitrator for the Bar Association of San Francisco's (BASF) attorney-client fee arbitration program. Ms. Singh works to promote creative, non-partisan solutions to law-related issues for the benefit of Californians through her active participation in the Conference of California Bar Associations (CCBA – www.calconference.org). Ms. Singh is the immediate past chair of the BASF Delegation to CCBA, and serves on the Resolutions Committee of CCBA (this committee prepares reports on proposed changes to California laws). Ms. Singh received her Ph.D. from the University of Wisconsin-Madison, and J.D. from Vermont Law School.

James J. Brosnahan **San Francisco, CA**

James Brosnahan, Senior Trial Counsel at Morrison & Foerster LLP, is one of the most respected and recognized trial lawyers in the United States. He has undertaken complex cases that are about to go to trial. With 50 years of expertise in both civil and criminal trial work, he has tried, to conclusion, 150 cases, including many renowned cases involving bet-the-company commercial litigation, anti-trust, wire fraud, and patent litigation, white collar crimes, and murder. Mr. Brosnahan has received numerous awards and recognition throughout his distinguished career. Mr. Brosnahan is a past president of the Bar Association of San Francisco, whose Volunteer Legal Service Program he founded. He also serves as Master Advocate on the faculty of the National Institute for Trial Advocacy. Mr. Brosnahan regularly teaches continuing legal education programs at law schools and to professional organizations on various topics. His expertise includes overall trial strategies in planning, discovery, and jury selection as well as evidence, first amendment, criminal, antitrust, constitutional law, appellate, legal argument, civil procedure, torts, and legal ethics. He is also a frequent keynote speaker at legal conferences and bar association programs around the country.

Karen M. Goodman **Sacramento, CA**

Karen Goodman represents business owners and professionals in and out of the courtroom in matters pertaining to professional liability, real estate and employment. She founded her Sacramento firm, Goodman & Associates in 2003. Certified as a Legal Specialist in Legal Malpractice Law by the California Board of Legal Specialization, Karen is also the attorney other attorneys and licensed professionals consult for advice on ethical questions. Her ability to quickly evaluate the merits of a case is a powerful asset in shaping outcomes for her clients. She says that "rectifying messy situations and righting wrongs" is what gets her up in the morning. Karen has received numerous accolades and recognitions over the years, including the Martindale-Hubbell rating of AV Preeminent®. She has received the Harry Sondheim Ethics Award from the State Bar of California and the Frances Newell Carr Award from the Women Lawyers of Sacramento. She is currently a member of the California Committee of Bar Examiners, Treasurer for the Sacramento Valley Chapter of American Board of Trial Advocates and the Litigation Committee Chairperson for the ABA GP Solo Division.

Mary G. McNamara ***San Francisco, CA***

Mary McNamara specializes in white-collar criminal defense and commercial litigation matters and she also is a twenty-year member of the Criminal Justice Act (CJA) Panel for the Northern District of California. She served as an Assistant Federal Public Defender in

San Francisco from 1994 to 1998 and is a founding partner of Swanson & McNamara LLP (established 1998). She acts as the Panel Attorney District Representative for the Northern District of California and is a member of the national Defender Services Advisory Group to the Defender Services Office of the U.S. Courts. She sits on the Northern District's CJA Committee and CJA Fee Review Committee. She is AV-rated by Martindale Hubbell and is profiled in Chambers USA America's Leading Lawyers, where her firm is rated in Band 1, Litigation: White Collar Crime & Government investigations. She is a Northern California Super Lawyer in white-collar criminal defense and was named Best Lawyers 2012 Lawyer of the Year in White Collar Criminal Defense in San Francisco.

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Ragesh Tangri is a founding partner at Durie Tangri LLP. He has represented clients ranging from law firms to individuals to Fortune 100 companies in cases ranging from legal malpractice and commercial litigation to high-stakes intellectual property and trade secret matters in jurisdictions across the country. Ragesh recently represented a major California law firm accused of malpractice; a multi-week arbitration brought a favorable result for his client. He has represented numerous major law firms in professional negligence claims, arising from work done in a variety of underlying areas including intellectual property litigation, patent prosecution, general corporate matters, and tax. Ragesh clerked for the Hon. A. Raymond Randolph on the United States Court of Appeals for the District of Columbia Circuit. He has taught the Law of Lawyering courses at Boalt Hall and speaks frequently on issues including professional negligence and ethics. Ragesh serves on the Boards of Governors of the Association of Business Trial Lawyers, the Bar Association of San Francisco's Justice and Diversity Center, the Northern District Historical Society (President), the California Law Review, The Shotgun Players, and the Executive Committee of the Edward J. McFetridge Inn of Court. He previously served as a member and co-chair of the Lawyer Representatives of the Northern District of California to the Ninth Circuit Judicial Conference and as a member and Chair of the BASF's Judiciary Committee.

Joint Defense Agreements:
Intertwined Ethical and Strategic Considerations

Joint defense agreements are useful tools. They allow parties with common interests to work collaboratively in civil and criminal litigation as well as transactional matters to strategize together to further their mutual goals. But these agreements raise numerous ethical and strategic issues that must be carefully navigated. During this roundtable conversation, with lively panel of experienced trial lawyers and ethics experts will discuss the ethical issues and strategic considerations that arise when working jointly with parties sharing a common interest, including those that arise if those parties' interests begin to diverge.

The following articles and ethics opinion provide an overview:

- *Understanding the nuances of the joint defense 'privilege'*, Amy Bomse, California Bar Journal (August 2015)
- *Conflict and Ethics Issues Arising from Joint Defense/Common Interest Relations*, Kathryn M. Fenton, The Antitrust Source, The American Bar Association (December 2009)
- *District of Columbia Ethics Opinion 349: Conflicts of Interest for Lawyers Associated with Screened Lawyers Who Participated in a Joint Defense Group* (September 2009)

And the following sampling of cases from the California state and federal courts and the 9th Circuit provide the framework for these issues and considerations.

- ***Hewlett-Packard Co. v. Bausch & Lomb, Inc.* (N.D. Cal. 1987) 115 F.R.D. 308**

  This federal patent infringement action involves a dispute over the discoverability of an infringement opinion letter prepared by Defendant Baush & Lomb's (B&L) counsel. B&L was negotiating the sale of one of its divisions to GEC, and in the course of those negotiations provided the opinion letter to GEC. The Court held that the letter was privileged, and need not be produced to a third party suing the company for patent infringement.

  GEC, not a party to this infringement action B&L understood that the document was confidential and privileged when it shared it with GEC. B&L intended to maintain the letter's confidentiality and privilege. B&L impressed upon GEC the need to maintain the confidentiality of the opinion letter, and GEC agreed and did so. Though HP had not yet filed this lawsuit, B&L anticipated the claims, and envisioned a situation in which B&L and GEC would both face the infringement claims based on the activities of each before and after the sale. However, GEC ultimately did not purchase the business, and HP sued B&L as anticipated for patent infringement. Because the anticipated joint litigation did not occur, the Court was unable to determine the extent to which B&L's and GEC's interests would have been exactly aligned had such litigation occurred. Therefore, the Court also considered the policies involved in ruling on waiver of privilege under these circumstances, and held that the privilege had not been waived. The Court considered the following five policy underpinnings: (1) the conduct of the parties to determine intent to maintain the confidentiality of the document; (2) whether privilege was waived by selective disclosure; (3) the importance of creating an environment in which businesses can share more freely information that is relevant to their transactions; (4) "the tendency of some lawyers,

especially in intellectual property cases, to spend an inordinate amount of time attempting to gain an advantage in the litigation by making use of the adversary *attorney's* words and opinions. In patent cases the primary focus should be on the real world, on the similarity of the products involved in the dispute and on the history of relevant inventions and commercial conduct. Preoccupation with efforts to paint opposing counsel into some semantic corner or to take advantage of his choice of terms leads to costly, unproductive, and unseemly disputes." *Id*. at 311-312; and (5) the unfair use of privilege as a sword and a shield.

- ***Raytheon Co. v. Superior Court (Renault & Handley Employees Investment Co.)*** **(1989) 208 Cal.App.3d 683 [256 Cal.Rptr. 425]**

  This was a state court case of first impression in California on the issue of the applicability of a common interest doctrine to documents shared before any lawsuit was filed. The Court considered "whether common cooperation among defendants, for a purpose other than a common defense of the lawsuit, is a purpose for which the defense lawyers were consulted, within the statute, so that there is no waiver by mutual disclosure of work." *Raytheon*, 208 Cal.App.3d at 687.

  Here, before this lawsuit was filed, the defendants were investigated by the United States Environmental Protection Agency for their part in toxic contamination of sites in Mountainview, CA. During that investigation, defendants, through their counsel, shared documents and information with each other. The discovery dispute in this litigation arose when plaintiffs (who are suing the defendants for tort and contract claims related to the same contamination) sought documents the defendants had shared with each other during the investigation. Defendants refused to produce them, claiming that they were protected by attorney-client privilege and the work product doctrine.

  The Court held that to determine whether the attorney client privilege had been waived, it was necessary to "determine the factual issue whether mutual disclosures were reasonably necessary to accomplish the purpose for which attorneys were consulted" per Cal. Evidence Code § 912. *Id*. at 688. Further, the Court explained that California does not recognize a joint defense privilege. Instead "the issue of waiver must be determined under the statute [i.e., Evid. Code § 912] with respect to the attorney-client privilege, and depends on the necessity for the disclosure." *Id*. at 689.

  Regarding the claim for work product protection, the Court held that the issue turned on whether the disclosure of work product could reasonably have been made with an expectation of confidentiality at the time of the disclosure. For example, the parties were litigation adversaries, could there have been reasonable expectation of confidentiality? Here, while the co-defendants had not made any cross-claims against each other, each had an interest in shifting some or all of the liability to the other defendants, and so their

interests may not have been aligned during the litigation. But were they similarly adverse to each other during the EPA investigation?

The Court remanded the matter to the trial court for further proceedings to develop a factual record to address these issues.

- ***United States v. Henke*** **(9th Cir. 2000) 222 F.3d 633**

In this federal criminal prosecution of three co-defendants for their roles in various securities violations, the Court ruled that a joint defense agreement among the co-defendants and counsel created an implied attorney-client relationship between the attorneys and their client's co-defendants. This attorney-client relationship created potential conflicts of interest which would hinderattorneys' ability toadequately represent their clients.

In this case, California Micro Devices, Inc.'s (Cal Micro) former Chief Financial Officer, Vice President / Treasurer and President were indicted on charges of conspiracy, making false statements, securities fraud, and insider trading. *United States v. Henke*, 222 F.3d at 636. The three co-defendants and their counsel entered into a joint defense agreement, and shared confidential information regarding the central issue at trial: "whether the defendants had early knowledge of the false revenue reporting scheme and whether they traded their stock because of this inside information." *Id*. at 636.

The President of Cal Micro struck a plea deal with the prosecution, and agreed to testify against his co-defendants. Concerned that the joint defense agreement prevented him from cross-examining the President on matters involving information learned as a result of the joint defense agreement, counsel for one of the remaining co-defendant moved the court for a mistrial and to withdraw. Counsel for the other co-defendant appears to have joined in this motion. The trial court denied the motion to withdraw, but granted the mistrial. "It reasoned that any privileged impeaching information counsel learned about Gupta would not be known to new counsel and the defendants were therefore no worse off for being represented by their original attorneys. The court granted the motion for a mistrial to allow defense counsel to regroup after Gupta's plea. Once the new trial began, [the President] testified for the government. Defense counsel conducted no cross-examination for fear that the examination would lead to inquiries into material covered by the joint defense privilege." The issue for the Court "is whether the government's use of a former defendant, with whom both Henke's and Desaigoudar's [the remaining co-defendants] attorneys had an attorney-client relationship arising from a joint defense agreement, as a key witness at trial created a conflict of interest that impaired defense counsel's ability to defend their clients." *Id*. at 637.

The Court held that here, the joint defense agreement created a disqualifying conflict of interest because "this was not a situation where [the attorneys] could avoid reliance on the privileged information and still fully uphold their ethical duty to represent their clients." And the attorneys did the right thing by moving to withdraw based on this conflict of interest, and the trial court should have granted the motion to withdraw. The Court explained that "Few aspects of our criminal justice system are more vital to the assurance of fairness than the right to be defended by counsel, and this means counsel not burdened by a conflict of interest. Here, because of that conflict, the appellants' lawyers were constrained to impair yet another primary right of their clients: the right to cross-examine a witness who testified against them. By choosing to convert Gupta into a prospective witness shortly before the trial was scheduled to start, the government—which may not have anticipated this complication when it made a deal with Gupta—caused this problem, and should not now be heard to complain." *Id*. at 638.

In the end, based on this issue, and other issues unrelated to the joint defense agreement, the Court reversed the judgments of conviction, vacated the sentences, and remanded for a new trial.

- ***STI Outdoor v. Superior Court*** **(2001) 91 Cal.App.4th 334 [109 Cal. Rptr. 2d 865]**

In this state court case, the Court held that documents related to negotiations between a governmental agency and a company bidding for a public works contract were protected from disclosure to a third party under the common interest doctrine, even though the documents were shared without any litigation pending or anticipated.

"In September 1997, the MTA issued its Request for Proposal No. OP65102504 (the RFP) soliciting bids for the installation of automated public toilets as a service to its bus and rail riders (hereinafter referred to as the Project). The RFP provided, in essence, that in exchange for the construction, installation and maintenance of 10 automatic pay toilets, the MTA would award a contract to allow the successful bidder the use of certain advertising sites at selected, unspecified locations along its routes and on other real property owned by the MTA. Real Party Eller Media reviewed the RFP and concluded that the advertising sites that were to be made available were not in highly desirable, freeway-viewable locations. Accordingly, it did not submit a bid to the MTA. When the bidding period ended on December 18, 1997, petitioner STI was the only party that submitted a bid in response to the RFP. STI's bid was accepted and it began negotiations with the MTA regarding a License Agreement for the Project. In this connection, STI employed the law firm of Manatt, Phelps & Phillips (the Manatt firm). A License Agreement regarding the construction of the toilets and the scope of the advertising space was not entered into until November 1999, almost two years after the close of bidding. According to Eller, sometime after the execution of the License Agreement, it discovered that the advertising space to be awarded to the successful bidder in connection with the Project consisted of approximately 80 highly desirable above-ground spaces which could be viewed by vehicles traveling along the freeway, and not just

by subway users. Eller claimed that during the RFP bidding period, the MTA had represented to it that the advertising spaces available were not freeway viewable and were limited to no more than 35 spaces. On August 22, 2000, Eller sent a letter to the MTA requesting that it produce all information and documents in its possession pertaining to the RFP, pursuant to the California Public Records Act (Gov.Code, §§ 6250–6268) and the Freedom of Information Act (5 U.S.Code § 552). When the MTA did not produce the requested documents, Eller filed its petition for writ of mandate in Superior Court. STI filed an application to intervene, which was granted. Then, MTA produced certain documents, stating that it was withholding certain other documents. Among the items the MTA refused to produce were three documents . . . [dated before the License Agreement was finalized:] a memo from Augustin Zuniga, from the Office of the County Counsel, General Counsel for MTA, to Velma Marshall, the MTA's Director of Real Estate, dated January 22, 1999. . . .[A] memo from the Manatt firm to STI dated August 2, 1998. . . .[And] a letter from Velma Marshall to Don Davidson, President of STI, dated January 27, 1999." S*TI Outdoor v. Superior Court*, 91 Cal.App.4th at 336–37.

The Court upheld MTA's privilege claims, holding that there was no waiver because "the disclosure of such documents was reasonably necessary to further the interests of both parties in finalizing negotiations for the License Agreement." *Id*. at 341.

- ***United States v. Stepney*** **(N.D. Cal. 2003) 246 F.Supp.2d 1069**

This federal criminal case involved numerous defendants were charged with violations of many federal drug and weapons laws. Some of the defendants had already taken plea bargains at the time of this opinion, and were cooperating with the governmentNotably, the interests of the co-defendants were not identical in part because they were not all charged with the same crime(s).

The Court had previously instructed the parties to submit proposed joint defense agreements for the Court's approval, given the great potential for disqualifying conflicts of interest in this complex case. In reviewing the proposed joint defense agreements, the Court discussed three key issues, namely the importance of (1) not imposing a duty of loyalty to the client's co-defendants because this would impede the attorney's ability to represent her own client without conflicts of interest; (2) the inclusion of a limited waiver of conflicts of interest to protect each defendant's right to cross-examine any co-defendants, particularly those who cooperate with the prosecution; and (3) making it clear that the joint defense agreement does not create any attorney-client relationships (implied or otherwise) between attorneys and their clients' co-defendants in order to avoid creating conflicts of interest. The Court emphasized that keeping these issues in mind while drafting the joint defense agreement helps to protect the client's confidential and privileged information, allows each attorney and defendant to make strategic decisions about the information they wish to reveal, and preserves each defendant's rights.

The Court explained that a key benefit of joint defense agreements is defendants' access to information: "The joint defense privilege allows defendants to share information so as to avoid unnecessarily inconsistent defenses that undermine the credibility of the defense as a whole. In criminal cases where discovery is limited, such collaboration is necessary to assure a fair trial in the face of the prosecution's informational advantage gained through the power to gather evidence by searches and seizures. Co-defendants may eliminate inconsistent defenses without the same degree of disclosure that would be required for an attorney to adequately represent her client. The legitimate value of joint defense agreements will not be significantly diminished by including a limited waiver of confidentiality by testifying defendants for purposes of cross-examination only." *United States v. Stepney*, 246 F.Supp.2d at 1086.

The Court rejected the proposed joint defense agreements mainly because they did not protect against conflicts of interest. Instead the proposed agreements imposed a duty of loyalty on the participating attorneys to the non-client co-defendants, and failed to specify that no attorney client relationships would be formed between the participating attorneys and their clients' co-defendants.

- ***McKesson HBOC, Inc. v. Superior Court*** **(2004) 115 Cal.App.4th 1229 [9 Cal.Rptr.3d 812]**

This shareholder derivative litigation in state court followed on McKesson's public disclosure that its auditors had discovered improperly recorded revenues at its subsidiary HBO & Co. While this litigation was pending, the US Attorney's Office and the Securities and Exchange Commission also initiated investigations of McKesson and HBO based on this disclosure. McKesson retained Sheppard Mullin to represent it in the civil actions, and to conduct an internal investigation. Sheppard Mullin conducted numerous interviews of current and former employees, and prepared interview memoranda and a written report. McKesson offered to share the report and the interview memoranda with the SEC and the US Attorney's office in exchange for a confidentiality agreement preventing the disclosure of these materials to any other persons. The governmental agencies agreed to keep the information confidential other than as needed to further investigate and possibly prosecute McKesson and/or HBO. McKesson provided the report and memoranda to the government.

In the pending consolidated civil action, the parties adverse to McKesson moved the Court to compel McKesson to produce the report and memoranda. McKesson claimed that these materials were privileged and work product, and that they were protected by the common interest doctrine. The Court held that McKesson must produce the documents, as the privilege and work product protection had been waived by disclosure to the government. There was no common interest between a party under investigation and the governmental agency investigating that party. The government and the party were always adverse to each other. Therefore, Court held that the confidentiality agreements did not protect the

documents from disclosure to the plaintiffs in the civil litigation, and compelled McKesson to produce the internal audit report and the interview memoranda.

- ***OXY Res. California LLC v. Superior Court*** **(2004) 115 Cal.App.4th 874 [9 Cal.Rptr.3d 621]**

In this state court case, the Court considered the question: "May parties negotiating a business transaction rely on a "joint defense agreement" as the basis for refusing to produce privileged documents exchanged long before they are actually sued by a third party?" *OXY Res. California LLC v. Superior Court*, 115 Cal.App.4th at 879.

This case involved two issues of first impression in California: (1) "the consequences of a "joint defense agreement" entered into by parties to a transaction"; and (2) "the propriety of an in camera review of documents allegedly protected by the attorney-client privilege but disclosed to parties outside the attorney-client relationship pursuant to a joint defense agreement." *Id*. at 887.

As a preliminary matter, the Court emphasized that unlike Federal law as discussed in *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000), "the common interest doctrine is more appropriately characterized under California law as a nonwaiver doctrine, analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine." *Id*. at 889 (footnote reference omitted). For this analysis, the Court identified the key principles as follows: "it is essential that participants in an exchange have a reasonable expectation that information disclosed will remain confidential. If a disclosing party does not have a reasonable expectation that a third party will preserve the confidentiality of the information, then any applicable privileges are waived. An expectation of confidentiality, however, is not enough to avoid waiver. In addition, disclosure of the information must be reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted. (Evid.Code, § 912, subd. (d).) Thus, "[f]or the common interest doctrine to attach, most courts seem to insist that the two parties have in common an interest in securing legal advice related to the same matter—and that the communications be made to advance their shared interest in securing legal advice on that common matter." *Id*. at 891. Therefore, the joint defense agreement cannot be the sole basis for withholding otherwise relevant documents.

The Court held that in order to determine whether the privilege was waived, an *in camera* review of the documents at issue is appropriate. Here, the documents at issue were divided into two categories – communications before the commercial transaction closed, or pre-acquisition communications, and those after transaction closed, or post-acquisition communications. The Court held that in camera review of the pre-acquisition documents was necessary to determine "whether disclosure of the information in the 30 preacquisition documents was reasonably necessary to further the interests of both parties in concluding their transaction." *Id*. at 899. And the Court held that to the extent that the pre-acquisition documents were protected from disclosure, that protection may extend to post-acquisition

documents, and that the record upon which the trial court relied to compel their disclosure was inadequate. The Court remanded the matter to the trial court to hold further proceedings to develope a record which would allow a determination of these issues.

- ***Nidec Corp. v. Victor Co. of Japan*** **(N.D. Cal. 2007) 249 F.R.D. 575**

In this federal patent infringement action, the Court held that communications between a company and a party negotiating to purchase an interest in the company may be protected from disclosure under the common interest privilege, if the common interest was a legal, as opposed to a merely business or commercial interest. Here, the plaintiff subpoenaed documents from a third party which it believed to have been a bidder responding to a call for bids to purchase shares of the defendant, Victor Co. of Japan (JVC). Specifically, plaintiff sought documents provided to the potential bidders and communications between JVC and potential bidders, including a litigation abstract that JVC provided to bidders. JVC and the third party moved to quash the subpoena on privilege and other grounds. The Court granted the motions, and quashed the subpoena.

The Court explained that the "protection of the privilege under the community of interest rationale, however, is not limited to joint litigation preparation efforts. It is applicable whenever parties with common interests joint forces for the purpose of obtaining more effective legal assistance. . . [H]owever, that legal assistance must pertain to the matter in which the parties have a joint legal interest, and the communication must be designed to further that specific legal interest." *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. at 578.

Further, the Court explained that in order to apply this privilege "even if there were a common legal interest, the common interest exception requires that the communication at issue be designed to further *that* legal effort. In context of the instant case, the disclosures which concern the instant litigation, to be protected, must be made in the course of formulating a *common legal strategy*, or otherwise furthering the parties' joint interest in this litigation." The Court held that a litigation abstract provided to the potential bidders was not protected under the attorney-client privilege, because while it "might have been helpful to facilitate the potential commercial transaction, it did not further a common legal strategy in connection with the instant litigation. It was not, for instance, a communication coordinating the defense in this case. Rather, Defendants provided the litigation abstract in order to facilitate the TPG fund's and other potential bidders' commercial decision whether to buy the majority share in JVC. Thus, it was designed to further not a joint defense in this litigation, but to further a commercial transaction in which the parties, if anything, have opposing interests. The litigation abstract thus would not qualify for the common interest exception [to the waiver of privileged documents]." *Id*. at 579-580 (emphasis in original) (internal citations, quotation marks and square brackets omitted).

The Court found, however, that the litigation abstract was protected from disclosure under the work product privilege, because "the disclosure to a third party does not necessarily

constitute a waiver of the work product privilege. For work product, protection is waived where disclosure of the otherwise privileged documents is made to a third party, and that disclosure enables an adversary to gain access to the information. The work product privilege provides protection against adversaries and is not as easily waived as the attorney-client privilege. Of course, this more restrictive rule on waiver applies only to communications which constitute attorney work product in the first instance." Id.

- ***All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc.*** **(N.D. Cal. Dec. 18, 2008) No. C 06-2915, 2008 WL 5484552, *order clarified,* (N.D. Cal. Feb. 5, 2009) No. C 07-1200 PJH, 2009 WL 292536**

This federal litigation involved four individual cases brought by Plaintiffs who opted out of an antitrust multi-district litigation ("MDL") action "that generally alleges a horizontal price-fixing conspiracy carried out by numerous defendants, in violation of various state and federal antitrust laws. … These individual cases, like the related MDL, follow a United States Department of Justice ("DOJ") investigation that resulted in the filing of criminal charges of illegal price-fixing against Infineon Technologies ("Infineon") and some of its executives," including Gunter Hefner ("Hefner"), Infineon's Vice President of Sales. In the DOJ investigation and criminal action, Hefner was represented by John Vandevelde of Lightfoot, Vandevelde, Sadowsky, Crouchley, Rutherford & Levine LLP ("Lightfoot Vandevelde"). The DOJ investigation resulted in the filing of criminal charges, a guilty plea, and sentencing of Hefner.

During that DOJ investigation, Infineon and its counsel entered into a joint defense agreement ("JDA") with Hefner and his separate counsel John Vandevelde and Lightfoot Vandevelde "in connection with the investigation of the DRAM Industry being conducted by, among others, the DOJ, as well as related civil litigation." "According to Infineon, pursuant to the JDA, it shared confidential information with Vandevelde in the course of both the criminal and civil matters in which Vandevelde represented Hefner. Specifically, Infineon claims that it collaborated extensively with Vandevelde in the prior litigation, including sharing confidential and privileged information regarding Infineon's legal strategy as well as other information Infineon obtained during its investigation of the alleged price-fixing conspiracy." All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc. 2008 WL 5484552, at *2

Later, Lightfoot Vandevelde merged with Crowell & Moring LLP ("Crowell"), the law firm representing the Plaintiffs here,. John Vandevelde and Crowell continued to represent the Plaintiffs after the merger. Infineon moved to disqualify Crowell and John Vandevelde from representing Plaintiffs against Infineon. The JDA contained a conflict waiver which Vandevelde and his firm believed protected them against disqualification.[1] However, the

[1] The conflict waiver provided: "While the precise nature of each possible conflict that may arise in the future cannot be identified at the present time, each client member after being informed of the

Court did not agree, and narrowly construing the conflict waiver, the Court granted Infineon's disqualification motion, holding that (a) there was a conflict of interest based on the substantial relationship between the DOJ investigation and subsequent criminal case and the current civil litigation, as both involved the same price fixing claims; (b) the ethical wall Crowell built following the merger did not prevent the imputation of the conflict to the entire firm; and (c) the JDA did not waive the particular conflict created by the merger of Crowell and Lightfoot Vandevelde, but only waived conflicts related to cross-examination of witnesses during the criminal action.

- ***United States v. Gonzalez*** **(9th Cir. 2012) 669 F.3d 974**

In this federal criminal case, defendant "Luis Alberto Gonzalez ("Gonzalez") challenges an order denying his motion to quash a subpoena in a section 2255 habeas proceeding brought by his wife, Katherine Elizabeth Paiz ("Paiz"). Gonzalez and Paiz were convicted in separate trials of fraud arising from an insurance scam involving Paiz's car. The car was found burned in a field with a gas can in the backseat shortly after the pair discovered the car needed several thousand dollars of repairs not covered by warranty, and ten days after Paiz took out an insurance policy on the vehicle. Although both separately confessed to the fraud, Paiz claimed she had no knowledge that fire would be used to destroy the car. Gonzalez initially told FBI agents that he had burned the car but that his wife knew nothing about it. The trial court severed the trials when Gonzalez announced he intended to testify at his wife's trial regarding the use of fire count (which carried a mandatory minimum ten-year sentence). *See* 18 U.S.C. § 844(h). However, shortly before his own trial, Gonzalez indicated his defense would be that he had nothing at all to do with the crime and that he had lied to the FBI about his involvement to protect his wife. He was convicted of three fraud counts, but acquitted of the use of fire count, and sentenced to ninety-six months in prison. Paiz's attorney, Nina Wilder ("Wilder") ultimately decided not to call Gonzalez as a witness at Paiz's trial. Paiz was convicted on all counts, and sentenced to 121 months in prison. In her section 2255 petition, Paiz now alleges that Wilder provided ineffective assistance of counsel by failing to call Gonzalez as a witness. Gonzalez intervened to seek quashal of the subpoenas directed at Wilder on the basis of a joint defense privilege." *United States v. Gonzalez*, 669 F.3d at 976 (footnote omitted).

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general nature of the conflicts that may arise, knowingly, and intelligently waives any conflict of interest that may arise on account of this Agreement, including specifically from an attorney member of this Agreement, other than his, her or its own attorney, cross-examining him, her or it at trial or in any other proceeding arising from or relating to the above Investigation. Each client member further waives any claim of conflict of interest which might arise by virtue of participation by his, her or its attorney in this Agreement. Each attorney member and client member waives any right to seek the disqualification of counsel for any other attorney member who is a party to this Agreement based upon a communication of joint-defense privileged information." *Id*.

Court considered (a) whether a joint defense agreement existed in the absence of a written agreement and where the co-defendants' defenses were adverse to each other; and (b) if such an agreement did exist, whether it protected the communications from disclosure.

The Court held that "the existence of a JDA is not necessarily an all-or-nothing proposition, and may be created (and ended) by conduct as well as express agreement. The timeline of events and the facts of this case could suggest that a JDA existed at the outset between the parties and their counsel, but that it had ended at least by the time Gonzalez decided to pursue his own defense and blame Paiz for the crime (thus ending their common legal interests). . . Alternatively, it may also be that Paiz's and Gonzalez's "joint defense" strategy always related only to the use-of-fire charge and that they remained committed on this point notwithstanding other defense changes." The Court held that "[t]he record at least establishes the existence of a JDA (either an express verbal agreement or one implied from conduct)", but because the trial court did not make specific findings regarding the extent or duration of that JDA, the Court remanded the matter "to the trial court for an (*in camera*) evidentiary hearing to expressly determine: (1) if the JDA implicitly ended at some point, (2) if so, when, and (3) when the relevant communication here (the ultimate representation regarding what Gonzalez would testify to at Paiz's trial) was made." The Court held that "[i]f the communication occurred during the existence of the JDA, then it remains protected.... On the other hand, if it was made after the joint defense efforts ended, and when Gonzalez was merely a potential trial witness for Paiz, then that specific communication to Paiz's counsel may not be privileged (though any prior statements made or communicated to her during the JDA would remain protected)." *Id*. at 981.

- ***Citizens for Ceres v. Superior Court*** **(2013) 217 Cal.App.4th 889 [159 Cal.Rptr.3d 789]**

"This [state court] case involves a challenge under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) (CEQA) to a decision by the City of Ceres (city) to grant approvals necessary to build a shopping center anchored by a Wal-Mart store." *Ceres,* 217 Cal.App.4th at 897. The administrative record designated by the city did not include any communications between the city and the developer. When the challenger objected to this record as incomplete due to these missing communications, city produced a privilege log claiming that the joint defense privilege protected the communications and that therefore the attorney client privilege and the attorney work product protection had not been waived for all of the missing communications."

The Court explained that "the common-interest doctrine allows disclosure between parties, without waiver of privileges, of communications protected by the attorney-client privilege or the attorney work-product doctrine where the disclosure is necessary to accomplish the purpose for which the legal advice was sought. The doctrine is not an independent privilege but a doctrine specifying circumstances under which disclosure to a third party does not waive privileges. It does *not* mean there is an expanded attorney-client relationship

encompassing all parties and counsel who share a common interest." *Id*. at 914 (emphasis in original) (internal citations and quotation marks omitted).

In the context of this case, Court held that the "common-interest doctrine, which is designed to preserve privileges from waiver by disclosure under some circumstances, does not protect otherwise privileged communications disclosed by the developer to the city or by the city to the developer *prior* to approval of the project. This is because, when environmental review is in progress, the interests of the lead agency and a project applicant are fundamentally divergent. While the applicant seeks the agency's approval on the most favorable, least burdensome terms possible, the agency is duty bound to analyze the project's environmental impacts objectively. An agency must require feasible mitigation measures for all significant impacts and consider seriously and without bias whether the project should be rejected if mitigation is infeasible or approved in light of overriding considerations. The applicant and agency cannot be considered to be advancing any shared interest when they share legal advice at the *preapproval stage.* Under established principles, this means that the common-interest doctrine does not apply. *After* approval, by contrast, the agency and applicant have a united interest in defending the project as approved, and privileges are not waived by disclosures between them from that time onward." *Id*. at 898 (emphasis in original).

Understanding the Nuances of the Joint Defense 'Privilege'

By Amy Bomse

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California lawyers, particularly defense litigators, rely on the joint defense "privilege" or common interest doctrine to share privileged documents and communications with third parties without risking waiver. Transactional lawyers may not realize that the doctrine can protect communications or documents shared between negotiating adversaries from discovery in certain circumstances.

All lawyers who intend to rely upon such protection should understand the nature of the doctrine as well as the potential risks entering into such arrangements might pose. This article describes the development of the common interest doctrine in California, its differences from the federal counterpart, its application in less traditional contexts and certain ways to mitigate the risks arising from a common interest arrangement.

History of the joint defense doctrine in California

Under California and federal law, attorney-client privilege is generally waived by voluntary disclosure to unrelated third parties. See, e.g., *Weil v. Inv./Indicators, Research &Mgmt., Inc.*, 647 F.2d 18 (9th Cir. 1981); Cal. Evid. Code §912. Work product protection may also be waived by disclosure, however only where the disclosure is wholly inconsistent with purpose of protection. See *Raytheon Co. v. Superior Court*, 208 Cal. App. 3d 683, 689 (1989); *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575 (N.D. Cal. 2007).

On occasion, separately represented parties want to have their lawyers work together. For example, co-defendants may wish to pool resources for efficiency or to ensure a consistent approach to their defense. To facilitate that sharing, originally among criminal defendants, courts outside of California developed the concept of a joint defense privilege. The concept has expanded to include non-criminal defendants, plaintiffs and even non-litigants. See *OXY Res. Cal. LLC v. Superior Court*, 115 Cal. App. 4th 874, 889 (2004) ("*OXY Resources*") (noting the expansion of the joint defense privilege).

Starting about 20 years ago, California courts confronted the question of whether California law would provide a similar protection for information sharing between parties with common interests. In California, unlike under federal law, privileges are creatures of statute. Courts have no power to create new privileges, and the California Evidence Code does not include a joint defense privilege for separately represented parties. Thus, California courts held that there is no joint defense privilege. *Raytheon Co.*, 208 Cal. App. 3d at 689. To provide some protection, California courts recognized that they could shelter shared communications under Evidence Code section 912, which states that a disclosure does not waive privilege if such disclosure is (a) confidential and (b) reasonably necessary for the accomplishment of the purpose for which a lawyer was consulted. To avoid suggesting the existence of a separate privilege, California

courts refer to the joint defense or common interest *doctrine* rather than privilege. See *OXY Resources,* at 889-94.

To determine whether the common interest doctrine applies, California courts consider three elements. First, the exchanged communication or document must itself be privileged under a statutory privilege (e.g., attorney-client communication or marital privilege) or protected by the work product doctrine. Second, the party who shared the privileged communication or protected document must have had a reasonable expectation that it would be kept confidential. Even communications shared with a large group, however, may be protected by the common interest doctrine if the lawyer has taken steps to ensure confidentiality, such as instructing the recipients to keep the information confidential. See *Seahaus La Jolla Owners Ass'n v. Superior Court*, 224 Cal. App. 4th 754, 774 (2014) (communications by counsel for homeowners association shared at a meeting of all homeowners were protected by common interest). Third, the communication must be shared to advance the purpose for which the lawyer was consulted. See *OXY Resources,* at 894.

Various practical consequences flow from the fact that California recognizes a common interest doctrine rather than a privilege for joint defense. First, a privilege log should not identify documents as protected only by "common interest" but should instead identify the applicable privilege or cite the work product doctrine. See *OXY Resources,* at 894 (compelling production of documents asserted to be protected solely by the "common interest privilege). Second, where the common interest is not obvious (such as where parties who shared privileged communications based on their "common interest" are adversaries), courts may scrutinize claims that the documents were shared to further a common legal purpose and may even order in camera review.

Not just for litigators

Although the common interest doctrine is probably invoked and utilized more frequently by litigators than transactional lawyers, some of the key early common interest cases involved communications between parties to a business negotiation. See *STI Outdoor v. Superior Court*, 91 Cal. App. 4th 334, 340 (2001) ("We are not persuaded that the attorney-client privilege is limited to litigation-related communications.); *OXY Resources,* at 889 ("The need to exchange privileged information may arise in the negotiations of a commercial transaction."). However, while communications outside of litigation may come under the rubric of the common interest doctrine, such communications must be shared for a legal purpose, not a business purpose.

In an early case recognizing the common interest doctrine in business negotiations, the court held that a vendor and government agency could shield their negotiations from discovery in a subsequent suit by a competitor. See *STI Outdoor v. Superior Court*, 91 Cal. App. 4th 334 (2001). Although the parties who had shared the information were adversaries, the court held that once they had entered into a letter of intent, they shared an interest in finalizing their negotiations that justified protecting the privileged information they shared.

On the other hand, sometimes courts find that parties' interests are so fundamentally different that there can be no common interest. In *Citizens for Ceres v. Superior Court*, 217 Cal. App. 4th 889 (2013), Wal-Mart sought approval to develop a shopping center in the City of Ceres. During the environmental study phase, Wal-Mart and the city entered into common interest agreement. They took great care to involve their attorneys in all discussions and to document their shared anticipation that the development would be the subject of a legal challenge. The court granted a motion to compel production of their shared communications, reasoning that the city and the developer could not have a common interest in the development because the city was required to remain neutral until the project was approved.

Similarly, a defendant cannot share privileged information with one litigation adversary and assert the privilege as to others. This issue arises, for example, when a company faces claims from a government agency and private civil litigants. Some companies have attempted to cooperate with the government by sharing privileged information under a purported common interest in ferreting out corruption, with the goal of preventing their civil litigation adversaries from obtaining the information under a waiver theory. California courts have rejected the notion that a company that is being investigated by the government has any common interest with the government. See, e.g., *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229 (2004).

Intellectual property advice

Companies engaged in a sale or merger, or trying to attract investors, may wish to share their counsel's legal advice about the strength of their intellectual property assets. Attorneys should proceed with caution in this arena, because federal court decisions are inconsistent about the applicability of the joint defense privilege. (The issue arises principally in federal court where patent litigation occurs.) If protection is critical, before the client shares privileged information with a buyer or investor an attorney should research the relevant jurisdiction and advise the client of the risks of waiver. The following cases illustrate the variety of views.

Documents shared between seller and buyer protected by joint defense privilege: In *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308 (N.D. Cal. 1987), the plaintiff sought to compel production of a legal opinion defendant had shared with a potential buyer. The plaintiff argued that the defendant had waived the privilege by sharing it with the potential buyer. The court denied the motion. It held that the seller and potential buyer had a common interest, because the seller and buyer could reasonably anticipate being named as co-defendants in a patent infringement lawsuit if the sale had occurred. The fact that the sale was ultimately not consummated did not change the analysis.

Documents shared between seller and buyer not protected by joint defense privilege: In *Oak Industries v. Zenith Industries*, 1988 WL 79614 (N.D. Ill. 1988), the patent plaintiff sought to take a 30(b)(6) deposition of the defendant concerning defendant's communications with a potential purchaser. The defendant opposed the motion, arguing that it had shared privileged communications about its patents and those were protected by the joint defense privilege. The

court disagreed, holding broadly that a party waives its attorney-client privilege by disclosing confidential information to a potential purchaser.

Documents shared between company and investor not protected by joint defense privilege: In *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575 (N.D. Cal. 2007), the plaintiff sought access to documents the defendant had shared with a potential investor about defendant's patents. The court rejected the defendant's argument that the documents were shared in pursuit of a common legal interest. Because the investor would not likely end up as a defendant in litigation, the court found that the seller had shared its lawyer's advice to further a business interest, not a legal interest. *Id*. at 580. ("[I]t was designed to further not a joint defense in this litigation, but to further a commercial transaction in which the parties, if anything have opposing interests."). The court did note, however, that if the documents qualified as work product under federal law, the fact that they were shared with the investor would not necessarily render them discoverable. While this may give negotiating parties some leeway, attorneys should keep in mind that federal work product protection applies only to materials prepared in anticipation of litigation. Fed. R. Civ. Proc. 26(b)(3)(A). In California, by contrast, the work product doctrine applies to non-litigation attorney-prepared documents as well. See State Comp. Ins. Fund v. Sup. Ct., 91 Cal. App. 4th, 1080, 1091 (2001).

Risk of participating in a common interest agreement

Attorneys may worry that being privy to a non-client's privileged communications may create duties to the non-client (including duties that could conflict with duties the attorney owes to his own client) or create an implied attorney-client relationship with members of a joint defense group. Some federal decisions have suggested that an implied attorney-client relationship can be created as a result of a joint defense agreement. See *U.S. v. Henke*, 222 F.3d. 633 (9th Cir. 2000) (joint defense agreement establishes implied attorney-client relationship); but see *U.S. v. Stepney*, 246 F. Supp. 2d 1069, 1080 (N.D. Cal. 2003) ("Courts have consistently viewed the obligations created by joint defense agreements as distinct from those created by actual attorney-client relationships."). California courts have rejected the notion that participation in a common interest group expands the attorney-client relationship to non-client members of the group. See *OXY Resources,* at 889.

Nonetheless, actually being privy to material confidential information through participation in a joint defense group may subject a lawyer (and his law firm) to disqualification if he goes to work for the law firm representing the other side of the same case. See *Meza v. H. Muehlstein & Co.*, 176 Cal. App. 4th 969 (2009). In *Meza*, an attorney who had participated in joint defense strategy sessions with a group of co-defendants went to work for the plaintiff's firm. At the plaintiff's firm, he was screened from the case. Certain members of the joint defense group who were still in the case moved to disqualify the plaintiff's firm. The court held that they had standing to do so and disqualified the attorney and his firm.

To avoid potential disqualification, parties and lawyers should agree that each client is represented only by his or her own attorney and that no party will have the right to seek the

disqualification of other attorney members of the joint defense group. Including appropriate consents in a common interest agreement should significantly limit that risk. See *In re Shared Memory Graphics LLC*, 659 F.3d 1336, 1339 (Fed. Cir. 2011).

When friends become foes

Parties also want to make sure that their confidential information remains protected. To mitigate the risk of confidential information ending up in the hands of an adversary, parties can and should agree that any privileged information they exchange will remain confidential and cannot be disclosed or used for any purpose other than the parties' joint effort, even in the event that the common interest agreement ends or members of the common interest group become adversaries. See *Price v. Charles Brown Charitable Remainder Unitrust Trust*, 27 N.E.3d 1168 (Ind. Ct. App. 2015) (parties to a joint defense agreement precluded from using against each other materials shared pursuant to the JDA). Unless parties expressly waive their rights to sue one another, participating in a joint defense group does not preclude one member from asserting claims against another. Id.

Some courts have ruled that applicable privileges are waived between the parties to a common interest agreement when they assert claims against each other, even when the parties have agreed to preserve the applicable privileges. See, e.g., *In re Taproot Sys., Inc*., 2013 WL 3505621 (E.D. N.C. 2013) (citing various authorities). In criminal cases, where it is not uncommon for a co-defendant to agree to testify for the prosecution in exchange for leniency, some federal courts hold that when a defendant chooses to testify for the government, she waives her right to confidentiality of information shared in a joint defense group. See *U.S. v. Stepney*, 246 F. Supp. 2d 1069 (N.D. Cal. 2003); *U.S. v. Almeida*, 341 F.3d 1318 (11th Cir. 2003).

Conclusion

With a clear understanding of the common interest doctrine, attorneys can take advantage of its protections while limiting associated risks. Before sharing privileged communications or work product with third parties, lawyers should consider whether cooperation is necessary to further the client's legal interests and, if it is, document that fact in a common interest agreement.

Conflict and Ethics Issues Arising from Joint Defense/Common Interest Relationships

Kathryn M. Fenton

Antitrust lawyers involved in merger reviews or multi-party litigation frequently enter into joint defense agreements (JDAs).[1] While such agreements are important in preserving legal privileges and facilitating coordination among parties with similar interests, they can create potentially significant conflict of interest issues.

It is common for companies under investigation for possible cartel activities to enter into a JDA to facilitate fact gathering and development of a coordinated strategy. Similar interests might motivate formation of common interest groups in merger reviews or civil antitrust lawsuits. In all of these settings, there may be reasons for one or more parties subsequently to withdraw from a JDA (e.g., an individual litigation settlement, or a leniency application or plea agreement in the criminal context) and, in so doing, become potentially adverse to the remaining members of the group.

A recently issued D.C. Bar ethics opinion (Opinion 349) offers a useful analysis of the ethical and fiduciary issues presented by JDAs and provides a strong reminder to lawyers of the need to consider these issues before they enter into such relationships.[2] After briefly reviewing the basic elements of JDAs and the guidance provided by Opinion 349, this article discusses the potential conflicts and ethics issues posed by JDAs and offers some practical suggestions on how to minimize these risks in antitrust representations.

Basic Elements of Joint Defense Agreements

A JDA is a means for a client and its lawyer to share privileged information with third parties sharing a "common interest" without waiving otherwise applicable legal privileges by this disclosure. It is based on the joint defense privilege, which

> permits a client to disclose information to her attorney in the presence of joint parties and their counsel without waiving the attorney-client privilege and is intended to preclude joint parties and their attorneys from disclosing confidential information learned as a consequence of the joint defense without permission.[3]

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[1] While the term "joint defense agreement" is commonly used, the existence of formal litigation is not required to protect the sharing of privileged information. As a result, other terms have been applied to this relationship, such as the "allied lawyer doctrine," "common interest doctrine," or "pooled information doctrine." *See* Lugosch v. Congel, 219 F.R.D. 220, 236 (N.D.N.Y. 2003). For convenience, this article primarily will use the term JDA.

[2] D.C. Bar Legal Ethics Comm., Op. 349, Conflicts of Interest for Lawyers Associated with Screened Lawyers Who Participated in a Joint Defense Group (Sept. 2009) (Opinion 349), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion349.cfm.

[3] United States v. Hsia, 81 F. Supp. 2d 7, 16 (D.D.C. 2000) (citations omitted).

Although the joint defense privilege is accepted by most courts, there are differences in the type and degree of common interest required before the privilege is applied.[4] At a minimum, a party seeking to establish the privilege generally must show by a preponderance of the evidence that the shared communications were: (1) intended to be kept confidential,[5] (2) made at a time the parties shared a common legal interest,[6] and (3) exchanged in pursuit of that joint legal interest.[7]

The specific obligations on participants depend largely on the precise terms of the JDA, which can range from very simple oral undertakings to detailed written agreements.[8] Most JDAs operate smoothly to accomplish their intended objectives and do not raise conflicts or ethics issues. However, it is not uncommon to find instances when a party will withdraw from a JDA—for example, an antitrust defendant agrees to a settlement and/or enters into a cooperation agreement with plaintiffs. In such cases, the lawyer for the former joint defense group participant subsequently may find himself adverse to other members of the joint defense group on behalf of his original or a new client.[9]

[A]ny use of confidential information of other parties obtained through the joint defense relationship may be challenged or asserted as a basis for lawyer disqualification.

Take, for example, a cartel investigation that subsequently proceeds to class action damages litigation. Defendants formed a joint defense group that ultimately dissolved because of multiple leniency applications and individual settlements. In such circumstances, one party's subsequent use of information obtained through the joint defense relationship against former joint defense group members may be problematic.

The defendants' lawyers may face similar issues. As recognized by the D.C. Bar ethics committee in Opinion 349, post-withdrawal, a lawyer may be limited in his ability to:

- Cross-examine at trial a co-defendant who later decided to cooperate with the government and testify on its behalf;
- Put on a defense that conflicted with the defenses of the other defendants participating in a JDA; or
- Attempt to shift blame to other defendants or introduce any evidence which undercuts their defenses.

In all of these cases, any use of confidential information of other parties obtained through the joint defense relationship may be challenged or asserted as a basis for lawyer disqualification.

Moreover, it is not simply the individual attorney personally involved in the joint defense representation who confronts these issues. Applying the concept of imputed disqualification,[10] the

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[4] While the Restatement finds that a common interest "may be either legal, factual, or strategic in character," RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 76 cmt (2000), most courts limit its application to common legal interests. *See* THOMAS E. SPAHN, THE ANTITRUST-CLIENT PRIVILEGE: A PRACTITIONERS GUIDE 252 (2007).

[5] *See, e.g.*, United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989) ("To qualify for the privilege, the communication must have been made in confidence.").

[6] *See, e.g.*, United States v. United Techs. Corp., 979 F. Supp. 108, 111 (D. Conn. 1997) (parties asserting the joint defense privilege must share "a common legal interest about a legal matter" but "it is . . . unnecessary that there be actual litigation in progress") (citing United States v. Schwimmer, 892 F.2d 237, 243–44 (2d Cir. 1989)).

[7] *See, e.g.*, SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 513 (D. Conn. 1976) (communications must be "directed at advancing the joint interest vis-à-vis the rest of the world").

[8] There is no requirement that joint defense agreement be in writing. *See, e.g.*, Continental Oil v. United States, 330 F.2d 347, 350 (9th Cir. 1964).

[9] *See, e.g.*, Amy Foot, *Joint Defense Agreements in Criminal Prosecution: Tactical and Ethical Implications*, 12 GEO. J. LEGAL ETHICS 377 (1999).

[10] MODEL RULES OF PROF'L CONDUCT R. 1.10 (Imputation of Conflicts of Interest: General Rule), *available at* http://www.abanet.org/cpr/mrpc/rule_1_10.html.

conflicts and other ethical restrictions of a single attorney can be imputed to the other attorneys "associated in a firm." Indeed, given the increasing lateral movement of lawyers among firms, issues arising from joint defense representations may confront an entirely new law firm that had no involvement in the original joint defense. In the worst possible outcome, a prior joint defense relationship may lead to disqualification of the lateral attorney's new law firm. Understanding the reasons for, and preventing, such outcomes requires a deeper consideration of the ethical issues presented by participating in JDAs.

Does the Sharing of Confidential Information in Joint Defense Agreements Create an Attorney-Client Relationship?

Because a primary goal of a JDA is to facilitate the sharing of otherwise privileged information without loss of the privilege, lawyers who participate in JDAs necessarily are exposed to confidences of the other, non-client members of the joint defense group. Does the receipt of such confidences create an implied or actual attorney-client relationship or otherwise trigger ethical obligations to protect or to not misuse the information, such as the confidentiality obligations of ABA Model Rule 1.6.[11] If such obligations are found, do they apply just to the time period in which a lawyer participates in a joint defense group? Or, like former client confidences,[12] do they continue to bind the attorney even after the joint defense relationship is terminated? The answers to these questions are important because access to confidential information can form the basis of attorney disqualification motions. Various courts that have found confidentiality obligations in joint defense relationships have utilized general conflict of interest principles to disqualify lawyers from representations adverse to participants in a joint defense group following their withdrawal.[13]

One basis for disqualification is that the JDA established an implied attorney-client relationship between the lawyers and the individual clients participating in the JDA.[14] Once an attorney-client relationship is found, some courts have found it easy to disqualify a participating lawyer who subsequently became adverse to one or more members of the joint defense group:

> [A]n attorney should also not be allowed to proceed against a co-defendant of a former client [if] the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and [if] confidential exchanges of information took place between the various co-defendants in preparation of a joint defense.[15]

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[11] ABA Model Rule 1.6 provides in part that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Model Rules of Prof'l Conduct R. 1.6 (Confidentiality of Information), *available at* http://www.abanet.org/cpr/mrpc/rule_1_6.html.

[12] Model Rules of Prof'l Conduct R. 1.9(c) ("A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client."), *available at* http://www.abanet.org/cpr/mrpc/rule_1_6.html.

[13] *See, e.g.*, All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc., 2009-1 Trade Cas. (CCH) ¶ 76,465 (N.D. Cal. 2008), *order clarified by* 2009-1 Trade Cas. (CCH) ¶ 76,501 (N.D. Cal. 2009).

[14] *See, e.g.*, United States v. Henke, 222 F.3d 633, 637 (9th Cir. 2000) ("A joint defense agreement establishes an implied attorney-client relationship with the co-defendant").

[15] Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977).

On the other hand, other courts[16] and the American Bar Association[17] have not found that joint defense participation creates a client relationship. The ABA in its analysis in Opinion 95-395, a formal ethics opinion on joint defense relationships, noted that information received through the joint defense relationship rather would be "information relating to representation of a client," which the lawyer would have an obligation to maintain in confidence under Rule 1.6(a), even though the information came not from the lawyer's client "but from another member of the consortium that was not represented by [l]awyer."[18] As a result, the consent of the original client to use the information may be required.[19] The ABA concluded that any obligations that the lawyer may have to other members of the joint defense group derive from fiduciary, not ethical, obligations.[20]

The D.C. Bar through its ethics committee in Opinion 349 also expressly rejected the argument that the sharing of confidences under a joint defense agreement gives rise to attorney-client relationship. Noting that a non-client member of a joint defense group often could not become a client under the applicable conflict rules,[21] the committee concluded that a non-client member of a joint defense group is not a client and thus the former client conflicts rule does not apply.

The ABA concluded that any obligations that the lawyer may have to other members of the joint defense group derive from fiduciary, not ethical, obligations.

The potential implications of a contrary finding are enormous—almost certain disqualification due to former client conflicts. Lawyers frequently make it a practice to include specific language in their JDAs specifically disclaiming any attorney-client relationship with the clients of other JDA participants. While this helps in withdrawal situations in avoiding the former client issues under ABA Model Rule 1.9, it does not completely resolve the possible conflict issues that might be found based on other obligations (i.e., as fiduciary obligations). Nor does it address the extent to which an attorney's individual disqualification is imputed to other lawyers in his firm. These are the issues that the D.C. Bar tackles in Opinion 349, the most recent (and certainly the most comprehensive) treatment of the conflict and disqualification issues arising out of JDAs.

Disqualification Issues: Screened Lawyer Changed Law Firms

In Opinion 349, the D.C. Bar ethics committee addressed two scenarios relating to joint defense groups that present familiar issues for antitrust lawyers. The first assumes that lawyer A represented an individual employee in a criminal investigation focused on that individual's employer (e.g., international cartel investigation). Attorney A executed a JDA with the other subjects of the investigation, including his client's employer, who all had a common interest in defeating the government charges. Under the JDA, Lawyer A received confidential information from the employer and participated in meetings with employer's counsel to discuss joint strategy and other work

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16 *See* United States v. Almeida, 341 F.3d 1318, 1326 (11th Cir. 2003) ("when each party to a joint defense agreement is represented by his own attorney, and when communications by one co-defendant are made to the attorneys of other co-defendants, such communications do not get the benefit of the attorney-client privilege in the event that the co-defendant decides to testify on behalf of the government").

17 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-395, Obligations of a Lawyer Who Formerly Represented a Client in Connection with a Joint Defense Consortium (1995).

18 *Id.* at 3 (emphasis added).

19 *Id.*

20 *Id.* at 5. The ABA found that this fiduciary obligation might arise from the law of agency (the lawyer having been a sub-agent of the client who in turn was the agent of the co-defendant with whom confidential information is shared), rather than from the law governing lawyers. *Id.* at 5 n.3 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 213 comment g(ii) (Preliminary Draft No. 11, 1995)).

21 An antitrust example is when a cartel investigation joint defense group includes a corporate employer and individual employees who are represented by separate counsel because of the potential direct adversity with their employer. *See* Kathryn M. Fenton & Ryan C. Thomas, "*The Rule of Professional Conduct Are Not Aspirational": Joint Representation of Corporations and Their Employees*, ANTITRUST SOURCE, June 2009, http://www.abanet.org/antitrust/at-source/09/06/Jun09-Fenton6-29f.pdf.

product. Lawyer A ultimately was successful in resolving his individual client's liability with the government, and so terminated the representation of the individual employee.

At this point, Lawyer A left his original law firm and joined a new law firm, which subsequently was approached by Client X, who wished to sue the employer of Lawyer A's client for treble damages arising out of the criminal price-fixing cartel. Lawyer A's new firm agreed to do so, and proposed to screen Lawyer A, the only lawyer at the firm who participated in the JDA and was exposed to confidential information of the other joint defense group participants. Even with the screen, would this representation violate Rules 1.6, 1.9, and 1.10, protecting confidential information and former client confidences and imputing an individual lawyer's conflict to all other lawyers in his firm?

The D.C. Bar ethics committee started its analysis by noting that the D.C. Rules of Professional Responsibility do not specifically address the subject of JDAs. It determined that the closest relevant provision—D.C. Rule 1.9 dealing with former client conflicts—was not directly applicable because a non-client member of a joint defense group is not a "client." Thus, neither the participating lawyer nor his new law firm is limited by former client conflict principles.[22]

The D.C. Bar ethics committee also rejected the confidentiality obligations of D.C. Rule 1.6, because it found that this rule applies to "a confidence or secret of the lawyer's client." Again, because the JDA did not make the parties to the joint defense agreement "clients" of the participating lawyers, Rule 1.6 did not apply. However, the committee noted that non-client members of a joint defense group can claim the protections due third parties to whom a lawyer may owe legal or fiduciary obligations. Such obligations, including the contractual commitments contained in JDAs, may trigger the conflict of interest provisions of D.C. Rule 1.7 (b)(4), which recognizes the potential for conflict when:

> The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

Thus, if a lawyer has undertaken fiduciary obligations by entering into the JDA, that lawyer may be personally disqualified from a subsequent representation adverse to a joint defense group member in a substantially related matter unless the lawyer is released from his obligation.

In the moving lawyer situation, the natural next question is whether this Rule 1.7(b)(4) conflict is imputed to the other lawyers in the new law firm. Under D.C.'s version of the imputation rules, Rule 1.7(b)(4) conflicts are not automatically imputed to other lawyers in the firm. Such imputation would arise only where the individual lawyer's personal interest "present[s] a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm."[23] The D.C. Bar ethics committee therefore concluded that a joint defense obligation to a non-client generally will be treated solely as an individual lawyer's obligation and not imputed to other lawyers in the new firm. In addition, according to the opinion, "[i]n most circumstances, deployment of a timely and effective screen will eliminate the risk that an individual lawyer's obligations under a joint defense agreement will adversely affect the client's representation by other lawyers in the firm."[24]

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[22] As the D.C. Bar committee recognized, "In the absence of a prohibited 'former client' conflict under Rule 1.9, there is nothing to impute to other lawyers at the same firm under Rule 1.10(a)." D.C. Bar Ethics Comm., Opinion 349, *supra* note 2.

[23] D.C. Rule 1.10(a)(1).

[24] D.C. Bar Ethics Comm., Opinion 349, *supra* note 2.

Disqualification Issues: Screened Lawyer Has Stayed at Same Law Firm

The D.C. Bar ethics committee used the same background facts to consider the ethical implications when Lawyer A did not change law firms. In this case, because the joint defense agreement required Lawyer A to keep confidential all information as well as work product received through the joint defense group, the firm proposed to screen Lawyer A and all the lawyers who represented the individual employee from any involvement in the lawsuit to be filed on behalf of Client X. Assuming an effective screen could be established, does this permit the original law firm to represent Client X against the employer of its former client without violating Rules 1.6, 1.9, and 1.10?

The individual lawyer may have obligations under Rule 1.7(b)(4) and these obligations may be imputed to other lawyers in the firm only if the JDA obligations present a "significant risk" of adversely affecting the representation of the firm's client.

The Rule 1.9 analysis remains the same as discussed above: because the employer never was Lawyer A's client, there was no former client issue under Rule 1.9, and hence no conflict to impute to the other lawyers in the firm under Rule 1.10. The individual lawyer may have obligations under Rule 1.7(b)(4) and these obligations may be imputed to other lawyers in the firm only if the JDA obligations present a "significant risk" of adversely affecting the representation of the firm's client.

In this "original firm" scenario, however, there are two additional issues that may affect the conflicts analysis: (1) the possibility that the firm itself is bound by the JDA (especially if the contractual undertaking was signed in the name of the firm); and (2) the practical difficulty of establishing retroactively a screen when multiple lawyers in the firm may have been exposed to confidences of the joint defense group during the period before the adverse representation commenced.

These considerations may make it more difficult for the original firm to avoid the imputed disqualification issues, and more likely to lead to a "significant risk" that joint defense obligations will impair the firm's ongoing representation of its proposed new client. As a result, the D.C. Bar ethics committee concluded:

> [I]n this scenario, the law firm likely would be precluded from undertaking the representation unless the law firm could conclude: (i) it and its other lawyers are not bound by the joint defense agreement; and (ii) none of the other lawyers had been exposed to any confidential information relating to the joint defense agreement.

The committee in Opinion 349 suggested two measures to minimize these potential conflicts issues. First, as soon as the joint defense agreement was executed, screens should be established within the firm to ensure that only Lawyer A and any other firm lawyers actually participating in the representation of the individual employee had access to confidential joint defense information. Second, assuming such screens would be created, the joint defense agreement should include language specifically acknowledging that nothing precluded the other lawyers in the firm "from undertaking litigation and other matters adverse to non-client members of the joint defense group, including matters that might be deemed to be substantially related to the matter that is the subject of the joint defense agreement."[25]

Practical Advice

Like a number of other ethics committees,[26] the D.C. Bar ethics committee encourages lawyers to anticipate and address in advance potential conflict issues that might arise upon withdrawal from the joint defense group. Practical measures that might minimize the risks of conflicts of interest and subsequent disqualification as a result of participation in JDAs include:

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[25] The opinion notes the practical difficulty that may be encountered in getting participants in the joint defense group to sign off on such undertakings. *Id.*

[26] *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-390, Conflicts of Interest in the Corporate Family Context (Jan. 25, 1995) (urging use of initial engagement letter to identify clients and non-clients in corporate representation).

1. Always include language in the JDA that disclaims the creation of an attorney-client relationship and waives any right to file motions to disqualify in an action involving a withdrawn attorney and non-client member of the group. While not controlling in all circumstances, such disclaimers provide useful evidence of the contemporaneous intent of the parties and can be used to refute claims of an implied attorney-client relationship with a non-client member.
2. Include in a JDA specific waiver language. Among specific waivers that might be considered are those that address: (a) cross-examination and possible impeachment of a defecting joint defense group member; (b) lateral lawyers/new law firms and reject any imputed disqualification of a new law firm; and (c) expressly permit other lawyers in the participating attorney's law firm to represent clients in matters adverse to other joint defense members (even including matters substantially related to the joint defense matter).
3. Have individual attorneys sign the JDA rather than signing it on behalf of, or in the name of, the law firm. As Opinion 349 recognized, a JDA signed on behalf of the firm may give rise to the argument that the firm has undertaken fiduciary obligations to the other members of the joint defense group. This may present conflict or disqualification issues for the firm subsequently seeking to represent a new client against a non-client member of the group, even in circumstances in which all of the attorneys who participated in the joint defense activities have left the firm.
4. Consider limiting the number of attorneys who are exposed to confidential information from other members of the joint defense group; possibly undertake formal screening procedures like those suggested in Opinion 349 to limit access to the information received from other joint defense members. Both these steps may make it easier to demonstrate that any confidential information derived from the joint defense group was not widely disseminated throughout the firm and thus may assist in defending disqualification motions based on a later representation adverse to a former non-client member.

Conclusion

Joint defense agreements will continue to be used in a variety of antitrust representations. To ensure that they remain an effective tool on behalf of clients, it is important for attorneys to understand the possible risks associated with their use and to take prudent steps to avoid conflict of interest and disqualification issues. ●

District of Columbia Ethics Opinion 349
Conflicts of Interest for Lawyers Associated with Screened Lawyers
Who Participated in a Joint Defense Group
September 2009

Joint defense agreements do not create "former client" conflicts under Rule 1.9 because members of a joint defense group do not become the lawyer's "clients" by virtue of such agreements. However, a lawyer who participates in a joint defense agreement may acquire contractual and fiduciary obligations to the members of the joint defense group who were not the lawyer's clients. Such obligations can give rise to a personally disqualifying conflict under Rule 1.7(b)(4) to the extent that they materially limit the lawyer's ability to prosecute or defend a substantially related matter adverse to a joint defense group member.

Under Rule 1.10(a)(1), such conflicts are not automatically imputed to other lawyers in the lawyer's firm. If the lawyer has moved to a new firm since handling the joint defense group matter, other lawyers at the new firm could undertake a substantially related matter adverse to a joint defense group member, provided that the personally disqualified lawyer is timely screened from the new representation. The analysis is more difficult if the lawyer has remained at the same firm. If that firm wishes to undertake a related matter adverse to a member of the joint defense group, the firm must consider: (i) whether the entire firm is bound by a joint defense agreement that one of its lawyers signed while affiliated with the firm; and (ii) if not, whether the lawyers who would be handling the new matter might have been exposed to confidential information from the joint defense group matter while that matter was being handled by others in the same firm.

Applicable Rules

- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest: General)
- Rule 1.9 (Conflict of Interest: Former Client)
- Rule 1.10 (Imputed Disqualification General Rule)

Inquiry

The District of Columbia Rules of Professional Conduct ("Rules") provide clear guidance to a lawyer who is considering taking on a representation that would be adverse to a former client of that lawyer or of another lawyer in the same law firm. The Committee has received multiple inquiries about whether and to what extent the Rules apply to representations adverse to members of a joint defense group who were never clients of the lawyer or law firm. In this opinion, the Committee considers two variations of the following scenario:

Lawyer A represented an individual in a criminal investigation focused on the individual's employer ("Employer") and others. Lawyer A executed a joint defense agreement with the other subjects of the investigation, including Employer, arising out of a common interest.

Lawyer A subsequently received confidential information relating to the investigation from Employer and participated in meetings with Employer's counsel to discuss joint strategy and other work product. Lawyer A ultimately resolved the individual client's matter with the government, and the representation terminated.

Scenario #1—New Firm: After Lawyer A resolved the criminal matter on behalf of the individual, he left his original law firm and joined a new law firm ("New Firm"). Client X approaches New Firm about suing Employer for damages arising out of the conduct that gave rise to the criminal investigation. New Firm proposes to screen A from the representation. Lawyer A is the only lawyer at New Firm who participated in the joint defense agreement. Because that representation was completed before Lawyer A joined New Firm, there are no other lawyers at New Firm who represented the individual employee in the criminal investigation. Would this representation violate the Rules, in particular, Rules 1.6, 1.9, and 1.10?

Scenario #2—Same Firm: Lawyer A does not change law firms. After the resolution of the criminal matter, Client X approaches Lawyer A's law firm ("Firm") about suing Employer for damages arising out of the conduct that gave rise to the criminal investigation. Because the joint defense agreement that Lawyer A signed with Employer required A to keep confidential all information as well as work product shared by Employer, Firm proposes to screen Lawyer A and all the lawyers with whom he worked on the criminal investigation from participating in the lawsuit to be filed by Client X. Assuming that an effective screen is imposed, would Firm's representation of Client X against Employer violate of any of the Rules, in particular Rules 1.6, 1.9, and 1.10?

Analysis

In the District of Columbia, the Rules do not mention joint defense agreements. Certain decisions in other jurisdictions have disqualified lawyers from matters adverse to members of a joint defense group because of the past membership in the joint defense group of another lawyer in the same firm. *See, e.g., All American Semiconductor, Inc. v. Hynix Semiconductor, Inc.*, 2009-1 Trade Cas. (CCH) ¶76,465 (N.D. Cal. Dec. 18, 2008), *order clarified by* 2009-1 Trade Cas. (CCH) ¶76,501 (N.D. Cal. Feb. 5, 2009)*; In re Gabapentin Patent Litig.* 407 F. Supp. 2d 607 (D.N.J. 2005), *reconsideration denied*, 432 F. Supp. 2d 461 (D.N.J. 2006); *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996).[1] Those cases relied upon the

[1] In the *Gabapentin Patent Litigation* case, for example, a law firm was disqualified from litigation despite the screening of two lateral attorneys who joined the firm during the litigation. The firm had obtained a consent from the laterals' former client. However, the firm was disqualified because it did not obtain separate consents from the other members of the joint defense group in which the laterals had participated. Finding "a fiduciary and implied attorney-client relationship between" the two laterals and the other members of the joint defense group, the court held that the other members of the joint defense group were, "by implication, [the laterals'] 'former clients'...." 407 F. Supp. 2d at 615. The law firm was disqualified because the court concluded that the two laterals were personally disqualified under New Jersey's Rule 1.9, and that conflict was imputed to other lawyers in the same firm under New

obligations that a lawyer owes a former client under the rules of other jurisdictions. In approaching these questions in the District of Columbia, one must distinguish between obligations imposed by the Rules and obligations arising under other law, such as the law of contracts or principles of fiduciary duty. This Committee's jurisdiction is limited to questions arising under the Rules.

A. Background.

1. Duties to Former Clients.

Without a former client's consent, a law firm may not represent others in suing the former client in matters that are the same as or substantially related to the matter in which the firm represented the former client. Rule 1.9 prohibits the lawyer who represented the former client from representing anyone against the former client in the same or in a substantially related matter.[2] Rule 1.10(a) imputes that conflict to all other lawyers in the same law firm, even if those other lawyers had nothing to do with the representation of the former client.[3] When a lawyer joins a new firm, however, conflicts are imputed to the other lawyers in the firm only if the lawyer had "in fact acquired information protected by Rule 1.6 [confidentiality of information] that is material to the matter." Rule 1.10(b).[4] Although the Rules recognize the concept of a screen[5] – and require use of screens in certain circumstances– a screen alone does

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Jersey's Rule 1.10. *Id*. Under those rules, screening without a consent was not available to cure the conflict. *Id*. at 615-16.

[2] Rule 1.9 provides: "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 consent."

[3] Rule 1.10(a) provides:

> 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:
>
> (1) the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm; or
>
> (2) the representation is permitted by Rules 1.11 [successive government and private employment], 1.12 [former arbitrator], or 1.18 [duties to prospective client].

[4] Rule 1.10(b) provides: "When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in a matter which is the same as, or substantially related to, a matter with respect to which the lawyer had previously represented a client whose interests are materially adverse to that person and about whom the lawyer has in fact acquired information protected by Rule 1.6 that is material to the matter. The firm is not disqualified if the lawyer participated in a previous representation or acquired information under the circumstances covered by Rule 1.6(h) or Rule 1.18."

[5] *See* Rule 1.0(l) (defining "screened").

not resolve an imputed former client conflict under Rules 1.9 and 1.10. *See* D.C. Legal Ethics Opinion 279 (1998).

2. <u>Joint Defense Agreements Generally.</u>

Joint defense agreements are entered into by parties who, by choice or by necessity given applicable conflict of interest rules, have separate counsel in the matter but have some common interests. They may be used in both criminal and civil matters. They may be written or unwritten. This Committee is not opining on the validity or intricacies of joint defense agreements, but sets forth here a brief background on such agreements as context for the application of the Rules to the questions presented.

A joint defense agreement (also known as a common interest agreement) is a way for clients and their lawyers to share privileged information with third parties without waiving otherwise applicable privileges.

> The joint defense privilege, often referred to as the common interest rule, is an extension of the attorney-client privilege that protects from forced disclosure communications between two or more parties and/or their respective counsel if they are participating in a joint defense agreement. It permits a client to disclose information to her attorney in the presence of joint parties and their counsel without waiving the attorney-client privilege and is intended to preclude joint parties and their attorneys from disclosing confidential information learned as a consequence of the joint defense without permission.

United States v. Hsia, 81 F.Supp. 2d 7, 16 (D.D.C. 2000) (citations omitted). "It protects communications between the parties where they are 'part of an on-going and joint effort to set up a common defense strategy' in connection with actual or prospective litigation." *Minebea Co. v. Papst*, 228 F.R.D. 13, 15 (D.D.C. 2005) (citations omitted). "[T]he rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine." *Id*. at 16 (quoting *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990)). "Although occasionally termed a privilege itself, the common interest doctrine is really an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person." *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007).

As with any contract or other agreement, the precise terms of a joint defense agreement depend on the agreement itself. Some forms of joint defense agreement define in great detail the rights and obligations that each member of the joint defense group is assuming with respect to every other member of the group. For example, the joint defense agreement might specifically disclaim any attorney-client relationship with the members of the joint defense group who are not the participating lawyer's client. It might also provide a specific waiver to allow use of confidential joint defense information to cross-examine and impeach a member of

the joint defense group who becomes a witness for the adversary after abandoning the joint defense through, e.g., a guilty plea or settlement agreement.

One form of joint defense agreement that does both provides as follows:

> Nothing contained herein shall be deemed to create an attorney-client relationship between any attorney and anyone other than the client of that attorney and the fact that any attorney has entered this Agreement shall not be used as a basis for seeking to disqualify any counsel from representing any other party in this or any other proceeding; and no attorney who has entered into this Agreement shall be disqualified from examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise, because of such attorney's participation in this Agreement; and the signatories and their clients further agree that a signatory attorney examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise, may use any Defense Material or other information contributed by such client during the joint defense; and it is herein represented that each undersigned counsel to this Agreement has specifically advised his or her respective client of this clause and that such client has agreed to its provisions.
>
> *United States v. Stepney*, 246 F.Supp. 2d 1069, 1085 (N.D. Cal. 2003) (quoting Joint Defense Agreement, Am. Law Institute-Am. Bar Ass'n, *Trial Evidence in the Federal Courts: Problems and Solutions*, at 35 (1999)).

Indeed, the *Stepney* court recommended use of such a waiver in a criminal case after holding that a joint defense agreement which purported to create "a general duty of loyalty to all participating defendants" was "unacceptable" and supported by "neither precedent nor sound policy." 464 F. Supp. 2d at 1084-85.[6] The court found that "[a] duty of loyalty between parties to a joint defense agreement would create a minefield of potential conflicts." *Id*. at 1083. Such conflicts would include:

- The inability to cross-examine at trial co-defendants who participated in the joint defense group but later decided to cooperate with the adversary and testify on its behalf [7]

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[6] *See also Stepney* at 1079-80 ("Joint defense agreements are not contracts which create whatever rights the signatories chose, but are written notice of defendants' invocation of privileges set forth in common law. Joint defense agreements therefore cannot extend greater protections than the legal privileges on which they rest. A joint defense agreement which purports to do so does not accurately set forth the protections which would be given to defendants who sign. In the present case, unless the joint defense privilege recognized in this Circuit imposes a duty of loyalty on attorneys who are parties to a joint defense agreement, the duty of loyalty set forth in the proposed agreement would have no effect other than misinforming defendants of the actual scope of their rights.") (footnote omitted)

[7] *See id.* at 1083 ("Should any defendant that signed the agreement decide to cooperate with the government and testify in the prosecution's case-in-chief, an attorney for a non-cooperating defendant would be put in the position of cross-examining a witness to whom she owed a duty of loyalty on behalf

- The inability to "cross-examine a defendant who testified on his own behalf." *Id*.
- The inability "to put on a defense that in any way conflicted with the defenses of the other defendants participating in a joint defense agreement." *Id*.
- The inability to "shift blame to other defendants or introduce any evidence which undercut their defenses." *Id*.

As illustrated by the above, "a joint defense agreement that imposes a duty of loyalty to all members of the joint defense agreement eliminates the utility of employing separate counsel for each defendant and (for purposes of conflict analysis) effectively creates a situation in which all signing defendants are represented jointly by a team of all signing attorneys." *Stepney* at 1083. Such a situation is ethically impermissible in some circumstances, including those presented to the *Stepney* court. *See id*. at 1083-1084 ("The court certainly could not permit joint representation of defendants with such disjointed interests as those in the present case.") (citing Fed. R. Crim. P. 44(c)(2)).

Just as a joint defense agreement may contain a specific waiver to allow cross-examination and impeachment of a defecting joint defense group member, it might also provide specific agreed-upon ground rules to address situations in which:

- Other lawyers in a participating attorney's law firm are asked to represent clients in matters adverse to one or more non-client members of the joint defense group, including matters that are substantially related to the joint defense matter.
- A participating lawyer moves to another law firm which has, or is later asked to undertake, representations adverse to one or more members of the joint defense group that are substantially related to the joint defense matter.

The parties could agree, for example, that other attorneys at any law firm that the participating attorney might later join shall not be precluded by virtue of the attorney's past participation in the joint defense group from undertaking, or continuing to handle, potentially related matters adverse to one or more non-client members of the joint defense group, provided that the lawyer in question does not personally participate in the representation and is timely screened from it. Such an understanding would provide certainty and avoid potential issues under the rules of professional conduct in most jurisdictions by providing advance consent to the extent that a consent might be deemed to be required under the applicable rules.[8]

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of her own client, to whom she also would owe a duty of loyalty. This would create a conflict of interest which would require withdrawal.... [T]he existence of a duty of loyalty would require that the attorneys for *all* noncooperating defendants withdraw from the case in the event that any *one* participating defendant decided to testify for the government.").

[8] In some jurisdictions, consents must be in writing or confirmed in writing. *See, e.g.* ABA Model Rules 1.7(b)(4) and 1.9(a). While the D.C. Rules do not require that waivers be in writing (*see* Rule 1.7 cmt. 28), this Committee has recommended "that – for the protection of lawyers as well as clients – advance waivers be written." D.C. Legal Ethics Opinion 309 (2001).

B. Joint Defense Agreements and the Rules.

In the District of Columbia, Rule 1.9 addresses only conflicts that involve a "former client" of the lawyer. By its own terms, Rule 1.9 creates no obligations with respect to a person or entity who never was a client.[9] Case law in the District of Columbia requires a showing "that an attorney-client relationship formerly existed" in order for the Rule to apply. *Derrickson v. Derrickson*, 541 A.2d 149, 152 (D.C. 1988). Because a non-client member of a joint defense group is not a "client" – and in many cases could not be a client under the applicable conflicts rules – Rule 1.9 does not preclude adversity to non-client joint defense group members. In the absence of a prohibited "former client" conflict under Rule 1.9, there is nothing to impute to other lawyers at the same firm under Rule 1.10(a).

Similarly Rule 1.10(b) speaks only to a situation in which a lawyer moves from one firm to another after having represented a "client" at the first firm. Nothing in the text of that rule prohibits other lawyers at the new firm from being adverse to a person or entity their new colleague never represented.

Nor does Rule 1.6 create any confidentiality obligations to non-clients that are enforceable through discipline under the Rules. The only obligations that Rule 1.6 imposes involve "a confidence or secret of the lawyer's client." A joint defense agreement does not make the parties "clients" of the participating lawyers. Indeed the raison d'être for a joint defense agreement is to share privileged information with non-clients.

Even though non-client members of a joint defense group are not "clients" or "former clients," they are "*third parties*" to whom an individual attorney may owe an obligation under a joint defense agreement. Such an obligation can give rise to a conflict of interest under Rule 1.7.

Rule 1.7(b)(4) addresses conflicts involving third parties:

> [A] lawyer shall not represent a client with respect to a matter if… the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected *by the lawyer's responsibilities to* or interests in *a third party* or the lawyer's own financial, business, property, or personal interests. (emphasis added).

Under this Rule, a lawyer's confidentiality responsibilities to a non-client member of a joint defense group may preclude the lawyer from undertaking a representation adverse to the member in a substantially related matter that implicates the confidential information. The

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[9] *See also* ABA Formal Opinion 95-395, *Obligations of a Lawyer Who Formerly Represented a Client in Connection with a Joint Defense Consortium* (1995) (while a lawyer "would almost surely have a fiduciary obligation to the other members of the consortium... [h]e would not, however, owe an ethical obligation to them, for there is simply no provision of the Model Rules imposing such an obligation.").

lawyer will be personally disqualified from such a matter unless the lawyer can secure a release from the obligation.[10]

Unlike other conflicts under Rules 1.7 and 1.9, a Rule 1.7(b)(4) conflict is not necessarily imputed to other lawyers in the same law firm. Rule 1.10(a)(1) takes such conflicts out of the general imputation rule:

> (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:
>
> > (1) the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm....

Thus, a joint defense agreement obligation to a non-client will be treated as an individual lawyer's obligation to a third party. That obligation is not imputed to other lawyers in the firm as long as the individual lawyer's interest does not present a significant risk of adversely affecting the representation of the client by the other lawyers in the firm. In most circumstances, deployment of a timely and effective screen will eliminate the risk that an individual lawyer's obligations under a joint defense agreement will adversely affect the client's representation by other lawyers in the firm.[11]

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[10] Conflicts arising under Rule 1.7(b) can be waived if "(1) each potentially affected client provides informed consent...; and (2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected clients." Rule 1.7(c). In this context, of course, the non-client joint defense group member is not an "affected client" whose consent is required under 1.7(c). However, law independent of the Rules may require the lawyer to get a release of some kind before the lawyer may begin a representation that would otherwise be prohibited by the joint defense agreement. If the terms of that release impose any material limitations on the lawyer's representation of the client in the proposed matter– such as prohibiting the lawyer from using on the client's behalf relevant confidential information of which the lawyer is aware– Rule 1.7(c) will require an informed consent from the client in the matter. If the terms of the release place too many restrictions on the lawyer's proposed representation, the lawyer will not be able to satisfy the Rule 1.7(c)(2) requirement that he or she "reasonably believe[] that the lawyer will be able to provide competent and diligent representation...." In such event, the lawyer would have to decline the representation.

[11] Strictly speaking, a screen is not necessary if the personally disqualified lawyer avoids participation in the new matter and does not reveal any confidential information about the prior matter to the lawyer's colleagues, thereby fulfilling the lawyer's own obligations under the joint defense agreement. However, use of a screen is prudent to remind the personally disqualified lawyer of his obligations, to alert the involved lawyers to the existence of the issue, and to confirm their commitment to take extra care in the screened lawyer's presence.

C. Application of the Pending Inquiry.

Both scenarios presented to the Committee for analysis involve a law firm being asked to represent Client X in related litigation against a non-client participant (Employer) in a joint defense agreement to which one of the firm's current lawyers, Lawyer A, had been a party. We assume the litigation will not involve or adversely affect the employee – Lawyer A's former client from the criminal investigation.[12] Lawyer A has confidential information from Employer that the joint defense agreement precludes him from sharing or using on another's behalf against Employer. The law firm seeking to represent X in the litigation against Employer plans to screen the lawyer from the representation.

The only difference between the two scenarios is that, in the first scenario, Lawyer A has changed law firms since handling the criminal matter. New Firm has been asked to represent X in the litigation and New Firm's only connection with the past criminal representation is that it is now associated with the lawyer who handled it at a previous firm. In the second scenario, by contrast, the law firm that is being asked to represent Client X against Employer is the same firm that Lawyer A was associated with during the representation of the employee in the criminal matter.

1. The Screened Lawyer Is At a New Firm, Which Has Been Asked to Handle the Related Matter Against the Joint Defense Group Member.

In the first scenario, New Firm should not be precluded from representing Client X in the litigation against Employer under Rules 1.7(b)(4) and 1.10(a)(1). While we assume Lawyer A at New Firm has relevant confidential information of Employer that cannot be shared with others because of the joint defense agreement, a timely and effective screen assures that Lawyer A will not violate the lawyer's own personal obligations under the joint defense agreement, and that others in New Firm will not be tainted by exposure to confidential information that cannot be used or disclosed. This is a situation in which there would not appear to be any "significant risk of adversely affecting the representation of the client by the remaining lawyers in" New Firm, so Lawyer A's personal disqualification would not be imputed to others in the firm. New Firm does not need a consent from Employer because Employer never was Lawyer A's client. Thus, Rule 1.9 does not apply to Lawyer A, and there is no Rule 1.9 conflict to impute to other lawyers in New Firm under Rule 1.10(a). Similarly, Employer's never-client status as to A means that the New Firm does not have an imputed conflict under Rule 1.10(b), which applies only to matters involving a lateral attorney's past representation of a "client."

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[12] If the litigation did involve or adversely affect the lawyer's former client, the lawyer and the firm would be required to conduct an analysis under Rule 1.9 to determine whether the new matter could be accepted. Such adversity to the former client could exist if the representation of the new client exposed the former client to claims by other members of the joint defense group based on an alleged breach of the joint defense agreement. *See also* ABA Formal Opinion 95-395, *supra* note 9.

2. The Screened Lawyer Has Stayed at the Same Firm, Which Now Has Been Asked to Handle the Related Matter Against the Joint Defense Group Member.

When Lawyer A stays at the same firm, the analysis under Rule 1.9 is the same as it was when he changed firms: Lawyer A has no conflict under Rule 1.9 because Employer was never Lawyer A's client. There is no Rule 1.9 conflict to impute to other lawyers in the same firm under Rule 1.10. However, Lawyer A will have a personally disqualifying conflict under Rule 1.7(b)(4) if his obligations to third parties under the joint defense agreement will, or reasonably may, adversely affect his professional judgment on behalf of a client in a matter adverse to a joint defense group member.

As discussed above, an individual lawyer's joint defense agreement conflict under Rule 1.7(b)(4) is imputed to other lawyers in the same law firm only if the personally disqualified lawyer's obligations under the joint defense agreement "present[] a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm" Rule 1.10(a)(1). The analysis of whether this will occur in the second scenario (where the lawyer stayed at the same firm) is complicated by two issues: (i) the possibility that the firm itself is bound by the joint defense agreement that one of its lawyers signed during an affiliation with the firm; and (ii) the practical difficulty of establishing a retroactive screen.

Putting aside the signing lawyer's individual obligations under a joint defense agreement, the lawyer's firm would need to consider carefully whether the firm and its other lawyers had any confidentiality or other relevant obligations under an agreement signed by a firm lawyer during the lawyer's practice with the firm. That analysis cannot be done in the abstract without reference to the terms of a specific agreement. However, it is unlikely that a firm could allow lawyers who had not participated in the prior representation to search the firm's files respecting that representation for information that would be useful in the case against the joint defense group participant. Moreover, to the extent that information obtained pursuant to a joint defense agreement is protected under Rule 1.6, the firm and its other lawyers would be precluded from using that information for the advantage of another client, unless the former client's consent has been obtained or certain other Rule 1.6 exceptions apply.

In addition, the original firm's own involvement in the criminal investigation—through the then- and still-associated lawyer and any other firm attorneys or staff who participated in the representation—would raise questions about the timeliness and effectiveness of any screen it might erect to block the attorneys who planned to handle the substantially related litigation against Employer from exposure to confidential information arising from the earlier matter. While the firm could take steps to prevent future discussions of the past matter with the litigators on the new matter, it would also need to be sure that none of them was exposed to information about the case in the past, when there might not have been any reason to take extra steps to keep them from hearing about or discussing the criminal matter that was being handled by others in that firm.

Thus, in this scenario, the law firm likely would be precluded from undertaking the representation unless the law firm could conclude: (i) it and its other lawyers are not bound by the joint defense agreement; and (ii) none of the other lawyers had been exposed to any confidential information relating to the joint defense agreement.

This is an issue that could have been clarified by the terms of the joint defense agreement. The law firm in this scenario would have more options if the joint defense agreement provided that:

> (1) Screens would be erected within the firm so that only the participating lawyer and certain other named individuals associated with the firm would have access to confidential joint defense information; and
>
> (2) Nothing in the joint defense agreement would preclude screened lawyers in the firm from undertaking litigation and other matters adverse to non-client members of the joint defense group, including matters that might be deemed to be substantially related to the matter that is the subject of the joint defense agreement.

We acknowledge that it may be difficult in many circumstances to get potential joint defense group members to agree to such an approach.

Conclusion

Under the D.C. Rules, joint defense agreements with non-clients do not create "former client" conflicts for lawyers as to those non-clients under Rule 1.9. Joint defense agreements may create obligations to a third party, however, that will cause the individual participating lawyer to have a conflict under Rule 1.7(b)(4) in a proposed new matter adverse to the joint defense group member. However, such conflicts are imputed to other lawyers in the same law firm only if the personally disqualified lawyer's obligations under the joint defense agreement "present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the law firm." Rule 1.10(a)(1). Where the joint defense group matter was handled by the personally disqualified lawyer while at a different law firm, the lawyer's new firm may avoid any imputed disqualification by screening the lawyer from the new matter. When the personally disqualified lawyer remains at the same law firm, however, other lawyers at that firm who are considering undertaking the new matter adverse to the joint defense group member likely will face a disqualifying conflict under Rule 1.7(b)(4) unless it is clear that: (i) none of them has any obligations under the joint defense agreement signed by another lawyer in the same firm; and (ii) none of them was exposed to confidential information about the past representation.

TAB 3

The Law and Ethics of Attorney Mistakes

The Law and Ethics of Attorney Mistakes

Stephen M. Bundy, Moderator — ***San Francisco, CA***

Stephen Bundy is a member of COPRAC. He is Professor of Law Emeritus at the University of California at Berkeley and an attorney with Taylor & Patchen, LLP in San Francisco. As an academic his scholarship centered on legal ethics and dispute resolution. He has taught legal ethics to law students, lawyers and judges for over 30 years. He has also represented both lawyers and clients in ethics matters and has testified many times as an expert witness on ethics issues

Merri A. Baldwin — ***San Francisco, CA***

Merri Baldwin is a shareholder in the San Francisco office of Rogers Joseph O'Donnell, P.C. Ms. Baldwin's practice focuses on business litigation and attorney liability and conduct. She was a member of the State Bar's Standing Committee on Professional Responsibility and Conduct from 2011 to 2017 and served as its chair in 2016. She is a certified legal specialist in Legal Malpractice Law, California Board of Legal Specialization. Ms. Baldwin is a member of the executive committee of the Bar Association of San Francisco's Legal Malpractice section and is a vice-chair of the American Bar Association Litigation Section's Professional Services Litigation Committee. She is an adjunct professor at The University of California, Berkeley School of Law, and speaks and writes frequently on legal ethics and professional responsibility matters. She co-edited The Law of Lawyers' Liability (2012, First Chair Press.) Ms. Baldwin received her law degree from the UC Berkeley School of Law, where she was co-editor-in-chief of the Berkeley Women's Law Journal. She graduated magna cum laude from Smith College, and was a Fulbright Scholar at the London School of Economics. Ms. Baldwin was the 2017 President of the Bar Association of San Francisco.

Ernest J. Galvan — **San Francisco, CA**

Ernest Galvan is a partner at Rosen Bien Galvan & Grunfeld LLP. Mr. Galvan represents both plaintiffs and defendants in a wide range of matters, including disputes over business formation and dissolution, commercial disputes, employment law matters, disability access compliance, and attorney fee matters. Mr. Galvan's experience in legal ethics matters includes hard-fought disputes arising from the breakdown of co-counsel relationships, including matters with multiple clients and cross-crossing conflict allegations. Mr. Galvan is a graduate of the University of California at Berkeley, and of Yale Law School. He served as a law clerk to Judge Dean D. Pregerson of the United States District Court for the Central District of California.

Tyler C. Gerking — **San Francisco, CA**

Tyler Gerking is a partner at Farella Braun + Martel LLP and chair of its Insurance Recovery Group. Mr. Gerking represents individual and corporate policyholders in complex, high-stakes insurance matters. He helps clients negotiate favorable policy terms (particularly cyber insurance), shepherds clients through the claim process and pursues breach of contract and bad faith claims against insurance companies. Mr. Gerking regularly handles matters involving all types of commercial insurance, including cyber, professional liability, errors & omissions liability (E&O), commercial general liability (CGL), directors & officers liability (D&O), employment practices liability (EPL), first-party property, crime and other policies. Mr. Gerking has been selected for inclusion in The Best Lawyers in America 2018 in the area of Insurance Law and is ranked by Chambers USA in California in the Insurance Policyholder practice area (2014-2017). He is recognized in Benchmark Litigation 2018 in California as a Future Star and has been recognized among Super Lawyers' Northern California Rising Stars and Super Lawyers (2010–2017). Mr. Gerking earned his B.A. in German and Political Science from the University of Montana in 1999. Mr. Gerking earned his J.D. from the UC Berkeley School of Law in 2002.

The Law and Ethics of Attorney Mistakes

Hypothetical (Slide 2)

- Firm advised Client that proposed course of conduct was lawful under state law
- Firm did not research federal law
- Client sued under state law, retains Firm to defend
- Firm researches federal law, discovers federal law problem
- Client has some potential defenses, both to liability and damages.

Sources of Duty to Disclose (Slide 3)

- CRPC 3-500:
  "A member shall keep a client reasonably informed about **significant developments** relating to the employment or representation…."
  - Policy: Client control of representation
- Common law fiduciary duty to disclose all **material facts**, including "acts of malpractice"
  - *Beal Bank, SSB v. Arter & Hadden, LLP*, 42 Cal. 4th 503, 514 (Cal. 2007)
  - *Neel et al. v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 188 (Cal. 1971)
  - Policies: Lawyer's superior expertise; client's inability to observe; duty of loyalty

Potential Additional Source of Duty to Disclose (Slide 4)

- CRPC 3-310(B)(4):
  Duty to make written disclosure of the lawyer's "legal, business, financial, or professional interest in the subject matter of the representation."
  - Policy: Client control of representation; duty of loyalty

What is a Mistake (Slide 5)

- Shaped by the law of malpractice
  - Scope of representation
  - Duty of care
  - Breach
  - Causation/damages
  - Reasoned judgment made after reasonable investigation is not a mistake
- Types of mistakes

When Must a Mistake Be Disclosed (Slide 6)

- Substantial harm
  - Loss of a claim
  - Change in value of claim
  - Significant increase in cost or delay
- Sliding scale based on obviousness; severity; ability to rectify
- Duty to investigate
- Timing

The Law and Ethics of Attorney Mistakes

Consequences of Failure to Disclose (Slide 7)

- Enhanced risk of malpractice liability
- Potential additional claim for breach of fiduciary duty/constructive fraud
- Potential additional remedies, some not insured
  - Disgorgement of fees
  - Punitive damages
  - Emotional distress damages
- Potential disciplinary liability
- Failure to comply with related insurance obligations may trigger loss of coverage

Conflicts Considerations (Slide 8)

- CRPC 3-310(B)(4): "interest in the subject matter of the representation"
- Model Rule 1.7 (and proposed California Rule 1.7): "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer."
  - Lawyer's conduct may be adversely influenced by the law firm's wish to reduce liability or embarrassment
  - Conflict disclosures and consent
  - What if you can't disclose the mistake?
  - Are there limits on what a client can consent to?

What Must Be Disclosed? (Slide 9)

- Cannot merely transmit case documents
- Describe error as neutrally as possible
- Describe potential consequences and means of avoiding them
- Acknowledge potential that mistake may give rise to claim against the lawyer?
- Advise the client of his/her right to consult independent counsel
- Written or oral?

What Should Not Be Said? (Slide 10)

- No advice regarding whether malpractice claims are viable or not
- No advice as to whether any conflict should be consented to or not
- No admission of liability

Insurance Considerations (Slides 11-14)

- "Claims made and reported" coverage
- Notice pitfalls
  - No coverage of claims made and not reported during policy/extended reporting period
  - Regardless of prejudice to insurer

- Multiple Claims based on the same or similar facts are deemed "related" and treated as a single "Claim" made on the date the first "Claim" was made
- What is a "Claim"? More than you think . . .
  - Demand for money or services, or service of complaint
  - Can include informal "demands" (e.g., email or text)
  - Does it include oral demands?
- Knowledge of acts, errors or omissions that might reasonably be expected to give rise to a Claim
- Renewal and application issues

Seeking Legal Advice (Slide 15)

- Consulting with outside and/or inside counsel
  - Ethically proper? [More here on California Proposed Opinion 12-0005]
  - Privileged?
    - Outside counsel
    - Inside counsel (state law; federal law)
- Must those communications be disclosed to the client?

Hypothetical (Slide 16)

- Associate misses redaction on key document
- Document contains serious admission that can be used to defeat summary judgment
- The parties do not have a clawback agreement, and FRE 502 may not protect the disclosure
- Associate told Partner, who told Associate to say and do nothing about it

Responsibilities of Junior and Senior Attorneys (Slides 17-18)

- Associate
  - Current law: There is currently no rule relieving a junior lawyer of her ethical obligations to the client based on the command of a senior lawyer.
  - Proposed California Rule 5.2: Associate permitted to follow a partner's reasonable resolution of an arguable question of professional duty
- Firm: duty to supervise and put in place measures to assure that ethical obligations will be complied with.

Conclusion (Slide 19)

- Don't panic; investigate
- Err on the side of disclosure
- Disclose facts, not opinions or advice
- Consult—with counsel, insurer
- For firms, build accountability into the culture

The Law and Ethics of Attorney Mistakes

Selected Sources on the Law of Lawyer Mistakes (Slides 20-21)

- Duty to Disclose
  - California:
    - California Rules of Professional Conduct 3-310 and 3-500
    - *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*¸ 6 Cal. 33 176 (1971)
    - *Beal Bank, SSB v. Arter & Hadden, LLP*, 42 Cal. 4th 503 (2007)
    - California State Bar, Formal Opinion 2009-178
    - California State Bar, Proposed Formal Opinion 12-0005
  - Other Jurisdictions:
    - Colorado Formal Opinion 113 (2005)
    - New York State Bar Association, Formal Opinion 734 (2000)
    - North Carolina Formal Opinion 15 FEO 4
  - Secondary Sources:
    - Restatement (Third) of the Law of Lawyering § 20, Comment c (2000)
    - D. Dorsanvil, D. Richmond & J. Bonnie, My Bad: Creating a Culture of Owning Up to Lawyer Missteps and Resisting the Temptation of Bury Professional Error (2015) (http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-sac/written_materials/18_1_my_bad_creating_a_culture_of_owning_up_to_lawyer_missteps.authcheckdam.pdf)
- Intra-Firm Privilege
  - *Edwards Wildman Palmer LLP v. Superior Court*, 237 Cal. App. 4th 1214 (2014) (California and state law approach)
  - *Thelen Reid & Priest v. Marland,* 2007 U.S. Dist. Lexis 17482 (N.D. Cal. 2007) (federal approach)
  - *In re SonicBlue, Inc.,* 2008 Bankr. Lexis 181 (Bankr., N.D. Cal. 2008) (federal approach)
  - G. Grunfeld and S. Alexander, Privilege When Firms Advise Themselves, L.A. Daily Journal, April 3, 2015 (https://rbgg.com/wp-content/uploads/DJ-Privilege-April-3-2015.pdf)
  - American Bar Association, Formal Opinion 08-453

TAB 4

Prohibited Discrimination and Sexual Harassment in the Legal Profession

Prohibited Discrimination and Sexual Harassment in the Legal Profession

Joel A. Osman, Moderator — ***Los Angeles, CA***

Joel A. Osman, Senior Counsel and General Counsel to the Firm at Parker Mills, concentrates his practice on litigation and trials. Prior to joining Park Mills LLP in 2014, Mr. Osman was principal of Osman & Associates a private law firm in South Pasadena. Prior to setting up his private practice, he managed a similarly named entity which was part of staff counsel to Travelers Indemnity Company. For Travelers, he was responsible for all aspects of managing its Southern California liability practice, its multi-million dollar budget and 54 employees engaged in defense of Travelers insureds in all manner of general liability, auto, fire and subrogation matters. Previously, Mr. Osman was a senior partner at Anderson, McPharlin & Conners LLP in Los Angeles. In his career, he has represented clients in cases involving professional liability, general liability, product liability, construction defect and commercial litigation, trying numerous jury trials to verdict. He has focused much of his interest on the defense of lawyers and legal ethics. His current professional activities include membership in the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee (where he was the chairperson for the 2008-2009 year). Mr. Osman is in the third year of a three year appointment as a member of the State Bar's Committee on Professional Responsibility and Conduct.

Carole J. Buckner — ***San Diego, CA***

Carole Buckner is a Partner and General Counsel with Procopio, Cory, Hargreaves and Savitch, LLP in San Diego. She is AV rated in Martindale Hubbell. Ms. Buckner consults and advises on matters involving legal ethics issues, State Bar investigations and discipline matters, serves as an expert witness and consults on risk management. Ms. Buckner is a former member of the State Bar's Committee on Professional Responsibility and Conduct (COPRAC) from 2006 through 2011, and served as Chair, Vice Chair and Special Advisor to COPRAC, and as liaison to the California State Bar's Commission for the Revision of the Rules of Professional Conduct. She currently serves on the State Bar's Committee on Mandatory Fee Arbitration, and is a fee arbitrator for the Orange County Bar Association. Carole has extensive experience with business, commercial, and employment related civil litigation in private practice and as corporate counsel to Amplicon, Inc. and California First National Bancorp. Ms. Buckner also served as a Special Assistant United States Attorney, in the Central District of California. She is member and former chair of the Los Angeles County Bar Association's Professionalism and Ethics Committee, and a member and former co-chair of the Orange County Bar's Professionalism and Ethics Committee. She recently was appointed to the San Diego County Bar Association's Legal Ethics Committee, and a member of the Association of Professional Responsibility Lawyers (APRL). Ms. Buckner is a long time legal educator, and she speaks and writes frequently on ethics-related issues. A 1980 graduate of the University of California, Berkeley, she holds her J. D. from Hastings College of the Law (1984).

Wendy Wen Yun Chang — ***Los Angeles, CA***

Wendy Wen Yun Chang, Partner, Hinshaw & Culbertson LLP, Los Angeles, represents businesses in all types of business litigation, with particular emphasis in high exposure complex litigation, trials and appeals. She also represents lawyers in all types of complex matters that involve the practice of the law, including professional liability defense, ethics litigation, disqualification motions, sanctions motions, fee related issues, discipline defense, hotline counseling, risk management counseling, ethics, crises management, and outside general counsel support. Ms. Chang is a member of the American Bar Association's Standing Committee on Ethics and Professional Responsibility. She served as an Advisor to the State Bar of California's Commission for the Revisions of the Rules of Professional Conduct, and as a past Chair of the State Bar of California Standing Committee on

Professional Responsibility & Conduct (COPRAC). Ms. Chang is a Certified Specialist in Legal Malpractice Law by the State Bar of California's Board of Legal Specialization. Ms. Chang serves as Co-Chair of the Judiciary and Executive Nominations and Appointments Committee for the National Asian Pacific American Bar Association, on the Advisory Board for the Asian Pacific American Bar Association Los Angeles, and a member of the Board of Directors for the National Association of Women Lawyers. In addition, Ms. Chang serves on the Professional Responsibility and Ethics Committee (PREC) and is a past member of the State Appellate Judicial Evaluation Committee for the Los Angeles County Bar Association. Ms. Chang received her J.D. from Loyola Law School, Los Angeles, and her B.A. from the University of California, at Los Angeles.

Prohibited Discrimination and Sexual Harassment in the Legal Profession

The Role of The State Bar On Issues of Social Justice (Slide 2)

- Does the State Bar have such a role? If so,
- What is that role?
- What statutory or case law defines that role?

The State Bar Is Created By Statute for a Specific Purpose (Slide 3)

"Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount."

Business & Profession Code Section 6001.1

The Rules of Professional Conduct Declare a Similar Purpose (Slide 4)

"The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to *protect the public and to promote respect and confidence in the legal profession*."

Rule of Professional Conduct 1-100(A). *Emphasis added.*

Examples Of State Bar Efforts to Protect the Public (Slides 5-6)

- Regulating admission to practice, B & P Section 6060 et seq.
- Define duties of attorney, B & P 6068 et seq.
- Encourage pro bono service, B & P Section 6073
- Formulate and enforce Rules of Professional Conduct, B & P Section 6076 et seq.
- Regulate retainer agreements, B & P Sections 6090.5, 6147, 6148
- Regulate client trust accounts, B & P Section 6091
- Regulate sexual relations with clients, B & P Section 6106.9
- Regulate unauthorized practice of law, B & P 6125 et seq.
- Collect funds to support free legal services for needy, B & P Section 6140.03
- Prohibit solicitation, B & P Section 6150
- Regulate advertising, B & P Section 6157

- Despite the length and breadth of the foregoing list there is little there that speaks to issues of social justice with the exception of:
  - Support for pro bono work,
  - Financial support for legal services for the needy,
  - Protecting of clients from sexual advances by attorneys.
  - Current RPC 2-400
  - B & P Code Section 6068(h)

Prohibited Discrimination and Sexual Harassment in the Legal Profession

Current Rule

(Slides 7-9)

RPC 2-400(B):

"(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race , national origin, sex, sexual orientation, religion, age or disability in:

(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or

(2) accepting or terminating representation of any client."

RPC 2-400(C):

"(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."

- Historically, the requirement that the question of discrimination be previously adjudicated by a tribunal of competent jurisdiction has been a difficult if not impossible burden to overcome in the prosecution of violations of RPC 2-400 which is one of the reasons why a new version of this rule was proposed by the Rules revision Commission.

Proposed Rule 8.4.1

(Slides 10-13)

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

(1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or

(2) unlawfully retaliate against persons.

(b) In relation to a law firm's operations, a lawyer shall not:

(1)…(i) unlawfully discriminate or knowingly permit unlawful discrimination;

(ii) unlawfully harass or knowingly permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or

(iii) unlawfully refuse to hire or employ a person, or refuse to select a person* for a training program leading to employment, or bar or discharge a person from employment or from a training program leading to employment, or discriminate against a person in compensation or in terms, conditions, or privileges of employment; or

(2) unlawfully retaliate against persons.

(c) For purposes of this rule:

(1) "protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;

(2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and . . .

Comments to Proposed Rule 8.4.1

(Slides 14-17)

Excerpt of Comments to Proposed Rule 8.4.1:

[1] Conduct that violates this rule *undermines confidence in the legal profession and our legal system* and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). In relation to a law firm's operations, this rule imposes on all law firm lawyers the responsibility to advocate corrective action to address known harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm management and supervisorial lawyers retain their separate responsibility under rules 5.1 and 5.3. Neither this rule nor rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this rule any responsibility to advocate corrective action.

. . .

[3] A lawyer does not violate this rule by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer also does not violate this rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these rules or other law.

[4] This rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

. . .

[8] This rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

[9] A disciplinary investigation or proceeding for conduct coming within this rule may also be initiated and maintained if such conduct warrants discipline under

California Business and Professions Code §§ 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

Proposed 8.4.1 Is Similar to ABA Model Rule 8.4(g)

(Slide 18)

ABA Model Rule 8.4, paragraph (g), which makes it misconduct for a lawyer to:

> "(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16."

Thank you!

(Slide 19)

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New Model Rule 8.4(g) makes knowing discrimination and harassment a black letter ethical violation

It provides model language and sends an essential strong definitive statement about what is a minimum standard of conduct for all lawyers.

By Wendy Wen Yun Chang

At the ABA's Annual Meeting in August, the House of Delegates passed Model Rule 8.4(g), making knowing discrimination and harassment a black letter ethical violation under the Model Rules of Professional Conduct (model rules). The rule's strong passage gave testament to the substantial effort that brought the proposed rule, Resolution 109, to a successful vote on the House floor.

The pathway to the rule was neither fast nor easy. The rule, as passed, was the fourth official draft of the rule, which had gone through a two-year transparent and

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New Model Rule 8.4(g)

It is professional misconduct for a lawyer to … (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

collaborative effort. The Rule's sponsor, ABA's Standing Committee on Ethics and Professional Responsibility (SCEPR), started its work in May 2014 after SCEPR received a joint letter from the ABA's four Goal III Commissions: the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, Commission on Disability Rights and the Commission on Sexual Orientation and Gender Identity. SCEPR was tasked with developing a proposal to amend the Model Rules to better address issues of harassment and discrimination and to implement the ABA's Goal III, "Eliminate Bias and Enhance Diversity."

For two years, SCEPR went through an extensive national formal and informal comment process and continued to refine the rule based upon the ongoing conversation with numerous stakeholders. These extended efforts resulted in the fourth and final version of the rule released on August 3, and approved on August 8.

The Rule was, and continues to be, subject to significant debate and scrutiny. NAWL participated in the public support effort leading up to the vote, making a strong case for why a rule was needed. In its July 21, 2016, letter of support, NAWL wrote:

> The amended Rule is necessary because explicit and implicit discrimination is still pervasive in our institutions as well as across a counsel table. Our members experience unequal pay for equal work, misogynistic comments and actions by opposing counsel, limited access to decision-makers, sexual harassment and objectification, inequitable reviews that lead to inequitable compensation, diminishing comments and behavior in meetings, and mistaken assumptions that undermine earned progression in the profession. Those who have experienced these instances of discrimination and harassment are the ones whose careers are derailed, stalled or halted while the perpetrators continue to climb the ladder of success unimpeded in what is essentially an endorsement of their behavior.

A united coalition of the national minority bar associations, the Hispanic National Bar Association (HNBA), the National Asian Pacific American Bar Association (NAPABA), the National Bar Association (NBA), the National LGBT Bar Association (National LGBT Bar), and the National Native American Bar Association (NNABA), also submitted a joint letter, observing:

> Our members regularly face discrimination and harassment in their day-to-day practice. There is a constant state of "otherness" that requires our members to justify their right to simply be an equal member at the bar or at the table. Far from a "presumption of competence,"[1] there exist requirements that our members demonstrate higher "objective" metrics to be taken seriously and/or to prove their value. These concerns play out in situations

SCEPR went through an extensive national formal and informal comment process and continued to refine the rule based upon the ongoing conversation with numerous stakeholders.

NAWL led one arm of the public support effort leading up to the vote, making a strong case for why a rule was needed

> including, but not limited to, pay disparities and exclusion from case assignments, opportunities, development, sponsorship, or resources. Study after study has shown stagnant progress of women and diverse attorneys in the profession, against the backdrop of an America, and of a profession, that is becoming increasingly diverse. Unfortunately, diverse attorneys, already underrepresented in private law firms, have a disproportionately high attrition rate.

Ultimately, Rule 8.4(g)'s coalition of support before the vote included ABA Board of Governors, seven sections of the ABA, every standing committee in the ABA's Center for Professional Responsibility, five ABA divisions, and outside-ABA support from a large and unanimous coalition representing the national women's bar associations, and each of the major national affinity bar associations, representing a collective membership in the hundreds of thousands of lawyers.

As passed, Model Rule 8.4(g) provides:

> It is professional misconduct for a lawyer to … (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

On its face, the rule does not nullify application of Model Rule 1.16's provisions about declining, continuing or terminating a representation.

Comment 3 defines discrimination and harassment, and explicitly states that the substantive law of antidiscrimination and anti-harassment guides its application.

Comment 4 defines "conduct related to the practice of law," and requires a connection between the alleged conduct to the practice of law. It applies to anything that a lawyer may do in his or her professional capacity, which includes representation, legal employment and legal business-social events such as bar association events, etc. Comment 4 makes clear that Rule 8.4(g) does not apply to conduct and programs to promote diversity.

Comment 5 discusses exceptions. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis do not, standing alone, establish a violation of 8.4(g). Comment 5 states a lawyer does not violate 8.4(g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these rules and other law. Still further, a lawyer may charge and collect reasonable fees and expenses, and Model Rule 1.5(a) [fees] continues to apply.

In the four months since Model Rule 8.4(g) was passed, mainstream media has reported positively on the legal profession's step to bring equality to the profession.

The most significant changes to the final draft were the addition of a mens rea ("knows/reasonably should know") and the rewording/moving of the legitimate advocacy statement into the black letter of the rule itself, enlarging the scope slightly to apply to both legitimate advice (transactional) or advocacy (before a tribunal). The clause "consistent with these Rules" clarifies "legitimate."

Model Rule 8.4(g) is a very important step forward – but it is just a first step. It provides model language and sends an essential strong definitive statement about what is a minimum standard of conduct for all lawyers. As a Model Rule, it fosters uniformity. However,

Model Rules are not self-executing, and must be adopted by each state to be enforceable in that state

the Model Rules are not self-executing, and must be adopted by each state to be enforceable in that state. The responsibility now turns to each state to take the next step to consider the rule, and either adopt a new rule or amend an existing one.

In the four months since Model Rule 8.4(g) was passed, mainstream media has reported positively on the legal profession's step to bring equality to the profession. And yet, negative articles continue to appear within the legal media, arguing that states should not adopt 8.4(g), asserting that a disciplinary apocalypse for innocent nonviolators is coming. Getting individual anti-discrimination and anti-harassment rules adopted in each state – that are as protective as Model Rule 8.4(g) – will take some effort by lawyers on the ground in each state. This effort is not "just" a women's issue. It is not "just" a minority issue. It is not "just" a progressive issue. Equality is a core American value. The right to self-regulate is a privilege that lawyers must exercise responsibly. NAWL's July 21, 2106, letter provides that "[p]erhaps when the refusal to accept discrimination and harassment is literally written into the moral code of the legal profession, women and minorities will be fully accepted as colleagues, partners, bosses, and opposing counsel." Perhaps. All eyes now pass to the states. ■

ENDNOTES

1 Deborah L. Rhode, "Law is the least diverse profession in the nation. And lawyers aren't doing enough to change that", Washington Post, May 27, 2015.

TAB 5

California Rules of Professional Conduct
Selected State Bar Act Sections and
Selected Statutes Regarding Duties of Attorneys
and the Attorney Discipline System

California Rules of Professional Conduct

Selected State Bar Act Sections and Statutes Regarding Duties of Attorneys and the Attorney Discipline System

(Current as of March, 2018)

The State Bar of California
Office of Professional Competence

The State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105-1617
Phone: (415) 538-2116
Website: www.calbar.ca.gov/ethics
Ethics Hotline: 1-800-238-4427

STATE BAR ETHICS RESOURCES

The State Bar of California's Office of Professional Competence offers the following attorney regulatory resources provided to assist attorneys in maintaining their professional responsibilities:

Ethics Hotline 1-800-238-4427 (1-800-2ETHICS)

The Ethics Hotline, a confidential research service for attorneys only, helps lawyers identify and analyze their professional responsibilities. Since 1983, the Ethics Hotline has been one of the State Bar's most popular services. Although staff members cannot provide legal counsel, advice, or opinions, they can discuss issues and authorities with lawyers. By referring callers to statutes, rules, cases, and non-binding opinions of ethics committees, staff members strive to assist attorneys in reaching informed decisions about their professional responsibility questions. Staff members monitor new cases and laws to provide up-to-date information. Some of the topics addressed by the Hotline are: advertising, communications, competence, confidences and secrets, conflicts of interest, fees and costs, files, misconduct, unauthorized practice of law, and withdrawal from employment.

Attorneys can reach the Ethics Hotline from 9:00 a.m. to 5:00 p.m. on weekdays by calling 800-238-4427 (800-2-ETHICS) within California or 415-538-2150 from outside of California (*number printed on back of each member's bar card*). All calls to the Ethics Hotline are confidential. Due to limited staff, the Hotline receptionist will take your name and phone number, and a Hotline staff member will return your call, often calling you in a couple of hours. An emergency call receives top priority and at the discretion of Hotline staff will get an immediate response. The Hotline accommodates attorneys who do not wish to divulge their names or telephone numbers. The receptionist will take pseudonyms and schedule appointments for callers who desire to remain anonymous.

Online Ethics Resources: *www.calbar.ca.gov/ethics*

Client Trust Accounting Resources

The Client Trust Accounting page is a collection of client trust accounting resources which includes links to relevant rules and statutes, publications (including the Client Trust Accounting Handbook), forms, ethics opinions, links to trust accounting MCLE programs, and online videos. The Client Trust Accounting Handbook is a downloadable practical guide created to assist attorneys in complying with the record-keeping standards for client trust accounts. The handbook includes: a copy of the standards and statutes relating to an attorney's trust accounting requirements; a step-by-step description of how to maintain a client trust account; information on FDIC coverage for IOLTA trust accounts; and sample forms.
(http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Client-Trust-Accounting-IOLTA/Client-Trust-Accounting-Resources)

Ethics and Technology Resources

The Ethics and Technology page is a collection of resources addressing attorney professional responsibility issues that arise in connection with the use of Internet websites, social media, email, chat rooms and other technologies. The resources include advisory ethics opinions, articles and MCLE programs.
(http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Ethics-Technology-Resources).

Senior Lawyers Resources

Many attorneys reach their senior years with questions about what to do if they face health problems that might affect how long they can work. They may be thinking of closing their

practices or how to handle their business if they were to suddenly become seriously ill. This Senior Lawyers Ethics Resources page is a collection of resources addressing attorney professional responsibility issues that arise in connection with retirement, disability, and death of attorneys. The resources include rules, advisory ethics opinions, articles, publications, and MCLE programs. Additionally, this page includes information regarding closing a law practice and attorney surrogacy.
(http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Senior-Lawyers-Resources)

Ethics Opinions

The State Bar's Committee on Professional Responsibility and Conduct (COPRAC) publishes advisory opinions regarding the ethical propriety of hypothetical attorney conduct. Although not binding, they are often cited in the decisions of the Supreme Court, the State Bar Court Review Department, and the Court of Appeal. The full text of COPRAC's over 190 opinions are available under the Ethics Opinions link from the Ethics Information page.

COPRAC is a standing committee of the State Bar Board of Trustees. In addition to its primary charge to issue advisory ethics opinions, COPRAC also develops and presents continuing education programs, including an Annual Statewide Ethics Symposium.

Publications

California Rules of Professional Conduct and The State Bar Act (Publication 250)

Publication 250 is a desktop resource book which includes: the California Rules of Professional Conduct (past and present); the State Bar Act; selected California Rules of Court related to the State Bar and attorney conduct; selected statutes relating to attorney discipline and the practice of law; the Minimum Continuing Legal Education Rules; and the Mortgage Assistance Relief Services Rule. *Publication 250* can be obtained for $20.00 by mail or $15.00 for walk-in requests (price subject to change). A full text on-line version of the booklet is available at the Ethics Information page of the State Bar website (www.calbar.ca.gov/ethics). Both the hard copy and the on-line version are updated annually.

E-Reader Version of California Rules of Professional Conduct and The State Bar Act (Publication 250)

The *Amazon Kindle e-Reader version* of the rule book can be purchased at Amazon.com for $6.99, a significant discount from the price of the hardcopy book. The *e-Reader version* of the rule book is compatible with the Kindle Reader App, a free e-Reader application available for iPads, iPhones, Blackberry phones, Android phones, Macs and PC laptops. By using the *e-Reader version* of the book, it offers several useful features including a search function, bookmarking, highlighting and annotating. In addition, once downloaded to a tablet, smart phone or other compatible device, the book can be accessed at any time, even without an Internet or cellular data signal.

California Compendium on Professional Responsibility

The Compendium is an annually updated reference manual that contains a comprehensive collection of various ethics authorities. The Compendium includes: 1) the ethics opinions of the State Bar of California, the Bar Association of San Francisco, the San Diego County Bar Association, the Los Angeles County Bar Association, and the Orange County Bar Association; 2) a comprehensive subject matter index; 3) the California Rules of Professional Conduct and the State Bar Act; and 4) the Code of Judicial Ethics. This 3 volume publication is sold for $157 and the annual updates cost $50.

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RULES OF PROFESSIONAL CONDUCT

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RULES OF COURT – SELECTED RULES

(Current rules as of January 1, 2018. The operative dates of select rule amendments are shown at the end of relevant rules.)

CHAPTER 1. PROFESSIONAL INTEGRITY IN GENERAL

Rule 1-100 Rules of Professional Conduct, in General

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

(A) Purpose and Function.

The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.

For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.

The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, §6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.

(B) Definitions.

(1) "Law Firm" means:

(a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or

(b) a law corporation which employs more than one lawyer; or

(c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or

(d) a publicly funded entity which employs more than one lawyer to perform legal services.

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

(3) "Lawyer" means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.

(4) "Associate" means an employee or fellow employee who is employed as a lawyer.

(5) "Shareholder" means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.

(C) Purpose of Discussions.

Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.

(D) Geographic Scope of Rules.

(1) As to members:

These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

(2) As to lawyers from other jurisdictions who are not members:

These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

(E) These rules may be cited and referred to as "Rules of Professional Conduct of the State Bar of California."

Discussion:

The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489].) The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324 [231 Cal.Rptr. 355].) These rules are not intended to supercede existing law relating to members in non-disciplinary contexts. (See, e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (motion for disqualification of counsel due to a conflict of interest); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (disqualification of member appropriate remedy for improper communication with adverse party).)

Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law. (Amended by order of the Supreme Court, operative September 14, 1992.)

Rule 1-110 Disciplinary Authority of the State Bar

A member shall comply with conditions attached to public or private reprovals or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19, California Rules of Court. (Amended by order of the Supreme Court, operative July 11, 2008.)

Rule 1-120 Assisting, Soliciting, or Inducing Violations

A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.

Rule 1-200 False Statement Regarding Admission to the State Bar

(A) A member shall not knowingly make a false statement regarding a material fact or knowingly fail to disclose a material fact in connection with an application for admission to the State Bar.

(B) A member shall not further an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes.

(C) This rule shall not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to such admission.

Discussion:

For purposes of rule 1-200 "admission" includes readmission.

Rule 1-300 Unauthorized Practice of Law

(A) A member shall not aid any person or entity in the unauthorized practice of law.

(B) A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

Rule 1-310 Forming a Partnership With a Non-Lawyer

A member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.

Discussion:

Rule 1-310 is not intended to govern members' activities which cannot be considered to constitute the practice of law. It is intended solely to preclude a member from being involved in the practice of law with a person who is not a lawyer. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 1-311 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

(A) For purposes of this rule:

(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(c), or California Rule of Court 9.31; and

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

(B) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the member's client:

(1) Render legal consultation or advice to the client;

(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) Appear as a representative of the client at a deposition or other discovery matter;

(4) Negotiate or transact any matter for or on behalf of the client with third parties;

(5) Receive, disburse or otherwise handle the client's funds; or

(6) Engage in activities which constitute the practice of law.

(C) A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:

(1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or

(3) Accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.

(D) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (B) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The member shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the member's employment with the client.

(E) A member may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

(F) Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.

Discussion:

For discussion of the activities that constitute the practice of law, see *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corporation* (1922) 189 Cal. 531, 535 [209 P. 363]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)

Paragraph (D) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a member's client is an organization, then the written notice required by paragraph (D) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600).

Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules

9.40, 9.41, 9.42, and 9.44 of the California Rules of Court, or any local rule of a federal district court concerning admission pro hac vice. (Added by Order of Supreme Court, operative August 1, 1996. Amended by order of the Supreme Court, operative July 11, 2008.)

Rule 1-320 Financial Arrangements With Non-Lawyers

(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:

(1) An agreement between a member and a law firm, partner, or associate may provide for the payment of money after the member's death to the member's estate or to one or more specified persons over a reasonable period of time; or

(2) A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or

(3) A member or law firm may include non-member employees in a compensation, profit-sharing, or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement, if such plan does not circumvent these rules or Business and Professions Code section 6000 et seq.; or

(4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.

(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

Discussion:

Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 1-400 Advertising and Solicitation

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

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf

of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or

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

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(B) For purposes of this rule, a "solicitation" means any communication:

(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and

(2) Which is:

(a) delivered in person or by telephone, or

(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

(D) A communication or a solicitation (as defined herein) shall not:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or

(5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

(6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.

(E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

*[**Publisher's Note**: Former rule 1-400 (D)(6) repealed by order of the Supreme Court effective November 30, 1992. New rule 1-400 (D)(6) added by order of the Supreme Court effective June 1, 1997.]*

Standards:

Pursuant to rule 1-400(E) the Board has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

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

(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.

(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.

(6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

(7) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A "communication" which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

(9) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or

law firm at the same time in the same community.

(10) A "communication" which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.

(11) (Repealed. See rule 1-400(D)(6) for the operative language on this subject.)

(12) A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.

(13) A "communication" which contains a dramatization unless such communication contains a disclaimer which states "this is a dramatization" or words of similar import.

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

(15) A "communication" which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

(16) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. (Amended by order of Supreme Court, operative September 14, 1992. Standard (5) amended by the Board, effective May 11, 1994. Standards (12) - (16) added by the Board, effective May 11, 1994. Standard (11) repealed June 1, 1997.)

Rule 1-500 Agreements Restricting a Member's Practice

(A) A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law, except that this rule shall not prohibit such an agreement which:

(1) Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or

(2) Requires payments to a member upon the member's retirement from the practice of law; or

(3) Is authorized by Business and Professions Code sections 6092.5 subdivision (i), or 6093.

(B) A member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules.

Discussion:

Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.

Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 1-600 Legal Service Programs

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

(A) A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.

(B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.

Discussion:

The participation of a member in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of these rules.

Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.

Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.

For purposes of paragraph (A), "a nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.

Rule 1-650 Limited Legal Services Programs

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

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

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

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

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

Discussion:

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

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

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

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

disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

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

Rule 1-700 Member as Candidate for Judicial Office

(A) A member who is a candidate for judicial office in California shall comply with Canon 5 of the Code of Judicial Ethics.

(B) For purposes of this rule, "candidate for judicial office" means a member seeking judicial office by election. The determination of when a member is a candidate for judicial office is defined in the terminology section of the California Code of Judicial Ethics. A member's duty to comply with paragraph (A) shall end when the member announces withdrawal of the member's candidacy or when the results of the election are final, whichever occurs first.

Discussion:

Nothing in rule 1-700 shall be deemed to limit the applicability of any other rule or law. (Added by order of the Supreme Court, operative November 21, 1997.)

Rule 1-710 Member as Temporary Judge, Referee, or Court-Appointed Arbitrator

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

Discussion:

This rule is intended to permit the State Bar to discipline members who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law. (Added by order of the Supreme Court, operative March 18, 1999.)

*[**Publisher's Note:** The California Code of Judicial Ethics is available on-line at the official website of the California Courts located at www.courts.ca.gov. Navigate to the "Forms & Rules" area of the website and select "California Code of Judicial Ethics" under the "Related Links" box.]*

CHAPTER 2.
RELATIONSHIP AMONG MEMBERS

Rule 2-100 Communication With a Represented Party

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a "party" includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may

constitute an admission on the part of the organization.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or

(3) Communications otherwise authorized by law.

Discussion:

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.

As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.

Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)

Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 2-200 Financial Arrangements Among Lawyers

(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Rule 2-300 Sale or Purchase of a Law Practice of a Member, Living or Deceased

All or substantially all of the law practice of a member, living or deceased, including goodwill, may be sold to another member or law firm subject to all the following conditions:

(A) Fees charged to clients shall not be increased solely by reason of such sale.

(B) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e), then;

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

(a) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

(b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.

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

(a) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

(b) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller.

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

(D) All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.

(E) Confidential information shall not be disclosed to a non-member in connection with a sale under this rule.

(F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

Discussion:

Paragraph (A) is intended to prohibit the purchaser from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing clients.

"All or substantially all of the law practice of a member" means, for purposes of rule 2-300, that, for example, a member may retain one or two clients who have such a longstanding personal and professional relationship with the member that transfer of those clients' files is not feasible. Conversely, rule 2-300 is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by subparagraph (B)(1)(a) or paragraph (D).

Transfer of individual client matters, where permitted, is governed by rule 2-200. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by rule 1-320. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice

(A) For purposes of this rule:

(1) "law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;

(2) "knowingly permit" means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or

(2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated

a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

Discussion:

In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.

A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.

A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard. (Added by order of Supreme Court, effective March 1, 1994.)

CHAPTER 3. PROFESSIONAL RELATIONSHIP WITH CLIENTS

Rule 3-100 Confidential Information of a Client

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

Discussion:

[1] *Duty of confidentiality.* Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information

involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] *Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.* The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.

[3] *Narrow exception to duty of confidentiality under this Rule.* Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business & Professions Code section 6068, subdivision (e)(1). Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception. Although a member is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

[4] *Member not subject to discipline for revealing confidential information as permitted under this Rule.* Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes is likely to result in death or substantial bodily harm to an individual. A member who reveals information as permitted under this rule is not subject to discipline.

[5] *No duty to reveal confidential information.* Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule

1-100(A).) A member may decide not to reveal confidential information. Whether a member chooses to reveal confidential information as permitted under this rule is a matter for the individual member to decide, based on all the facts and circumstances, such as those discussed in paragraph [6] of this discussion.

[6] *Deciding to reveal confidential information as permitted under paragraph (B)*. Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information as permitted under paragraph (B), the member must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:

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

(2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;

(3) whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;

(4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;

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

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

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

[7] *Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.* Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action – such as by ceasing the criminal act before harm is caused – the option for permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or

third person to warn the victim or consider other appropriate action to prevent the harm. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

[8] *Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.* Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.

[9] *Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).* A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

(1) whether the client is an experienced user of legal services;

(2) the frequency of the member's contact with the client;

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

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

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

(6) the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and

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

[10] *Avoiding a chilling effect on the lawyer-client relationship.* The foregoing flexible approach to the member's informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph [1].) To avoid that chilling effect, one member may choose to inform the client of the member's

ability to reveal information as early as the outset of the representation, while another member may choose to inform a client only at a point when that client has imparted information that may fall under paragraph (B), or even choose not to inform a client until such time as the member attempts to counsel the client as contemplated in Discussion paragraph [7]. In each situation, the member will have discharged properly the requirement under subparagraph (C)(2), and will not be subject to discipline.

[11] *Informing client that disclosure has been made; termination of the lawyer-client relationship.* When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client's informed consent to the member's continued representation. The member must inform the client of the fact of the member's disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm.

[12] *Other consequences of the member's disclosure.* Depending upon the circumstances of a member's disclosure of confidential information, there may be other important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).

[13] *Other exceptions to confidentiality under California law.* Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)

Rule 3-110 Failing to Act Competently

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

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

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

Discussion:

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

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

Rule 3-120 Sexual Relations With Client

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

(B) A member shall not:

(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or

(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or

(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.

(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

(D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.

Discussion:

Rule 3-120 is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all client matters, a member is advised to keep clients' interests paramount in the course of the member's representation.

For purposes of this rule, if the client is an organization, any individual overseeing the representation shall be deemed to be the client. (See rule 3-600.)

Although paragraph (C) excludes representation of certain clients from the scope of rule 3-120, such exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including rule 3-110. (Added by order of Supreme Court, operative September 14, 1992.)

Rule 3-200 Prohibited Objectives of Employment

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

(A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an

extension, modification, or reversal of such existing law.

Rule 3-210 Advising the Violation of Law

A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

Discussion:

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

Rule 3-300 Avoiding Interests Adverse to a Client

A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and

(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

Discussion:

Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 4-200.

Rule 3-300 is not intended to apply where the member and client each make an investment on terms offered to the general public or a significant portion thereof. For example, rule 3-300 is not intended to apply where A, a member, invests in a limited partnership syndicated by a third party. B, A's client, makes the same investment. Although A and B are each investing in the same business, A did not enter into the transaction "with" B for the purposes of the rule.

Rule 3-300 is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 3-310 Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;

(3) "Written" means any writing as defined in Evidence Code section 250.

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

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The member knows or reasonably should know that:

(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the member's representation; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

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

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

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

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

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

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

(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law; or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion:

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

Other rules and laws may preclude making adequate disclosure under this rule. If such

disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)

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

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

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

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

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

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

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

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

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

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

Rule 3-320 Relationship With Other Party's Lawyer

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

Discussion:

Rule 3-320 is not intended to apply to circumstances in which a member fails to advise the client of a relationship with another lawyer who is merely a partner or associate in the same law firm as the adverse party's counsel, and who has no direct involvement in the matter. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 3-400 Limiting Liability to Client

A member shall not:

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

(B) Settle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

Discussion:

Rule 3-400 is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent a member from reasonably limiting the scope of the member's employment or representation. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 3-410 Disclosure of Professional Liability Insurance

(A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the member, that the member does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours.

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

(C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity.

(D) This rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.

(E) This rule does not apply where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance.

Discussion:

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

[2] A member may use the following language in making the disclosure required by Rule 3-410(A), and may include that language in a

written fee agreement with the client or in a separate writing:

> *"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."*

[3] A member may use the following language in making the disclosure required by Rule 3-410(B):

> *"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I no longer have professional liability insurance."*

[4] Rule 3-410(C) provides an exemption for a "government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. (Added by order of the Supreme Court, operative January 1, 2010.)

Rule 3-500 Communication

A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

Discussion:

Rule 3-500 is not intended to change a member's duties to his or her clients. It is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be disciplined for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, subd. (m).)

A member may contract with the client in their employment agreement that the client assumes responsibility for the cost of copying significant documents. This rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

Rule 3-500 is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the member to provide work product to the client shall be governed by relevant statutory and decisional law. Additionally, this rule is not intended to apply to any document or correspondence that is subject to a protective order or non-disclosure agreement, or to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the member. (Amended by order of the Supreme Court, operative June 5, 1997.)

Rule 3-510 Communication of Settlement Offer

(A) A member shall promptly communicate to the member's client:

> (1) All terms and conditions of any offer made to the client in a criminal matter; and
>
> (2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

(B) As used in this rule, "client" includes a person who possesses the authority to accept an

offer of settlement or plea, or, in a class action, all the named representatives of the class.

Discussion:

Rule 3-510 is intended to require that counsel in a criminal matter convey all offers, whether written or oral, to the client, as give and take negotiations are less common in criminal matters, and, even were they to occur, such negotiations should require the participation of the accused.

Any oral offers of settlement made to the client in a civil matter should also be communicated if they are "significant" for the purposes of rule 3-500.

Rule 3-600 Organization as Client

(A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

(B) If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(C) If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with rule 3-700.

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

(E) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

Discussion:

Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.

Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee

benefit packages for closely held corporations or professional partnerships.

Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.

Rule 3-700 Termination of Employment

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal.

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

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(C) Permissive Withdrawal.

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

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

(f) breaches an agreement or obligation to the member as to expenses or fees.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or

(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The client knowingly and freely assents to termination of the employment; or

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

(D) Papers, Property, and Fees.

A member whose employment has terminated shall:

(1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and

(2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

Discussion:

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

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

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

CHAPTER 4.
FINANCIAL RELATIONSHIP WITH CLIENTS

Rule 4-100 Preserving Identity of Funds and Property of a Client

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

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member shall:

(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

(4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

(C) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

Standards:

Pursuant to rule 4-100(C) the Board adopted the following standards, effective January 1, 1993, as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3).

(1) A member shall, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintain:

(a) a written ledger for each client on whose behalf funds are held that sets forth:

(i) the name of such client,

(ii) the date, amount and source of all funds received on behalf of such client,

(iii) the date, amount, payee and purpose of each disbursement made on behalf of such client, and

(iv) the current balance for such client;

(b) a written journal for each bank account that sets forth:

(i) the name of such account,

(ii) the date, amount and client affected by each debit and credit, and

(iii) the current balance in such account;

(c) all bank statements and canceled checks for each bank account; and

(d) each monthly reconciliation (balancing) of (a), (b), and (c).

(2) A member shall, from the date of receipt of all securities and other properties held for the benefit of client through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written journal that specifies:

(a) each item of security and property held;

(b) the person on whose behalf the security or property is held;

(c) the date of receipt of the security or property;

(d) the date of distribution of the security or property; and

(e) person to whom the security or property was distributed.

*[**Publisher's Note:** Trust Account Record Keeping Standards as adopted by the Board on July 11, 1992, effective January 1, 1993.]*

Rule 4-200 Fees for Legal Services

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

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

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

(2) The relative sophistication of the member and the client.

(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.

(4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.

(5) The amount involved and the results obtained.

(6) The time limitations imposed by the client or by the circumstances.

(7) The nature and length of the professional relationship with the client.

(8) The experience, reputation, and ability of the member or members performing the services.

(9) Whether the fee is fixed or contingent.

(10) The time and labor required.

(11) The informed consent of the client to the fee.

(Amended by order of Supreme Court, operative September 14, 1992.)

Rule 4-210 Payment of Personal or Business Expenses Incurred by or for a Client

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member:

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

(2) After employment, from lending money to the client upon the client's promise in writing to repay such loan; or

(3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

(B) Nothing in rule 4-210 shall be deemed to limit rules 3-300, 3-310, and 4-300.

Rule 4-300 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

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

(B) A member shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the member or of another lawyer in the member's law firm or is an employee of the member or the member's law firm. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 4-400 Gifts From Client

A member shall not induce a client to make a substantial gift, including a testamentary gift, to the member or to the member's parent, child, sibling, or spouse, except where the client is related to the member.

Discussion:

A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence. The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where

impermissible influence occurred, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

CHAPTER 5.
ADVOCACY AND REPRESENTATION

Rule 5-100 Threatening Criminal, Administrative, or Disciplinary Charges

(A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(B) As used in paragraph (A) of this rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(C) As used in paragraph (A) of this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Discussion:

Rule 5-100 is not intended to apply to a member's threatening to initiate contempt proceedings against a party for a failure to comply with a court order.

Paragraph (B) is intended to exempt the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.

For purposes of paragraph (C), the definition of "civil dispute" makes clear that the rule is applicable prior to the formal filing of a civil action.

Rule 5-110 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(A) Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;

(B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;

(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(E) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.

(F) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) Promptly disclose that evidence to an appropriate court or authority, and

(2) If the conviction was obtained in the prosecutor's jurisdiction,

(a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and

(b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(G) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion:

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S. Ct. 1194] and its progeny. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows or reasonably should know casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely. Paragraph (D) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and paragraph (D) is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[4] The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[5] Paragraph (E) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (E) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (E) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the

person did not commit, paragraph (F) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (F) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[8] Under paragraph (G), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (F) and (G), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110. (Amended by order of Supreme Court, effective November 2, 2017.)

Rule 5-120 Trial Publicity

(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(B) Notwithstanding paragraph (A), a member may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(a) the identity, residence, occupation, and family status of the accused;

(b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;

(c) the fact, time, and place of arrest; and

(d) the identity of investigating and arresting officers or agencies and the length of the investigation.

(C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Discussion:

Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.

Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d); (3) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and (4) the timing of the statement.

Paragraph (A) is intended to apply to statements made by or on behalf of the member.

Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the member's duty to maintain client confidence and secrets. (Added by order of the Supreme Court, operative October 1, 1995.)

Rule 5-200 Trial Conduct

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

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

Rule 5-210 Member as Witness

A member shall not act as an advocate before a jury which will hear testimony from the member unless:

(A) The testimony relates to an uncontested matter; or

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

(C) The member has the informed, written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal.

Discussion:

Rule 5-210 is intended to apply to situations in which the member knows or should know that he or she ought to be called as a witness in litigation in which there is a jury. This rule is not intended to encompass situations in which the member is representing the client in an adversarial proceeding and is testifying before a judge. In non-adversarial proceedings, as where the member testifies on behalf of the client in a hearing before a legislative body, rule 5-210 is not applicable.

Rule 5-210 is not intended to apply to circumstances in which a lawyer in an advocate's firm will be a witness. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 5-220 Suppression of Evidence

A member shall not suppress evidence that the member or the member's client has a legal obligation to reveal or to produce.

Discussion:

See rule 5-110 for special responsibilities of a prosecutor. (Amended by order of Supreme Court, effective May 1, 2017.)

Rule 5-300 Contact With Officials

(A) A member shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.

(B) A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:

(1) In open court; or

(2) With the consent of all other counsel in such matter; or

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

(4) In writing with a copy thereof furnished to such other counsel; or

(5) In ex parte matters.

(C) As used in this rule, "judge" and "judicial officer" shall include law clerks, research attorneys, or other court personnel who participate in the decision-making process. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 5-310 Prohibited Contact With Witnesses

A member shall not:

(A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for loss of time in attending or testifying.

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

Rule 5-320 Contact With Jurors

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

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

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

(D) After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

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

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

(G) A member shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the member has knowledge.

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

(I) For purposes of this rule, "juror" means any empanelled, discharged, or excused juror. (Amended by order of Supreme Court, operative September 14, 1992.)

*[**Publisher's Notes**: (1) Unless otherwise indicated, statutes are effective on January 1 following enactment. (2) " * * * * * " indicates sections have been omitted.]*

BUSINESS AND PROFESSIONS CODE

CHAPTER 4.
ATTORNEYS

ARTICLE 1
GENERAL PROVISIONS

§ 6000 Short Title

This chapter of the Business and Professions Code constitutes the chapter on attorneys. It may be cited as the State Bar Act. (Origin: State Bar Act, § 1. Added by Stats. 1939, ch. 34.)

* * * * *

§ 6001.1 State Bar–Protection of the Public as the Highest Priority

Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. (Added by Stats. 2011, ch. 417.)

§ 6001.2 State Bar Governance in the Public Interest Task Force

(a) On or before February 1, 2013, there shall be created within the State Bar a Governance in the Public Interest Task Force comprised of 7 members, including 6 members appointed as provided herein and the President of the State Bar. Two members shall be elected attorney members of the board of trustees who are selected by the elected attorney members, two members shall be attorney members of the board of trustees appointed by the Supreme Court who are selected by the Supreme Court appointees, and two members shall be public members of the board of trustees selected by the public members. The president shall preside over its meetings, all of which shall be held consistent with Section 6026.5.

(b) On or before May 15, 2014, and every three years thereafter, the task force shall prepare and submit a report to the Supreme Court, the Governor, and the Assembly and Senate Committees on Judiciary that includes its recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys, to be reviewed by the Assembly and Senate Committees on Judiciary in their regular consideration of the annual State Bar dues measure. If the task force does not reach a consensus on all of the recommendations in its report, the dissenting members of the task force may prepare and submit a dissenting report to the same entities described in this subdivision, to be reviewed by the committees in the same manner.

(c) The task force shall make suggestions to the board of trustees regarding possible additions to, or revisions of, the strategic plan required by Section 6140.12. In addition, the task force shall also make suggestions to the board of trustees regarding other issues requested from time to time by the Legislature.

This section shall become operative on January 1, 2013. (Former § 6001.2 added by Stats. 2010, ch. 476, repealed by Stats. 2011, ch. 417. New § 6001.2 added by Stats. 2011, ch. 417, operative Jan. 1, 2013.)

* * * * *

§ 6002 Members

The members of the State Bar are all persons admitted and licensed to practice law in this State except justices and judges of courts of record during their continuance in office. (Origin: State Bar Act, §§ 3, 7. Added by Stats. 1939, ch. 34.)

§ 6002.1 Official Membership Records

(a) A member of the State Bar shall maintain all of the following on the official membership records of the State Bar:

(1) The member's current office address and telephone number or, if no office is maintained, the address to be used for State Bar purposes or purposes of the agency charged with attorney discipline.

(2) All specialties in which the member is certified.

(3) Any other jurisdictions in which the member is admitted and the dates of his or her admission.

(4) The jurisdiction, and the nature and date of any discipline imposed by another jurisdiction, including the terms and conditions of any probation imposed, and, if suspended or disbarred in another jurisdiction, the date of any reinstatement in that jurisdiction.

(5) Any other information as may be required by agreement with or by conditions of probation imposed by the agency charged with attorney discipline.

A member shall notify the membership records office of the State Bar of any change in the information required by paragraphs (1), (4), and (5) within 30 days of any change and of the change in the information required by paragraphs (2) and (3) on or before the first day of February of each year.

(b) Every former member of the State Bar who has been ordered by the Supreme Court to comply with Rule 9.20 of the California Rules of Court shall maintain on the official membership records of the State Bar the former member's current address and within 10 days after any change therein, shall file a change of address with a membership records office of the State Bar until such time as the former member is no longer subject to the order.

(c) The notice initiating a proceeding conducted under this chapter may be served upon the member or former member of the State Bar to whom it is directed by certified mail, return receipt requested, addressed to the member or former member at the latest address shown on the official membership records of the State Bar. The service is complete at the time of the mailing but any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a date certain after the notice is served by mail shall be extended five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. A member of the State Bar or former member may waive the requirements of this subdivision and may, with the written consent of another member of the State Bar, designate that other member to receive service of any notice or papers in any proceeding conducted under this chapter.

(d) The State Bar shall not make available to the general public the information specified in paragraph (5) of subdivision (a) unless that information is required to be made available by a condition of probation. That information is, however, available to the State Bar, the Supreme Court, or the agency charged with attorney discipline.

(e) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation. (Added by Stats. 1985, ch. 453. Amended by Stats. 1986, ch. 475; Stats. 2007, ch. 474.)

§ 6003 Classes of Members

Members of the State Bar are divided into two classes:

(a) Active members.

(b) Inactive members.

(Origin: State Bar Act, § 4. Added by Stats. 1939, ch. 34.)

§ 6004 Active Members

Every member of the State Bar is an active member until as in section 6007 of this code provided or at his request, he is enrolled as an inactive member. (Origin: State Bar Act, §§ 5, 6. Added by Stats. 1939, ch. 34. Amended by Stats. 1957, ch. 737; Stats. 1977, ch. 58.)

§ 6005 Inactive Members

Inactive members are those members who have requested that they be enrolled as inactive members or who have been enrolled as inactive members by action of the board of trustees as set forth in Section 6007. (Origin: State Bar Act, § 5. Added by Stats. 1939, ch. 34. Amended by Stats. 1957, ch. 737; Stats. 2011, ch. 417.)

* * * * *

ARTICLE 2
ADMINISTRATION

§ 6010 Board of Trustees in General

(a) The State Bar is governed by a board known as the board of trustees of the State Bar. The board has the powers and duties conferred by this chapter.

(b) As used in this chapter or any other provision of law, "board of governors" shall be deemed to refer to the board of trustees. (Origin: State Bar Act, § 20. Added by Stats. 1939, ch. 34. Amended by Stats. 2011, ch. 417.)

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§ 6030 Executive Functions; Enforcement of Chapter; Injunction

The board shall be charged with the executive function of the State Bar and the enforcement of the provisions of this chapter. The violation or threatened violation of any provision of Articles 7 (commencing with section 6125) and 9 (commencing with section 6150) of this chapter may be enjoined in a civil action brought in the superior court by the State Bar and no undertaking shall be required of the State Bar. (Origin: State Bar Act, § 21. Amended by Stats. 1961, ch. 2033.)

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ARTICLE 3
COMMITTEES OF THE STATE BAR

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§ 6043.5 Complaints; False and Malicious

(a) Every person who reports to the State Bar or causes a complaint to be filed with the State Bar that an attorney has engaged in professional misconduct, knowing the report or complaint to be false and malicious, is guilty of a misdemeanor.

(b) The State Bar may, in its discretion, notify the appropriate district attorney or city attorney that a person has filed what the State Bar believes to be a false and malicious report or complaint against an attorney and recommend prosecution of the person under subdivision (a). (Added by Stats. 1990, ch. 1639.)

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§ 6049.1 Professional Misconduct Proceeding in Another Jurisdiction; Expedited Disciplinary Proceeding

(a) In any disciplinary proceeding under this chapter, a certified copy of a final order made by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys, of the United States, or of any state or territory of the United States or of the District of Columbia, determining that a member of the State Bar committed professional misconduct in such other jurisdiction shall be conclusive evidence that the member is culpable of professional

misconduct in this state, subject only to the exceptions set forth in subdivision (b).

(b) The board may provide by rule for procedures for the conduct of an expedited disciplinary proceeding against a member of the State Bar upon receipt by the State Bar of a certified copy of a final order determining that the member has been found culpable of professional misconduct in a proceeding in another jurisdiction conducted as specified in subdivision (a). The issues in the expedited proceeding shall be limited to the following:

(1) The degree of discipline to impose.

(2) Whether, as a matter of law, the member's culpability determined in the proceeding in the other jurisdiction would not warrant the imposition of discipline in the State of California under the laws or rules binding upon members of the State Bar at the time the member committed misconduct in such other jurisdiction, as determined by the proceedings specified in subdivision (a).

(3) Whether the proceedings of the other jurisdiction lacked fundamental constitutional protection.

The member of the State Bar subject to the proceeding under this section shall bear the burden of establishing that the issues in paragraphs (2) and (3) do not warrant the imposition of discipline in this state.

(c) In proceedings conducted under subdivision (b), the parties need not be afforded an opportunity for discovery unless the State Bar Court department or panel having jurisdiction so orders upon a showing of good cause.

(d) In any proceedings conducted under this chapter, a duly certified copy of any portion of the record of disciplinary proceedings of another jurisdiction conducted as specified in subdivision (a) may be received in evidence.

(e) This section shall not prohibit the institution of proceedings under Section 6044, 6101, or 6102, as may be appropriate, concerning any member of the State Bar based upon the member's conduct in another jurisdiction, whether or not licensed as an attorney in the other jurisdiction. (Added by Stats. 1985, ch. 453.)

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ARTICLE 4
ADMISSION TO THE PRACTICE OF LAW

§ 6060 Qualifications; Examination and Fee

To be certified to the Supreme Court for admission and a license to practice law, a person who has not been admitted to practice law in a sister state, United States jurisdiction, possession, territory, or dependency or in a foreign country shall:

(a) Be of the age of at least 18 years.

(b) Be of good moral character.

(c) Before beginning the study of law, have done either of the following:

(1) Completed at least two years of college work, which college work shall be not less than one-half of the collegiate work acceptable for a bachelor's degree granted upon the basis of a four-year period of study by a college or university approved by the examining committee.

(2) Have attained in apparent intellectual ability the equivalent of at least two years of college work by taking any examinations in such subject matters and achieving the scores thereon as are prescribed by the examining committee.

(d) Have registered with the examining committee as a law student within 90 days after beginning the study of law. The examining committee, upon good cause being shown, may permit a later registration.

(e) Have done any of the following:

(1) Had conferred upon him or her a juris doctor (J.D.) degree or a bachelor of laws

(LL.B.) degree by a law school accredited by the examining committee or approved by the American Bar Association.

(2) Studied law diligently and in good faith for at least four years in any of the following manners:

(A) In a law school that is authorized or approved to confer professional degrees and requires classroom attendance of its students for a minimum of 270 hours a year.

A person who has received his or her legal education in a foreign state or country wherein the common law of England does not constitute the basis of jurisprudence shall demonstrate to the satisfaction of the examining committee that his or her education, experience, and qualifications qualify him or her to take the examination.

(B) In a law office in this state and under the personal supervision of a member of the State Bar of California who is, and for at least five years last past continuously has been, engaged in the active practice of law. It is the duty of the supervising attorney to render any periodic reports to the examining committee as the committee may require.

(C) In the chambers and under the personal supervision of a judge of a court of record of this state. It is the duty of the supervising judge to render any periodic reports to the examining committee as the committee may require.

(D) By instruction in law from a correspondence law school authorized or approved to confer professional degrees by this state, which requires 864 hours of preparation and study per year for four years.

(E) By any combination of the methods referred to in this paragraph (2) of this subdivision.

(f) Have passed any examination in professional responsibility or legal ethics as the examining committee may prescribe.

(g) Have passed the general bar examination given by the examining committee.

(h) (1) Have passed a law students' examination administered by the examining committee after completion of his or her first year of law study. Those who pass the examination within its first three administrations upon becoming eligible to take the examination shall receive credit for all law studies completed to the time the examination is passed. Those who do not pass the examination within its first three administrations upon becoming eligible to take the examination, but who subsequently pass the examination, shall receive credit for one year of legal study only.

(2) This requirement does not apply to a student who has satisfactorily completed his or her first year of law study at a law school accredited by the examining committee and who has completed at least two years of college work prior to matriculating in the accredited law school, nor shall this requirement apply to an applicant who has passed the bar examination of a sister state or of a country in which the common law of England constitutes the basis of jurisprudence.

The law students' examination shall be administered twice a year at reasonable intervals. (Origin: State Bar Act, § 24.2. Amended by Stats. 1953, ch. 1090; Stats. 1959, ch. 1084; Stats. 1970, ch. 251; Stats. 1971, ch. 1748; Stats. 1972, ch. 1285; Stats. 1973, ch. 1052; Stats. 1974, ch. 316, effective May 31, 1974; Stats. 1987, ch. 239; Stats. 1990, ch. 707, Stats. 1996, ch. 866; Stats. 2001, ch. 46.)

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§ 6064 Admission

(a) Upon certification by the examining committee that the applicant has fulfilled the requirements for admission to practice law, the Supreme Court may admit the applicant as an attorney at law in all the courts of this state and may direct an order to be entered upon its records to that effect. A certificate of admission thereupon shall be given to the applicant by the clerk of the court.

(b) Upon certification by the examining committee that an applicant who is not lawfully present in the United States has fulfilled the requirements for admission to practice law, the Supreme Court may admit that applicant as an attorney at law in all the courts of this state and may direct an order to be entered upon its records to that effect. A certificate of admission thereupon shall be given to the applicant by the clerk of the court. (Origin: State Bar Act, § 24.5. Amended by Stats. 2013, ch. 574.)

* * * * *

§ 6067 Oath

(a) Upon certification by the examining committee that the applicant has fulfilled the requirements for admission to practice law, the Supreme Court may admit the applicant as an attorney at law in all the courts of this state and may direct an order to be entered upon its records to that effect. A certificate of admission thereupon shall be given to the applicant by the clerk of the court

(b) Upon certification by the examining committee that an applicant who is not lawfully present in the United States has fulfilled the requirements for admission to practice law, the Supreme Court may admit that applicant as an attorney at law in all the courts of this state and may direct an order to be entered upon its records to that effect. A certificate of admission thereupon shall be given to the applicant by the clerk of the court. (Origin: State Bar Act, § 24.5. Amended by Stats. 2013, ch. 574.)

§ 6068 Duties of Attorney

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

(a) To support the Constitution and laws of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

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

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

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

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

(i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not

be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

(j) To comply with the requirements of Section 6002.1.

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

(l) To keep all agreements made in lieu of disciplinary prosecution with the agency charged with attorney discipline.

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

(n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

(o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.

(2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

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

(4) The bringing of an indictment or information charging a felony against the attorney.

(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

(6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

(8) As used in this subdivision, "against the attorney" includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney's knowledge already been reported by the law firm or corporation.

(9) The State Bar may develop a prescribed form for the making of reports

required by this section, usage of which it may require by rule or regulation.

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

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ARTICLE 4.8
PRO BONO SERVICES

§ 6073 Pro Bono Services–Fulfillment of Commitment by Financial Support to Organizations Providing Free Legal Service

It has been the tradition of those learned in the law and licensed to practice law in this state to provide voluntary pro bono legal services to those who cannot afford the help of a lawyer. Every lawyer authorized and privileged to practice law in California is expected to make a contribution. In some circumstances, it may not be feasible for a lawyer to directly provide pro bono services. In those circumstances, a lawyer may instead fulfill his or her individual pro bono ethical commitment, in part, by providing financial support to organizations providing free legal services to persons of limited means. In deciding to provide that financial support, the lawyer should, at minimum, approximate the value of the hours of pro bono legal service that he or she would otherwise have provided. In some circumstances, pro bono contributions may be measured collectively, as by a firm's aggregate pro bono activities or financial contributions. Lawyers also make invaluable contributions through their other voluntary public service activities that increase access to justice or improve the law and the legal system. In view of their expertise in areas that critically affect the lives and well-being of members of the public, lawyers are uniquely situated to provide invaluable assistance in order to benefit those who might otherwise be unable to assert or protect their interests, and to support those legal organizations that advance these goals. (Added by Stats. 2007, ch. 474. Amended by Stats. 2008, ch. 179.)

§ 6074 Pro Bono Civil Legal Assistance to Veterans and Their Families

(a) The State Bar shall administer a program to coordinate pro bono civil legal assistance to veterans and their families who otherwise cannot afford legal services.

(b) The State Bar shall engage with local bar associations, legal aid organizations, veterans service providers, and volunteer attorneys and encourage those groups to provide legal services throughout the state.

(c) The State Bar shall provide resources and educational materials to attorneys and the public in order to support the purposes of this section by, among other things, doing the following:

(1) Compiling a list of local bar associations, legal aid organizations, veterans service providers, and volunteer attorneys willing to provide pro bono legal services to veterans, organized by city and county, and posting the list on its Internet Web site.

(2) Conducting a statewide survey of programs that provide civil legal assistance to veterans in order to identify whether and where there is a need for legal advice clinics, publishing a report and recommendations based upon its findings no later than December 31, 2018, and posting the report on its Internet Web site. (Added by Stats. 2017, ch. 401.)

ARTICLE 5
DISCIPLINARY AUTHORITY OF THE BOARD OF TRUSTEES

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§ 6076 Rules of Professional Conduct; Formulation

With the approval of the Supreme Court, the Board of Trustees may formulate and enforce rules of professional conduct for all members of the bar in the State. (Origin: State Bar Act, § 25. Amended by Stats 1939, ch. 34. Amended by Stats. 2011, ch. 417.)

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§ 6077 Rules of Professional Conduct– Sanctions for their Violation

The Rules of Professional Conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar.

For a willful breach of any of these rules, the board has power to discipline members of the State Bar by reproval, public or private, or to recommend to the Supreme Court the suspension from practice for a period not exceeding three years of members of the State Bar. (Origin: State Bar Act, § 29. Amended by Stats. 1957, ch. 1249.)

* * * * *

§ 6086.1 Disciplinary Proceeding Hearings and Records Shall be Public

(a) (1) Subject to subdivision (b), and except as otherwise provided by law, hearings and records of original disciplinary proceedings in the State Bar Court shall be public, following a notice to show cause.

(2) Subject to subdivision (b), and except as otherwise provided by law, hearings and records of the following matters shall be public:

(A) Filings for involuntary inactive enrollment or restriction under subdivision (a), (c), (d), or (e) of Section 6007.

(B) Petitions for reinstatement under Section 6078.

(C) Proceedings for suspension or disbarment under Section 6101 or 6102.

(D) Payment information from the Client Security Fund pursuant to Section 6140.5.

(E) Actions to cease a law practice or assume a law practice under Section 6180 or 6190.

(b) All disciplinary investigations are confidential until the time that formal charges are filed and all investigations of matters identified in paragraph (2) of subdivision (a) are confidential until the formal proceeding identified in paragraph (2) of subdivision (a) is instituted. These investigations shall not be disclosed pursuant to any state law, including, but not limited to, the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). This confidentiality requirement may be waived under any of the following exceptions:

(1) The member whose conduct is being investigated may waive confidentiality.

(2) The Chief Trial Counsel or President of the State Bar may waive confidentiality, but only when warranted for protection of the public. Under those circumstances, after private notice to the member, the Chief Trial Counsel or President of the State Bar may issue, if appropriate, one or more public announcements or make information public confirming the fact of an investigation or proceeding, clarifying the procedural aspects and current status, and

defending the right of the member to a fair hearing. If the Chief Trial Counsel or President of the State Bar for any reason declines to exercise the authority provided by this paragraph, or disqualifies himself or herself from acting under this paragraph, he or she shall designate someone to act in his or her behalf. Conduct of a member that is being inquired into by the State Bar but that is not the subject of a formal investigation shall not be disclosed to the public.

(3) The Chief Trial Counsel or his or her designee may waive confidentiality pursuant to Section 6044.5.

(c) Notwithstanding the confidentiality of investigations, the State Bar shall disclose to any member of the public so inquiring, any information reasonably available to it pursuant to subdivision (o) of Section 6068, and to Sections 6086.7, 6086.8, and 6101, concerning a member of the State Bar which is otherwise a matter of public record, including civil or criminal filings and dispositions. (Added by Stats. 1990, ch. 1639, Stats. 1992, ch. 1265; Stats. 2015, ch. 537.)

* * * * *

§ 6086.7 Court Notification to State Bar for Misconduct, Misrepresentation, Incompetent Representation and Imposition of Sanctions

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

(1) A final order of contempt imposed against an attorney that may involve grounds warranting discipline under this chapter. The court entering the final order shall transmit to the State Bar a copy of the relevant minutes, final order, and transcript, if one exists.

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

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

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

(5) A violation described in paragraph (1) of subdivision (a) of Section 1424.5 of the Penal Code by a prosecuting attorney, if the court finds that the prosecuting attorney acted in bad faith and the impact of the violation contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.

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

(c) The State Bar shall investigate any matter reported under this section as to the appropriateness of initiating disciplinary action against the attorney. (Added by Stats. 1990, ch. 483. Amended by Stats. 2003, ch. 469; Stats. 2015, ch. 467.)

§ 6086.8 Reporting Requirements– Court, Insurers and Attorneys

(a) Within 20 days after a judgment by a court of this state that a member of the State Bar of California is liable for any damages resulting in a judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity, the court which rendered the judgment shall report that fact in writing to the State Bar of California.

(b) Every claim or action for damages against a member of the State Bar of California for fraud, misrepresentation, breach of fiduciary duty, or negligence committed in a professional capacity shall be reported to the State Bar of California within 30 days of receipt by the admitted insurer or licensed surplus brokers providing professional liability insurance to that member of the State Bar.

(c) An attorney who does not possess professional liability insurance shall send a complete written report to the State Bar as to any settlement, judgment, or arbitration award described in subdivision (b), in the manner specified in that subdivision. (Added by Stats. 1986, ch. 475. Amended by Stats. 1988, ch. 1159.)

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ARTICLE 5.5 MISCELLANEOUS DISCIPLINARY PROVISIONS

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§ 6090.5 Attorney/Client Agreement Not to File Complaint–Cause for Discipline

(a) It is cause for suspension, disbarment, or other discipline for any member, whether as a party or as an attorney for a party, to agree or seek agreement, that:

(1) The professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the disciplinary agency.

(2) The plaintiff shall withdraw a disciplinary complaint or shall not cooperate with the investigation or prosecution conducted by the disciplinary agency.

(3) The record of any civil action for professional misconduct shall be sealed from review by the disciplinary agency.

(b) This section applies to all settlements, whether made before or after the commencement of a civil action. (Added by Stats. 1986, ch. 475. Amended by Stats. 1996, ch. 1104.)

§ 6090.6 State Bar Access to Nonpublic Court Records

In a disciplinary proceeding, the State Bar shall have access, on an ex parte basis, to all nonpublic court records relevant to the competence or performance of its members, provided that these records shall remain confidential. This access, for investigation and enforcement purposes, shall not be limited by any court order sealing those records, except a court order authorized by Section 851.6, 851.7, 851.8, or 851.85 of the Penal Code. The State Bar may disclose publicly the nature and content of those records, including sealed records other than those specified immediately above in this section, after notice of intention to disclose all or a part of the records has been given to the parties in the underlying action. A party to the underlying action who would be adversely affected by the disclosure may serve notice on the State Bar within 10 days of receipt of the notice of intention to disclose the records that it opposes the disclosure and will seek a hearing in the court of competent jurisdiction on an expedited basis. (Added by Stats. 1988, ch. 1159.)

§ 6091 Trust Fund Account–State Bar Investigation/ Audit

If a client files a complaint with the State Bar alleging that his or her trust fund is being mishandled, the State Bar shall investigate and may require an audit if it determines that circumstances warrant.

At the client’s written request, the attorney shall furnish the client with a complete statement of the funds received and disbursed and any

charges upon the trust account, within 10 calendar days after receipt of the request. Such requests may not be made more often than once each 30 days unless a client files a complaint with the State Bar and the State Bar determines that more statements are warranted. (Added by Stats. 1986, ch. 475.)

* * * * *

§ 6094 Communications to Disciplinary Agency Privileged

(a) Communications to the disciplinary agency relating to lawyer misconduct or disability or competence, or any communication related to an investigation or proceeding and testimony given in the proceeding are privileged, and no lawsuit predicated thereon may be instituted against any person. The disciplinary agency and officers and employees are subject to the rules governing liability of public entities, officers, and employees specified in Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.

Nothing in this subdivision limits or alters the privileges accorded communications to the State Bar or testimony given in investigations or proceedings conducted by it or the immunities accorded complainants, informants, witnesses, the State Bar, its officers, and employees as existed prior to the enactment of this section. This subdivision does not constitute a change in, but is cumulative with the existing law.

(b) Upon application by the disciplinary agency and notice to the appropriate prosecuting authority, the superior court may grant immunity from criminal prosecution to a witness in any disciplinary agency proceeding. (Added by Stats. 1986, ch. 475.)

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ARTICLE 6
DISCIPLINARY AUTHORITY OF THE COURTS

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§ 6101 Conviction of Crimes Involving Moral Turpitude

(a) Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension. In any proceeding, whether under this article or otherwise, to disbar or suspend an attorney on account of that conviction, the record of conviction shall be conclusive evidence of guilt of the crime of which he or she has been convicted.

(b) The district attorney, city attorney, or other prosecuting agency shall notify the Office of the State Bar of California of the pendency of an action against an attorney charging a felony or misdemeanor immediately upon obtaining information that the defendant is an attorney. The notice shall identify the attorney and describe the crimes charged and the alleged facts. The prosecuting agency shall also notify the clerk of the court in which the action is pending that the defendant is an attorney, and the clerk shall record prominently in the file that the defendant is an attorney.

(c) The clerk of the court in which an attorney is convicted of a crime, shall within 48 hours after the conviction, transmit a certified copy of the record of conviction to the office of the State Bar. Within five days of receipt, the office of the State Bar shall transmit the record of any conviction which involves or may involve moral turpitude to the Supreme Court with such other records and information as may be appropriate to establish the Supreme Court’s jurisdiction. The State Bar of California may procure and transmit the record of conviction to the Supreme Court when the clerk has not done so or when the conviction was had in a court other than a court of this state.

(d) The proceedings to disbar or suspend an attorney on account of such a conviction shall be

undertaken by the Supreme Court, pursuant to the procedure provided in this section and Section 6102, upon the receipt of the certified copy of the record of conviction.

(e) A plea or verdict of guilty, an acceptance of a nolo contendere plea, or a conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of those Sections. (Origin: Code Civ. Proc., §§ 287(1), 288, 289. Amended by Stats. 1953, ch. 44; Stats. 1955, ch. 1190; Stats. 1984, ch. 1355; Stats. 1996, ch. 1104.)

§ 6102 Conviction of Crime–Suspension and Disbarment Procedure

(a) Upon the receipt of the certified copy of the record of conviction, if it appears therefrom that the crime of which the attorney was convicted involved, or that there is probable cause to believe that it involved, moral turpitude or is a felony under the laws of California, the United States, or any state or territory thereof, the Supreme Court shall suspend the attorney until the time for appeal has elapsed, if no appeal has been taken, or until the judgment of conviction has been affirmed on appeal, or has otherwise become final, and until the further order of the court. Upon its own motion or upon good cause shown, the court may decline to impose, or may set aside, the suspension when it appears to be in the interest of justice to do so, with due regard being given to maintaining the integrity of, and confidence in, the profession.

(b) For the purposes of this section, a crime is a felony under the law of California if it is declared to be so specifically or by subdivision (a) of Section 17 of the Penal Code, unless it is charged as a misdemeanor pursuant to paragraph (4) or (5) of subdivision (b) of Section 17 of the Penal Code, irrespective of whether in a particular case the crime may be considered a misdemeanor as a result of postconviction proceedings, including proceedings resulting in punishment or probation set forth in paragraph (1) or (3) of subdivision (b) of Section 17 of the Penal Code.

(c) After the judgment of conviction of an offense specified in subdivision (a) has become final or, irrespective of any subsequent order under Section 1203.4 of the Penal Code or similar statutory provision, an order granting probation has been made suspending the imposition of sentence, the Supreme Court shall summarily disbar the attorney if the offense is a felony under the laws of California, the United States, or any state or territory thereof, and an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement, or involved moral turpitude.

(d) For purposes of this section, a conviction under the laws of another state or territory of the United States shall be deemed a felony if:

> (1) The judgment or conviction was entered as a felony irrespective of any subsequent order suspending sentence or granting probation and irrespective of whether the crime may be considered a misdemeanor as a result of postconviction proceedings.
>
> (2) The elements of the offense for which the member was convicted would constitute a felony under the laws of the State of California at the time the offense was committed.

(e) Except as provided in subdivision (c), if after adequate notice and opportunity to be heard (which hearing shall not be had until the judgment of conviction has become final or, irrespective of any subsequent order under Section 1203.4 of the Penal Code, an order granting probation has been made suspending the imposition of sentence), the court finds that the crime of which the attorney was convicted, or the circumstances of its commission, involved moral turpitude, it shall enter an order disbarring the attorney or suspending him or her from practice for a limited time, according to the gravity of the crime and the circumstances of the case; otherwise it shall dismiss the proceedings. In determining the extent of the discipline to be imposed in a proceeding pursuant to this article, any prior

discipline imposed upon the attorney may be considered.

(f) The court may refer the proceedings or any part thereof or issue therein, including the nature or extent of discipline, to the State Bar for hearing, report, and recommendation.

(g) The record of the proceedings resulting in the conviction, including a transcript of the testimony therein, may be received in evidence.

(h) The Supreme Court shall prescribe rules for the practice and procedure in proceedings conducted pursuant to this section and Section 6101.

(i) The other provisions of this article providing a procedure for the disbarment or suspension of an attorney do not apply to proceedings pursuant to this section and Section 6101, unless expressly made applicable. (Origin: Code Civ. Proc., § 299. Amended by Stats. 1941, ch. 1183; Stats. 1955, ch. 1190; Stats. 1981, ch. 714; Stats. 1985, ch. 453; Stats. 1996, ch. 1104.)

§ 6103 Sanctions for Violation of Oath or Attorney's Duties

A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension. (Origin: Code Civ. Proc., § 287(2).)

§ 6103.5 Communicate Written Offer of Settlement to Client

(a) A member of the State Bar shall promptly communicate to the member's client all amounts, terms, and conditions of any written offer of settlement made by or on behalf of an opposing party. As used in this section, "client" includes any person employing the member of the State Bar who possesses the authority to accept an offer of settlement, or in a class action, who is a representative of the class.

(b) Any written offer of settlement or any required communication of a settlement offer, as described in subdivision (a), shall be discoverable by either party in any action in which the existence or communication of the offer of settlement is an issue before the trier of fact. (Added by Stats. 1986, ch. 1238. Amended by Stats. 1987, ch. 213.)

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§ 6103.7 Report of Suspected Immigration Status Cause for Discipline

It is cause for suspension, disbarment, or other discipline for any member of the State Bar to report suspected immigration status or threaten to report suspected immigration status of a witness or party to a civil or administrative action or his or her family member to a federal, state, or local agency because the witness or party exercises or has exercised a right related to his or her employment or hiring of residential real property, broadly interpreted. As used in this section, "family member" means a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership. (Added by Stats. 2013, ch. 577. Amended by Stats. 2017, ch. 489.)

§ 6104 Appearing for Party without Authority

Corruptly or willfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension. (Origin: Code Civ. Proc., § 287(3).)

§ 6105 Permitting Misuse of Name

Lending his name to be used as attorney by another person who is not an attorney constitutes a cause for disbarment or suspension. (Origin: Code Civ. Proc., § 287(4).)

§ 6106 Moral Turpitude, Dishonesty or Corruption Irrespective of Criminal Conviction

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

If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor. (Origin: Code Civ. Proc., § 287(5).)

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§ 6106.2 Violation of Civil Code Section 55.3–Grounds for Discipline

(a) It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to engage in any conduct in violation of Section 55.3, subdivision (b) or (c) of Section 55.31, or paragraph (2) of subdivision (a) or subdivision (b) of Section 55.32 of the Civil Code.

(b) This section shall become operative on January 1, 2016. (Added by Stats. 2012, ch. 383, effective September 19, 2012, operative January 1, 2016.)

§ 6106.3 Mortgage Loan Modifications: Violation of Civil Code Sections 2944.6–Grounds for Discipline

(a) It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to engage in any conduct in violation of Section 2944.6 of the Civil Code.

(b) This section shall become operative on January 1, 2017. (Added by Stats. 2009, ch. 630. Amended by Stats. 2012, ch. 563, operative January 1, 2017.)

[***Publisher's Note:*** *The following paragraph concerns Business and Professions Code 6106.3 and was added by Stats. 2009, ch. 630, but not codified. It is provided below for your information.*]

SEC. 14. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: With foreclosures at historic levels, foreclosure rescue scams are pervasive and rampant. In order to prevent financially stressed homeowners from being victimized and to provide them with needed protection at the earliest possible time, it is necessary that this act take effect immediately.

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§ 6106.8 Sexual Involvement Between Lawyers and Clients; Rule of Professional Conduct

(a) The Legislature hereby finds and declares that there is no rule that governs propriety of sexual relationships between lawyers and clients. The Legislature further finds and declares that it is difficult to separate sound judgment from emotion or bias which may result from sexual involvement between a lawyer and his or her client during the period that an attorney-client relationship exists, and that emotional detachment is essential to the lawyer's ability to render competent legal services. Therefore, in order to ensure that a lawyer acts in the best interest of his or her client, a rule of professional conduct governing sexual relations between attorneys and their clients shall be adopted.

(b) With the approval of the Supreme Court, the State Bar shall adopt a rule of professional conduct governing sexual relations between attorneys and their clients in cases involving, but not limited to, probate matters and domestic relations, including dissolution proceedings, child custody cases, and settlement proceedings.

(c) The State Bar shall submit the proposed rule to the Supreme Court for approval no later than January 1, 1991.

(d) Intentional violation of this rule shall constitute a cause for suspension or disbarment. (Added by Stats. 1989, ch. 1008.)

§ 6106.9 Sexual Relations Between Attorney and Client

(a) It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to do any of the following:

(1) Expressly or impliedly condition the performance of legal services for a current or prospective client upon the client's willingness to engage in sexual relations with the attorney.

(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.

(3) Continue representation of a client with whom the attorney has sexual relations if the sexual relations cause the attorney to perform legal services incompetently in violation of Rule 3-110 of the Rules of Professional Conduct of the State Bar of California, or if the sexual relations would, or would be likely to, damage or prejudice the client's case.

(b) Subdivision (a) shall not apply to sexual relations between attorneys and their spouses or persons in an equivalent domestic relationship or to ongoing consensual sexual relationships that predate the initiation of the attorney-client relationship.

(c) Where an attorney in a firm has sexual relations with a client but does not participate in the representation of that client, the attorneys in the firm shall not be subject to discipline under this section solely because of the occurrence of those sexual relations.

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

(e) Any complaint made to the State Bar alleging a violation of subdivision (a) shall be verified under oath by the person making the complaint. (Added by Stats. 1992, ch. 740.)

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§ 6116 Judgment

When an attorney has been found guilty of the charges made in proceedings not based upon a record of conviction, judgment shall be rendered disbarring the attorney or suspending him from practice for a limited time, according to the gravity of the offense charged. (Added by Stats. 1939, ch. 34.)

§ 6117 Effect of Disbarment or Suspension

During such disbarment or suspension, the attorney shall be precluded from practicing law.

When disbarred, his name shall be stricken from the roll of attorneys. (Origin: Code Civ. Proc., § 299.)

ARTICLE 7
UNLAWFUL PRACTICE OF LAW

§ 6125 Necessity of Active Membership in State Bar

No person shall practice law in California unless the person is an active member of the State Bar. (Origin: State Bar Act, § 47. Amended by Stats. 1990, ch. 1639.)

§ 6126 Unauthorized Practice or Advertising as a Misdemeanor

(a) Any person advertising or holding himself or herself out as practicing or entitled to practice

law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in this state at the time of doing so, is guilty of a misdemeanor punishable by up to one year in a county jail or by a fine of up to one thousand dollars ($1,000), or by both that fine and imprisonment. Upon a second or subsequent conviction, the person shall be confined in a county jail for not less than 90 days, except in an unusual case where the interests of justice would be served by imposition of a lesser sentence or a fine. If the court imposes only a fine or a sentence of less than 90 days for a second or subsequent conviction under this subdivision, the court shall state the reasons for its sentencing choice on the record.

(b) Any person who has been involuntarily enrolled as an inactive member of the State Bar, or has been suspended from membership from the State Bar, or has been disbarred, or has resigned from the State Bar with charges pending, and thereafter practices or attempts to practice law, advertises or holds himself or herself out as practicing or otherwise entitled to practice law, is guilty of a crime punishable by imprisonment in the state prison or a county jail. However, any person who has been involuntarily enrolled as an inactive member of the State Bar pursuant to paragraph (1) of subdivision (e) of Section 6007 and who knowingly thereafter practices or attempts to practice law, or advertises or holds himself or herself out as practicing or otherwise entitled to practice law, is guilty of a crime punishable by imprisonment in the state prison or a county jail.

(c) The willful failure of a member of the State Bar, or one who has resigned or been disbarred, to comply with an order of the Supreme Court to comply with Rule 9.20 of the California Rules of Court, constitutes a crime punishable by imprisonment in the state prison or a county jail.

(d) The penalties provided in this section are cumulative to each other and to any other remedies or penalties provided by law. (Origin: State Bar Act, § 49; Pen. Code, § 161a. Added by Stats. 1939, ch. 34. Amended by Stats. 1939, ch. 980; Stats. 1988, ch. 1159; Stats. 2002, ch. 394; Stats. 2007, ch. 130; Stats. 2007, ch. 474; Stats. 2011, ch. 15, effective April 4, 2011, operative October 1, 2011.)

§ 6126.3 Authority of Courts; Assumption of Jurisdiction Over Practices of Persons Who Advertise or Hold Themselves Out as Entitled to Practice Law but are Not Members of the State Bar or Otherwise Authorized to Practice Law

(a) In addition to any criminal penalties pursuant to Section 6126 or to any contempt proceedings pursuant to Section 6127, the courts of the state shall have the jurisdiction provided in this section when a person advertises or holds himself or herself out as practicing or entitled to practice law, or otherwise practices law, without being an active member of the State Bar or otherwise authorized pursuant to statute or court rule to practice law in this state at the time of doing so.

(b) The State Bar, or the superior court on its own motion, may make application to the superior court for the county where the person described in subdivision (a) maintains or more recently has maintained his or her principal office for the practice of law or where he or she resides, for assumption by the court of jurisdiction over the practice to the extent provided in this section. In any proceeding under this section, the State Bar shall be permitted to intervene and to assume primary responsibility for conducting the action.

(c) An application made pursuant to subdivision (b) shall be verified, and shall state facts showing all of the following:

(1) Probable cause to believe that the facts set forth in subdivision (a) of Section 6126 have occurred.

(2) The interest of the applicant.

(3) Probable cause to believe that the interests of a client or of an interested

person or entity will be prejudiced if the proceeding is not maintained.

(d) The application shall be set for hearing, and an order to show cause shall be issued directing the person to show cause why the court should not assume jurisdiction over the practice as provided in this section. A copy of the application and order to show cause shall be served upon the person by personal delivery or, as an alternate method of service, by certified or registered mail, return receipt requested, addressed to the person either at the address at which he or she maintains, or more recently has maintained, his or her principal office or at the address where he or she resides. Service is complete at the time of mailing, but any prescribed period of notice and any right or duty to do any act or make any response within that prescribed period or on a date certain after notice is served by mail shall be extended five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. If the State Bar is not the applicant, copies shall also be served upon the Office of the Chief Trial Counsel of the State Bar in similar manner at the time of service on the person who is the subject of the application. The court may prescribe additional or alternative methods of service of the application and order to show cause, and may prescribe methods of notifying and serving notices and process upon other persons and entities in cases not specifically provided herein.

(e) If the court finds that the facts set forth in subdivision (a) of Section 6126 have occurred and that the interests of a client or an interested person or entity will be prejudiced if the proceeding provided herein is not maintained, the court may make an order assuming jurisdiction over the person's practice pursuant to this section. If the person to whom the order to show cause is directed does not appear, the court may make its order upon the verified application or upon such proof as it may require. Thereupon, the court shall appoint one or more active members of the State Bar to act under its direction to mail a notice of cessation of practice, pursuant to subdivision (g), and may order those appointed attorneys to do one or more of the following:

(1) Examine the files and records of the practice and obtain information as to any pending matters that may require attention.

(2) Notify persons and entities who appear to be clients of the person of the occurrence of the event or events stated in subdivision (a) of Section 6126, and inform them that it may be in their best interest to obtain other legal counsel.

(3) Apply for an extension of time pending employment of legal counsel by the client.

(4) With the consent of the client, file notices, motions, and pleadings on behalf of the client where jurisdictional time limits are involved and other legal counsel has not yet been obtained.

(5) Give notice to the depositor and appropriate persons and entities who may be affected, other than clients, of the occurrence of the event or events.

(6) Arrange for the surrender or delivery of clients' papers or property.

(7) Arrange for the appointment of a receiver, where applicable, to take possession and control of any and all bank accounts relating to the affected person's practice.

(8) Do any other acts that the court may direct to carry out the purposes of this section. The court shall have jurisdiction over the files and records and over the practice of the affected person for the limited purposes of this section, and may make all orders necessary or appropriate to exercise this jurisdiction. The court shall provide a copy of any order issued pursuant to this section to the Office of the Chief Trial Counsel of the State Bar.

(f) Anyone examining the files and records of the practice of the person described in subdivision (a) shall observe any lawyer-client privilege under Sections 950 and 952 of the Evidence Code and shall make disclosure only to the extent necessary to carry out the purposes of this section. That disclosure shall be a disclosure that is reasonably necessary for the accomplishment of the purpose for which the person described in subdivision (a) was consulted. The appointment of a member of the State Bar pursuant to this section shall not affect the lawyer-client privilege, which privilege shall apply to communications by or to the appointed members to the same extent as it would have applied to communications by or to the person described in subdivision (a).

(g) The notice of cessation of law practice shall contain any information that may be required by the court, including, but not limited to, the finding by the court that the facts set forth in subdivision (a) of Section 6126 have occurred and that the court has assumed jurisdiction of the practice. The notice shall be mailed to all clients, to opposing counsel, to courts and agencies in which the person has pending matters with an identification of the matter, to the Office of the Chief Trial Counsel of the State Bar, and to any other person or entity having reason to be informed of the court's assumption of the practice.

(h) Nothing in this section shall authorize the court or an attorney appointed by it pursuant to this section to approve or disapprove of the employment of legal counsel, to fix terms of legal employment, or to supervise or in any way undertake the conduct of the practice, except to the limited extent provided by paragraphs (3) and (4) of subdivision (e).

(i) Unless court approval is first obtained, neither the attorney appointed pursuant to this section, nor his or her corporation, nor any partner or associate of the attorney shall accept employment as an attorney by any client of the affected person on any matter pending at the time of the appointment. Action taken pursuant to paragraphs (3) and (4) of subdivision (e) shall not be deemed employment for purposes of this subdivision.

(j) Upon a finding by the court that it is more likely than not that the application will be granted and that delay in making the orders described in subdivision (e) will result in substantial injury to clients or to others, the court, without notice or upon notice as it shall prescribe, may make interim orders containing any provisions that the court deems appropriate under the circumstances. Such an interim order shall be served in the manner provided in subdivision (d) and, if the application and order to show cause have not yet been served, the application and order to show cause shall be served at the time of serving the interim order.

(k) No person or entity shall incur any liability by reason of the institution or maintenance of a proceeding brought under this section. No person or entity shall incur any liability for an act done or omitted to be done pursuant to order of the court under this section. No person or entity shall be liable for failure to apply for court jurisdiction under this section. Nothing in this section shall affect any obligation otherwise existing between the affected person and any other person or entity.

(l) An order pursuant to this section is not appealable and shall not be stayed by petition for a writ, except as ordered by the superior court or by the appellate court.

(m) A member of the State Bar appointed pursuant to this section shall serve without compensation. However, the member may be paid reasonable compensation by the State Bar in cases where the State Bar has determined that the member has devoted extraordinary time and services that were necessary to the performance of the member's duties under this article. All payments of compensation for time and services shall be at the discretion of the State Bar. Any member shall be entitled to reimbursement from the State Bar for necessary expenses incurred in the performance of the member's duties under this article. Upon court approval of expenses or

compensation for time and services, the State Bar shall be entitled to reimbursement therefor from the person described in subdivision (a) or his or her estate. (Added by Stats. 2005, ch. 273. Amended by Stats. 2006, ch. 538.)

§ 6126.4 Authority of Courts to Assume Jurisdiction Extends to Immigration Consultants

Section 6126.3 shall apply to a person acting in the capacity of an immigration consultant pursuant to Chapter 19.5 (commencing with Section 22440) who advertises or holds himself or herself out as practicing or entitled to practice law, or otherwise practices law. (Added by Stats. 2006, ch. 605.)

§ 6126.5 Relief

(a) In addition to any remedies and penalties available in any enforcement action brought in the name of the people of the State of California by the Attorney General, a district attorney, or a city attorney, acting as a public prosecutor, the court shall award relief in the enforcement action for any person who obtained services offered or provided in violation of Section 6125 or 6126 or who purchased any goods, services, or real or personal property in connection with services offered or provided in violation of Section 6125 or 6126 against the person who violated Section 6125 or 6126, or who sold goods, services, or property in connection with that violation. The court shall consider the following relief:

(1) Actual damages.

(2) Restitution of all amounts paid.

(3) The amount of penalties and tax liabilities incurred in connection with the sale or transfer of assets to pay for any goods, services, or property.

(4) Reasonable attorney's fees and costs expended to rectify errors made in the unlawful practice of law.

(5) Prejudgment interest at the legal rate from the date of loss to the date of judgment.

(6) Appropriate equitable relief, including the rescission of sales made in connection with a violation of law.

(b) The relief awarded under paragraphs (1) to (6), inclusive, of subdivision (a) shall be distributed to, or on behalf of, the person for whom it was awarded or, if it is impracticable to do so, shall be distributed as may be directed by the court pursuant to its equitable powers.

(c) The court shall also award the Attorney General, district attorney, or city attorney reasonable attorney's fees and costs and, in the court's discretion, exemplary damages as provided in Section 3294 of the Civil Code.

(d) This section shall not be construed to create, abrogate, or otherwise affect claims, rights, or remedies, if any, that may be held by a person or entity other than those law enforcement agencies described in subdivision (a). The remedies provided in this section are cumulative to each other and to the remedies and penalties provided under other laws. (Added by Stats. 2001, ch. 304.)

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§ 6127 Contempt of Court

The following acts or omissions in respect to the practice of law are contempts of the authority of the courts:

(a) Assuming to be an officer or attorney of a court and acting as such, without authority.

(b) Advertising or holding oneself out as practicing or as entitled to practice law or otherwise practicing law in any court, without being an active member of the State Bar.

Proceedings to adjudge a person in contempt of court under this section are to be taken in

accordance with the provisions of Title V of Part III of the Code of Civil Procedure. (Origin: Code Civ. Proc., §§ 281, 1209.)

§ 6127.5 Law Corporation Under Professional Corporation Act

Nothing in sections 6125, 6126 and 6127 shall be deemed to apply to the acts and practices of a law corporation duly certificated pursuant to the Professional Corporation Act, as contained in Part 4 (commencing with section 13400) of Division 3 of Title 1 of the Corporations Code, and pursuant to Article 10 (commencing with section 6160) of Chapter 4 of Division 3 of this code, when the law corporation is in compliance with the requirements of (a) the Professional Corporation Act; (b) Article 10 (commencing with section 6160) of Chapter 4 of Division 3 of this code; and (c) all other statutes and all rules and regulations now or hereafter enacted or adopted pertaining to such corporation and the conduct of its affairs. (Added by Stats. 1968, ch. 1375.)

§ 6128 Deceit, Collusion, Delay of Suit and Improper Receipt of Money as Misdemeanor

Every attorney is guilty of a misdemeanor who either:

(a) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.

(b) Willfully delays his client's suit with a view to his own gain.

(c) Willfully receives any money or allowance for or on account of any money which he has not laid out or become answerable for.

Any violation of the provisions of this section is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both. (Origin: Pen. Code § 160. Amended by Stats. 1976, ch. 1125.)

§ 6129 Buying Claim as Misdemeanor

Every attorney who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor.

Any violation of the provisions of this section is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both. (Origin: Pen. Code § 161. Amended by Stats. 1976, ch. 1125.)

§ 6130 Disbarred or Suspended Attorney Suing as Assignee

No person, who has been an attorney, shall while a judgment of disbarment or suspension is in force appear on his own behalf as plaintiff in the prosecution of any action where the subject of the action has been assigned to him subsequent to the entry of the judgment of disbarment or suspension and solely for purpose of collection. (Origin: Code Civ. Proc., § 300.)

§ 6131 Aiding Defense Where Partner or Self has Acted as Public Prosecutor; Misdemeanor and Disbarment

Every attorney is guilty of a misdemeanor and, in addition to the punishment prescribed therefor, shall be disbarred:

(a) Who directly or indirectly advises in relation to, or aids, or promotes the defense of any action or proceeding in any court the prosecution of which is carried on, aided or promoted by any person as district attorney or other public prosecutor with whom such person is directly or indirectly connected as a partner.

(b) Who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court as district attorney or other public prosecutor, afterwards, directly or indirectly, advises in relation to or takes any part in the defense thereof, as attorney or otherwise, or who takes or receives any valuable consideration from or on behalf of any defendant in any such action upon any

understanding or agreement whatever having relation to the defense thereof.

This section does not prohibit an attorney from defending himself in person, as attorney or counsel, when prosecuted, either civilly or criminally. (Origin: Pen. Code, §§ 162, 163.)

§ 6132 Law Firm Name–Removal of Name of Disciplined Attorney

Any law firm, partnership, corporation, or association which contains the name of an attorney who is disbarred, or who resigned with charges pending, in its business name shall remove the name of that attorney from its business name, and from all signs, advertisements, letterhead, and other materials containing that name, within 60 days of the disbarment or resignation. (Added by Stats. 1988, ch. 1159.)

§ 6133 Supervision of Disciplined Attorney Activities by Law Firms

Any attorney or any law firm, partnership, corporation, or association employing an attorney who has resigned, or who is under actual suspension from the practice of law, or is disbarred, shall not permit that attorney to practice law or so advertise or hold himself or herself out as practicing law and shall supervise him or her in any other assigned duties. A willful violation of this section constitutes a cause for discipline. (Added by Stats. 1988, ch. 1159.)

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ARTICLE 8
REVENUE

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§ 6140.03 Increase in Annual Fee to Support Nonprofits Providing Free Legal Services to Needy; Opt Out Provision

(a) The board shall increase each of the annual membership fees fixed by Sections 6140 and 6141 by an additional forty dollars ($40), to be allocated only for the purposes established pursuant to Section 6033, except to the extent that a member elects not to support those activities.

(b) The invoice provided to members for payment of the annual membership fee shall provide each member the option of deducting forty dollars ($40) from the annual membership fee if the member elects not to have this amount allocated for the purposes established pursuant to Section 6033. (Added by Stats. 2013, ch. 681. Amended by Stats. 2014, ch. 429.)

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ARTICLE 8.5
FEE AGREEMENTS

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§ 6147 Contingency Fee Contract: Contents; Effect of Noncompliance; Application to Contracts for Recovery of Workers' Compensation Benefits

(a) An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following:

(1) A statement of the contingency fee rate that the client and attorney have agreed upon.

(2) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.

(3) A statement as to what extent, if any, the client could be required to pay any

compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee contract. This may include any amounts collected for the plaintiff by the attorney.

(4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client.

(5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.

(b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee.

(c) This section shall not apply to contingency fee contracts for the recovery of workers' compensation benefits.

(d) This section shall become operative on January 1, 2000. (Added by Stats. 1993, ch. 982. Amended by Stats. 1994, ch. 479; Stats. 1996, ch. 1104, operative January 1, 2000.)

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§ 6148 Written Fee Contract: Contents; Effect of Noncompliance

(a) In any case not coming within Section 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars ($1,000), the contract for services in the case shall be in writing. At the time the contract is entered into, the attorney shall provide a duplicate copy of the contract signed by both the attorney and the client, or the client's guardian or representative, to the client or to the client's guardian or representative. The written contract shall contain all of the following:

(1) Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.

(2) The general nature of the legal services to be provided to the client.

(3) The respective responsibilities of the attorney and the client as to the performance of the contract.

(b) All bills rendered by an attorney to a client shall clearly state the basis thereof. Bills for the fee portion of the bill shall include the amount, rate, basis for calculation, or other method of determination of the attorney's fees and costs. Bills for the cost and expense portion of the bill shall clearly identify the costs and expenses incurred and the amount of the costs and expenses. Upon request by the client, the attorney shall provide a bill to the client no later than 10 days following the request unless the attorney has provided a bill to the client within 31 days prior to the request, in which case the attorney may provide a bill to the client no later than 31 days following the date the most recent bill was provided. The client is entitled to make similar requests at intervals of no less than 30 days following the initial request. In providing responses to client requests for billing information, the attorney may use billing data that is currently effective on the date of the request, or, if any fees or costs to that date cannot be accurately determined, they shall be described and estimated.

(c) Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee.

(d) This section shall not apply to any of the following:

(1) Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is otherwise impractical.

(2) An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client.

(3) If the client knowingly states in writing, after full disclosure of this section, that a writing concerning fees is not required.

(4) If the client is a corporation.

(e) This section applies prospectively only to fee agreements following its operative date.

(f) This section shall become operative on January 1, 2000. (Added by Stats. 1993, ch. 982. Amended by Stats. 1994, ch. 479; Stats. 1996, ch. 1104, operative January 1, 2000.)

§ 6149 Written Fee Contract Confidential Communication

A written fee contract shall be deemed to be a confidential communication within the meaning of subdivision (e) of Section 6068 and of Section 952 of the Evidence Code. (Added by Stats. 1986, ch. 475.)

§ 6149.5 Insurer Notification to Claimant of Settlement Payment Delivered to Claimant's Attorney

(a) Upon the payment of one hundred dollars ($100) or more in settlement of any third-party liability claim the insurer shall provide written notice to the claimant if both of the following apply:

(1) The claimant is a natural person.

(2) The payment is delivered to the claimant's lawyer or other representative by draft, check, or otherwise.

(b) For purposes of this section, "written notice" includes providing to the claimant a copy of the cover letter sent to the claimant's attorney or other representative that accompanied the settlement payment.

(c) This section shall not create any cause of action for any person against the insurer based upon the insurer's failure to provide the notice to a claimant required by this section. This section shall not create a defense for any party to any cause of action based upon the insurer's failure to provide this notice. (Added by Stats. 1994, ch. 479.)

ARTICLE 9
UNLAWFUL SOLICITATION

§ 6150 Relation of Article to Chapter

This article is a part of Chapter 4 of this division of the Business and Professions Code, but the phrase "this chapter" as used in Chapter 4 does not apply to the provisions of this article unless expressly made applicable. (Added by Stats. 1939, ch. 34.)

§ 6151 Runners and Cappers–Definitions

As used in this article:

(a) A runner or capper is any person, firm, association or corporation acting for consideration in any manner or in any capacity as an agent for an attorney at law or law firm, whether the attorney or any member of the law firm is admitted in California or any other jurisdiction, in the solicitation or procurement of business for the attorney at law or law firm as provided in this article.

(b) An agent is one who represents another in dealings with one or more third persons. (Origin: Stats 1931, ch. 1043; Deering's Gen. Laws (1937), Act 592, § 5. Amended by Stats. 1963, ch. 206; Stats. 1991, ch. 116.)

§ 6152 Prohibition of Solicitation

(a) It is unlawful for:

(1) Any person, in an individual capacity or in a capacity as a public or private employee, or for any firm, corporation, partnership or association to act as a runner or capper for any attorneys or to solicit any business for any attorneys in and about the state prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, superior courts, or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever.

(2) Any person to solicit another person to commit or join in the commission of a violation of subdivision (a).

(b) A general release from a liability claim obtained from any person during the period of the first physical confinement, whether as an inpatient or outpatient, in a clinic or health facility, as defined in Sections 1203 and 1250 of the Health and Safety Code, as a result of the injury alleged to have given rise to the claim and primarily for treatment of the injury, is presumed fraudulent if the release is executed within 15 days after the commencement of confinement or prior to release from confinement, whichever occurs first.

(c) Nothing in this section shall be construed to prevent the recommendation of professional employment where that recommendation is not prohibited by the Rules of Professional Conduct of the State Bar of California.

(d) Nothing in this section shall be construed to mean that a public defender or assigned counsel may not make known his or her services as a criminal defense attorney to persons unable to afford legal counsel whether those persons are in custody or otherwise. (Origin: Statutes of 1931, ch. 1043. Added by Stats. 1939, ch. 34. Amended by Stats. 1963, ch. 206; Stats. 1976, ch. 1016; Stats. 1977, ch. 799, effective September 14, 1977; Stats. 1998, ch. 931; Stats. 2002, ch. 784.)

§ 6153 Prohibition of Solicitation

Any person, firm, partnership, association, or corporation violating subdivision (a) of Section 6152 is punishable, upon a first conviction, by imprisonment in a county jail for not more than one year or by a fine not exceeding fifteen thousand dollars ($15,000), or by both that imprisonment and fine. Upon a second or subsequent conviction, a person, firm, partnership, association, or corporation is punishable by imprisonment in a county jail for not more than one year, or by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years, or by a fine not exceeding fifteen thousand dollars ($15,000), or by both that imprisonment and fine.

Any person employed either as an officer, director, trustee, clerk, servant or agent of this state or of any county or other municipal corporation or subdivision thereof, who is found guilty of violating any of the provisions of this article, shall forfeit the right to his office and employment in addition to any other penalty provided in this article. (Origin: Statutes of 1931, ch. 1043. Amended by Stats. 1976, ch. 1016; Stats. 1976, ch. 1125; Stats. 1977, ch. 799, effective September 14, 1977; Stats. 1991, ch. 116; Stats. 2000, ch. 867; Stats. 2011, ch. 15, effective Apr. 4, 2011, operative Oct. 1, 2011.)

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ARTICLE 9.5
LEGAL ADVERTISING

§ 6157 Definitions

As used in this article, the following definitions apply:

(a) "Member" means a member in good standing of the State Bar and includes any agent of the member and any law firm or law

corporation doing business in the State of California.

(b) "Lawyer" means a member of the State Bar or a person who is admitted in good standing and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof, and includes any agent of the lawyer, law firm, or law corporation doing business in the state.

(c) "Advertise" or "advertisement" means any communication, disseminated by television or radio, by any print medium, including, but not limited to, newspapers and billboards, or by means of a mailing directed generally to members of the public and not to a specific person, that solicits employment of legal services provided by a member, and is directed to the general public and is paid for by, or on the behalf of, an attorney.

(d) "Electronic medium" means television, radio, or computer networks. (Added by Stats. 1993, ch. 518. Amended by Stats. 1994, ch. 711; Stats. 2006, ch. 538.)

§ 6157.1 Advertisements–False, Misleading or Deceptive

No advertisement shall contain any false, misleading, or deceptive statement or omit to state any fact necessary to make the statements made, in light of circumstances under which they are made, not false, misleading, or deceptive. (Added by Stats. 1993, ch. 518.)

§ 6157.2 Advertisements–Guarantees, Settlements, Impersonations, Dramatizations and Contingent Fee Basis

No advertisement shall contain or refer to any of the following:

(a) Any guarantee or warranty regarding the outcome of a legal matter as a result of representation by the member.

(b) Statements or symbols stating that the member featured in the advertisement can generally obtain immediate cash or quick settlements.

(c) (1) An impersonation of the name, voice, photograph, or electronic image of any person other than the lawyer, directly or implicitly purporting to be that of a lawyer.

(2) An impersonation of the name, voice, photograph, or electronic image of any person, directly or implicitly purporting to be a client of the member featured in the advertisement, or a dramatization of events, unless disclosure of the impersonation or dramatization is made in the advertisement.

(3) A spokesperson, including a celebrity spokesperson, unless there is disclosure of the spokesperson's title.

(d) A statement that a member offers representation on a contingent basis unless the statement also advises whether a client will be held responsible for any costs advanced by the member when no recovery is obtained on behalf of the client. If the client will not be held responsible for costs, no disclosure is required. (Added by Stats. 1993, ch. 518. Amended by Stats. 1994, ch. 711.)

§ 6157.3 Advertisements–Disclosure of Payor Other Than Member

Any advertisement made on behalf of a member, which is not paid for by the member, shall disclose any business relationship, past or present, between the member and the person paying for the advertisement. (Added by Stats. 1993, ch. 518.)

§ 6157.4 Lawyer Referral Service Advertisements- Necessary Disclosures

Any advertisement that is created or disseminated by a lawyer referral service shall disclose whether the attorneys on the organization's referral list, panel, or system, paid any consideration, other than a proportional share of actual cost, to be included on that list, panel, or system. (Added by Stats. 1993, ch. 518.)

§ 6157.5 Advertisements–Immigration or Naturalization Legal Services; Disclosures

(a) All advertisements published, distributed, or broadcasted by or on behalf of a member seeking professional employment for the member in providing services relating to immigration or naturalization shall include a statement that he or she is an active member of the State Bar, licensed to practice law in this state. If the advertisement seeks employment for a law firm or law corporation employing more than one attorney, the advertisement shall include a statement that all the services relating to immigration and naturalization provided by the firm or corporation shall be provided by an active member of the State Bar or by a person under the supervision of an active member of the State Bar. This subdivision shall not apply to classified or "yellow pages" listings in a telephone or business directory of three lines or less that state only the name, address, and telephone number of the listed entity.

(b) If the advertisement is in a language other than English, the statement required by subdivision (a) shall be in the same language as the advertisement.

(c) This section shall not apply to members employed by public agencies or by nonprofit entities registered with the Secretary of State.

(d) A violation of this section by a member shall be cause for discipline by the State Bar. (Added by Stats. 2000, ch. 674.)

§ 6158 Electronic Media Advertisements; Compliance with Sections 6157.1 and 6157.2; Message May Not Be False, Misleading or Deceptive; Message Must Be Factually Substantiated

In advertising by electronic media, to comply with Sections 6157.1 and 6157.2, the message as a whole may not be false, misleading, or deceptive, and the message as a whole must be factually substantiated. The message means the effect in combination of the spoken word, sound, background, action, symbols, visual image, or any other technique employed to create the message. Factually substantiated means capable of verification by a credible source. (Added by Stats. 1994, ch. 711.)

§ 6158.1 Rebuttable Presumptions; False, Misleading or Deceptive Message

There shall be a rebuttable presumption affecting the burden of producing evidence that the following messages are false, misleading, or deceptive within the meaning of Section 6158:

(a) A message as to the ultimate result of a specific case or cases presented out of context without adequately providing information as to the facts or law giving rise to the result.

(b) The depiction of an event through methods such as the use of displays of injuries, accident scenes, or portrayals of other injurious events which may or may not be accompanied by sound effects and which may give rise to a claim for compensation.

(c) A message referring to or implying money received by or for a client in a particular case or cases, or to potential monetary recovery for a prospective client. A reference to money or monetary recovery includes, but is not limited to, a specific dollar amount, characterization of a sum of money, monetary symbols, or the implication of wealth. (Added by Stats. 1994, ch. 711.)

§ 6158.2 Presumptions; Information Not False, Misleading or Deceptive

The following information shall be presumed to be in compliance with this article for purposes of advertising by electronic media, provided the message as a whole is not false, misleading, or deceptive:

(a) Name, including name of law firm, names of professional associates, addresses, telephone numbers, and the designation "lawyer," "attorney," "law firm," or the like.

(b) Fields of practice, limitation of practice, or specialization.

(c) Fees for routine legal services, subject to the requirements of subdivision (d) of Section 6157.2 and the Rules of Professional Conduct.

(d) Date and place of birth.

(e) Date and place of admission to the bar of state and federal courts.

(f) Schools attended, with dates of graduation, degrees, and other scholastic distinctions.

(g) Public or quasi-public offices.

(h) Military service.

(i) Legal authorship.

(j) Legal teaching positions.

(k) Memberships, offices, and committee assignments in bar associations.

(l) Memberships and offices in legal fraternities and legal societies.

(m) Technical and professional licenses.

(n) Memberships in scientific, technical, and professional associations and societies.

(o) Foreign language ability of the advertising lawyer or a member of lawyer's firm. (Added by Stats. 1994, ch. 711)

§ 6158.3 Portrayal of Result in Particular Case or Cases; Additional Disclosures

In addition to any disclosure required by Section 6157.2, Section 6157.3, and the Rules of Professional Conduct, the following disclosure shall appear in advertising by electronic media. Use of the following disclosure alone may not rebut any presumption created in Section 6158.1. If an advertisement in the electronic media conveys a message portraying a result in a particular case or cases, the advertisement must state, in either an oral or printed communication, either of the following disclosures: The advertisement must adequately disclose the factual and legal circumstances that justify the result portrayed in the message, including the basis for liability and the nature of injury or damage sustained, or the advertisement must state that the result portrayed in the advertisement was dependent on the facts of that case, and that the results will differ if based on different facts. (Added by Stats. 1994, ch. 711.)

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§ 6159.1 Retention of Advertisement

A true and correct copy of any advertisement made by a person or member shall be retained for one year by the person or member who pays for an advertisement soliciting employment of legal services. (Added by Stats. 1993, ch. 518. Amended by Stats. 1994, ch. 711 (previously § 6157.6).)

§ 6159.2 Scope of Article–Provisions Not Exclusive

(a) Nothing in this article shall be deemed to limit or preclude enforcement of any other provision of law, or of any court rule, or of the State Bar Rules of Professional Conduct.

(b) Nothing in this article shall limit the right of advertising protected under the Constitution of the State of California, or of the United States. If any provision of this article is found to violate either Constitution, that

provision is severable and the remaining provisions shall be enforceable without the severed provision. (Added by Stats. 1993, ch. 518. Amended by Stats. 1994, ch. 711 (previously § 6157.7).)

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§ 6159.51 Legal Aid Organizations–Defined

For purposes of this article, "legal aid organization" means a nonprofit organization that provides civil legal services for the poor without charge. (Added by Stats. 2009, ch. 457.)

§ 6159.52 Legal Aid Organizations–Use of Terms; Prohibitions

It is unlawful for any person or organization to use the term "legal aid," "legal aide," or any confusingly similar name in any firm name, trade name, fictitious business name, or any other designation, or on any advertisement, letterhead, business card, or sign, unless the person or organization is a legal aid organization subject to fair use principles for nominative, descriptive, or noncommercial use. (Added by Stats. 2009, ch. 457.)

ARTICLE 10
LAW CORPORATIONS

§ 6160 Nature

A law corporation is a corporation which is registered with the State Bar of California and has a currently effective certificate of registration from the State Bar pursuant to the Professional Corporation Act, as contained in Part 4 (commencing with section 13400) of Division 3 of Title 1 of the Corporations Code, and this article. Subject to all applicable statutes, rules and regulations, such law corporation is entitled to practice law. With respect to a law corporation the governmental agency referred to in the Professional Corporation Act is the State Bar. (Added by Stats. 1968, ch. 1375.)

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§ 6167 Misconduct

A law corporation shall not do or fail to do any act the doing of which or the failure to do which would constitute a cause for discipline of a member of the State Bar, under any statute, rule or regulation now or hereafter in effect. In the conduct of its business, it shall observe and be bound by such statutes, rules and regulations to the same extent as if specifically designated therein as a member of the State Bar. (Added by Stats. 1968, ch. 1375.)

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ARTICLE 10.5
PROVISION OF FINANCIAL SERVICES BY LAWYERS

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§ 6175.3 Selling Financial Products to Clients–Disclosure Requirements

A lawyer, while acting as a fiduciary, may sell financial products to a client who is an elder or dependent adult with whom the lawyer has or has had, within the preceding three years, an attorney-client relationship, if the transaction or acquisition and its terms are fair and reasonable to the client, and if the lawyer provides that client with a disclosure that satisfies all of the following conditions:

(a) The disclosure is in writing and is clear and conspicuous. The disclosure shall be a separate document, appropriately entitled, in 12-point print with one inch of space on all borders.

(b) The disclosure, in a manner that should reasonably have been understood by that client, is signed by the client, or the client's

conservator, guardian, or agent under a valid durable power of attorney.

(c) The disclosure states that the lawyer shall receive a commission and sets forth the amount of the commission and the actual percentage rate of the commission, if any. If the actual amount of the commission cannot be ascertained at the outset of the transaction, the disclosure shall include the actual percentage rate of the commission or the alternate basis upon which the commission will be computed, including an example of how the commission would be calculated.

(d) The disclosure identifies the source of the commission and the relationship between the source of the commission and the person receiving the commission.

(e) The disclosure is presented to the client at or prior to the time the recommendation of the financial product is made.

(f) The disclosure advises the client that he or she may obtain independent advice regarding the purchase of the financial product and will be given a reasonable opportunity to seek that advice.

(g) The disclosure contains a statement that the financial product may be returned to the issuing company within 30 days of receipt by the client for a refund as set forth in Section 10127.10 of the Insurance Code.

(h) The disclosure contains a statement that if the purchase of the financial product is for the purposes of Medi-Cal planning, the client has been advised of other appropriate alternatives, including spend-down strategies, and of the possibility of obtaining a fair hearing or obtaining a court order. (Added by Stats. 1999, ch. 454.)

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ARTICLE 11
CESSATION OF LAW PRACTICE– JURISDICTION OF COURTS

§ 6180 Notice of Cessation; Jurisdiction of Courts

When an attorney engaged in law practice in this state dies, resigns, becomes an inactive member of the State Bar, is disbarred, or is suspended from the active practice of law and is required by the order of suspension to give notice of the suspension, notice of cessation of law practice shall be given and the courts of this state shall have jurisdiction, as provided in this article. (Added by Stats. 1974, ch. 589. Amended by Stats. 1985, ch. 453.)

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ARTICLE 12
INCAPACITY TO ATTEND TO LAW PRACTICE–JURISDICTION OF COURTS

§ 6190 Authority of Courts; Attorney Incapable of Practice; Protection of Clients

The courts of the state shall have the jurisdiction as provided in this article when an attorney engaged in the practice of law in this state has, for any reason, including but not limited to excessive use of alcohol or drugs, physical or mental illness, or other infirmity or other cause, become incapable of devoting the time and attention to, and providing the quality of service for, his or her law practice which is necessary to protect the interest of a client if there is an unfinished client matter for which no other active member of the State Bar, with the consent of the client, has agreed to assume responsibility. (Added by Stats. 1975, ch. 387.)

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ARTICLE 13
ARBITRATION OF ATTORNEYS' FEES

§ 6200 Establishment of System and Procedure; Jurisdiction; Local Bar Association Rules

(a) The board of trustees shall, by rule, establish, maintain, and administer a system and procedure for the arbitration, and may establish, maintain, and administer a system and procedure for mediation of disputes concerning fees, costs, or both, charged for professional services by members of the State Bar or by members of the bar of other jurisdictions. The rules may include provision for a filing fee in the amount as the board may, from time to time, determine.

(b) This article shall not apply to any of the following:

(1) Disputes where a member of the State Bar of California is also admitted to practice in another jurisdiction or where an attorney is only admitted to practice in another jurisdiction, and he or she maintains no office in the State of California, and no material portion of the services were rendered in the State of California.

(2) Claims for affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct, except as provided in subdivision (a) of Section 6203.

(3) Disputes where the fee or cost to be paid by the client or on his or her behalf has been determined pursuant to statute or court order.

(c) Unless the client has agreed in writing to arbitration under this article of all disputes concerning fees, costs, or both, arbitration under this article shall be voluntary for a client and shall be mandatory for an attorney if commenced by a client. Mediation under this article shall be voluntary for an attorney and a client.

(d) The board of trustees shall adopt rules to allow arbitration and mediation of attorney fee and cost disputes under this article to proceed under arbitration and mediation systems sponsored by local bar associations in this state. Rules of procedure promulgated by local bar associations are subject to review by the board or a committee designated by the board to ensure that they provide for a fair, impartial, and speedy hearing and award.

(e) In adopting or reviewing rules of arbitration under this section the board shall provide that the panel shall include one attorney member whose area of practice is either, at the option of the client, civil law, if the attorney's representation involved civil law, or criminal law, if the attorney's representation involved criminal law, as follows:

(1) If the panel is composed of three members the panel shall include one attorney member whose area of practice is either, at the option of the client, civil or criminal law, and shall include one lay member.

(2) If the panel is composed of one member, that member shall be an attorney whose area of practice is either, at the option of the client, civil or criminal law.

(f) In any arbitration or mediation conducted pursuant to this article by the State Bar or by a local bar association, pursuant to rules of procedure approved by the board of trustees, an arbitrator or mediator, as well as the arbitrating association and its directors, officers, and employees, shall have the same immunity which attaches in judicial proceedings.

(g) In the conduct of arbitrations under this article the arbitrator or arbitrators may do all of the following:

(1) Take and hear evidence pertaining to the proceeding.

(2) Administer oaths and affirmations.

(3) Issue subpoenas for the attendance of witnesses and the production of books,

papers, and documents pertaining to the proceeding.

(h) Participation in mediation is a voluntary consensual process, based on direct negotiations between the attorney and his or her client, and is an extension of the negotiated settlement process. All discussions and offers of settlement are confidential and shall not be disclosed pursuant to any state law, including, but not limited to, the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code), and may not be disclosed in any subsequent arbitration or other proceedings. (Added by Stats. 1978, ch. 719. Amended by Stats. 1984, ch. 825; Stats. 1989, ch. 1416; Stats. 1990, ch. 483; Stats. 1990, ch. 1020; Stats. 1993, ch. 1262; Stats. 1994, ch. 479; Stats. 1996, ch. 1104; Stats. 2009, ch. 54; Stats. 2011. ch. 417; Stats. 2015, ch. 537.)

§ 6201 Notice to Client; Request for Arbitration; Client's Waiver of Right to Arbitration

(a) The rules adopted by the board of trustees shall provide that an attorney shall forward a written notice to the client prior to or at the time of service of summons or claim in an action against the client, or prior to or at the commencement of any other proceeding against the client under a contract between attorney and client which provides for an alternative to arbitration under this article, for recovery of fees, costs, or both. The written notice shall be in the form that the board of trustees prescribes, and shall include a statement of the client's right to arbitration under this article. Failure to give this notice shall be a ground for the dismissal of the action or other proceeding. The notice shall not be required, however, prior to initiating mediation of the dispute.

The rules adopted by the board of trustees shall provide that the client's failure to request arbitration within 30 days after receipt of notice from the attorney shall be deemed a waiver of the client's right to arbitration under the provisions of this article.

(b) If an attorney, or the attorney's assignee, commences an action in any court or any other proceeding and the client is entitled to maintain arbitration under this article, and the dispute is not one to which subdivision (b) of Section 6200 applies, the client may stay the action or other proceeding by serving and filing a request for arbitration in accordance with the rules established by the board of trustees pursuant to subdivision (a) of Section 6200. The request for arbitration shall be served and filed prior to the filing of an answer in the action or equivalent response in the other proceeding; failure to so request arbitration prior to the filing of an answer or equivalent response shall be deemed a waiver of the client's right to arbitration under the provisions of this article if notice of the client's right to arbitration was given pursuant to subdivision (a).

(c) Upon filing and service of the request for arbitration, the action or other proceeding shall be automatically stayed until the award of the arbitrators is issued or the arbitration is otherwise terminated. The stay may be vacated in whole or in part, after a hearing duly noticed by any party or the court, if and to the extent the court finds that the matter is not appropriate for arbitration under the provisions of this article. The action or other proceeding may thereafter proceed subject to the provisions of Section 6204.

(d) A client's right to request or maintain arbitration under the provisions of this article is waived by the client commencing an action or filing any pleading seeking either of the following:

(1) Judicial resolution of a fee dispute to which this article applies.

(2) Affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct.

(e) If the client waives the right to arbitration under this article, the parties may stipulate to set aside the waiver and to proceed with arbitration. (Added by Stats. 1978, ch. 719.

Amended by Stats. 1979, ch. 878; Stats. 1982, ch. 979; Stats. 1984, ch. 825; Stats. 1989, ch. 1416; Stats. 1990, ch. 483; Stats. 1993, ch. 1262; Stats. 1994, ch. 479; Stats. 1996, ch. 1104; Stats. 2011, ch. 417.)

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§ 6203 Notice to Client; Request for Arbitration; Client's Waiver of Right to Arbitration

(a) The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy. The award shall not include any award to either party for costs or attorney's fees incurred in preparation for or in the course of the fee arbitration proceeding, notwithstanding any contract between the parties providing for such an award or costs or attorney's fees. However, the filing fee paid may be allocated between the parties by the arbitrators. This section shall not preclude an award of costs or attorney's fees to either party by a court pursuant to subdivision (c) of this section or of subdivision (d) of Section 6204. The State Bar, or the local bar association delegated by the State Bar to conduct the arbitration, shall deliver to each of the parties with the award, an original declaration of service of the award.

Evidence relating to claims of malpractice and professional misconduct, shall be admissible only to the extent that those claims bear upon the fees, costs, or both, to which the attorney is entitled. The arbitrators shall not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying the claim. Nothing in this section shall be construed to prevent the arbitrators from awarding the client a refund of unearned fees, costs, or both previously paid to the attorney.

(b) Even if the parties to the arbitration have not agreed in writing to be bound, the arbitration award shall become binding upon the passage of 30 days after service of notice of the award, unless a party has, within the 30 days, sought a trial after arbitration pursuant to Section 6204. If an action has previously been filed in any court, any petition to confirm, correct, or vacate the award shall be to the court in which the action is pending, and may be served by mail on any party who has appeared, as provided in Chapter 4 (commencing with Section 1003) of Title 14 of Part 2 of the Code of Civil Procedure; otherwise it shall be in the same manner as provided in Chapter 4 (commencing with Section 1285) of Title 9 of Part 3 of the Code of Civil Procedure. If no action is pending in any court, the award may be confirmed, corrected, or vacated by petition to the court having jurisdiction over the amount of the arbitration award, but otherwise in the same manner as provided in Chapter 4 (commencing with Section 1285) of Title 9 of Part 3 of the Code of Civil Procedure.

(c) Neither party to the arbitration may recover costs or attorney's fees incurred in preparation for or in the course of the fee arbitration proceeding with the exception of the filing fee paid pursuant to subdivision (a) of this section. However, a court confirming, correcting, or vacating an award under this section may award to the prevailing party reasonable fees and costs incurred in obtaining confirmation, correction, or vacation of the award including, if applicable, fees and costs on appeal. The party obtaining judgment confirming, correcting, or vacating the award shall be the prevailing party except that, without regard to consideration of who the prevailing party may be, if a party did not appear at the arbitration hearing in the manner provided by the rules adopted by the board of trustees, that party shall not be entitled to attorney's fees or costs upon confirmation, correction, or vacation of the award.

(d) (1) In any matter arbitrated under this article in which the award is binding or has become binding by operation of law or has become a judgment either after confirmation under subdivision (c) or after

a trial after arbitration under Section 6204, or in any matter mediated under this article, if: (A) the award, judgment, or agreement reached after mediation includes a refund of fees or costs, or both, to the client and (B) the attorney has not complied with that award, judgment, or agreement the State Bar shall enforce the award, judgment, or agreement by placing the attorney on involuntary inactive status until the refund has been paid.

(2) The State Bar shall provide for an administrative procedure to determine whether an award, judgment, or agreement should be enforced pursuant to this subdivision. An award, judgment, or agreement shall be so enforced if:

(A) The State Bar shows that the attorney has failed to comply with a binding fee arbitration award, judgment, or agreement rendered pursuant to this article.

(B) The attorney has not proposed a payment plan acceptable to the client or the State Bar.

However, the award, judgment, or agreement shall not be so enforced if the attorney has demonstrated that he or she (i) is not personally responsible for making or ensuring payment of the refund, or (ii) is unable to pay the refund.

(3) An attorney who has failed to comply with a binding award, judgment, or agreement shall pay administrative penalties or reasonable costs, or both, as directed by the State Bar. Penalties imposed shall not exceed 20 percent of the amount to be refunded to the client or one thousand dollars ($1,000), whichever is greater. Any penalties or costs, or both, that are not paid shall be added to the membership fee of the attorney for the next calendar year.

(4) The board shall terminate the inactive enrollment upon proof that the attorney has complied with the award, judgment, or agreement and upon payment of any costs or penalties, or both, assessed as a result of the attorney's failure to comply.

(5) A request for enforcement under this subdivision shall be made within four years from the date (A) the arbitration award was mailed, (B) the judgment was entered, or (C) the date the agreement was signed. In an arbitrated matter, however, in no event shall a request be made prior to 100 days from the date of the service of a signed copy of the award. In cases where the award is appealed, a request shall not be made prior to 100 days from the date the award has become final as set forth in this section. (Added by Stats. 1978, ch. 719. Amended by Stats. 1982, ch. 979; Stats. 1984, ch. 825; Stats. 1989, ch. 1416; Stats. 1990, ch. 483; Stats. 1992, ch. 1265; Stats. 1993, ch. 1262; Stats. 1996, ch. 1104; Stats. 2009, ch. 54; Stats. 2011, ch. 417.)

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ARTICLE 14
FUNDS FOR THE PROVISION OF LEGAL SERVICES TO INDIGENT PERSONS

§ 6210 Legislative Findings; Purpose of Program

The Legislature finds that, due to insufficient funding, existing programs providing free legal services in civil matters to indigent persons, especially underserved client groups, such as the elderly, the disabled, juveniles, and non-English-speaking persons, do not adequately meet the needs of these persons. It is the purpose of this article to expand the availability and improve the quality of existing free legal services in civil matters to indigent persons, and to initiate new programs that will provide services to them. The Legislature finds that the use of funds collected by the State Bar pursuant

to this article for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes in the judicial branch of government. The Legislature further finds that the expansion, improvement, and initiation of legal services to indigent persons will aid in the advancement of the science of jurisprudence and the improvement of the administration of justice. (Added by Stats. 1981, ch. 789.)

§ 6211 Definition of Funds to be Deposited in Interest Bearing Demand Trust Account; Interest Earned Paid to State Bar; Other Accounts or Trust Investments; Rules of Professional Conduct; Disciplinary Authority of Supreme Court or State Bar

(a) An attorney or law firm that, in the course of the practice of law receives or disburses trust funds shall establish and maintain an IOLTA account in which the attorney or law firm shall deposit or invest all client deposits or funds that are nominal in amount or are on deposit or invested for a short period of time. All such client funds may be deposited or invested in a single unsegregated account. The interest and dividends earned on all those accounts shall be paid to the State Bar of California to be used for the purposes set forth in this article.

(b) Nothing in this article shall be construed to prohibit an attorney or law firm from establishing one or more interest bearing bank trust deposit accounts or dividend-paying trust investment accounts as may be permitted by the Supreme Court, with the interest or dividends earned on the accounts payable to clients for trust funds not deposited or invested in accordance with subdivision (a).

(c) With the approval of the Supreme Court, the State Bar may formulate and enforce rules of professional conduct pertaining to the use by attorneys or law firms of an IOLTA account for unsegregated client funds pursuant to this article.

(d) Nothing in this article shall be construed as affecting or impairing the disciplinary powers and authority of the Supreme Court or of the State Bar or as modifying the statutes and rules governing the conduct of members of the State Bar. (Added by Stats. 1981, ch. 789. Amended by Stats. 2007, ch. 422.)

§ 6212 Requirements in Establishing Client Trust Accounts; Amount of Interest; Remittance to State Bar; Statements and Reports

An attorney who, or a law firm that, establishes an IOLTA account pursuant to subdivision (a) of Section 6211 shall comply with all of the following provisions:

(a) The IOLTA account shall be established and maintained with an eligible institution offering or making available an IOLTA account that meets the requirements of this article. The IOLTA account shall be established and maintained consistent with the attorney's or law firm's duties of professional responsibility. An eligible financial institution shall have no responsibility for selecting the deposit or investment product chosen for the IOLTA account.

(b) Except as provided in subdivision (e), the rate of interest or dividends payable on any IOLTA account shall not be less than the interest rate or dividends generally paid by the eligible institution to nonattorney customers on accounts of the same type meeting the same minimum balance and other eligibility requirements as the IOLTA account. In determining the interest rate or dividend payable on any IOLTA account, an eligible institution may consider, in addition to the balance in the IOLTA account, risk or other factors customarily considered by the eligible institution when setting the interest rate or dividends for its non-IOLTA accounts, provided that the factors do not discriminate between IOLTA customers and non-IOLTA customers and that these factors do not include the fact that the account is an IOLTA account. The eligible institution shall calculate interest and dividends

in accordance with its standard practice for non-IOLTA customers. Nothing in this article shall preclude an eligible institution from paying a higher interest rate or dividend on an IOLTA account or from electing to waive any fees and service charges on an IOLTA account.

(c) Reasonable fees may be deducted from the interest or dividends remitted on an IOLTA account only at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No other fees or service charges may be deducted from the interest or dividends earned on an IOLTA account. Unless and until the State Bar enacts regulations exempting from compliance with subdivision (a) of Section 6211 those accounts for which maintenance fees exceed the interest or dividends paid, an eligible institution may deduct the fees and service charges in excess of the interest or dividends paid on an IOLTA account from the aggregate interest and dividends remitted to the State Bar. Fees and service charges other than reasonable fees shall be the sole responsibility of, and may only be charged to, the attorney or law firm maintaining the IOLTA account. Fees and charges shall not be assessed against or deducted from the principal of any IOLTA account. It is the intent of the Legislature that the State Bar develop policies so that eligible institutions do not incur uncompensated administrative costs in adapting their systems to comply with the provisions of Chapter 422 of the Statutes of 2007 or in making investment products available to IOLTA members.

(d) The attorney or law firm shall report IOLTA account compliance and all other IOLTA account information required by the State Bar in the manner specified by the State Bar.

(e) The eligible institution shall be directed to do all of the following:

(1) To remit interest or dividends on the IOLTA account, less reasonable fees, to the State Bar, at least quarterly.

(2) To transmit to the State Bar with each remittance a statement showing the name of the attorney or law firm for which the remittance is sent, for each account the rate of interest applied or dividend paid, the amount and type of fees deducted, if any, and the average balance for each account for each month of the period for which the report is made.

(3) To transmit to the attorney or law firm customer at the same time a report showing the amount paid to the State Bar for that period, the rate of interest or dividend applied, the amount of fees and service charges deducted, if any, and the average daily account balance for each month of the period for which the report is made.

(f) An eligible institution has no affirmative duty to offer or make investment products available to IOLTA customers. However, if an eligible institution offers or makes investment products available to non-IOLTA customers, in order to remain an IOLTA-eligible institution, it shall make those products available to IOLTA customers or pay an interest rate on the IOLTA deposit account that is comparable to the rate of return or the dividends generally paid on that investment product for similar customers meeting the same minimum balance and other requirements applicable to the investment product. If the eligible institution elects to pay that higher interest rate, the eligible institution may subject the IOLTA deposit account to equivalent fees and charges assessable against the investment product. [See the Supreme Court order pursuant to Statutes 1981, Chapter 789.] (Added by Stats. 1981, ch. 789. Amended by Stats. 2007, ch. 422; Stats. 2008, ch. 179; Stats. 2009, ch. 129.)

§ 6213 Definitions

As used in this article:

(a) "Qualified legal services project" means either of the following:

(1) A nonprofit project incorporated and operated exclusively in California that

provides as its primary purpose and function legal services without charge to indigent persons and that has quality control procedures approved by the State Bar of California.

(2) A program operated exclusively in California by a nonprofit law school accredited by the State Bar of California that meets the requirements of subparagraphs (A) and (B).

(A) The program shall have operated for at least two years at a cost of at least twenty thousand dollars ($20,000) per year as an identifiable law school unit with a primary purpose and function of providing legal services without charge to indigent persons.

(B) The program shall have quality control procedures approved by the State Bar of California.

(b) "Qualified support center" means an incorporated nonprofit legal services center that has as its primary purpose and function the provision of legal training, legal technical assistance, or advocacy support without charge and which actually provides through an office in California a significant level of legal training, legal technical assistance, or advocacy support without charge to qualified legal services projects on a statewide basis in California.

(c) "Recipient" means a qualified legal services project or support center receiving financial assistance under this article.

(d) "Indigent person" means a person whose income is

(1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or

(2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project that provides free services of attorneys in private practice without compensation, "indigent person" also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code. For the purpose of this subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses.

(e) "Fee generating case" means a case or matter that, if undertaken on behalf of an indigent person by an attorney in private practice, reasonably may be expected to result in payment of a fee for legal services from an award to a client, from public funds, or from the opposing party. A case shall not be considered fee generating if adequate representation is unavailable and any of the following circumstances exist:

(1) The recipient has determined that free referral is not possible because of any of the following reasons:

(A) The case has been rejected by the local lawyer referral service, or if there is no such service, by two attorneys in private practice who have experience in the subject matter of the case.

(B) Neither the referral service nor any attorney will consider the case without payment of a consultation fee.

(C) The case is of the type that attorneys in private practice in the area ordinarily do not accept, or do not accept without prepayment of a fee.

(D) Emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate and consistent with professional responsibility, referral will be attempted at a later time.

(2) Recovery of damages is not the principal object of the case and a request for damages is merely ancillary to an action for

equitable or other nonpecuniary relief, or inclusion of a counterclaim requesting damages is necessary for effective defense or because of applicable rules governing joinder of counterclaims.

(3) A court has appointed a recipient or an employee of a recipient pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction.

(4) The case involves the rights of a claimant under a publicly supported benefit program for which entitlement to benefit is based on need.

(f) "Legal Services Corporation" means the Legal Services Corporation established under the Legal Services Corporation Act of 1974 (P.L. 93-355; 42 U.S.C. Sec. 2996 et seq.).

(g) "Older Americans Act" means the Older Americans Act of 1965, as amended (P.L. 89-73; 42 U.S.C. Sec. 3001 et seq.).

(h) "Developmentally Disabled Assistance Act" means the Developmentally Disabled Assistance and Bill of Rights Act, as amended (P.L. 94-103; 42 U.S.C. Sec. 6001 et seq.).

(i) "Supplemental security income recipient" means an individual receiving or eligible to receive payments under Title XVI of the federal Social Security Act, or payments under Chapter 3 (commencing with Section 12000) of Part 3 of Division 9 of the Welfare and Institutions Code.

(j) "IOLTA account" means an account or investment product established and maintained pursuant to subdivision (a) of Section 6211 that is any of the following:

(1) An interest-bearing checking account.

(2) An investment sweep product that is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund.

(3) An investment product authorized by California Supreme Court rule or order.

A daily financial institution repurchase agreement shall be fully collateralized by United States Government Securities or other comparably conservative debt securities, and may be established only with any eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund shall be invested solely in United States Government Securities or repurchase agreements fully collateralized by United States Government Securities or other comparably conservative debt securities, shall hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1 et seq.), and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

(k) "Eligible institution" means either of the following:

(1) A bank, savings and loan, or other financial institution regulated by a federal or state agency that pays interest or dividends in the IOLTA account and carries deposit insurance from an agency of the federal government.

(2) Any other type of financial institution authorized by the California Supreme Court. (Added by Stats. 1981, ch. 789. Amended by Stats. 1984, ch. 784; Stats. 2007, ch. 422; Stats. 2008, ch. 179; Stats. 2009, ch. 129; Stats. 2010, ch. 328.)

BUSINESS AND PROFESSIONS CODE

§ 22442.5 Immigration Consultants– Client Trust Account for Immigration Reform Act Services

(a) An immigration consultant who provides immigration reform act services shall establish and deposit into a client trust account any funds received from a client prior to performing those services for that client.

(b) For purposes of this section, the following definitions apply:

(1) "Immigration reform act" means either of the following:

(A) Any pending or future act of Congress that is enacted after October 5, 2013, that authorizes an undocumented immigrant who either entered the United States without inspection or who did not depart after the expiration of a nonimmigrant visa, to attain a lawful status under federal law. The State Bar shall announce and post on its Internet Web site when an immigration reform act has been enacted.

(B) The President's executive actions on immigration announced on November 20, 2014, or any future executive action or order that authorizes an undocumented immigrant who either entered the United States without inspection or who did not depart after the expiration of a nonimmigrant visa to attain a lawful status under federal law. The State Bar shall announce and post on its Internet Web site when an executive action or order has been issued.

(2) "Immigration reform act services" means services described in Section 22441 that are provided in connection with an immigration reform act.

(c) The immigration consultant providing immigration reform act services for the client may withdraw funds received from that client only in compliance with either of the following:

(1) After completing one or more of the itemized services described in paragraph (1) of subdivision (b) of Section 22442, and only in the amount identified as the cost of that service or those services pursuant to paragraph (2) of subdivision (b) of Section 22442.

(2) After completing one or more of the documents listed, and only in the amounts listed, pursuant to paragraph (4) of subdivision (b) of Section 22442. (Added by Stats. 2013, ch. 574. Amended by Stats. 2015, ch. 6, effective June 17, 2015.)

§ 22442.6 Immigration Consultants– Immigration Reform Act Services; Refunding of Advance Payment; Statement of Accounting

(a) It is unlawful for an immigration consultant to demand or accept the advance payment of any funds from a person for immigration reform act services in connection with any of the following:

(1) An immigration reform act as defined in subparagraph (A) of paragraph (1) of subdivision (b) of Section 22442.5, before the enactment of that act.

(2) (A) Requests for expanded Deferred Action for Childhood Arrivals (DACA) under an immigration reform act as defined in subparagraph (B) of paragraph (1) of subdivision (b) of Section 22442.5, before the date the United States Citizenship and Immigration Services begins accepting those requests.

(B) Requests for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) under an

immigration reform act as defined in subparagraph (B) of paragraph (1) of subdivision (b) of Section 22442.5, before the date the United States Citizenship and Immigration Services begins accepting those requests.

(C) Requests for Expanded Provisional Waivers of Unlawful Presence under an immigration reform act as defined in subparagraph (B) of paragraph (1) of subdivision (b) of Section 22442.5, before the issuance and effective date of new guidelines and regulations for those provisional waivers.

(D) Any relief offered under any executive action announced or executive order issued, on or after the effective date of the act adding this subparagraph, that authorizes an undocumented immigrant who either entered the United States without inspection or who did not depart after the expiration of a nonimmigrant visa to attain a lawful status under federal law, before the executive action or order has been implemented and the relief is available.

(b) Any advance payment of funds for immigration reform act services that was received after October 5, 2013, but before the enactment or implementation of the immigration reform act for which the services were sought, shall be refunded to the client promptly, but no later than 30 days after the receipt of the funds.

(c) (1) If an immigration consultant providing immigration reform act services accepted funds prior to the effective date of this amendment to this section, and the services provided in connection with payment of those funds were rendered, the consultant shall promptly, but no later than 30 days after the effective date of this amendment to this section, provide the client with a statement of accounting describing the services rendered.

(2) (A) Any funds received before the effective date of this amendment to this section for which immigration reform act services were not rendered prior to the effective date of this amendment to this section shall either be refunded to the client or shall be deposited in a client trust account pursuant to Section 22442.5.

(B) If an immigration consultant deposits funds in a client trust account pursuant to this paragraph, he or she shall comply with all applicable provisions of this chapter, including Section 22442, and shall provide to the client a written notice, in both English and in the client's native language, that there are no benefits or relief available, that no application for such benefits or relief may be processed until enactment or implementation of an immigration reform act and the related necessary federal regulations and forms, and that commencing with the effective date of this amendment to this section, it is unlawful for an immigration consultant to demand or accept the advance payment of any funds from a person for immigration reform act services before the enactment or implementation of an immigration reform act.

(d) (1) In addition to the remedies and penalties prescribed in this chapter, a person who violates this section shall be subject to a civil penalty not to exceed one thousand dollars ($1,000) per day for each violation, to be assessed and collected in a civil action brought by any person injured by the violation or in a civil action brought in the name of the people of the State of California by the Attorney General, a district attorney, or a city attorney.

(2) In assessing the amount of the civil penalty, the court may consider relevant circumstances presented by the parties to the case, including, but not limited to, the following:

(A) The nature and severity of the misconduct.

(B) The number of violations.

(C) The length of time over which the misconduct occurred, and the persistence of the misconduct.

(D) The willfulness of the misconduct.

(E) The defendant's assets, liabilities, and net worth.

(3) If the Attorney General brings the action, one-half of the civil penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the General Fund. If a district attorney brings the action, the civil penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If a city attorney brings the action, one-half of the civil penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered.

(4) The court shall grant a prevailing plaintiff reasonable attorneys' fees and costs. (Added by Stats. 2013, ch. 574. Amended by Stats. 2015, ch. 6, effective June 17, 2015.)

* * * * *

§ 22443.1 Immigration Consultants– Bond; Requirements; Filing Fee Disclosure; Posting of Information

(a) (1) Prior to engaging in the business or acting in the capacity of an immigration consultant, each person shall file with the Secretary of State a bond of one hundred thousand dollars ($100,000) executed by a corporate surety admitted to do business in this state and conditioned upon compliance with this chapter. The total aggregate liability on the bond shall be limited to one hundred thousand dollars ($100,000).

(2) The bond may be terminated pursuant to Section 995.440 of, and Article 13 (commencing with Section 996.310) of Chapter 2 of Title 14 of Part 2 of, the Code of Civil Procedure.

(b) The bond required by this section shall be in favor of, and payable to, the people of the State of California and shall be for the benefit of any person damaged by any fraud, misstatement, misrepresentation, unlawful act or omission, or failure to provide the services of the immigration consultant or the agents, representatives, or employees of the immigration consultant while acting within the scope of that employment or agency.

(c) An immigration consultant who is required to file a surety bond with the Secretary of State shall also file a disclosure form with the Secretary of State that contains all of the following information:

(1) The immigration consultant’s name, date of birth, residence address, business address, residence telephone number, and business telephone number.

(2) The name and address of the immigration consultant’s agent for service of process if one is required to be or has been appointed.

(3) Whether the immigration consultant has ever been convicted of a violation of this chapter or of Section 6126.

(4) Whether the immigration consultant has ever been arrested or convicted of a crime.

(5) If applicable, the name, business address, business telephone number, and agent for service of process of the corporation or partnership employing the immigration consultant.

(d) An immigration consultant shall notify the Secretary of State's office in writing within 30 days when the surety bond required by this section is renewed, and of any change of name, address, telephone number, or agent for service of process.

(e) The Secretary of State shall post information on its Internet Web site demonstrating that an immigration consultant is in compliance with the bond required by this section and has satisfactorily passed the background check required under Section 22441.1, and shall also post a copy of the immigration consultant's photograph. The Secretary of State shall ensure that the information is current and shall update the information at least every 30 days. The Secretary of State shall only post this information and photograph on its Internet Web site if the person has filed and maintained the bond, filed the disclosure form and photograph required to be filed with the Secretary of State, and passed the background check required by Section 22441.1.

(f) The Secretary of State shall develop the disclosure form required to file a bond under this section and make it available to any immigration consultant filing a bond pursuant to this section.

(g) An immigration consultant shall submit all of the following with the disclosure form:

(1) A copy of valid and current photo identification to determine the immigration consultant's identity, such as a California driver's license or identification card, passport, or other identification acceptable to the Secretary of State.

(2) A photograph of himself or herself with the dimensions and in the style that would be acceptable to the United States Department of State for obtaining a United States passport, as instructed by the Secretary of State.

(h) The Secretary of State shall charge and collect a filing fee to cover the cost of filing the bond.

(i) The Secretary of State shall enforce the provisions of this chapter that govern the filing and maintenance of bonds.

(j) This section does not apply to employees of nonprofit, tax-exempt corporations who help clients complete application forms in an immigration matter free of charge or for a nominal fee, including reasonable costs, consistent with that authorized by the Board of Immigration Appeals under Section 292.2 of Title 8 of the Code of Federal Regulations.

(k) This section shall become operative on July 1, 2014. (Added by Stats. 2013, ch. 574, operative July 1, 2014.)

CIVIL CODE

§ 55.3 Construction-Related Accessibility Claim–Defined

(a) For purposes of this section, the following apply:

(1) "Complaint" means a civil complaint that is filed or is to be filed with a court and is sent to or served upon a defendant on the basis of one or more construction-related accessibility claims, as defined in this section.

(2) "Construction-related accessibility claim" means any claim of a violation of any construction-related accessibility standard, as defined by paragraph (6) of subdivision (a) of Section 55.52, with respect to a place of public accommodation. "Construction-related accessibility claim" does not include a claim of interference with housing within the meaning of paragraph (2) of subdivision (b) of Section 54.1, or any claim of interference caused by something other than the construction-related accessibility condition of the property, including, but not limited to, the conduct of any person.

(3) "Demand for money" means a prelitigation written document or oral statement that is provided or issued to a building owner or tenant, or the owner's or tenant's agent or employee, that does all of the following:

(A) Alleges that the site is in violation of one or more construction-related accessibility standards, as defined in paragraph (6) of subdivision (a) of Section 55.52, or alleges one or more construction-related accessibility claims, as defined in paragraph (2).

(B) Contains or makes a request or demand for money or an offer or agreement to accept money.

(C) Is provided or issued whether or not the attorney intends to file a complaint, or eventually files a complaint, in state or federal court.

(4) "Demand letter" means a prelitigation written document that is provided to a building owner or tenant, or the owner's or tenant's agent or employee, that alleges the site is in violation of one or more construction-related accessibility standards, as defined in paragraph (6) of subdivision (a) of Section 55.52, or alleges one or more construction-related accessibility claims, as defined in paragraph (2), and is provided whether or not the attorney intends to file a complaint, or eventually files a complaint, in state or federal court.

(b) An attorney shall provide the following items with each demand letter or complaint sent to or served upon a defendant or potential defendant alleging a construction-related accessibility claim:

(1) A written advisory on the form described in subparagraph (B), or, until that form is available, on a separate page or pages that are clearly distinguishable from the demand letter or complaint. The advisory shall not be required in subsequent communications following the initial demand letter or initial complaint unless a new construction-related accessibility claim is asserted in the subsequent demand letter or amended complaint. The advisory shall state as follows:

(A) The advisory shall state as follows:

STATE LAW REQUIRES THAT YOU GET THIS IMPORTANT ADVISORY INFORMATION FOR BUILDING OWNERS AND TENANTS

This information is available in English, Spanish, Chinese, Vietnamese, and Korean through the Judicial Council of California. Persons with visual impairments can get assistance in viewing this form through the Judicial Council Internet Web site at www.courts.ca.gov.

California law requires that you receive this information because the demand letter or court complaint you received with this document claims that your building or property does not comply with one or more existing construction-related accessibility laws or regulations protecting the civil rights of persons with disabilities to access public places.

YOU HAVE IMPORTANT LEGAL OBLIGATIONS. Compliance with disability access laws is a serious and significant responsibility that applies to all California building owners and tenants with buildings open for business to the public. You may obtain information about your legal obligations and how to comply with disability access laws through the Division of the State Architect at www.dgs.ca.gov. Information is also available from the California Commission on Disability Access at www.ccda.ca.gov/guide.htm.

YOU HAVE IMPORTANT LEGAL RIGHTS. The allegations made in the accompanying demand letter or court complaint do not mean that you are required to pay any money unless and until a court finds you liable. Moreover, RECEIPT OF A

DEMAND LETTER OR COURT COMPLAINT AND THIS ADVISORY DOES NOT NECESSARILY MEAN YOU WILL BE FOUND LIABLE FOR ANYTHING.

You will have the right if you are later sued to fully present your explanation why you believe you have not in fact violated disability access laws or have corrected the violation or violations giving rise to the claim.

You have the right to seek assistance or advice about this demand letter or court complaint from any person of your choice. If you have insurance, you may also wish to contact your insurance provider. Your best interest may be served by seeking legal advice or representation from an attorney, but you may also represent yourself and file the necessary court papers to protect your interests if you are served with a court complaint. If you have hired an attorney to represent you, you should immediately notify your attorney.

If a court complaint has been served on you, you will get a separate advisory notice with the complaint advising you of special options and procedures available to you under certain conditions.

ADDITIONAL THINGS YOU SHOULD KNOW: ATTORNEY MISCONDUCT. Except for limited circumstances, state law generally requires that a prelitigation demand letter from an attorney MAY NOT MAKE A REQUEST OR DEMAND FOR MONEY OR AN OFFER OR AGREEMENT TO ACCEPT MONEY. Moreover, a demand letter from an attorney MUST INCLUDE THE ATTORNEY'S STATE BAR LICENSE NUMBER.

REDUCING YOUR DAMAGES. If you are a small business owner and correct all of the construction-related violations that are the basis of the complaint against you within 30 days of being served with the complaint, you may qualify for reduced damages. You may wish to consult an attorney to obtain legal advice. You may also wish to contact the California Commission on Disability Access for additional information about the rights and obligations of business owners.

COMMERCIAL TENANT. If you are a commercial tenant, you may not be responsible for ensuring that some or all portions of the premises you lease for your business, including common areas such as parking lots, are accessible to the public because those areas may be the responsibility of your landlord. You may want to refer to your lease agreement and consult with an attorney or contact your landlord, to determine if your landlord is responsible for maintaining and improving some or all of the areas you lease.

(B) On or before July 1, 2016, the Judicial Council shall update the advisory form that may be used by an attorney to comply with the requirements of subparagraph (A). The advisory form shall be in substantially the same format and include all of the text set forth in subparagraph (A). The advisory form shall be available in English, Spanish, Chinese, Vietnamese, and Korean, and shall include a statement that the advisory form is available in additional languages, and the Judicial Council Internet Web site address where the different versions of the advisory form are located. The advisory form shall include Internet Web site information for the Division of the State Architect and the California Commission on Disability Access.

(2) A verified answer form developed by the Judicial Council, which allows a defendant to respond to the complaint in the event a complaint is filed.

(A) The answer form shall be written in plain language and allow the defendant

to state any relevant information affecting the defendant's liability or damages including, but not limited to, the following:

(i) Specific denials of the allegations in the complaint, including whether the plaintiff has demonstrated that he or she was denied full and equal access to the place of public accommodation on a particular occasion pursuant to Section 55.56.

(ii) Potential affirmative defenses available to the defendant, including:

(I) An assertion that the defendant's landlord is responsible for ensuring that some or all of the property leased by the defendant, including the areas at issue in the complaint, are accessible to the public. The defendant shall provide facts supporting that assertion, and the name and contact information of the defendant's landlord.

(II) Any other affirmative defense the defendant wishes to assert.

(iii) A request to meet in person at the subject premises, if the defendant qualifies for an early evaluation conference pursuant to Section 55.54.

(iv) Any other information that the defendant believes is relevant to his or her potential liability or damages, including that the defendant qualifies for reduced damages pursuant to paragraph (1) or (2) of subdivision (f) of Section 55.56, and, if so, any facts supporting that assertion.

(B) The answer form shall provide instructions to a defendant who wishes to file the form as an answer to the complaint. The form shall also notify the defendant that he or she may use the completed form as an informal response to a demand letter or for settlement discussion purposes.

(C) On or before July 1, 2016, the Judicial Council shall adopt the answer form that may be used by an attorney to comply with the requirements of this paragraph, and shall post the answer form on the Judicial Council Internet Web site.

(c) Subdivision (b) applies only to a demand letter or complaint made by an attorney. This section does not affect the right to file a civil complaint under any other law or regulation protecting the physical access rights of persons with disabilities. Additionally, this section does not require a party to provide or send a demand letter to another party before proceeding against that party with a civil complaint.

(d) This section does not apply to an action brought by the Attorney General or any district attorney, city attorney, or county counsel. (Added by Stats. 2008, ch. 549. Amended by Stats. 2011, ch. 419; Stats. 2012, ch. 383; Stats. 2015, ch. 755, effective October 10, 2015.)

§ 55.32 Mortgage Loan Modifications– Person Offering to Perform Modification for a Fee; Notice to Borrower; Violations

(a) An attorney who provides a demand letter, as defined in subdivision (a) of Section 55.3, shall do all of the following:

(1) Include the attorney's State Bar license number in the demand letter.

(2) Contemporaneously with providing the demand letter, send a copy of the demand letter to the State Bar of California by facsimile transmission at 1-415-538-2171, or by mail to 180 Howard Street, San

Francisco, CA, 94105, Attention: Professional Competence.

(3) Within five business days of providing the demand letter, send a copy of the demand letter, and submit information about the demand letter in a standard format specified by the California Commission on Disability Access on the commission's Internet Web site pursuant to Section 8299.08.1 of the Government Code, to the commission.

(b) An attorney who sends or serves a com An attorney who sends or serves a complaint, as defined in subdivision (a) of Section 55.3, shall do both of the following:

(1) Send a copy of the complaint and submit information about the complaint in a standard format specified by the California Commission on Disability Access on the commission's Internet Web site pursuant to Section 8299.08.1 of the Government Code to the commission within five business days of sending or serving the complaint.

(2) Notify the California Commission on Disability Access within five business days of judgment, settlement, or dismissal of the claim or claims alleged in the complaint of the following information in a standard format specified by the commission on the commission's Internet Web site pursuant to Section 8299.08.1 of the Government Code:

(A) The date of the judgment, settlement, or dismissal.

(B) Whether or not the construction-related accessibility violations alleged in the complaint were remedied in whole or in part after the plaintiff filed a complaint or provided a demand letter, as defined by Section 55.3.

(C) If the construction-related accessibility violations alleged in the complaint were not remedied in whole or in part after the plaintiff filed a complaint or provided a demand letter, as defined by Section 55.3, whether or not another favorable result was achieved after the plaintiff filed the complaint or provided the demand letter.

(D) Whether or not the defendant submitted an application for an early evaluation conference and stay pursuant to Section 55.54, whether the defendant requested a site inspection, the date of any early evaluation conference, and the date of any site inspection.

(c) A violation of paragraph (2) or (3) of subdivision (a) or subdivision (b) shall constitute cause for the imposition of discipline of an attorney where a copy of the complaint, demand letter, or notification of a case outcome is not sent to the California Commission on Disability Access in the standard format specified on the commission's Internet Web site pursuant to Section 8299.08.1 of the Government Code within five business days, or a copy of the demand letter is not sent to the State Bar within five business days. In the event the State Bar receives information indicating that an attorney has failed to send a copy of the complaint, demand letter, or notification of a case outcome to the California Commission on Disability Access in the standard format specified on the commission's Internet Web site pursuant to Section 8299.08.1 of the Government Code within five business days, the State Bar shall investigate to determine whether paragraph (3) of subdivision (a) or subdivision (b) has been violated.

(d) Notwithstanding subdivisions (a) and (b), an attorney is not required to send to the State Bar of California or the California Commission on Disability Access a copy of any subsequent demand letter or amended complaint in the same dispute following the initial demand letter or complaint, unless that subsequent demand letter or amended complaint alleges a new construction-related accessibility claim.

(e) A demand letter, complaint, or notification of a case outcome sent to the California Commission on Disability Access shall be for the informational purposes of Section 8299.08 of the Government Code. A demand letter received by the State Bar from either the sender or recipient of the demand letter shall be reviewed by the State Bar to determine whether subdivision (b) or (c) of Section 55.31 has been violated.

(f) (1) Commencing July 31, 2013, and annually each July 31 thereafter, the State Bar shall report to the Legislature and the Chairs of the Senate and Assembly Committees on Judiciary, both of the following with respect to demand letters received by the State Bar:

(A) The number of investigations opened to date on a suspected violation of subdivision (b) or (c) of Section 55.31.

(B) Whether any disciplinary action resulted from the investigation, and the results of that disciplinary action.

(2) A report to be submitted pursuant to this subdivision shall be submitted in compliance with Section 9795 of the Government Code.

(g) The California Commission on Disability Access shall review and report on the demand letters, complaints, and notifications of case outcomes it receives as provided in Section 8299.08 of the Government Code.

(h) Paragraphs (2) and (3) of subdivision (a) and subdivision (b) shall not apply to a demand letter or complaint sent or filed by an attorney employed or retained by a qualified legal services project or a qualified support center, as defined in Section 6213 of the Business and Professions Code, when acting within the scope of employment in asserting a construction-related accessibility claim. The Legislature finds and declares that qualified legal services projects and support centers are extensively regulated by the State Bar of California, and that there is no evidence of any abusive use of demand letters or complaints by these organizations. The Legislature further finds that, in light of the evidence of the extraordinarily small number of construction-related accessibility cases brought by regulated legal services programs, and given the resources of those programs, exempting regulated legal services programs from the requirements of this section to report to the California Commission on Disability Access will not affect the purpose of the reporting to, and tabulation by, the commission of all other construction-related accessibility claims.

(i) This section shall become operative on January 1, 2013.

(j) This section shall remain in effect only until January 1, 2019, and as of that date is repealed. (Added by Stats. 2012, ch. 383. Amended by Stats. 2015, ch. 755, effective October 10, 2015; Stats. 2016, ch. 872. Repealed as of January 1, 2019, by its own provisions.)

* * * * *

§ 1940.05 "Immigration or citizenship status" – Defined

For purposes of this chapter, "immigration or citizenship status" includes a perception that the person has a particular immigration status or citizenship status, or that the person is associated with a person who has, or is perceived to have, a particular immigration status or citizenship status. (Added by Stats. 2017, ch. 489.)

* * * * *

§ 2944.6 Mortgage Loan Modifications– Person Offering to Perform Modification for a Fee; Notice to Borrower; Violations

(a) Notwithstanding any other provision of law, any person who negotiates, attempts to

negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, shall provide the following to the borrower, as a separate statement, in not less than 14-point bold type, prior to entering into any fee agreement with the borrower:

It is not necessary to pay a third party to arrange for a loan modification or other form of forbearance from your mortgage lender or servicer. You may call your lender directly to ask for a change in your loan terms. Nonprofit housing counseling agencies also offer these and other forms of borrower assistance free of charge. A list of nonprofit housing counseling agencies approved by the United States Department of Housing and Urban Development (HUD) is available from your local HUD office or by visiting www.hud.gov.

(b) If loan modification or other mortgage loan forbearance services are offered or negotiated in one of the languages set forth in Section 1632, a translated copy of the statement in subdivision (a) shall be provided to the borrower in that foreign language.

(c) A violation of this section by a natural person is a public offense punishable by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the county jail for a term not to exceed one year, or by both that fine and imprisonment, or if by a business entity, the violation is punishable by a fine not exceeding fifty thousand dollars ($50,000). These penalties are cumulative to any other remedies or penalties provided by law.

(d) This section does not apply to a person, or an agent acting on that person's behalf, offering loan modification or other loan forbearance services for a loan owned or serviced by that person.

(e) This section shall apply only to mortgages and deeds of trust secured by residential real property containing four or fewer dwelling units. (Added by Stats. 2009, ch. 630, operative October 11, 2009.)

§ 2944.7 Mortgage Loan Modifications–Person Offering to Perform Modification for a Fee; Prohibitions; Violations

(a) Notwithstanding any other law, it shall be unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to do any of the following:

(1) Claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.

(2) Take any wage assignment, any lien of any type on real or personal property, or other security to secure the payment of compensation.

(3) Take any power of attorney from the borrower for any purpose.

(b) A violation of this section by a natural person is punishable by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the county jail for a term not to exceed one year, or by both that fine and imprisonment, or if by a business entity, the violation is punishable by a fine not exceeding fifty thousand dollars ($50,000). These penalties are cumulative to any other remedies or penalties provided by law.

(c) In addition to the penalties and remedies provided by Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code, a person who violates this section shall be liable for a civil penalty not to exceed twenty thousand dollars ($20,000) for each violation, which shall be assessed and recovered in a civil action brought

in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving a violation of a county ordinance, by any city attorney of a city having a population in excess of 750,000, by any city attorney of any city and county, or, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, in any court of competent jurisdiction pursuant to Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code.

(d) Nothing in this section precludes a person, or an agent acting on that person's behalf, who offers loan modification or other loan forbearance services for a loan owned or serviced by that person, from doing any of the following:

(1) Collecting principal, interest, or other charges under the terms of a loan, before the loan is modified, including charges to establish a new payment schedule for a nondelinquent loan, after the borrower reduces the unpaid principal balance of that loan for the express purpose of lowering the monthly payment due under the terms of the loan.

(2) Collecting principal, interest, or other charges under the terms of a loan, after the loan is modified.

(3) Accepting payment from a federal agency in connection with the federal Making Home Affordable Plan or other federal plan intended to help borrowers refinance or modify their loans or otherwise avoid foreclosures.

(e) This section shall apply only to mortgages and deeds of trust secured by residential real property containing four or fewer dwelling units. (Added by Stats. 2009, ch. 630, operative October 11, 2009. Amended by Stats. 2012, ch. 536; Stats. 2012, ch. 569; Stats. 2014, ch. 457.)

* * * * *

§ 3339.10 Immigration or Citizenship Status Irrelevant to Issues of Liability or Remedy; Discovery

(a) The immigration or citizenship status of any person is irrelevant to any issue of liability or remedy under Chapter 2 (commencing with Section 1940) of Title 5 of Part 4 of Division 3, Chapter 2 (commencing with Section 789) of Title 2 of Part 2 of Division 2 of this code, or under Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure, or in any civil action involving a tenant's housing rights.

(b) (1) In proceedings or discovery undertaken in a civil action to enforce Chapter 2 (commencing with Section 1940) of Title 5 of Part 4 of Division 3, Chapter 2 (commencing with Section 789) of Title 2 of Part 2 of Division 2 of this code, or under Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure, or in any civil action involving a tenant's housing rights, no inquiry shall be permitted into a person's immigration or citizenship status, except as follows:

(A) The tenant's claims or defenses raised place the person's immigration or citizenship status directly in contention.

(B) The person seeking to make this inquiry demonstrates by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law.

(2) The assertion of an affirmative defense to an unlawful detainer action under Section 1161.4 of the Code of Civil Procedure does not constitute cause under this subdivision for discovery or other inquiry into that person's immigration or citizenship status. (Added by Stats. 2017, ch. 489.)

CODE OF CIVIL PROCEDURE

§ 1281.85 Neutral Arbitrators– Applicability of Ethics Standards

(a) Beginning July 1, 2002, a person serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with the ethics standards for arbitrators adopted by the Judicial Council pursuant to this section. The Judicial Council shall adopt ethical standards for all neutral arbitrators effective July 1, 2002. These standards shall be consistent with the standards established for arbitrators in the judicial arbitration program and may expand but may not limit the disclosure and disqualification requirements established by this chapter. The standards shall address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity, disqualifications, acceptance of gifts, and establishment of future professional relationships.

(b) Subdivision (a) does not apply to an arbitration conducted pursuant to the terms of a public or private sector collective bargaining agreement.

(c) The ethics requirements and standards of this chapter are nonnegotiable and shall not be waived. (Added by Stats. 2001, ch. 362. Amended by Stats. 2002, ch. 176; Stats. 2009, ch. 133)

EVIDENCE CODE

§ 912 Privilege, Waiver

(a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 966 (lawyer referral service-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergy member), 1035.8 (sexual assault counselor-victim privilege), 1037.5 (domestic violence counselor-victim privilege), or 1038 (human trafficking caseworker-victim privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 966 (lawyer referral service-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), 1037.5 (domestic violence counselor-victim privilege), or 1038 (human trafficking caseworker-victim privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 966 (lawyer referral service-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), 1037.5 (domestic violence counselor-victim privilege), or 1038 (human trafficking caseworker-victim privilege), when disclosure is reasonably necessary for the accomplishment of

the purpose for which the lawyer, lawyer referral service, physician, psychotherapist, sexual assault counselor, domestic violence counselor, or human trafficking caseworker was consulted, is not a waiver of the privilege. (Added by Stats. 1965, ch. 299. Amended by Stats. 1980, ch. 917; Stats. 2002, ch. 72; Stats. 2004, ch. 405; Stats. 2013, ch. 123; Stats. 2014, ch. 913.)

* * * * *

§ 915 Disclosure of Privileged Information in Ruling on Claim of Privilege

(a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division or attorney work product under subdivision (a) of Section 2018.030 of the Code of Civil Procedure in order to rule on the claim of privilege; provided, however, that in any hearing conducted pursuant to subdivision (c) of Section 1524 of the Penal Code in which a claim of privilege is made and the court determines that there is no other feasible means to rule on the validity of the claim other than to require disclosure, the court shall proceed in accordance with subdivision (b).

(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) or under subdivision (b) of Section 2018.030 of the Code of Civil Procedure (attorney work product) and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither the judge nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers. (Added by Stats. 1965, ch. 299. Amended by Stats. 1979, ch. 1034; Stats. 2001, ch. 812; Stats. 2004, ch. 182.)

* * * * *

§ 950 Lawyer Defined

As used in this article, "lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation. (Added by Stats. 1965, ch. 299, operative January 1, 1967.)

§ 951 Client Defined

As used in this article, "client" means 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 him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent. (Added by Stats. 1965, ch. 299, operative January 1, 1967.)

§ 952 Confidential Communication Between Client and Lawyer Defined

As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the

lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. (Added by Stats. 1965, ch. 299, operative January 1, 1967. Amended by Stats. 1967, ch. 650; Stats. 1994, ch. 587; Stats. 2002, ch. 72.)

§ 953 Holder of Privilege Defined

As used in this article, "holder of the privilege" means:

(a) The client, if the client has no guardian or conservator.

(b) A guardian or conservator of the client, if the client has a guardian or conservator.

(c) The personal representative of the client if the client is dead, including a personal representative appointed pursuant to Section 12252 of the Probate Code.

(d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence. (Added by Stats. 1965, ch. 299, operative January 1, 1967. Amended by Stats. 2009, ch. 8.)

§ 954 Who May Claim Privilege

Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

The relationship of attorney and client shall exist between a law corporation as defined in Article 10 (commencing with Section 6160) of Chapter 4 of Division 3 of the Business and Professions Code and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities. (Added by Stats. 1965, ch. 299, operative January 1, 1967. Amended by Stats. 1968, ch. 1375; Stats. 1994, ch. 1010.)

§ 955 When Lawyer Must Claim Privilege

The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954. (Added by Stats. 1965, ch. 299, operative January 1, 1967.)

§ 956 Services of Lawyer Obtained to Aid in Commission of Crime or Fraud

(a) There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

(b) This exception to the privilege granted by this article shall not apply to legal services rendered in compliance with state and local laws on medicinal cannabis or adult-use cannabis, and confidential communications provided for the purpose of rendering those services are confidential communications between client and lawyer, as defined in Section 952, provided the lawyer also advises the client on conflicts with respect to federal law. (Added by Stats. 1965, ch. 299, operative January 1, 1967. Amended by Stats. 2017, ch. 530.)

§ 956.5 Prevention of Criminal Act Likely to Result in Death or Substantial Bodily Harm

There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual. (Added by Stats. 1993, ch. 982. Amended by Stats. 2003, ch. 765; Stats. 2004, ch. 183.)

* * * * *

§ 958 Breach of Duty Arising Out of Lawyer-Client Relationship in Issue

There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship. (Added by Stats. 1965, ch. 299, operative January 1, 1967.)

* * * * *

§ 962 Two or More Clients Retaining Same Lawyer in Matter of Common Interest

Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest). (Added by Stats. 1965, ch. 299, operative January 1, 1967.)

* * * * *

§ 1119 Written or Oral Communications During Mediation Process; Admissibility

Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential. (Added by Stats. 1997, ch. 772.)

RULES OF COURT

Rule 9.7 Oath Required When Admitted to Practice Law

In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

Rule 9.7 renumbered effective January 1, 2018; adopted as rule 9.4 effective May 27, 2014.

* * * * *

Rule 9.20 Duties of Disbarred, Resigned, or Suspended Attorneys

(a) Disbarment, suspension, and resignation orders

The Supreme Court may include in an order disbarring or suspending a member of the State Bar, or accepting his or her resignation, a direction that the member must, within such time limits as the Supreme Court may prescribe:

(1) Notify all clients being represented in pending matters and any co-counsel of his or her disbarment, suspension, or resignation and his or her consequent disqualification to act as an attorney after the effective date of the disbarment, suspension, or resignation, and, in the absence of co-counsel, also notify the clients to seek legal advice elsewhere, calling attention to any urgency in seeking the substitution of another attorney or attorneys;

(2) Deliver to all clients being represented in pending matters any papers or other property to which the clients are entitled, or notify the clients and any co-counsel of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property;

(3) Refund any part of fees paid that have not been earned; and

(4) Notify opposing counsel in pending litigation or, in the absence of counsel, the adverse parties of the disbarment, suspension, or resignation and consequent disqualification to act as an attorney after the effective date of the disbarment, suspension, or resignation, and file a copy of the notice with the court, agency, or tribunal before which the litigation is pending for inclusion in the respective file or files.

(Subd (a) amended effective January 1, 2007; previously amended effective December 1, 1990.)

(b) Notices to clients, co-counsel, opposing counsel, and adverse parties

All notices required by an order of the Supreme Court or the State Bar Court under this rule must be given by registered or certified mail, return receipt requested, and must contain an address where communications may be directed to the disbarred, suspended, or resigned member.

(Subd (b) amended effective January 1, 2007; previously amended effective December 1, 1990.)

(c) Filing proof of compliance

Within such time as the order may prescribe after the effective date of the member's disbarment, suspension, or resignation, the member must file with the Clerk of the State Bar Court an affidavit showing that he or she has fully complied with those provisions of the order entered under this rule. The affidavit must also specify an address where communications may be directed to the disbarred, suspended, or resigned member.

(Subd (c) amended effective January 1, 2007; previously amended effective December 1, 1990.)

(d) Sanctions for failure to comply

A disbarred or resigned member's willful failure to comply with the provisions of this rule is a ground for denying his or her application for reinstatement or readmission. A suspended member's willful failure to comply with the provisions of this rule is a cause for disbarment or suspension and for revocation of any pending probation. Additionally, such failure may be punished as a contempt or a crime.

(Subd (d) amended effective January 1, 2007; previously relettered and amended effective December 1, 1990.)

Rule 9.20 amended and renumbered effective January 1, 2007; adopted as rule 955 effective April 4, 1973; previously amended effective December 1, 1990.

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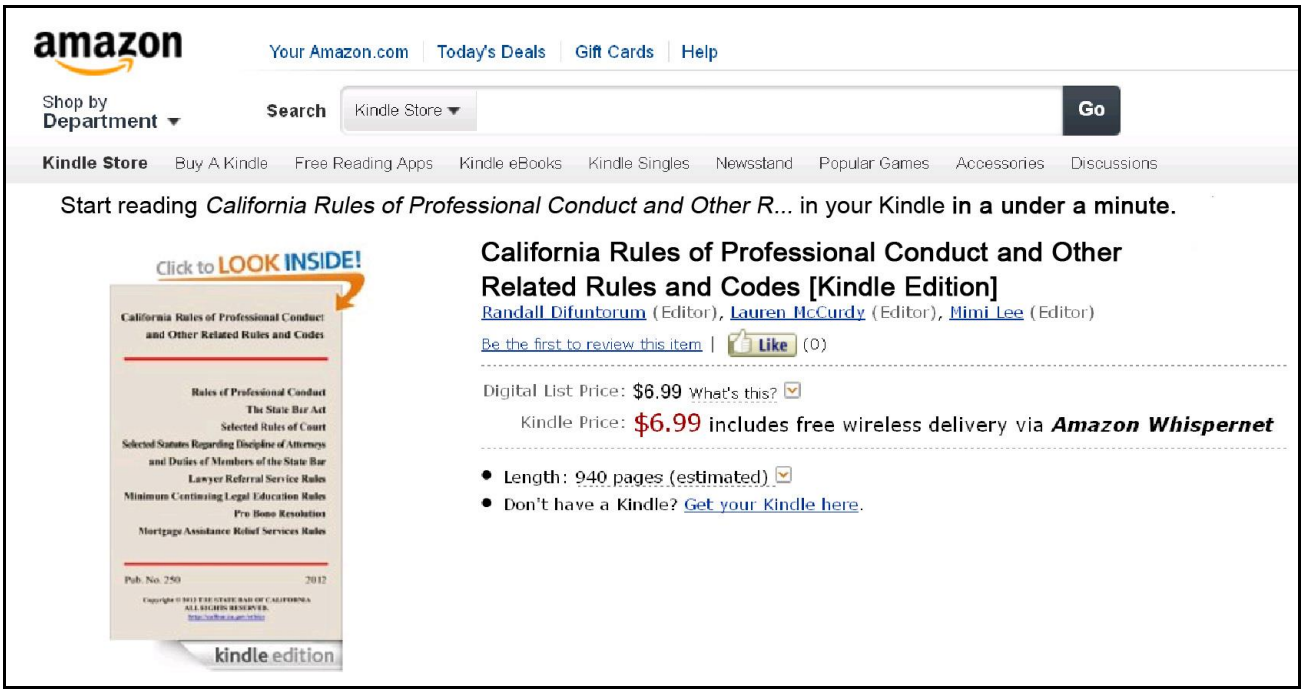

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