DISCUSSION DRAFT

PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

Commission for the Revision of the
Rules of Professional Conduct

State Bar of California

March, 2008

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SUMMARY OF PUBLIC COMMENT PROPOSAL

PLEASE NOTE: Publication for public comment is not, and shall not be construed as a recommendation or approval by the Board of Governors of the materials published.

SUBJECT: Thirteen (13) proposed amended Rules of Professional Conduct of the State Bar of California developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

BACKGROUND: The Rules of Professional Conduct of the State Bar of California are attorney conduct rules the violation of which will subject an attorney to discipline. Pursuant to statute, rule amendment proposals may be formulated by the State Bar for submission to the Supreme Court of California for approval. The State Bar has assigned a special commission to conduct a thorough study of the rules and to recommend comprehensive amendments.

In 2006, the Commission completed work on a group of twenty-seven proposed new and amended rules and those rules were distributed for a public comment period, which ended on October 16, 2006. In 2007, the Commission completed work on a group of five proposed amended rules and those rules were distributed for a public comment period, which ended on October 26, 2007. Public hearings were conducted in connection with each of the two public comment distributions.

The Commission has now completed work on thirteen (13) more rules that are the subject of this present request for public comment. As was the case with the Commission's prior proposals, a public hearing is being planned to gather additional input.

The Supreme Court will provide preliminary guidance to the Commission after each group of proposed rules has been circulated for public comment and the Commission has made any subsequent revisions. The Court has agreed that the Commission may submit each group of proposed rules to the Supreme Court for informal review at this stage of the Commission's consideration. The purpose of this initial submission is to provide the Commission with an opportunity to consider any initial reactions, concerns, and suggestions that the Supreme Court may have about each group of proposed amendments. This preliminary consideration by the Supreme Court will not constrain or foreclose any action by the Supreme Court in the future, but is intended to provide helpful guidance to the Commission as it proceeds with its preparation of its final draft proposals and formal recommendations to the Court. Amendments to the rules will become operative only upon formal approval by the Supreme Court.

PROPOSAL: The thirteen (13) proposed amended rules are listed below by proposed new rule number. The rule number of the comparable current rule is indicated in brackets. Each of these proposed rules are subject to change following consideration of the public comment received.

FISCAL/PERSONNEL IMPACT: No unbudgeted fiscal or personnel impact.

SOURCE: State Bar Special Commission for the Revision of the Rules of Professional Conduct

COMMENT DEADLINE: 5 p.m., June 6, 2008

HOW TO COMMENT:

The State Bar encourages all interested persons or organizations to submit comments on the proposed new and amended Rules of Professional Conduct.

This Discussion Draft is available on a CD-ROM disk that includes word processing files for each of the proposed rules. If your comment will include recommended modifications of any of the proposed rules, then submitting a redraft of a rule will help the Rules Revision Commission understand your desired changes. The Discussion Draft is available online on the State Bar's website (http://www.calbar.ca.gov). Under the heading **Ethics,** which is located on the right navigation bar, there is a link (Proposed Rules of Professional Conduct) which should bring you to the Public Comment page.

Electronic Submission: Comments may be submitted ***electronically*** by using the online Public Comment Form.*/ A link to the Public Comment Form is also posted at the State Bar's website on the Public Comment page for the proposed Rules.

Mail or Fax Submission: Comments may also be submitted in writing by ***mail*** or ***fax***. To facilitate the Commission's consideration of written comments, each rule you choose to comment on should be on a ***separate sheet of paper***. Indicate the rule number ***in the subject line at the beginning of the letter***, your name, any organization or entity on whose behalf you are submitting comment, and any brief information about yourself which you wish to be considered on each page.

Mail or Fax to: Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
Ph. # (415) 538-2167
Fax # (415) 538-2171

*/ The url for the online comment form is: **http://fs16.formsite.com/SB_RRC/CommentFormBatch3/index.html**

I. INTRODUCTION

A. History and Commission Charge

The last complete revision of the California rules occurred in the late1980's and it was at that time that the State Bar established its Special Commission for the Revision of the Rules of Professional Conduct ("the Commission")*. In 2001, the State Bar reactivated the Commission, in part, to respond to the American Bar Association's ("ABA") near completion of its own "Ethics 2000" project for a systematic revision of the Model Rules of Professional Conduct. The Commission has been given the following charge:

> The Commission is to evaluate the existing California Rules of Professional Conduct in their entirety considering developments in the attorney professional responsibility field since the last comprehensive revision of the rules occurred in 1989 and 1992. In this regard, the Commission is to consider, along with judicial and statutory developments, the Final Report and Recommendations of the ABA Ethics 2000 Commission, the American Law Institute's Restatement of the Law Third, The Law Governing Lawyers, as well as other authorities relevant to the development of professional responsibility standards. The Commission is specifically charged to also consider the work that has occurred at the local, state and national level with respect to multi-disciplinary practice, multi-jurisdictional practice, court facilitated *in propria persona* assistance, discrete task representation and other subjects that have a substantial impact upon the development of professional responsibility standards.
>
> The Commission is to develop proposed amendments to the California Rules that:
>
> 1) Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules;
> 2) Assure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended in 1989 and 1992;
> 3) Promote confidence in the legal profession and the administration of justice; and
> 4) Eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues.

* For more information about the Commission, including the schedule of meetings, open session agendas, and meeting materials, visit: http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10129&id=1100.

B. State Bar Rule Amendment Process and the Commission's Methodology

The Board of Governors of the State Bar ("the Board") has the statutory responsibility for formulating and adopting amendments to the Rules of Professional Conduct. Business and Professions Code section 6076 provides: "With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar of this State." The amendments adopted by the Board are submitted to the Supreme Court for approval and upon approval become binding disciplinary standards for all members of the State Bar. Business and Professions Code section 6077, in part, provides: "The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar."

The State Bar's process for consideration of rule amendments generally involves the following steps: (1) development of draft rules (including proposed new rules, amended rules, and deletion of existing rules); (2) publication of the draft rules for public comment; (3) further drafting following consideration of public comments received; (4) Board Committee and full Board action to adopt the draft rules; and (5) State Bar submission of a memorandum to the Supreme Court requesting approval of the rules adopted by the Board. The Commission's role is to carry out the substantive study and drafting aspects of the process, both before and after public comment. Ultimately, the Commission will issue a final report and recommendation to the Board setting forth its recommendations for comprehensive rule amendments.

The Commission's methodology for conducting its study and developing rule amendment proposals is a seriatim approach. The Commission is considering each of the current California rules in current rule number order. In considering each rule, any relevant ABA Model Rule or Restatement section is compared and contrasted, both as to policy as well as language. Developments in case law and analysis found in ethics opinions are also analyzed. If there are significant state variations of the rule, national studies or other major developments, trends or initiatives, those matters are also considered. The Commission's deliberations are conducted in open session and several groups, including representatives of local bar associations, regularly attend and monitor the work of the Commission.

The Commission's plan involves the issuance of four groups or batches of proposed rule amendments. In 2006, 27 proposed new and amended rules were distributed for public comment. In 2007, 5 proposed amended rules were distributed for public comment. This current Discussion Draft presents 13 proposed new and amended rules and is the third of four batches of rules.

After each of the four batches are issued for, and returned from public comment, the Commission will seek Board committee authorization to publish the entirety of the proposed rule amendments as a single, comprehensive work product for a final additional public comment period. This redistribution for further public comment of the entirety of the rules would follow any changes implemented by the Commission in response to each of the four initial public comment periods. Following consideration of the public comments received in response to this distribution, the Commission will present its final report and recommendation to the Board with a request that the Board adopt the Commission's proposed rule amendments.

C. Ethics Resources

The following ethics resources are available on the internet and may be helpful in evaluating the proposed new and amended rules.

The California Rules of Professional Conduct: (click here)
http://www.calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf

The State Bar Act portion of the California Business and Professions Code: (click here)
http://www.calbar.ca.gov/calbar/pdfs/ethics/State-Bar-Act.pdf

The ABA Model Rules of Professional Conduct: (click here)
http://www.abanet.org/cpr/mrpc/mrpc_toc.html

Detailed Comparison Chart: California Rules to ABA Model Rules: (click here)
http://calbar.ca.gov/calbar/pdfs/ethics/ca_to_aba.pdf

Detailed Comparison Chart: ABA Model Rules to California Rules: (click here)
http://calbar.ca.gov/calbar/pdfs/ethics/aba_to_ca.pdf

Commission's 2006 Public Comment Discussion Draft of the Proposed Amendments to the Rules of Professional Conduct [Batch 1]: (click here)
http://calbar.ca.gov/calbar/pdfs/public-comment/2006/Discussion-Draft.pdf

Commission's 2007 Public Comment Discussion Draft of the Proposed Amendments to the Rules of Professional Conduct [Batch 2]: (click here)
http://calbar.ca.gov/calbar/pdfs/public-comment/2007/DiscussionDraft.pdf

State Bar of California Ethics Information page: (click here)
http://www.calbar.ca.gov/ethics

D. Discussion Draft is Available on CD-ROM Disc

This Discussion Draft is available on a CD-ROM disc upon request (contact Audrey Hollins: (415) 538-2167). If you have received this Discussion Draft on a disc, then with the exception of the ABA Model Rules, the internet resources listed above are included on your disc. You will need Adobe Acrobat Reader (6.0 or newer) in order to view the Proposed Rules Discussion Draft. A free copy of Adobe Acrobat Reader is available for download from Adobe's Web site. Word processing files are being provided to facilitate your ability to submit comments with suggested language for modifying a proposed rule. These can be found by opening the Discussion Draft document and then by clicking the **Attachments** icon () located at the bottom right corner of the Acrobat Reader window. Select the Rule document from the **Attachments** window and choose **Open** from the **Options** menu. Submitting a redraft of a rule will help the Rules Revision Commission understand a commentator's desired changes to the proposed rules.

I. SUMMARY OF PROPOSED NEW AND AMENDED RULES

The following summary of the thirteen proposed rules lists each new or amended rule by its proposed new rule number that tracks the ABA Model Rules numbering system. The summaries include discussion of any key issues considered by the Commission.[5/]

Rule 1.5 Fees for Legal Services [4-200]

Proposed Rule 1.5 amends current rule 4-200. (Refer to: page 1 of Attachment 1 for a clean version of this draft rule; page 4 for a redline/strikeout version that shows changes to the current rule; and page 7 for a redline/strikeout version that shows changes to the relevant parts of ABA Model Rule 1.8.) Proposed Rule 1.5 continues the prohibition against a lawyer making an agreement for, charging, or collecting an illegal or unconscionable fee.

The amendments implement substantive changes. Paragraph (b) of the rule adds a description of an unconscionable fee that codifies case law. The current rule does not include this description and only offers factors to consider in evaluating the conscionability of fee. The factors have been modified for style and clarity but no substantive changes are made to the factors. A new paragraph (d) states that expenses for which a client can be charged cannot be unconscionable. A new paragraph (e) codifies case law prohibitions against contingent fee arrangements in criminal defense matters and in certain family law matters. A new paragraph (f) states a prohibition against charging a "non-refundable fee" but this includes a clarification that a "true retainer fee" is permissible.

Current rule 4-200 does not include any commentary. As proposed, the amended rule adds eight new comments. Comment [1] provides case law examples of illegal fees and also gives guidance on how to apply the factors for determining the conscionability of a fee. Comment [2] distinguishes a "non-refundable fee" from a "true retainer fee." Comment [3] refers to the statutory written fee agreement provisions in the State Bar Act and cites a case discussing the consequences for violating these statutory provisions. Comment [4] provides a cross-reference to proposed Rule 1.8.1 (re adverse interests and business transactions with clients) for guidance on modifications of fee agreements. Comment [5] provides a cross-reference to proposed Rule 1.16 (re terminating a client's representation) for guidance on a lawyer's obligation to return unearned portions of a fee paid in advance. Comment [5] also provides a cross-reference to proposed Rule 1.8.1 (re adverse interests and business transactions with clients) for guidance on fees paid in property rather than

[5/] As was the case with Commission's first two public comment proposals distributed in 2006 and 2007, this current group of proposed amendments includes a global change that is under consideration by the Commission. That change is the replacement of the term "member" with the term "lawyer" throughout the entirety of the rules. The Commission believes that the term "member," which is operative term used in the current rules, may be construed to be an under-inclusive concept. Consistent with the promulgation of multi-jurisdictional practice Rules of Court (see California Rules of Court 9.45 - 9.47), the Rules of Professional Conduct should be understood to govern the conduct of all persons authorized to practice law in California and not just those persons who are members of the State Bar of California.

money. Comment [6] cautions against fee agreement terms that might induce a lawyer to curtail services or perform services in a way that is contrary to the client's interests. Comment [7] elaborates on the impermissible contingent fees in certain family law matters. Comment [8] provides a cross-reference to proposed Rule 1.5.1 (re division of fees among separate practitioners) for guidance on lawyer fee splits.

As proposed, the rule is a departure from ABA Model Rule 1.5 in four significant aspects. First, the Model Rule states a prohibition against an "unreasonable fee" while the proposed rule continues California's longstanding standard prohibiting an "unconscionable fee." Second, the Model Rule prohibits "unreasonable expenses" but the proposed rule generally states that expenses cannot be unconscionable. Third, the proposed rule includes four factors that are not included in the Model Rule (see factors (1), (2), (10), and (11) in paragraph (c) of proposed Rule 1.5) while the Model Rule includes one factor not included in the proposed rule (see factor (3) in paragraph (a) of ABA Model Rule 1.5). Fourth, unlike the proposed rule, the Model Rule includes a provision governing fee divisions among lawyers who are not in the same firm (see ABA Model Rule 1.5 (e)). The Commission has recommended that the fee division provision remain a separate, stand-alone rule as is currently the case in California (current rule 2-200). The proposed rule on fee divisions, Rule 1.5.1, revised current rule 2-200 in significant respects and was submitted as part of the first group of rules that were distributed for public comment.

Regarding the comments, comments [5], [6], and [7] are variations of comments found in the Model Rule but the other comments are not comparable to any of the Model Rule's comments. In consideration of the foregoing differences with the ABA Model Rule, the most significant is the retention of California's longstanding standard prohibiting an unconscionable fee. It is anticipated that some public commentators will regard this issue as a major policy decision for the State Bar.

Rule 1.7 Conflicts of Interests: Current Clients [3-310]

Proposed Rule 1.7 amends current rule 3-310. (Refer to: page 12 of Attachment 1 for a clean version of this draft rule; page 23 for a redline/strikeout version that shows changes to the current rule; and page 36 for a redline/strikeout version that shows changes to ABA Model Rule 1.7.)

Proposed Rule 1.7 continues the regulation of conflicts of interest arising from certain client representations and from a lawyer's own interests and relationships. Although the proposed rule is numbered to track the comparable ABA Model Rule, the rules are substantially different in terms of the approach and language used to regulate conflicting interests that involve *current* clients.

Proposed Rule 1.7 incorporates some but not all of the provisions found in rule 3-310, specifically, 3-310(A), (B) and (C), and part of (E). The provisions included are intended to track the analogous concepts in ABA Model Rule 1.7. Regarding the rule 3-310 provisions that are not included in proposed Rule 1.7 (3-310(D) and (F), and the remaining aspects of

(E)), these provisions are pending consideration by the Commission and it is anticipated that these provisions will be covered by other rule proposals that will track the ABA's organization of its conflicts rules under the "Client-Lawyer Relationship" title of the ABA Model Rules.

In addition, the Commission anticipates making a future decision on whether the rules should include a global definitions section similar to the ABA Model Rule 1.0 terminology rule. In proposed Rule 1.7, the definitions of "disclosure" and "informed written consent" carried over from rule 3-310(A) are placed in brackets at the end of the rule text because the Commission's decision on a global definitions section is presently pending. Whether or not the substance of the definitions remains as drafted, they might be moved to a global definitions rule when the Commission submits its final report and recommendations.

Paragraph (a) of the proposed rule is derived from that aspect of rule 3-310(E) that prohibits a lawyer from accepting or continuing a representation of a client that is directly adverse to another client *currently* represented by the lawyer. Paragraph (a) implements a material change to the standard in rule 3-310(E) because it deletes the current rule's element of confidential information. Rule 3-310(E) applies if a lawyer possesses confidential information material to the conflicting representation. In contrast, the proposed rule only requires that the conflicting representations be directly adverse and the absence or presence of a risk that the lawyer will violate confidentiality is no longer a prerequisite for the applicability of the rule. It is important to note, however, that the aspect of rule 3-310(E) that is concerned with the confidentiality of client information is not being discarded. Rather, it is being addressed in proposed Rules 1.9 ("Duties to Former Clients") and 1.18 ("Duties to Prospective Clients"), both of which are anticipated to be modeled on the respective Model Rules. These proposed rules are expected to be in the Commission's next group of public comment proposals.

This substantive change adopts the standard used by the Supreme Court in analyzing current client conflicts under the rubric of a lawyer's duty of undivided loyalty. (See *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284-289 [36 Cal.Rptr. 373].) Although some courts have elected to construe rule 3-310(C)(3) as a rule which codifies the duty of loyalty owed to a current client, the background on the development of rule 3-310(C)(3) by the Commission (a.k.a. the "legislative history" of the rule) arguably does not support that interpretation. Rather, the rule 3-310 legislative history reveals a 1991 memorandum from the Commission to the Board Committee on Admissions and Competence (the predecessor to RAD) describing a proposed rule 3-310(C)(4) that was developed, too late in the process to be a part of the Commission's final report, and thus was never adopted. As drafted in 1991 by the Commission, proposed rule 3-310(C)(4) provided: "(C) A member shall not, without the informed written consent of each client: . . . (4) Accept employment in a matter by one client adverse to another party being represented by the member or the member's firm in another matter, whether or not the matters are related." (See "Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation," December, 1991, Enclosure 5, memorandum discussing "Rule Paragraph Which Was Considered But Not Recommended for Adoption at This Time.")

In 1998, the Committee on Professional Responsibility and Conduct ("COPRAC") revived the State Bar's consideration of a proposed rule 3-310(C)(4), distributing several revised versions of the rule for public comment. The public comment on COPRAC's proposals was divided, with the majority of commentators opposed to the proposed rule. Among the opposition comments were letters from local bar association ethics committees that questioned whether the rule would be workable as a disciplinary rule in the context of non-litigation matters. The commentators believed that a bright line standard would be necessary for fair disciplinary enforcement of the rule and that most non-litigation contexts would not be susceptible to a clear application of the rule. Due to the opposition comments, COPRAC ceased consideration of a proposed rule 3-310(C)(4).

In view of the history on this issue, the Commission anticipates that public commentators will regard the issue of whether to adopt paragraph (a) of proposed Rule 1.7 without the confidential information element found in current rule 3-310(E) as a major policy decision for the State Bar. In developing paragraph (a) of proposed Rule 1.7, the Commission noted that the jurisdictions that have adopted ABA Model Rule 1.7 do not appear to have any special problems applying the rule. Similarly, the California courts seem to be able to apply the common law duty of loyalty in an evenhanded manner. Accordingly, it would not be unreasonable to expect that the State Bar Court would be able to apply a current client conflicts rule that uses a standard of "directly adverse."

By comparison, the other provisions in proposed Rule 1.7 are less controversial. Paragraph (b) carries forward the standards in current rules 3-310(C)(1) and (C)(2) that regulate dual or multiple representations of clients in a case or matter. Like the current rule, paragraph (b) of proposed Rule 1.7 requires informed written consent to potential or actual conflicts from each of the clients who are represented in the case or matter.

Paragraph (c) of proposed Rule 1.7 carries forward the standard in rule 3-310(C)(3) that requires the informed written consent of each client when a lawyer accepts representation of a client's adversary in a separate matter against another party. Both paragraphs (b) and (c) have been revised for clarity. Sub-headings have been added to aid lawyers in understanding the distinct type of conflicts addressed in each of the rule's paragraphs. Paragraph (c) also has been modified to include the "directly adverse" standard. This is consistent with the amendments in paragraph (a), described above.

Paragraph (d) of proposed Rule 1.7 carries forward the standard currently found in rule 3-310(B) that requires written disclosure to a client when a lawyer has or had certain personal, business or professional relationships or interests that might affect a lawyer's zealous or impartial representation of a client. Like current rule 3-310(B), paragraph (d) requires a lawyer to make written disclosure of the relevant circumstances and the reasonably foreseeable adverse consequences, but written consent from the client is not required. In addition, the descriptions of the specific relationships and interests in paragraph (d) have been revised for clarity.

It bears emphasizing that these proposed standards track rule 3-310's approach to current client conflicts and is a significant departure from ABA Model Rule 1.7. Unlike current rule 3-310 and proposed Rule 1.7, ABA Model Rule 1.7 does not treat conflicts arising from a joint representation of multiple clients and conflicts arising from a concurrent representation of a current client's adversary as separate types of conflicts. Moreover, Model Rule 1.7 does not attempt to identify with specificity the kinds of interests and relationships that could give rise to a lawyer's personal conflict. Instead, the model rule regulates all of these concurrent conflict situations under one or the other of two standards: (1) representations that are "directly adverse" to one another; or (2) representations that create a risk that the lawyer's representation of one client will be "materially limited" by the lawyer's own relationships or interests, or by duties owed another person. Accordingly, the model rule approach does not involve characterizations of "potential conflicts" or "actual conflicts" that are the concepts used in rule 3-310(C)(1) and (C)(2) and perpetuated in paragraph (b) of the proposed rule. Nor does the model rule use a "written disclosure" protocol to address personal interest conflicts, as does paragraph (d) [current rule 3-310(B)]. Instead, any conflicting personal interest or relationship that *materially limits* the lawyer's representation imposes an obligation to seek a client's informed consent, *confirmed in writing*. As in the case of the Commission's proposed paragraph (a), some public commentators may regard as a major policy decision for the State Bar the issue of whether to retain, in proposed paragraphs (b), (c) and (d), California's unique approach to conflicts found in current rule 3-310(B) and (C).

It is worthwhile noting another divergence of proposed Rule 1.7 from the ABA Model Rule, this involving the client's consent to a conflict. Proposed Rules 1.7(a), (b) and (c) carry forward the requirement in paragraphs (C) and (E) of current rule 3-310 that a lawyer obtain the "informed written consent" of the client to a potential or actual conflict. In effect, the client must sign a writing that demonstrates the client is consenting and that the consent is informed. Although the ABA Model Rule also requires client consent, the ABA's approach is somewhat different. The Model Rule requires only that the lawyer obtain the client's consent, for example orally, and then confirm that consent, for example, with an e-mail. The client's signature is not required. Rather than following the Model Rule's protocol of client consent confirmed in writing, the Commission determined to carry forward California's traditional requirement of "informed written consent" as more protective of the client's interests. Similarly, the Commission also determined to carry forward, in proposed Rule 1.7(d), current rule 3-310(B)'s requirement that the lawyer give "written disclosure" of the lawyer's business, professional and personal relationships that might affect the representation. Here, however, the Model Rule arguably sets a higher standard for these conflicts by requiring the client's consent, confirmed in writing.

Because of the proposed Rule's divergence from the standards found in the Model Rule, the comments to proposed Rule 1.7 differ substantially from those found in the commentary to the Model Rule. In addition, the commentary found in current rule 3-310 has been expanded to provide enhanced guidance on the application of the Rule. There are thirty-nine comments. The bulk of these comments are new. Some portions are revisions of existing comments to rule 3-310 and a few are derived from comments to ABA

Model Rule 1.7. Comments [1] through [3] address general principles applicable to conflicts rules. Comments [4] through [9] offer guidance on applying the "directly adverse" standard. In particular, comment [7] gives actual examples of circumstances that ordinarily would not constitute direct adversity. Comments [10] through [16] elaborate on representations of multiple clients under paragraph (b), including discussion of "potential conflicts" and "actual conflicts."

Comment [17] describes the conflicting duties that might arise when a lawyer acts in a non-lawyer fiduciary capacity (i.e., as a corporate director or executor). Comment [18] addresses the obligation to obtain client consent under paragraph (c) when a lawyer represents a client's adversary. This comment clarifies that the paragraph is intended to apply to both litigation and non-litigation matters. Comments [19] through [26] offer guidance on applying paragraph (d)'s requirement to make written disclosure of personal interests and relationships. In particular, comment [23] carries forward a comment to rule 3-310 clarifying that the requirement to make disclosure only applies to a lawyer's own interests and relationships, unless the lawyer knows that another lawyer in the same law firm has or had an interest or relationship covered by the Rule.

Comments [27] and [28] describe prohibited representations, such as a conflict where a lawyer cannot obtain the required client consent. Cases are cited to illustrate what is contemplated as a prohibited representation. Comments [29] through [32] offer general guidance on the requirements to make written disclosure and obtain informed written consent. These comments explain that a disclosure or informed written consent is only valid to the extent that the material facts and circumstances giving rise to the conflict remain unchanged.

Comment [33] addresses the risk management practice utilized by some law firms to seek from a client advance consent to unspecified conflicts that might arise at sometime in the future. This comment is a variation on its counterpart in ABA Model Rule 1.7, comment [22]. The comment states that the determination of whether an advance consent is in compliance with the rule is a fact-specific inquiry; however, the comment also identifies some factors to consider in making that determination. The Commission anticipates that some public commentators may regard the issue of whether to include this comment as a key policy decision for the State Bar.

Comment [34] offers guidance on the application of the rule to class action representations. In part, the comment discusses whether an unnamed class member or potential member of a class should be regarded as a client for purposes of the rule. Similarly, comments [35] and [36] offer guidance on the application of the Rule to the representation of an organization. A cross-reference to proposed Rule 1.13 [current rule 3-600, re organizations as clients] is included together with a discussion of the situation where a lawyer for a corporation also serves on the company's governing board.

Comments [37] and [38] slightly modify and carry forward an existing comment to rule 3-310 which clarifies the application of the rule to conflicts involving the insurance defense

tripartite relationship. Comment [39] is placed in brackets because it is included as a placeholder until the Commission considers ABA Model Rules 6.3 (re membership in a legal services organization) and 6.5 (re nonprofit and court-annexed limited legal services programs). It is anticipated that if these model rules are recommended by the Commission, then it also would be appropriate to recommend including comment [39] for its useful cross-references.

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client [3-300]

Proposed Rule 1.8.1 amends current rule 3-300. (Refer to: page 54 of Attachment 1 for a clean version of this draft rule; page 59 for a redline/strikeout version that shows changes to the current rule; and page 64 for a redline/strikeout version that shows changes to the relevant parts of ABA Model Rule 1.8.) Proposed Rule 1.8.1 continues the regulation of conflicts of interest arising from a lawyer's business transaction with a client and from a lawyer's acquisition of an ownership, possessory, security, or other pecuniary interest adverse to a client. Only one substantive change has been made to the rule text. In paragraph (b), new language provides that if a client is already represented in the transaction or acquisition by an independent lawyer of the client's choice, then the lawyer is not required to advise the client in writing to seek the advice of an independent lawyer. Under current rule 3-300, no language to that effect is present and the rule thus implies that the requirement to give such advice applies even if the client is already represented by an independent lawyer. Aside from this change, all other amendments to the rule text are for style and clarity, including a change in the rule title. This proposed rule has been given a rule number in the 1.8 series to track ABA Model Rule 1.8(a). As current rule 3-300 is a standalone rule and not part of another rule, the proposed Rule is numbered 1.8.1 to maintain its visibility as a standalone rule.

The comments to the rule have been significantly expanded, from only three paragraphs of commentary in the current rule to fifteen paragraphs in the proposed rule.

Comments [1] and [2] address the purpose and scope of the rule. Comments [3] through [6] discuss the application of the rule to business transactions with clients, providing guidance on transactions that are generally covered and those that are not intended to be covered. Of particular significance, are comments [5] and [6] which state that the rule is not intended to apply to a modification of an agreement by which the lawyer has been retained (e.g., a written fee agreement as required by the State Bar Act), unless the modification confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client. Current rule 3-300 is silent on its application to modification of fee agreements and existing case law and ethics opinions addressing this issue arguably offer only limited guidance. For this reason, it is anticipated that comments [5] and [6] will be recognized as a significant policy issue by public commentators, especially bar association ethics committees.

Comment [7] provides case citations concerning the application of the rule to adverse pecuniary interests, including a citation to a recent California Supreme Court decision, *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58], in which the Supreme Court held that a charging lien in an hourly fee arrangement with a client constitutes an adverse interest and requires compliance with the rule.

Comments [8] through [13] discuss the requirement that full disclosure be given in a manner that reasonably can be understood by the client. Comment [8] clarifies that the standard for this requirement is an objective standard. Comment [9] provides citation to cases discussing the required breadth of full disclosure to a client. This comment states the lawyer must give the same advice regarding the transaction or adverse interest that the lawyer would provide to the client if the transaction was a transaction with a third party and not the lawyer. Comment [10] is derived from an analogous comment to ABA Model Rule 1.8(a) and identifies the risks of harm to the client that are inherent in lawyer-client business transactions and in a lawyer's acquisition of an adverse interest. Comment [11] raises additional considerations that might occur when a lawyer-client relationship will continue after a business transaction or the lawyer's acquisition of an interest adverse to a client. This comment discusses an example of a lawyer who enters into a business transaction with a client to form or acquire a business entity and it is contemplated that the lawyer will represent that business entity once it is formed or acquired. Comment [12] cross-references proposed Rule 1.7(d) (re conflicts of interests with current clients) and describes how that rule might also be applicable. Comment [13] cautions that a business transaction with a client might not be permitted notwithstanding compliance with proposed Rule 1.8.1 where, for example, the lawyer could not continue to represent the client competently as a result of the transaction.

Comments [14] and [15] provide guidance on the requirement that a client either be represented by an independent lawyer or be advised in writing to seek such advice. Comment [14] discusses the requirement for independence and clarifies that an independent lawyer must not have any ongoing financial interest or legal, business, financial, professional or personal interest with the lawyer who is seeking the client's consent. Comment [15] clarifies that even where a client already has an independent lawyer who is advising on the transaction or adverse interest, the lawyer seeking client consent remains obligated to make full disclosure to the client in writing of all material facts.

As proposed, the substance of the rule is very similar to the analogous ABA Model Rule, ABA Model Rule 1.8 (a). The main difference between the proposed rule and the ABA Model Rule is that paragraph (b) adds language providing that if a client is represented in the transaction or acquisition by an independent lawyer of the client's choice, then the lawyer is not required to advise the client in writing to seek the advice of an independent lawyer. ABA Model Rule 1.8(a), like the current California rule, has no language in the rule text to that effect. However, comment [4] to ABA Model Rule 1.8(a) does state that if a client is already independently represented, then the obligation to give such advice is not required. This ABA comment goes even further than the standard in proposed Rule 1.8.1 because it also states that the rule's requirement of full disclosure is satisfied either by a

written disclosure by the lawyer who is a party to the transaction or by the fact that the client is represented by an independent lawyer. In contrast, proposed Rule 1.8.1 does not provide for an exception to the obligation of full disclosure, even if the client is represented by an independent lawyer.

One other slight difference is that ABA Model Rule 1.8(a) explicitly provides that the required written consent must address "the lawyer's role in the transaction" and "whether the lawyer is representing the client in the transaction." Proposed rule 1.8.1 generally addresses these concepts in the comments (see comments [10] through [13] and comment [15]) but, in the rule text, only states the lawyer's obligation to make full disclosure and thereafter obtain client consent in writing.

Rule 1.13 Organization as Client [3-600]

Proposed Rule 1.13 amends current rule 3-600. (Refer to: page 70 of Attachment 1 for a clean version of this draft rule; page 76 for a redline/strikeout version that shows changes to the current rule; and page 83 for a redline/strikeout version that shows changes to ABA Model Rule 1.13.) Rule 1.13 continues the regulation of a lawyer's representation of an organization as client. As proposed, the rule is materially different from both the current rule and the corresponding ABA Model Rule, Model Rule 1.13.

The proposed Rule differs from current rule 3-600 in that it enhances a lawyer's accountability for responding to acts or omissions by officers, employees or other constituents of the client organization that are reasonably believed to be *either* a violation of a legal obligation to the organization *or* a violation of law reasonably imputable to the organization, *and* also likely to result in substantial injury to the organization. As proposed, the rule's requirement for "up-the-ladder" reporting within the client organization is more prescriptive. Under current rule 3-600, such internal reporting is completely within the lawyer's discretion. Proposed Rule 1.13 requires that the lawyer go "up the ladder" within the organization "[u]nless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so." In both the conduct that triggers the obligation (violation of legal obligation or violation of law, and substantial injury to the organization) and the mandatory "up-the-ladder" reporting, the proposed Rule tracks Model Rule 1.13. It diverges, however, from current rule 3-600, under which such internal reporting is completely within the discretion of the lawyer. The proposed Rule also diverges from current rule 3-600 in the conduct that triggers the lawyer's internal reporting. Rule 3-600 permits a lawyer to exercise *discretion* and report up the ladder even if the wrongful acts or omissions do not pose a threat of substantial injury to the organization, or if there is a threat of substantial injury to the organization not caused by a wrongful act or omission. Like ABA Model Rule 1.13, the proposed rule requires both a violation of duty or law by constituents of the organization *and* a threat of substantial injury to the organization before the lawyer is *required* to take action.

To implement these changes, much of the rule text has been revised and the current rule's three paragraphs of commentary have been expanded to seventeen comments.

Paragraph (b) of the proposed rule mandates internal reporting obligations by providing that unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so, the lawyer *shall refer* misconduct that poses a risk of substantial injury to the organization to a higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization.

The proposed rule differs from ABA Model Rule 1.13 because, unlike the Model Rule, there is no provision for reporting outside the organization, that is, that would permit a lawyer for an organization to act as a whistle-blower. Paragraph (c) of proposed Rule 1.13 expressly states that a lawyer shall not violate the duty of confidentiality owed to a client organization. This approach is consistent with existing California law, which prohibits a lawyer from acting as a whistle-blower unless the disclosure falls under current rule 3-100, which permits, but does not require, a lawyer to reveal confidential information relating to the representation of a client to the extent necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual. This status quo would continue under the proposed rule. Further, like current rule 3-600, the proposed Rule by its terms applies to lawyers who represent a governmental organization. The absence of a provision permitting a lawyer to act as a whistle-blower to prevent or rectify improprieties that impact the financial interests of employees, investors or the public is an important aspect of the proposed rule that is anticipated to be identified by public commentators as a key policy issue for the State Bar, especially the issue of whistle blowing by lawyers who represent governmental organizations.

Paragraph (e) of the proposed rule adds a new provision providing that a lawyer, who reasonably believes that he or she has been discharged as a result of internal reporting (or who resigns or withdraws), shall inform the organization's highest authority about the lawyer's discharge, resignation or withdrawal, unless the lawyer reasonably believes that it is not in the best interests of the organization to do so. Paragraph (e) is derived from ABA Model Rule 1.13.

Although revised, paragraph (f) of the proposed rule carries forward rule 3-600(D)'s requirement that an organization's lawyer explain the identity of the lawyer's client when dealing with employees or other constituents of a client organization who may be under a mistaken belief that they have a lawyer-client relationship with the organization's lawyer. Similarly, paragraph (g) carries forward rule 3-600(E)'s provision for permissible representation of both an organization and any of its directors, officers, employees, members, shareholders or other constituents, subject to the requirements of the relevant conflicts of interest rules. Both of these provisions have counterparts in Model Rule 1.13.

The expanded comments cover five main topics: (1) the entity as the client (comments [1] - [10]); (2) the relation of the rule to other rules (comments [11] - [14]); (3) representation of governmental agencies and organizations (comments [13] and [14]); (4) clarification of the lawyer's role when the organization's interests become adverse to the interests of one or

more constituents of the organization (comment [15]); and (5) dual representation of both the organization and an officer, employee or other constituent of the organization (comments [16] and [17]). Of these comments, the following are variations of comments to ABA Model Rule 1.13: comments [3]; [4]; [7]; [8]; [11]; [13]; and [15].

Rule 1.16 Declining or Terminating Representation [3-700].

Proposed Rule 1.16 amends current rule 3-700. (Refer to: page 91 of Attachment 1 for a clean version of this draft rule; page 95 for a redline/strikeout version that shows changes to the current rule; and page 100 for a redline/strikeout version that shows changes to ABA Model Rule 1.16.) Proposed Rule 1.16 continues the regulation of a lawyer's conduct in terminating a representation.

The proposed amendments to this rule generally retain the substantive content of the current rule but reorganize that content to track the structure of the comparable ABA model rule, Model Rule 1.16. Like both the current rule and ABA Model Rule 1.16, the proposed rule identifies circumstances where a lawyer *must* seek to withdraw from a representation and circumstances where it is *permissible* for a lawyer to seek to withdraw. In addition to addressing withdrawal, the proposed rule includes new language expressly stating that a lawyer must decline to accept a representation in any circumstance where a mandatory withdrawal would be required. This concept, found in ABA Model Rule 1.16 but not expressly stated in current rule 3-700, is thus regarded as a substantive change.

Current rule 3-700's three paragraphs of commentary have been expanded to ten comments. Comments [1] through [4] are variations of the corresponding comments to ABA Model Rule 1.16. Comments [5] and [6] also are derived from comments to ABA Model Rule 1.16. Comment [7] is new language that gives guidance on situations where a lawyer's request for permission to withdraw is denied by a tribunal.

Comments [8] through [10] revise the existing comments to current rule 3-700. A possible substantive point is raised by the new language found in comment [9]. Comment [9] expands the guidance addressing a withdrawing lawyer's obligation to release client papers and property to their client or their client's new counsel. In part, the comment clarifies that a lawyer's duty to release papers and property may be subject to restrictions imposed by statute, citing, as examples, Penal Code sections 1054.2 and 1054.10 (re restrictions in a criminal matter on the release of certain witness and victim information to the defendant). Similarly, the comment clarifies that statutory law may require that a lawyer release client papers and property to a designated person other than the client, citing, as an example, Penal Code section 1054.2(b) (re release of the address and telephone number of a victim or witness to an investigator appointed by the court where the defendant is self-represented). In adding this new language, the Commission recognized that public commentators might identify other examples of statutory provisions that similarly impact a lawyer's release of client papers and property. The criminal law examples used in Comment [9] are not intended to be exhaustive.

Rule 1.17.1 Purchase and Sale of a Law Practice [2-300]

Proposed Rule 1.17.1 amends current rule 2-300. (Refer to page 105 of Attachment 1 for a clean version of this draft rule and to page 109 for a redline/strikeout version that shows changes to the current rule.) Proposed Rule 1.17.1 continues the restrictions imposed on the purchase and sale of all, or substantially all, of a lawyer's law practice.

This proposed rule is one of two separate rules proposed by the Commission to address sales of law practices. Proposed Rule 1.17.1 is consistent with the policy of the current rule that permits a sale of a law practice when that sale involves the transfer of *all or substantially* all of the entire law practice. In a separate proposal summarized below, the Commission recommends consideration of a second rule, proposed new Rule 1.17.2, that is intended to permit the sale of a *geographic area* of a law practice or a sale of a *substantive field* of a lawyer's practice. This provision is consistent with the policy of the ABA Model Rule on sales of a law practice, ABA Model Rule 1.17.

While the subject matter of the two rules is similar, the Commission developed separate rules with the objective of obtaining public comment on the distinct policies of the respective rules. The Commission was concerned that if the longstanding California policy permitting sales of an entire practice were combined in a single rule with the ABA-inspired expansion that permits sales for discrete practice areas, public commentators who might object to the expansion would feel compelled to object to the entire rule, even though California's longstanding policy of permitting the sale of an entire practice has been non-controversial and a benefit to both clients and lawyers. Accordingly, the two categories of sale were segregated and set forth in two separate rules. Adoption of one or both of the rules is under consideration. The rules are not competing proposals because they are not intended to be mutually exclusive.

Proposed Rule 1.17.1 makes several clarifying revisions to the current rule. First, it expressly refers to the subject matter of the rule as covering purchases as well as sales. The terms of the proposed rule, like the current rule, governs both the seller and purchaser so it is more accurate to have the rule title and rule text specifically refer to both the purchase and the sale of a law practice. Second, the proposed rule expressly acknowledges the option of a client to elect to represent himself or herself rather than having the client's matter transferred to the purchasing lawyer. Third, the references in the rule to a lawyer's duty to properly handle the transfer or release of client papers or property have been clarified to refer to client papers or property "in any form or format." This change is intended to assure that the interpretation of this obligation is broad enough to encompass electronic files and documents held by the selling lawyer. In addition, some changes for style or formatting have been made.

The current rule's three paragraphs of commentary have been expanded to twelve comments. Comments [1] through [4] in part revise the comments in current rule 2-300 that address the concept of a purchase or sale involving all or substantially all of a law practice. Comment [5] is new and clarifies that a lawyer who has sold a practice under this

rule is not precluded from returning to practicing law after a sale. Comments [6] through [9] revise the comments in current rule 2-300 that address the fee arrangement between the client and purchaser. These comments also add guidance on sales where the selling lawyer is disabled or deceased, as well as note the potential applicability of other rules, such as conflicts of interest rules, to any purchase or sale of a law practice. Comments [10] and [11] add guidance on the protection of confidential information and, specifically, the requirement to obtain client consent before such information is shared between the seller and purchaser. Comment [12] is new and explains the relationship between Rule 1.17.1 and Rule 1.17.2, which governs sales of part of a law practice.

Rule 1.17.2 Purchase and Sale of Geographic Area or Substantive Field of a Law Practice [2-300]

As described above in the section on proposed Rule 1.17.1, proposed Rule 1.17.2 is the second of two proposed rules addressing the purchase and sale of a law practice. (Refer to page 114 of Attachment 1 for a clean version of this draft rule and page 119 for a redline/strikeout version that shows changes to ABA Model Rule 1.17.) As a part of the ABA's complete revision of the Model Rules of Professional Conduct, the ABA's model rule on sale of a law practice, Model Rule 1.17, was amended to permit the sale of a geographic area or substantive field of a law practice. The Commission believes this expansion of the rule raises substantive and policy issues that are distinct from the issues raised by the pre-ABA Ethics 2000 model rule and current rule 2-300, both of which are limited to sales of all or substantially all of an entire law practice. To better identify any potential advantages or disadvantages in permitting the sale of part of a law practice, and to garner public comment on the proposed rule, the Commission has drafted proposed Rule 1.17.2.

In comparison with proposed Rule 1.17.1, proposed Rule 1.17.2 sets similar but not identical restrictions. Regarding similarities, both rules require client notice, consent and protection of confidential information. In addition, like proposed Rule 1.17.1, proposed Rule 1.17.2 restricts a partial sale of a law practice to a sale of "substantially all" of a geographic area or substantive field of practice.

As for differences, there are several restrictions, not present in proposed 1.17.1, that are included in proposed Rule 1.17.2. These restrictions are intended to set public protection boundaries that prophylactically guard against potential commercialization in the sale of a part of a law practice. First, the proposed rule states that such sales must be made "directly to one or more lawyers or law firms" so as to preclude the involvement, of any broker, finder or middleman that might result in additional fees or transactional costs. Second, the proposed rule places a "one time" only limitation on the sale of a substantive field of practice, unless there are extraordinary circumstances. Third, for a sale of a geographic area, the seller must cease practice in the geographic area covered by the sale and the seller is prohibited from resuming practice in that geographic area; however, for a sale of a substantive field of practice, the prohibition against resuming practice includes an exception for extraordinary circumstances. In addition, because there are certain

exceptions for extraordinary circumstances, proposed Rule 1.17.2 identifies types of situations that constitute extraordinary circumstances under the rule (i.e., circumstances involving the seller's health or career changes between government service and private practice).

There are fourteen comments to the proposed rule. Some are variations of comments to ABA Model Rule 1.17. Among the subjects addressed in the comments are the following: the concept of a "direct" sale; cessation of practice by a seller; assumption by the buyer of the seller's fee arrangements with clients; sales involving a disabled or deceased lawyer; and the requirement to protect confidential information and obtain client consent to a sale.

As can be seen by the foregoing, the sale of an entire practice under proposed Rule 1.17.1 and the sale of a part of a practice under proposed Rule 1.17.2 involve different policy considerations and the Commission is interested in public comment on both the continuation of the existing rule's policy and the expanded policy inspired by the ABA model rule.

Rule 3.4 Fairness to Opposing Party and Counsel [5-200(E), 5-220, 5-310]]

Proposed Rule 3.4 amends current rules 5-200(E), 5-220 and 5-310 and incorporates new provisions found in ABA Model Rule 3.4. (Refer to: page 127 of Attachment 1 for a clean version of this draft rule; page 129 for a redline/strikeout version that shows changes to the current rules; and page 131 for a redline/strikeout version that shows changes to ABA Model Rule 3.4.) As explained in more detail below, most of the added provisions are already impliedly covered by existing prohibitions in the Business & Professions Code. Proposed Rule 3.4 also adopts the Model Rule title.

Paragraph (a) of the proposed rule is taken from ABA Model Rule 3.4 (a) and prohibits a lawyer from unlawfully obstructing access to evidence, including the unlawful altering or destruction of evidence. Although this explicit prohibition is not found in the existing rules, it can be construed to be encompassed within the existing general prohibitions against dishonest conduct. (For example, see: Bus. & Prof. Code sec. 6106 re moral turpitude; sec. 6128, subd. (a) re misdemeanor charge for a lawyer's act of deceit or collusion with the intent to deceive a court or any party; and see also rule 5-200 re the duty of a lawyer to employ means consistent with truth in presenting a matter to a tribunal.)

Proposed Rule 3.4 also continues the prohibition in rule 5-220 stating that a lawyer shall not suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce. Rule 5-220 is captured in paragraph (b) of the proposed rule and there is no substantive change.

Paragraph (c) is taken from ABA Model Rule 3.4 (b) and prohibits a lawyer from falsifying evidence or assisting a witness to testify falsely. As in the case of paragraph (a), this explicit prohibition is not stated in the existing rules but may be construed to be

encompassed within other existing prohibitions against dishonest conduct, especially those existing provisions regarding candor in the presentation of a matter to a tribunal.

Proposed Rule 3.4 also continues the prohibition in rule 5-310(A) stating that a lawyer shall not advise a person to leave a jurisdiction for the purpose of making that person unavailable as a witness. Rule 5-310(A) is captured in paragraph (d) of the proposed rule with no substantive change.

Proposed Rule 3.4 also continues the prohibition in rule 5-310(B) on improper payments to witnesses. Rule 5-310(B) is captured in paragraph (e) of the proposed rule and the first phrase in paragraph (e) adds new language expressly prohibiting the offering of an inducement to a witness that is prohibited by law.

Paragraph (f) is taken from ABA Model Rule 3.4 (c) and prohibits a lawyer from falsifying evidence or counseling or assisting a witness to testify falsely. Like both proposed paragraph (a) and proposed paragraph (c), this explicit prohibition is not stated in the existing rules but may be construed to be encompassed within other existing prohibitions against dishonest conduct, especially those existing provisions regarding candor in the presentation of a matter to a tribunal.

Proposed Rule 3.4 continues the prohibition in rule 5-200(E) stating that a lawyer shall not assert personal knowledge of facts in issue except when testifying as a witness. Rule 5-200(E) is captured in paragraph (g) of the proposed rule and is revised to restrict the prohibition to conduct occurring "in trial" as opposed to any and all conduct occurring when a lawyer presents a matter "to a tribunal."

Paragraph (h) is taken from ABA Model Rule 3.4 (f) and prohibits a lawyer from asking a person, other than a client, to refrain from voluntarily giving relevant information to another party. There are two exceptions to the prohibition. The first exception is for requests made to a person who is a relative, employee or other agent of a client and the lawyer believes that the person's interest will not be adversely affected. The second exception is for situations where the person may be required by law to refrain from disclosing information.

Current rules 5-200(E), 5-220 and 5-310(A) and (B) do not include any comments. Proposed Rule 3.4 has five comments. Comments [1] and [2] are derived from the corresponding comments to ABA Model Rule 3.4. Comment [1] addresses the need for fairness in an adversary system. Comment [2] describes how the system relies upon fair access to documents and other evidentiary items that are necessary for the of establishment a party's claim or defense. Comments [3] and [4] are new. Comment [3] clarifies that the Rule is not intended to be a regulatory standard that governs civil or criminal discovery disputes. Comment [4] provides guidance on paragraph (e) of the proposed rule and, in part, states that it is permissible for a lawyer to pay a non-expert witness for time spent preparing for a deposition or trial. Comment [5] is derived from the last comment to ABA Model Rule 3.4. Comment [5] clarifies that a lawyer is permitted to request employees of a client to refrain from giving information to another party and

includes a cross reference to the rules governing communications with a represented person (proposed Rule 4.2) and communications with an unrepresented person (proposed Rule 4.3).

Rule 3.5 Impartiality and Decorum of the Tribunal [5-300, 5-320]

Proposed Rule 3.5 amends current rules 5-300 and 5-320. (Refer to: page 134 of Attachment 1 for a clean version of this draft rule; page 137 and 138 for a redline/strikeout version that shows changes to the current rules; and page 140 for a redline/strikeout version that shows changes to ABA Model Rule 3.5.) The proposed amendments generally retain the substantive content of the current rules but reorganize that content into a single rule to follow the approach used in the comparable ABA Model Rule, Model Rule 3.5.

Proposed Rule 3.5 continues the prohibition in rule 5-300 on improper contacts with officials, including improper ex parte communications with judges and improper gifts or loans to judges. Rule 5-300 is captured in paragraphs (a), (b), and (c) the proposed rule. Paragraph (a) of the proposed rule amends current rule 5-300(A) to include a new exception for a lawyer to give a gift or make a loan to a judge when such gift or loan is permitted under the Code of Judicial Ethics. Similarly, paragraph (b) of the proposed rule amends current rule 5-300(B) to include a new exception, derived from a corresponding exception in ABA Model Rule 3.5(b) that permits ex parte communications with a judge when authorized by law, by the Code of Judicial Ethics, or by a court order or other ruling of a tribunal. Paragraph (c) notes that for purposes of the Rule, the terms “judge” and “judicial officer” includes law clerks and other court personnel who participate in the decision-making process.

Proposed Rule 3.5 also continues the prohibition in rule 5-320 on improper contacts with jurors. Rule 5-320 is captured in paragraphs (d) through (i) of the rule. Some changes have been made for clarity and style. The only substantive amendment is in paragraph (g) of the proposed rule. Paragraph (g) modifies the existing language in rule 5-320(D) that restricts contacts with a juror after discharge from the jury. The current rule prohibits questions or comments to a juror that are “intended to harass or embarrass the juror.” This language is deleted and replaced with the following four types of prohibited communications: (1) communications prohibited by law or court order; (2) communications made when a juror has made known to the lawyer their desire not to communicate with the lawyer; (3) communications involving misrepresentation, coercion, duress or harassment; and (4) communications intended to influence a juror’s actions in future jury service. Of these four types of prohibited communications, the first three are taken from ABA Model Rule 3.5. The fourth type is a carry-over from the current rule and is not found in the model rule.

Current rules 5-300 and 5-320 do not include any comments. Proposed Rule 3.5 has four comments. Comments [1] and [2] are derived from the corresponding comments to ABA Model Rule 3.5. Comment [1] indicates that prohibitions against improper influence on a

tribunal may be found in both criminal law and in judicial conduct standards. Comment [2] includes a clarification, not found in the model rule, stating that a lawyer serving as a temporary judge, referee or court appointed arbitrator is permitted to engage in ex parte communications with judges when those communications occur in the performance of the lawyer's service as temporary judge, referee or court appointed arbitrator. Comment [3] is new and provides a cross reference to Code of Civil Procedure, section 206, concerning communications with a juror after the discharge of the jury. Comment [4] is derived from comment [3] to ABA Model Rule 3.5 and emphasizes the restriction on communications with a juror who has been removed from an empanelled jury.

Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges [5-100]

Proposed Rule 3.10 amends current rule 5-100 (Refer to: page 143 of Attachment 1 for a clean version of this draft rule; page 145 for a redline/strikeout version that shows changes to the current rule.) Proposed Rule 3.10 continues the prohibition against a lawyer threatening criminal, administrative, or disciplinary action to obtain an advantage in a civil dispute. This proposed rule tracks the current California rule as there is no corresponding ABA Model Rule. The ABA rule number that has been assigned is one that places the rule into the category of rules governing a lawyer's role as an advocate for a client. Some changes have been made to the rule text for clarity and style but there are no substantive amendments.

Current rule 5-100 has three comments that are expanded in the proposed new rule. Comment [1] clarifies the scope of the rule, in part, indicating that the rule does not apply to a threat to bring a civil action. This comment also includes a citation to a California Supreme Court disciplinary case that discusses implied threats. Comment [2] addresses threats to initiate contempt proceedings and adds a new discussion of good faith offers made by a government lawyer to settle all, or a portion of, the civil, administrative, and criminal aspects of a case. This comment was developed with input from government lawyer stakeholders. Comment [3] continues the existing rule's discussion of a threat arising from the context of an administrative charge which is a procedural prerequisite to filing a civil complaint.

A drafting issue that arose during the Commission's deliberations on this rule was the question of whether to include a definition of the term "threaten." Ultimately, the Commission voted to not include a definition because of the factually-intensive inquiry required to determine the Rule's applicability. It is possible that some public commentators will regard this as a significant decision limiting the guidance afforded by the rule.

Rule 4.2 Communication with a Person Represented by Counsel [2-100]

Proposed Rule 4.2 amends current rule 2-100. (Refer to: page 147 of Attachment 1 for a clean version of this draft rule; page 152 for a redline/strikeout version that shows changes to the current rule; and page 158 for a redline/strikeout version that shows changes to ABA Model Rule 4.2.) Proposed Rule 4.2 continues the prohibition on a lawyer's ex parte

communications with another lawyer's client. It also carries forward the exception that permits communications authorized by law.

Although the proposed Rule generally retains the substantive content of current rule 2-100, there are significant changes. The current rule refers to communications with a represented "party." The proposed rule replaces the term "party" with the term "person." This change tracks the comparable ABA Model Rule, Model Rule 4.2. The Commission believes this is a clarifying change which makes clear that the client protection afforded by current rule 2-100 extends to a person who is represented by a lawyer in a matter, but who is not a party to a legal proceeding pending before a tribunal or a party represented in a transactional matter. One example of such a person would be a witness represented by a lawyer in connection with a civil litigation matter where the witness is not also one of the litigants. The Commission believes this historical interpretation of the rule was called into doubt by a recent decision by the State Bar Court. (See *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [no violation of rule 2-100 found where respondent lawyer, who represented plaintiffs in a negligence action against apartment owner defendant, communicated with an incarcerated person, who was not a party to the negligence action but was represented by defense counsel in criminal proceedings arising from the same facts as the negligence action].)

The Commission anticipates that the proposed change from "party" to "person" will be identified by public commentators as a key policy issue for the State Bar. In connection with the Commission's open session deliberations on the Rule, representatives of the California Attorney General, the California District Attorneys Association and other interested persons expressed concerns that the amendment would be a major substantive change and would impair longstanding investigative and prosecutorial practices. The Commission considered these concerns and determined that the express exception language in proposed paragraph (c)(3), which permits "communications authorized by law or a court order" obviated the concerns. The Commission, however, also determined that paragraph (c)(3) should be amplified with new commentary to make clear that authorized investigative and prosecutorial practices are not intended to be affected by the change from "party" to "person." This proposed new commentary states:

"**Communications Authorized by Law or Court Order**

> [18] This Rule is intended to control communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule, case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that 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.

[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the "authorized by law" exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy considerations, including a person's right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.

[20] Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law.

[21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury."

With the addition of this new commentary, the Commission believes that the change from "party" to "person" appropriately balances the interests in client protection and legitimate law enforcement practices.

In addition to the change from "party" to "person," there are several other noteworthy amendments. Several new provisions have been added. A new paragraph (d) states that: "When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or

reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." This new provision is similar to ABA Model Rule 4.3, which addresses a lawyers communications with an "unrepresented person." Another new provision in proposed Rule 4.2 is new paragraph (e) which states: "In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive." This provision is derived from principles in case law concerning the protection of information that is subject to the attorney-client privilege. A third new provision, paragraph (f), provides: "A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true." This new provision is intended to preclude an organization's lawyer from interfering with the opposing lawyer's attempt to obtain information from organizational constituents who are not "persons" within the meaning of paragraph (b). Finally, paragraph (g) defines "public official" as "a duly-appointed or elected public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization." Together with the change of "public officer" to "public official" in the paragraph (c)(1) exception to the Rule permitting communications with "public officials, boards, committees or bodies," this definition helps delimit the scope of the exception.

Current rule 2-100's six paragraphs of commentary have been expanded to twenty-four comments. Comments [1] through [6] provide an overview of the rule and state its purpose with comments [1], [2], [3], and [4] derived from the commentary to ABA Model 4.2. Comment [5] is new language that addresses "indirect" communications with represented persons. Comments [7] and [8] are updated versions of existing comments to rule 2-100 on communications between the parties themselves, including the situation where a lawyer is party. Comments [9] and [10] are new. They provide general guidance on the scienter element of the rule and also specifically address knowledge of limited scope attorney-client representations (a.k.a., "unbundling").

Comments [11] through [16] are new and discuss the potentially complex application of the rule to represented organizations and employees and other constituents of those organizations. Comment [16] specifically addresses represented government organizations and the Commission anticipates that the continued inclusion of an exception, in paragraph (c)(1) of the proposed rule, that permits a lawyer to communicate with any represented public official, board, or committee will be identified by public commentators as a key policy issue for the State Bar. During the Commission's open session deliberations on this issue, representatives of the California League of Cities, the County Counsels Association, and other interested persons expressed concerns that the inclusion of this broad exception would be unfair to represented public officials and entities, particularly in litigation matters where a plaintiffs lawyer's access to an official can result in admissions that otherwise would not be made if the government's lawyer had an opportunity to counsel the official. As described in comment [16], the Commission believes that the exception for

communications with public officials is necessary to avoid impairing the constitutional right of access conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. As already noted, the addition of a definition for "public official" in paragraph (g) helps delimit the scope of the exception.

Comment [17] is an updated version of an existing comment to rule 2-100 providing guidance on the scenario where a represented client seeks a "second opinion" from another lawyer. Comments [18] through [21], excerpted above, are the new comments intended to elaborate on the exception for communications authorized by law or court order. Comments [22] through [24] are comments added to give guidance on new paragraphs (d) and (e) of the proposed rule.

Rule 4.3 Dealing with Unrepresented Person [n/a]

Proposed Rule 4.3 places restrictions on a lawyer's communications with an unrepresented person. The rule is based on the substantially similar ABA Model Rule 4.3. Although some aspects of Model Rule 4.3 are addressed in the context of an organization in current rule 3-600(D), the proposed Rule has no stand-alone counterpart in the existing California rules. (Refer to page 164 of Attachment 1 for a clean version of this draft rule and to page 166 for a redline/strikeout version that shows changes to ABA Model Rule 4.3.) The proposed rule is intended to prohibit a lawyer from making misleading statements or omissions when communicating with an unrepresented person.

Paragraph (a) of the proposed rule is a variation of language in ABA Model Rule 4.3. Paragraph (b) is new and provides that: "In communicating with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty owed to another or which the lawyer is not otherwise entitled to receive."

Comments [1] and [3] address the purpose of the rule and are slightly modified versions of comments [1] and [2] to ABA Model Rule 4.3. Comment [2] is new and identifies erroneous assumptions and other misunderstandings that an unrepresented person might have when dealing with a lawyer. Comments [4] and [5] are new and discuss the restriction, in paragraph (b), on a lawyer's efforts to obtain information that should not be disclosed by an unrepresented person due to the privileged nature of that information or some other legally cognizable confidentiality obligation. Comment [6] is new and addresses the application of the rule to covert criminal and civil enforcement investigations. The Commission anticipates that the terms of this last comment may be regarded by some public commentators as a key policy issue due to its impact on law enforcement activities.

Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence [1-310, 1-320,1-600]

Proposed Rule 5.4 is patterned after ABA Model Rule 5.4 and combines the standards relating to the preservation of a lawyer's professional independence that are presently

found in three separate California rules, rules 1-310, 1-320, and 1-600. (Refer to: page 168 of Attachment 1 for a clean version of this draft rule; page 170, 172, and 173 for a redline/strikeout version that shows changes to the current rules; and page 175 for a redline/strikeout version that shows changes to ABA Model Rule 5.4.) These standards set restrictions on: partnerships with non-lawyers; sharing of fees with non-lawyers; and a lawyer's participation in a non-governmental program, activity, or organization that renders, recommends, or pays for legal services.

The proposed rule generally retains the substantive content of each of the current rules that are incorporated but reorganizes that content to track the structure of ABA Model Rule 5.4. As is the case with the current California rules and ABA Model Rule 5.4, the proposed rule prohibits partnerships with non-lawyers where the activities of the partnership consist of the practice of law and prohibits fee sharing with non-lawyers, subject to specified exceptions. The proposed rule also restricts a lawyer's involvement in the provision of legal services for for-profit corporations and other organizations. In particular, the proposed rule prohibits any involvement if: a non-lawyer owns any interest in the corporation; a non-lawyer is a corporate director or officer; or a non-lawyer has authority to direct, influence or control the lawyer's professional judgment. The proposed rule also continues the requirement in current rule 1-600(B) that a lawyer complies with the State Bar's Rules and Regulations Pertaining to Lawyer Referral Services.

The six proposed comments to the rule include four new comments and two comments that are slight revisions of existing comments to rule 1-600. Comments [1] and [2] address the rule's protection of lawyer independence and offer cross-references to other rules that contribute to this protection. Comment [3] describes a practice, permitted but not expressly addressed in the current rules, whereby a lawyer places law corporation shares into a revocable living trust for estate planning purposes. Comment [4] perpetuates a comment to rule 1-600 stating that a lawyer's participation in certified lawyer referral service is encouraged. Comment [5] states that the rule applies to group, prepaid, and voluntary legal service programs and also clarifies that the rule is not intended to prohibit the payment of court-awarded legal fees to a non-profit legal aid, mutual benefit and advocacy groups that are not engaged in the unauthorized practice of law. This comment includes a citation to *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221] in which the California Supreme Court held that such payments of court-awarded legal fees are permitted. Comment [6] carries forward a comment to rule 1-600 stating that the rule is not intended to abrogate case law concerning the relationship between insurers and lawyers who provide legal services to insureds.

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ATTACHMENT 1

{ IMPORTANT NOTE: Explanation of markings on rule drafts

Some of the rule drafts may place certain text and/or rule number references in brackets with superscript notations. A legend of the specific markings is provided below. These markings serve two purposes.

First, the markings indicate whether the rule referenced in the brackets is a rule that is a part of the current public comment proposal. A superscript notation to [_____][B3] indicates that the rule referenced in the brackets is a rule found in this current public comment proposal. The other superscript notations indicate that the text and/or rule number references within the brackets are a reference to a rule that is not found in this current group of proposed rules. The reference may be to proposed rules previously distributed for public comment or to proposed rules that are pending consideration by the Commission and are anticipated to be distributed for public comment in the future.

Second, in some circumstances the markings also signal that the text within the brackets is tentative and subject to the Commission's pending consideration of a rule that has not yet been distributed for public comment. Where appropriate, the rule summaries include explanations of the tentative status of any bracketed text.

Legend:

[_____][B1] = A superscript notation to [B1] refers to a proposed rule that was included in the Commission's 2006 public comment discussion draft. The full text of that discussion draft is available online at: http://calbar.ca.gov/calbar/pdfs/public-comment/2006/Discussion-Draft.pdf

[_____][B2] = A superscript notation to [B2] refers to a proposed rule that was included in the Commission's 2007 public comment discussion draft. The full text of that discussion draft is available online at: http://calbar.ca.gov/calbar/pdfs/public-comment/2007/DiscussionDraft.pdf

[_____][B3] = A superscript notation to [B3] refers to a proposed rule that is included in this current public comment discussion draft.

[_____][B4] = A superscript notation to [B4] refers to a proposed rule that is pending consideration by the Commission and is anticipated to be included in a future public comment proposal. Refer to the corresponding current California rule or ABA Model rule in reading these parts of the text.

The current California rules are found at: http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf

The ABA Model Rules are found at: http://www.abanet.org/cpr/mrpc/model_rules.html }

PROPOSED RULE (CLEAN VERSION)

Rule 1.5: Fees For Legal Services

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

(b) A fee is unconscionable for purposes of this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience, or the lawyer, in negotiating or setting the fee, has engaged in fraud or overreaching, so that the fee charged, under the circumstances, constitutes an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.

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

(1) the amount of the fee in proportion to the value of the services performed;

(2) the relative sophistication of the lawyer and the client;

(3) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(5) the amount at stake and the results obtained;

(6) the time limitations imposed by the client or by the circumstances;

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

(8) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(9) whether the fee is fixed or contingent;

(10) the time and labor required;

(11) the informed consent of the client to the fee.

(d) Expenses for which the client will be charged cannot be unconscionable.

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

PROPOSED RULE (CLEAN VERSION)

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

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

(f) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Comment

Unconscionability of Fee

[1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy, (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed lawyer provides legal services. (e.g., *Birbrower, Montalbana, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.) Paragraph (b) defines an unconscionable fee. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule.

Non-refundable Fee

[2] This Rule prohibits a lawyer from making an agreement for, charging, or collecting a non-refundable fee. However, a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.

PROPOSED RULE (CLEAN VERSION)

Basis or Rate of Fee

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

[4] With respect to modifications to the basis or rate of a fee after the commencement of the attorney-client relationship, see Rule 1.8.1[B3], Comments [5], [6].

Terms of Payment

[5] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. (See Rule 1.16(d)[B3].) A fee paid in property instead of money may be subject to the requirements of Rule 1.8.1[B3].

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

Prohibited Contingent Fees

[7] Paragraph (e)(1) prohibits a lawyer from charging a contingent fee in a family law matter when payment is contingent upon the securing of a dissolution or nullity of a marriage or upon the amount of spousal or child support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of balances due under child or spousal support, or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[8] Division of fees among lawyers is governed by Rule 1.5.1[B1].

COMPARISON TO CURRENT CA RULE

Rule ~~4-200~~1.5: Fees ~~for~~For Legal Services

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

(~~B~~b) A fee is unconscionable for purposes of this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience, or the lawyer, in negotiating or setting the fee, has engaged in fraud or overreaching, so that the fee charged, under the circumstances, constitutes an improper appropriation of the client's funds. 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:*~~

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

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

(2) ~~The~~the relative sophistication of the ~~member~~lawyer and the client~~.~~;

(3) ~~The~~the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly~~.~~;

(4) ~~The~~the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the ~~member.~~lawyer;

(5) ~~The~~the amount ~~involved~~at stake and the results obtained~~.~~;

(6) ~~The~~the time limitations imposed by the client or by the circumstances~~.~~;

(7) ~~The~~the nature and length of the professional relationship with the client~~.~~;

(8) ~~The~~the experience, reputation, and ability of the ~~member~~lawyer or ~~members~~lawyers performing the services~~.~~;

(9) ~~Whether~~whether the fee is fixed or contingent~~.~~;

(10) ~~The~~the time and labor required~~.~~;

(11) ~~The~~the informed consent of the client to the fee.

(d) Expenses for which the client will be charged cannot be unconscionable.

COMPARISON TO CURRENT CA RULE

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

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

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

(f) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Comment

Unconscionability of Fee

[1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy, (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed lawyer provides legal services. (e.g., *Birbrower, Montalbana, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.) Paragraph (b) defines an unconscionable fee. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule.

Non-refundable Fee

[2] This Rule prohibits a lawyer from making an agreement for, charging, or collecting a non-refundable fee. However, a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.

COMPARISON TO CURRENT CA RULE

Basis or Rate of Fee

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

[4] With respect to modifications to the basis or rate of a fee after the commencement of the attorney-client relationship, see Rule 1.8.1, Comments [5], [6].

Terms of Payment

[5] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. (See Rule 1.16(d) [3-700(D)(1)].) A fee paid in property instead of money may be subject to the requirements of Rule 1.8.1 [3-300].

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

Prohibited Contingent Fees

[7] Paragraph (e)(1) prohibits a lawyer from charging a contingent fee in a family law matter when payment is contingent upon the securing of a dissolution or nullity of a marriage or upon the amount of spousal or child support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of balances due under child or spousal support, or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[8] Division of fees among lawyers is governed by Rule 1.5.1 [2-200].

COMPARISON TO ABA MODEL RULE

Rule 1.5: Fees For Legal Services

(a) A lawyer shall not make an agreement for, charge, or collect an ~~unreasonable fee~~unconscionable or ~~an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a~~illegal fee ~~include the following:~~.

(b) A fee is unconscionable for purposes of this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience, or the lawyer, in negotiating or setting the fee, has engaged in fraud or overreaching, so that the fee charged, under the circumstances, constitutes an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.

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

(1) the amount of the fee in proportion to the value of the services performed;

(2) the relative sophistication of the lawyer and the client;

(~~1~~3) the ~~time and labor required, the~~ novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(~~2~~4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

~~(3) the fee customarily charged in the locality for similar legal services;~~

(~~4~~5) the amount ~~involved~~at stake and the results obtained;

(~~5~~6) the time limitations imposed by the client or by the circumstances;

(~~6~~7) the nature and length of the professional relationship with the client;

(~~7~~8) the experience, reputation, and ability of the lawyer or lawyers performing the services; ~~and~~

(~~8~~9) whether the fee is fixed or contingent~~.~~;

(10) the time and labor required;

(11) the informed consent of the client to the fee.

COMPARISON TO ABA MODEL RULE

~~(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.~~

(d) Expenses for which the client will be charged cannot be unconscionable.

~~(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.~~

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

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

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

~~(e) A division of a fee between lawyers who are not in the same firm may be made only if:~~

~~(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;~~

(f) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.

~~(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and~~

~~(3) the total fee is reasonable.~~

COMPARISON TO ABA MODEL RULE

Comment

~~Reasonableness~~Unconscionability of Fee ~~and Expenses~~

~~[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.~~

[1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy, (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed lawyer provides legal services. (e.g., *Birbrower, Montalbana, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.) Paragraph (b) defines an unconscionable fee. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule.

~~Basis or Rate of~~Non-refundable Fee

~~[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the fee terms of the engagement reduces the possibility of misunderstanding.~~

~~[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is~~

~~reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.~~

[2] This Rule prohibits a lawyer from making an agreement for, charging, or collecting a non-refundable fee. However, a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Basis or Rate of Fee

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

[4] With respect to modifications to the basis or rate of a fee after the commencement of the attorney-client relationship, see Rule 1.8.1, Comments [5], [6].

Terms of Payment

[4~~5~~] A lawyer may require advance payment of a fee~~,~~ but is obliged to return any unearned portion. (See Rule 1.16(d)~~. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8~~[3-700(~~~~i~~~~D)(1)~~]. ~~However, a~~) A fee paid in property instead of money may be subject to the requirements of Rule ~~1.8(a) because such fees often have the essential qualities of a business transaction with the client~~1.8.1 ~~[3-300]~~.

[~~5~~6] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. ~~A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.~~

Prohibited Contingent Fees

[~~6~~7] Paragraph (~~d~~e)(1) prohibits a lawyer from charging a contingent fee in a ~~domestic relations~~family law matter when payment is contingent upon the securing of a ~~divorce~~dissolution or nullity of a marriage or upon the amount of ~~alimony~~spousal or child

support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of ~~post-judgment~~ balances due under child or spousal support, ~~alimony~~ or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

~~[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. and In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.~~

[8] Division of fees among lawyers is governed by Rule 1.5.1 [2-200].

~~[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.~~

~~*Disputes over Fees*~~

~~[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.~~

PROPOSED RULE (CLEAN VERSION)

Rule 1.7: Conflict Of Interest: Current Clients

(a) **Representation directly adverse to current client.** A lawyer shall not accept or continue representation of a client in a matter in which the lawyer's representation of that client in that matter will be directly adverse to another client the lawyer currently represents in another matter, without informed written consent from each client.

(b) **Representation of multiple clients in one matter.** A lawyer shall not, without the informed written consent of each client:

(1) Accept or continue 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.

(c) **Representing a client's adversary.** A lawyer shall not, while representing a client in a first matter, accept in a second matter the representation of a person or organization who is directly adverse to the lawyer's current client in the first matter, without the informed written consent of each client.

(d) **Disclosure of relationships and interests.** A lawyer shall not accept or continue representation of a client without providing written disclosure to the client where:

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

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

(a) the lawyer 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 lawyer's representation; or

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

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

PROPOSED RULE (CLEAN VERSION)

[To be placed in a "global" definitions section:

Definitions of "disclosure" and "informed written consent."

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences of those circumstances 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.] [B4]

Comment

General Principles Applicable to All Conflicts Rules (Rules 1.7, 1.8 series, and 1.9)

[1] This rule and the other conflict rules seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. For the purpose of considering whether the lawyer's duties to a client or other person could impair the lawyer's ability to fulfill the lawyer's duties to another client, it is helpful to consider the following: (1) the duty of undivided loyalty (including the duty to handle client funds and property as directed by the client); (2) the duty to exercise independent professional judgment for the client's benefit, not influenced by the lawyer's duties to or relationships with others, and not influenced by the lawyer's own interests; (3) the duty to maintain the confidentiality of client information; (4) the duty to represent the client competently within the bounds of the law; and (5) the duty to make full and candid disclosure to the client of all information and developments material to the client's understanding of the representation and its control and direction of the lawyer. (See Rule 1.2(a)[B4] regarding the allocation of authority between lawyer and client.)

[2] The first step in a lawyer's conflict analysis is to identify his or her client(s) in a current matter or potential client(s) in a new matter. In considering his or her ability to fulfill the foregoing duties, a lawyer should also be mindful of the scope of each relevant representation of a client or proposed representation of a potential client. Only then can the lawyer determine whether a conflict rule prohibits the representation, or permits the representation subject to a disclosure to the client or the informed written consent of the client or a former client. Determining whether a conflict exists may also require the lawyer to consult sources of law other than these Rules. [For guidance in determining whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment 4 to Rule 1.3[B4].]

[3] This rule describes a lawyer's duties to current clients. Additional specific rules regarding current clients are set out in Rules 1.8.1[B4] to 1.8.12[B1]. [For conflicts duties

to former clients, see Rule 1.9[B4].] [For conflicts of interest involving prospective clients, see Rule 1.18[B4].] [For definitions of "disclosure," "informed consent" and "written," see Rule 1.0(e)[B4] and (b), and see Comments [18] – [20].]

Paragraph (a): Representation Directly Adverse to Current Client

[4] A lawyer owes a duty of undivided loyalty to each current client. For purposes of paragraph (a), the duty of undivided loyalty means that, without the informed written consent of each affected client, a lawyer may not act as an advocate or counselor in a matter against a person or organization the lawyer represents in another matter, even when the matters are wholly unrelated. The duty of loyalty reflected in paragraph (a) applies equally in transactional and litigation matters. For example, a lawyer may not represent the seller of a business in negotiations when the lawyer represents the buyer in another matter, even if unrelated, without the informed written consent of each client. Paragraph (a) would apply even if the parties to the transaction expect to, or are, working cooperatively toward a goal of common interest to them. (If a lawyer proposes to represent two or more parties concerning the same negotiation or lawsuit, the situation should be analyzed under paragraph (b), not paragraph (a). As an example, if a lawyer proposes to represent two parties concerning a transaction between them, the lawyer should consult paragraph (b).)

[5] Paragraph (a) applies only to engagements in which the lawyer's work in a matter is *directly* adverse to a current client in any matter. The term "direct adversity" reflects a balancing of competing interests. The primary interest is to prohibit a lawyer from taking actions "adverse" to his or her client and thus inconsistent with the client's reasonable expectation that the lawyer will be loyal to the client. The word "direct" limits the scope of the rule to take into account the public policy favoring the right to select counsel of one's choice and the reality that the conflicts rules, if construed overly broadly, could become unworkable. As a consequence of this balancing and the variety of situations in which the issue can arise, there is no single definition of when a lawyer's actions are directly adverse to a current client for purposes of this Rule.

[6] Generally speaking, a lawyer's work on a matter will not be directly adverse to a person if that person is not a party to the matter. If the non-party's interests could be affected adversely by the outcome of the matter, then the adversity is indirect, not direct. However, in some situations, a lawyer's work could be directly adverse to a non-party if that non-party is an identifiable target of a litigation or non-litigation representation, or a competitor for a particular transaction (as would occur, for example, if one client were in competition with another of the lawyer's clients on other matters to purchase or lease an asset or to acquire an exclusive license). Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. (See *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 463-469 [134 Cal.Rptr.2d 756, 764-767].)

[7] Not all representations that might be harmful to the interests of a client create direct adversity governed by paragraph (a). The following are among the instances that ordinarily would not constitute direct adversity: (1) the representation of business competitors in different matters, even if a positive outcome for one might strengthen its competitive position against the other; (2) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, *e.g.*, if a client is the landlord of, or a lender to, the non-client; (3) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent either client competently, as might occur, *e.g.*, if the lawyer were advocating inconsistent positions in front of the same tribunal; and (5) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute.

[8] **[RESERVED]**

[9] If a conflict arises during a representation, the lawyer must in all events continue to protect the confidentiality of information of each affected client and former client. [Regarding former clients, see Rule 1.9(c)[B4].]

Paragraph (b): Representation of multiple clients in a matter

[10] Paragraph (b) applies when a lawyer represents multiple clients in a single matter, as when multiple clients intend to work cooperatively as co-plaintiffs or co-defendants in a single litigation, or as co-participants to a transaction or other common enterprise. In some situations, the employment of a single counsel might have benefits of convenience, economy or strategy, but paragraph (b) requires the lawyer to make disclosure to, and to obtain informed written consent from, each client whenever the lawyer's full performance of the duties owed to one of the joint clients might or does interfere with the lawyer's full performance of the duties owed to another of the joint clients. See Comment [38] with respect to the application of paragraph (b) to an insurer's appointment of counsel to defend an insured.

[11] A potential conflict exists when one can reasonably foresee an actual conflict arising among the joint clients in the matter in the future.

[12] The following are examples of actual conflicts in representing multiple clients in a single matter: (1) the lawyer receives conflicting instructions from the clients and the lawyer cannot follow one client's instructions without violating another client's instruction; (2) the clients have inconsistent interests or objectives so that it becomes impossible for the lawyer to advance one client's interests or objectives without detrimentally affecting another client's interests or objectives; (3) the clients have antagonistic positions and the lawyer's duty requires the lawyer to advise each client about how to advance that client's position relative to the other's position, because the

lawyer cannot be expected to exercise independent judgment in that circumstance; (4) the clients have inconsistent expectations of confidentiality because one client expects the lawyer to keep secret information that is material to the matter; (5) the lawyer has a preexisting relationship with one client that affects the lawyer's independent professional judgment on behalf of the other client(s); and (6) the clients make inconsistent demands for the original file.

[13] A lawyer's representation of two or more clients in a single matter can create potential confidentiality issues on which the lawyer must obtain each client's informed written consent under paragraph (b). First, although each client's communications with the lawyer are protected as to third persons by the lawyer's duty of confidentiality and the lawyer-client privilege, the communications might not be privileged in a civil dispute between the joint clients. (See Business and Professions Code section 6068, subdivision (e), Rule 3-100, and Evidence Code sections 952 and 962.) Second, because the lawyer is obligated to make disclosures to each jointly represented client to the full extent required by Rule 1.4[B1], and because the lawyer may not favor one joint client over any other, each joint client normally should expect that its communications with the lawyer will be shared with other jointly represented clients.

[14] If a lawyer obtains the consent of multiple clients to the lawyer's representation of them in a matter notwithstanding the existence of a potential conflict under paragraph (b)(1), the lawyer must obtain the further informed written consent of each client pursuant to paragraph (b)(2) if a potential conflict becomes an actual conflict. Likewise, if a previously unanticipated or unidentified potential or actual conflict arises, the lawyer must obtain consent of each client in the matter under paragraph (b)(1). Clients may provide such consents in advance of the conflict arising, subject to the criteria set forth below in Comment [33].

[15] Even if the clients have a dispute about one aspect of the matter, there often remain issues about which they have aligned interests. In litigation, for instance, joint clients might have an interest in presenting a unified front to the opposing party and in reducing their litigation expenses, but have an actual conflict about allocation of the proceeds of the litigation (for plaintiffs) or of liability (for defendants). A lawyer might be able to benefit the clients by representing them on issues on which they have aligned interests while excluding from the scope of the representation the areas in which they have a dispute or different interests, subject to the informed written consent requirements of paragraph (b). [See Rule 1.2(c)[B4] (limiting the scope of representation)].

[16] A client, who has consented to a joint representation under paragraph (b), may terminate the lawyer's representation at any time with or without a reason. If a jointly represented client terminates the lawyer-client relationship, the lawyer may not continue to represent the other jointly represented client or clients if the continued representation would be directly adverse to the client who terminated the representation unless the client terminating the representation consents or previously did so.

PROPOSED RULE (CLEAN VERSION)

Lawyer Acting in Dual Roles

[17] A lawyer might owe fiduciary duties in capacities other than as a lawyer that could conflict with the duties the lawyer owes to clients or former clients, such as fiduciary duties arising from a lawyer's service as a trustee, executor, or corporate director. (See, e.g., *William H. Raley Co, Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].)

Paragraph (c): Representing a Client's Adversary.

[18] Paragraph (c) applies when a lawyer represents client A in a matter adverse to B, and B proposes to retain the lawyer on another matter in which the lawyer's work will not be adverse to A. (If B were to seek to retain the lawyer in a matter directly adverse to A, then paragraph (a) would apply, not paragraph (c).) The purpose of paragraph (c) is (1) to ensure that client A's relationship with, and trust in, the lawyer are not disturbed by the lawyer accepting the representation of client A's adversary, B, without A's informed written consent; (2) to ensure B understands that the lawyer will continue to owe all of his or her duties in the first matter solely to A, notwithstanding the lawyer's representation of B on another matter; and (3) to apprise B of the lawyer's obligation to disclose to A all information that is material to the representation of A even if that information otherwise is the confidential information of B. Paragraph (c) applies in litigation and in non-litigation representations.

Paragraph (d): Disclosure of Relationships and Interests

[19] Paragraph (d) requires a lawyer to disclose to a potential or current client certain of the lawyer's present or past relationships with others, and the lawyer's own interest in the subject matter of the representation. The purpose of this disclosure is to permit the client or potential client to make a more informed decision about whether and on what conditions to retain, or continue to retain, the lawyer. Paragraph (d) applies in litigation and in non-litigation representations.

[20] A lawyer should not allow his or her own interests to have an adverse effect on the representation of a client. Paragraph (d)(4) requires a lawyer to make a disclosure to the client when the lawyer has an interest in the subject matter of the representation. Examples of this include the following: (1) the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; and (2) the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. In addition, the subject of a representation might raise questions about the lawyer's own conduct, such as questions about the correctness of the lawyer's earlier advice to the client; this situation would be governed by Paragraph (d)(4) unless the lawyer and client have agreed to take a common position in compliance with Rule 1.4[B1], as might occur, for example, in response to a motion for discovery sanctions. [See Rule 1.8.1[B3] through 1.8.12[B2] for additional Rules pertaining to other personal

interest conflicts, including business transactions with clients, and Rule 3.7[B4] concerning lawyer as witness.]

[21] Paragraph (d)(4) does not require a lawyer to investigate whether mutual funds or similar investment vehicles in which the lawyer holds an interest own interests in parties to a matter. However, if the lawyer knows that a mutual fund in which the lawyer owns an interest in a party to a matter the lawyer is handling, paragraph (d)(4) would apply.

[22] Paragraph (d)(4) requires disclosure to the lawyer's client if the lawyer has been having, or when the lawyer decides to have, substantive discussions concerning possible employment with an opponent of the lawyer's client or with a lawyer or law firm representing the opponent.

[23] Paragraph (d) applies only to a lawyer's own relationships and interests, unless the lawyer knows that another lawyer in the same firm as the lawyer has or had a relationship with another party, witness or has or had an interest in the subject matter of the representation. [See also Rule 1.10[B4] (personal interest conflicts under Rule 1.7[B3] ordinarily are not imputed to other lawyers in a law firm).]

[24] Paragraph (d) does not apply to the relationship of a lawyer to another person's lawyer. (See Rule 1.8.12[B2].)

[25] Paragraph (d) requires disclosures only to current clients. Rule 1.9[B4] specifies when a lawyer must obtain informed written consent from a former client.

[26] Paragraph (a) applies, rather than paragraph (d)(1) or (3), whenever a representation is directly adverse to another current client of the lawyer. (See Comment [4].)

Prohibited Representations

[27] There are some situations governed by this Rule for which a lawyer cannot obtain effective client consent. These include at least the following: (1) when the lawyer cannot provide competent representation to each affected client (See Rule 1.8.8(a)[B1]); (2) when the lawyer cannot make an adequate disclosure, for example, because of confidentiality obligations to another client or former client (See Business and Professions Code section 6068, subdivision (e) and Rule 3-100[B4]); (3) when the representation would involve the assertion of a claim by one client against another client, where the lawyer is asked to represent both clients in that matter. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] ["the attorney of a family-owned business, corporate or otherwise, should not represent one owner against the other in a [marital] dissolution action"]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] [attorney may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict]; and *Forrest v. Baeza* (1997) 58 Cal.App.4th 65, 74–75 [67 Cal.Rptr.2d 857, 863] [attorney may not represent both a

closely-held corporation and directors/shareholders who are accused of wrongdoing or whose interests are otherwise adverse to the corporation]); and (4) when the person who grants consent lacks capacity or authority. (See Civil Code section 38, and see Rule 1.14[B4] regarding clients with diminished capacity.)

[28] If a lawyer seeks permission from a tribunal to terminate a representation and that permission is denied, the lawyer is obligated to continue the representation even if the representation creates a conflict to which not all affected clients have given consent, and even if the lawyer has a conflict to which client consent is not available. (See Rule 1.16(c)[B3].)

Disclosure and Informed Written Consent

[29] Informed written consent requires the lawyer to disclose in writing to each affected client the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client or former client. [See Rule 1.0(e)[B4] (informed written consent).] The facts and explanation the lawyer must disclose will depend on the nature of the potential or actual conflict and the nature of the risks involved for the client or potential client. When undertaking the representation of multiple clients in a single matter, the information must include the implications of the joint representation, including possible effects on loyalty, and the confidentiality and lawyer-client privilege issues described in Comment [13].

[30] A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the material facts and circumstances remain unchanged. With any material change, the lawyer may not continue the representation without making a new written disclosure to each affected client and, if applicable, obtaining a new written consent under paragraph (a), (b), or (c).

[31] If the lawyer is required by this Rule or another Rule to make a disclosure, but the lawyer cannot do so without violating a duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. (See, e.g., Business and Professions Code section 6068, subdivision (e), Rule 3-100[B4].) A lawyer might be prevented from making a required disclosure because of a duty of confidentiality to former, current or potential clients, because of other fiduciary relationships such as service on a board of directors, or because of contractual or court-ordered restrictions.

[32] In some situations, Rule 1.13(g)[B3] limits who has authority to grant consent on behalf of an organization.

Consent to Future Conflict

[33] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but this is subject to the usual requirement that a client's consent must be "informed" to comply with this Rule. Determining whether a client's advance consent is

"informed," and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comment [30] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comment [30] ordinarily requires. Whenever seeking an advance consent, the lawyer's disclosure to the client should include an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also should disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, including litigation, or whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on such things as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client's degree of experience as a user of the legal services, including experience with the type of legal services involved; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was adequately instituted and maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education and language skills. An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved. In any case, advance consent will not be in compliance in the circumstances described in Comment [29] (prohibited representations). [See Rule 1.0(g)[B4] ("informed consent").]

Representation of a Class

[34] This Rule applies to a lawyer's representation of named class representatives. For purposes of this Rule, an unnamed current or potential member of a plaintiff class or a defendant class in a class action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not need to obtain the consent of such a person before representing a client who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent a party opposing a class action does not need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

PROPOSED RULE (CLEAN VERSION)

Organizational Clients

[35] A lawyer who represents an organization does not, by virtue of that representation alone, represent any constituent of the organization. (See Rule 1.13(a)[B3].) The lawyer for an organization also does not, by virtue of that representation alone, represent any affiliated organization, such as a subsidiary or organization under common ownership. The lawyer nevertheless could be barred under case law from accepting a representation adverse to an affiliate of an organizational client, even in a matter unrelated to the lawyer's representation of the client, under certain circumstances.

[36] A lawyer for a corporation who also is a member of its board of directors (or a lawyer for another type of organization who has corresponding fiduciary duties to it) should determine whether it is reasonably foreseeable that the responsibilities of the two roles might conflict, for example, because, as its lawyer, he or she might be called on to advise the corporation on matters involving actions of the directors. The lawyer should consider such things as the frequency with which these situations might arise, the potential materiality of the conflict to the lawyer's performance of his or her duties as a lawyer, and the possibility of the corporation obtaining legal advice from another lawyer in these situations. If there is material risk that the dual role will compromise the lawyer's ability to perform any of his or her duties to the client, the lawyer should not serve as a director or should cease to act as the corporation's lawyer. The lawyer should advise the other members of the board whenever matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege, and that conflict of interest considerations might require the lawyer to withdraw as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Insurance Defense

[37] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that the predecessor to paragraph (c) was violated when a lawyer, retained by an insurer to defend one suit against an insured, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, neither paragraph (a) nor (c) is intended to apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[38] Paragraph (b) is not intended to modify the tripartite relationship among a lawyer, an insurer, and an insured that is created when the insurer appoints the lawyer to represent the insured under the contract between the insurer and the insured. Although the lawyer's appointment by the insurer makes the insurer and the insured the lawyer's joint-clients in the matter, the appointment does not by itself create a potential conflict of interest for the lawyer under paragraph (b).

PROPOSED RULE (CLEAN VERSION)

Public Service

[39] [For special rules governing membership in a legal service organization, see Rule 6.3[B4]; for participation in law related activities affecting client interests, see Rule 6.4; and for work in conjunction with nonprofit and court-annexed limited legal services programs, see Rule 6.5[B4].]

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Rule 1.7: Conflict Of Interest: Current Clients

(a) **Representation directly adverse to current client.** A lawyer shall not accept or continue representation of a client in a matter in which the lawyer's representation of that client in that matter will be directly adverse to another client the lawyer currently represents in another matter, without informed written consent from each client.

~~**Rule 3-310 Avoiding the Representation of Adverse Interests**~~

(b) **Representation of multiple clients in one matter.** *A* lawyer *shall not, without the informed written consent of each client:*

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

(~~A~~2) ~~For purposes~~Accept or continue representation of ~~this rule:~~*more than one client in a matter in which the interests of the clients actually conflict*.

(~~1~~c) ~~"Disclosure" means informing the~~**Representing a client's adversary.** A lawyer shall not, while representing a client ~~or former client of~~in a first matter, accept in a second matter the ~~relevant circumstances and~~representation of ~~the actual and reasonably foreseeable~~a person or organization who is directly adverse ~~consequences~~ to the lawyer's current client ~~or former~~in the first matter, without the informed written consent of each 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~~d) **Disclosure of relationships and interests.** A ~~member~~lawyer shall not accept or continue representation of a client without providing written disclosure to the client where:

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

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

(a) the ~~member~~lawyer 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~~lawyer's representation; or

COMPARISON TO CURRENT CA RULE

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

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

[To be placed in a "global" definitions section:

Definitions of "disclosure" and "informed written consent."

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

Comment

General Principles Applicable to All Conflicts Rules (Rules 1.7, 1.8 series, and 1.9)

[1] This rule and the other conflict rules seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. For the purpose of considering whether the lawyer's duties to a client or other person could impair the lawyer's ability to fulfill the lawyer's duties to another client, it is helpful to consider the following: (1) the duty of undivided loyalty (including the duty to handle client funds and property as directed by the client); (2) the duty to exercise independent professional judgment for the client's benefit, not influenced by the lawyer's duties to or relationships with others, and not influenced by the lawyer's own interests; (3) the duty to maintain the confidentiality of client information; (4) the duty to represent the client competently within the bounds of the law; and (5) the duty to make full and candid disclosure to the client of all information and developments material to the client's understanding of the representation and its control and direction of the lawyer. [See Rule 1.2(a) regarding the allocation of authority between lawyer and client.]

[2] The first step in a lawyer's conflict analysis is to identify his or her client(s) in a current matter or potential client(s) in a new matter. In considering his or her ability to fulfill the foregoing duties, a lawyer should also be mindful of the scope of each relevant representation of a client or proposed representation of a potential client. Only

COMPARISON TO CURRENT CA RULE

then can the lawyer determine whether a conflict rule prohibits the representation, or permits the representation subject to a disclosure to the client or the informed written consent of the client or a former client. Determining whether a conflict exists may also require the lawyer to consult sources of law other than these Rules. [For guidance in determining whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment 4 to Rule 1.3.]

[3] This rule describes a lawyer's duties to current clients. Additional specific rules regarding current clients are set out in Rules 1.8.1 to [1.8.12]. [For conflicts duties to former clients, see Rule 1.9.] [For conflicts of interest involving prospective clients, see Rule 1.18.] [For definitions of "disclosure," "informed consent" and "written," see Rule 1.0(e) and (b), and see Comments [18] – [20].]

Paragraph (a): Representation Directly Adverse to Current Client

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

[4] A lawyer owes a duty of undivided loyalty to each current client. For purposes of paragraph (a), the duty of undivided loyalty means that, without the informed written consent of each affected client, a lawyer may not act as an advocate or counselor in a matter against a person or organization the lawyer represents in another matter, even when the matters are wholly unrelated. The duty of loyalty reflected in paragraph (a) applies equally in transactional and litigation matters. For example, a lawyer may not represent the seller of a business in negotiations when the lawyer represents the buyer in another matter, even if unrelated, without the informed written consent of each client. Paragraph (a) would apply even if the parties to the transaction expect to, or are, working cooperatively toward a goal of common interest to them. (If a lawyer proposes to represent two or more parties concerning the same negotiation or lawsuit, the situation should be analyzed under paragraph (b), not paragraph (a). As an example, if a lawyer proposes to represent two parties concerning a transaction between them, the lawyer should consult paragraph (b).)

[5] Paragraph (a) applies only to engagements in which the lawyer's work in a matter is *directly* adverse to a current client in any matter. The term "direct adversity" reflects a balancing of competing interests. The primary interest is to prohibit a lawyer from taking actions "adverse" to his or her client and thus inconsistent with the client's reasonable expectation that the lawyer will be loyal to the client. The word "direct" limits the scope of the rule to take into account the public policy favoring the right to select counsel of one's choice and the reality that the conflicts rules, if construed overly broadly, could become unworkable. As a consequence of this balancing and the variety of situations in which the issue can arise, there is no single definition of when a lawyer's actions are directly adverse to a current client for purposes of this Rule.

[6] Generally speaking, a lawyer's work on a matter will not be directly adverse to a person if that person is not a party to the matter. If the non-party's interests could be affected adversely by the outcome of the matter, then the adversity is indirect, not direct. However, in some situations, a lawyer's work could be directly adverse to a non-

party if that non-party is an identifiable target of a litigation or non-litigation representation, or a competitor for a particular transaction (as would occur, for example, if one client were in competition with another of the lawyer's clients on other matters to purchase or lease an asset or to acquire an exclusive license). Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. (See *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 463-469 [134 Cal.Rptr.2d 756, 764-767].)

[7] Not all representations that might be harmful to the interests of a client create direct adversity governed by paragraph (a). The following are among the instances that ordinarily would not constitute direct adversity: (1) the representation of business competitors in different matters, even if a positive outcome for one might strengthen its competitive position against the other; (2) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, *e.g.*, if a client is the landlord of, or a lender to, the non-client; (3) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent either client competently, as might occur, *e.g.*, if the lawyer were advocating inconsistent positions in front of the same tribunal; and (5) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute.

[8] **[RESERVED]**

[9] If a conflict arises during a representation, the lawyer must in all events continue to protect the confidentiality of information of each affected client and former client. [Regarding former clients, see Rule 1.9(c).]

Paragraph (b): Representation of multiple clients in a matter

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

[10] Paragraph (b) applies when a lawyer represents multiple clients in a single matter, as when multiple clients intend to work cooperatively as co-plaintiffs or co-defendants in a single litigation, or as co-participants to a transaction or other common enterprise. In some situations, the employment of a single counsel might have benefits of convenience, economy or strategy, but paragraph (b) requires the lawyer to make disclosure to, and to obtain informed written consent from, each client whenever the lawyer's full performance of the duties owed to one of the joint clients might or does interfere with the lawyer's full performance of the duties owed to another of the joint clients. See Comment [38] with respect to the application of paragraph (b) to an insurer's appointment of counsel to defend an insured.

COMPARISON TO CURRENT CA RULE

[11] A potential conflict exists when one can reasonably foresee an actual conflict arising among the joint clients in the matter in the future.

[12] The following are examples of actual conflicts in representing multiple clients in a single matter: (1) the lawyer receives conflicting instructions from the clients and the lawyer cannot follow one client's instructions without violating another client's instruction; (2) the clients have inconsistent interests or objectives so that it becomes impossible for the lawyer to advance one client's interests or objectives without detrimentally affecting another client's interests or objectives; (3) the clients have antagonistic positions and the lawyer's duty requires the lawyer to advise each client about how to advance that client's position relative to the other's position, because the lawyer cannot be expected to exercise independent judgment in that circumstance; (4) the clients have inconsistent expectations of confidentiality because one client expects the lawyer to keep secret information that is material to the matter; (5) the lawyer has a preexisting relationship with one client that affects the lawyer's independent professional judgment on behalf of the other client(s); and (6) the clients make inconsistent demands for the original file.

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

[13] A lawyer's representation of two or more clients in a single matter can create potential confidentiality issues on which the lawyer must obtain each client's informed written consent under paragraph (b). First, although each client's communications with the lawyer are protected as to third persons by the lawyer's duty of confidentiality and the lawyer-client privilege, the communications might not be privileged in a civil dispute between the joint clients. (See Business and Professions Code section 6068, subdivision (e), Rule 3-100, and Evidence Code sections 952 and 962.) Second, because the lawyer is obligated to make disclosures to each jointly represented client to the full extent required by Rule 1.4, and because the lawyer may not favor one joint client over any other, each joint client normally should expect that its communications with the lawyer will be shared with other jointly represented clients.

[14] If a lawyer obtains the consent of multiple clients to the lawyer's representation of them in a matter notwithstanding the existence of a potential conflict under paragraph (b)(1), the lawyer must obtain the further informed written consent of each client pursuant to paragraph (b)(2) if a potential conflict becomes an actual conflict. Likewise, if a previously unanticipated or unidentified potential or actual conflict arises, the lawyer must obtain consent of each client in the matter under paragraph (b)(1). Clients may provide such consents in advance of the conflict arising, subject to the criteria set forth below in Comment [33].

[15] Even if the clients have a dispute about one aspect of the matter, there often remain issues about which they have aligned interests. In litigation, for instance, joint clients might have an interest in presenting a unified front to the opposing party and in reducing their litigation expenses, but have an actual conflict about allocation of the proceeds of the litigation (for plaintiffs) or of liability (for defendants). A lawyer might be

able to benefit the clients by representing them on issues on which they have aligned interests while excluding from the scope of the representation the areas in which they have a dispute or different interests, subject to the informed written consent requirements of paragraph (b). [See Rule 1.2 (c) (limiting the scope of representation)].

[16] A client, who has consented to a joint representation under paragraph (b), may terminate the lawyer's representation at any time with or without a reason. If a jointly represented client terminates the lawyer-client relationship, the lawyer may not continue to represent the other jointly represented client or clients if the continued representation would be directly adverse to the client who terminated the representation unless the client terminating the representation consents or previously did so.

Lawyer Acting in Dual Roles

[17] A lawyer might owe fiduciary duties in capacities other than as a lawyer that could conflict with the duties the lawyer owes to clients or former clients, such as fiduciary duties arising from a lawyer's service as a trustee, executor, or corporate director. (See, e.g., *William H. Raley Co, Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].)

Paragraph (c): Representing a Client's Adversary.

~~(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.~~

[18] Paragraph (c) applies when a lawyer represents client A in a matter adverse to B, and B proposes to retain the lawyer on another matter in which the lawyer's work will not be adverse to A. (If B were to seek to retain the lawyer in a matter directly adverse to A, then paragraph (a) would apply, not paragraph (c).) The purpose of paragraph (c) is (1) to ensure that client A's relationship with, and trust in, the lawyer are not disturbed by the lawyer accepting the representation of client A's adversary, B, without A's informed written consent; (2) to ensure B understands that the lawyer will continue to owe all of his or her duties in the first matter solely to A, notwithstanding the lawyer's representation of B on another matter; and (3) to apprise B of the lawyer's obligation to disclose to A all information that is material to the representation of A even if that information otherwise is the confidential information of B. Paragraph (c) applies in litigation and in non-litigation representations.

~~(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~~

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~~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, subdivsion (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.~~

Paragraph (d): Disclosure of Relationships and Interests

~~While paragraph~~[19] Paragraph (~~B~~d) ~~deals with the issues of adequate disclosure~~requires a lawyer to ~~the present client~~disclose to a potential or ~~client's~~current client certain of the ~~member's~~lawyer's present or past relationships ~~to other parties or witnesses or present~~with others, and the lawyer's own 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~~The purpose of this disclosure is to ~~apply as complementary provisions~~permit the client or potential client to make a more

COMPARISON TO CURRENT CA RULE

informed decision about whether and on what conditions to retain, or continue to retain, the lawyer. Paragraph (d) applies in litigation and in non-litigation representations.

[20] A lawyer should not allow his or her own interests to have an adverse effect on the representation of a client. Paragraph (d)(4) requires a lawyer to make a disclosure to the client when the lawyer has an interest in the subject matter of the representation. Examples of this include the following: (1) the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; and (2) the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. In addition, the subject of a representation might raise questions about the lawyer's own conduct, such as questions about the correctness of the lawyer's earlier advice to the client; this situation would be governed by Paragraph (d)(4) unless the lawyer and client have agreed to take a common position in compliance with Rule 1.4, as might occur, for example, in response to a motion for discovery sanctions. [See Rule 1.8.1 through 1.8.12 for additional Rules pertaining to other personal interest conflicts, including business transactions with clients, and Rule 3.7 concerning lawyer as witness.]

[21] Paragraph (d)(4) does not require a lawyer to investigate whether mutual funds or similar investment vehicles in which the lawyer holds an interest own interests in parties to a matter. However, if the lawyer knows that a mutual fund in which the lawyer owns an interest in a party to a matter the lawyer is handling, paragraph (d)(4) would apply.

[22] Paragraph (d)(4) requires disclosure to the lawyer's client if the lawyer has been having, or when the lawyer decides to have, substantive discussions concerning possible employment with an opponent of the lawyer's client or with a lawyer or law firm representing the opponent.

[23] Paragraph (~~B~~d) ~~is intended to apply~~applies only to a ~~member's~~lawyer's own relationships ~~or~~and interests, unless the ~~member~~lawyer knows that ~~a partner or associate~~another lawyer in the same firm as the ~~member~~lawyer has or had a relationship with another party ~~or~~, witness or has or had an interest in the subject matter of the representation. [See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).]

[24] Paragraph (d) does not apply to the relationship of a lawyer to another person's lawyer. [See Rule 1.8.12].

[25] Paragraph (d) requires disclosures only to current clients. Rule 1.9 specifies when a lawyer must obtain informed written consent from a former client.

[26] Paragraph (a) applies, rather than paragraph (d)(1) or (3), whenever a representation is directly adverse to another current client of the lawyer. (See Comment [4].)

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Prohibited Representations

[27] There are some situations governed by this Rule for which a lawyer cannot obtain effective client consent. These include at least the following: (1) when the lawyer cannot provide competent representation to each affected client (See Rule 1.8.8(a)); (2) when the lawyer cannot make an adequate disclosure, for example, because of confidentiality obligations to another client or former client (See Business and Professions Code section 6068, subdivision (e) and Rule 3-100); (3) when the representation would involve the assertion of a claim by one client against another client, where the lawyer is asked to represent both clients in that matter. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] ["the attorney of a family-owned business, corporate or otherwise, should not represent one owner against the other in a [marital] dissolution action"]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] [attorney may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict]; and *Forrest v. Baeza* (1997) 58 Cal.App.4th 65, 74–75 [67 Cal.Rptr.2d 857, 863] [attorney may not represent both a closely-held corporation and directors/shareholders who are accused of wrongdoing or whose interests are otherwise adverse to the corporation]); and (4) when the person who grants consent lacks capacity or authority. (See Civil Code section 38, and see Rule 1.14 regarding clients with diminished capacity.)

[28] If a lawyer seeks permission from a tribunal to terminate a representation and that permission is denied, the lawyer is obligated to continue the representation even if the representation creates a conflict to which not all affected clients have given consent, and even if the lawyer has a conflict to which client consent is not available. (See Rule 1.16(c).)

Disclosure and Informed Written Consent

[29] Informed written consent requires the lawyer to disclose in writing to each affected client the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client or former client. [See Rule 1.0(e) (informed written consent).] The facts and explanation the lawyer must disclose will depend on the nature of the potential or actual conflict and the nature of the risks involved for the client or potential client. When undertaking the representation of multiple clients in a single matter, the information must include the implications of the joint representation, including possible effects on loyalty, and the confidentiality and lawyer-client privilege issues described in Comment [13].

[30] A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the material facts and circumstances remain unchanged. With any material change, the lawyer may not continue the representation without making a new written disclosure to each affected client and, if applicable, obtaining a new written consent under paragraph (a), (b), or (c).

COMPARISON TO CURRENT CA RULE

[31] If the lawyer is required by this Rule or another Rule to make a disclosure, but the lawyer cannot do so without violating a duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. (See, e.g., Business and Professions Code section 6068, subdivision (e), Rule 3-100.) A lawyer might be prevented from making a required disclosure because of a duty of confidentiality to former, current or potential clients, because of other fiduciary relationships such as service on a board directors, or because of contractual or court-ordered restrictions.

[32] In some situations, Rule 1.13(g) limits who has authority to grant consent on behalf of an organization.

Consent to Future Conflict

~~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).~~

[33] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but this is subject to the usual requirement that a client's consent must be "informed" to comply with this Rule. Determining whether a client's advance consent is "informed," and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comment [30] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comment [30] ordinarily requires. Whenever seeking an advance consent, the lawyer's disclosure to the client should include an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also should disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, including litigation, or whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on such things as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client's degree of experience as a user of the legal services, including experience with the type of legal services involved; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was adequately instituted and maintained; (4) whether before giving consent the client

either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education and language skills. An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved. In any case, advance consent will not be in compliance in the circumstances described in Comment [29] (prohibited representations). [See Rule 1.0(g) ("informed consent").]

Representation of a Class

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

[34] This Rule applies to a lawyer's representation of named class representatives. For purposes of this Rule, an unnamed current or potential member of a plaintiff class or a defendant class in a class action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not need to obtain the consent of such a person before representing a client who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent a party opposing a class action does not need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

Organizational Clients

[35] A lawyer who represents an organization does not, by virtue of that representation alone, represent any constituent of the organization. (See Rule 1.13(a).) The lawyer for an organization also does not, by virtue of that representation alone, represent any affiliated organization, such as a subsidiary or organization under common ownership. The lawyer nevertheless could be barred under case law from accepting a representation adverse to an affiliate of an organizational client, even in a matter unrelated to the lawyer's representation of the client, under certain circumstances.

[36] A lawyer for a corporation who also is a member of its board of directors (or a lawyer for another type of organization who has corresponding fiduciary duties to it) should determine whether it is reasonably foreseeable that the responsibilities of the two roles might conflict, for example, because, as its lawyer, he or she might be called

on to advise the corporation on matters involving actions of the directors. The lawyer should consider such things as the frequency with which these situations might arise, the potential materiality of the conflict to the lawyer's performance of his or her duties as a lawyer, and the possibility of the corporation obtaining legal advice from another lawyer in these situations. If there is material risk that the dual role will compromise the lawyer's ability to perform any of his or her duties to the client, the lawyer should not serve as a director or should cease to act as the corporation's lawyer. The lawyer should advise the other members of the board whenever matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege, and that conflict of interest considerations might require the lawyer to withdraw as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Insurance Defense

[37] 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~~the predecessor to paragraph (~~C~~)(~~3~~c) was violated when a ~~member~~lawyer, retained by an insurer to defend one suit~~, and while that suit was still pending~~against an insured, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, ~~subparagraph~~neither paragraph (~~C~~a) nor (~~3~~c) is ~~not~~ intended to apply with respect to the relationship between an insurer and a ~~member~~lawyer 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.)~~

[38] Paragraph (b) is not intended to modify the tripartite relationship among a lawyer, an insurer, and an insured that is created when the insurer appoints the lawyer to represent the insured under the contract between the insurer and the insured. Although the lawyer's appointment by the insurer makes the insurer and the insured the lawyer's joint-clients in the matter, the appointment does not by itself create a potential conflict of interest for the lawyer under paragraph (b).

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Public Service

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

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Rule 1.7: Conflict Of Interest: Current Clients

(a) **Representation directly adverse to current client.** A lawyer shall not accept or continue representation of a client in a matter in which the lawyer's representation of that client in that matter will be directly adverse to another client the lawyer currently represents in another matter, without informed written consent from each client.

(b) **Representation of multiple clients in one matter.** A lawyer shall not, without the informed written consent of each client:

(1) Accept or continue 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.

(a~~c~~) ~~Except as provided in paragraph (b),~~**Representing a client's adversary.** A lawyer shall not ~~represent~~, while representing a client ~~if~~in a first matter, accept in a second matter the representation ~~involves a concurrent conflict~~ of ~~interest. A concurrent conflict~~a person or organization who is directly adverse to the lawyer's current client in the first matter, without the informed written consent of ~~interest exists if:~~each client.

(~~1~~d) ~~the~~**Disclosure of relationships and interests.** A lawyer shall not accept or continue representation of ~~one~~a client ~~will be directly adverse~~without providing written disclosure to ~~another~~the client~~; or~~where:

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

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

(a) the lawyer 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 lawyer's representation; or

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

(3) The lawyer has or had a legal, business, financial, professional, or personal relationship with another person or entity the lawyer knows or

reasonably should know would be affected substantially by resolution of the matter; or

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

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

[To be placed in a "global" definitions section:

Definitions of "disclosure" and "informed written consent."

(1) "Disclosure" means informing the ~~lawyer reasonably believes that~~client or former client of the ~~lawyer will be able to provide competent~~relevant circumstances and ~~diligent representation~~of the actual and reasonably foreseeable adverse consequences of those circumstances to ~~each affected~~the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation ~~is not prohibited by law~~following written disclosure;

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

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

~~(4) each affected client gives informed consent, confirmed in writing.~~

Comment

General Principles Applicable to All Conflicts Rules (Rules 1.7, 1.8 series, and 1.9)

~~[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).~~

[1] This rule and the other conflict rules seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. For the purpose of considering whether the lawyer's duties to a client or other person could impair the lawyer's ability to fulfill the lawyer's duties to another client, it is helpful to consider the following: (1) the duty of

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undivided loyalty (including the duty to handle client funds and property as directed by the client); (2) the duty to exercise independent professional judgment for the client's benefit, not influenced by the lawyer's duties to or relationships with others, and not influenced by the lawyer's own interests; (3) the duty to maintain the confidentiality of client information; (4) the duty to represent the client competently within the bounds of the law; and (5) the duty to make full and candid disclosure to the client of all information and developments material to the client's understanding of the representation and its control and direction of the lawyer. [See Rule 1.2(a) regarding the allocation of authority between lawyer and client.]

~~[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).~~

~~[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.~~

[2] The first step in a lawyer's conflict analysis is to identify his or her client(s) in a current matter or potential client(s) in a new matter. In considering his or her ability to fulfill the foregoing duties, a lawyer should also be mindful of the scope of each relevant representation of a client or proposed representation of a potential client. Only then can the lawyer determine whether a conflict rule prohibits the representation, or permits the representation subject to a disclosure to the client or the informed written consent of the client or a former client. Determining whether a conflict exists may also require the lawyer to consult sources of law other than these Rules. [For guidance in determining whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment 4 to Rule 1.3.]

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

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~~given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].~~

[3] This rule describes a lawyer's duties to current clients. Additional specific rules regarding current clients are set out in Rules 1.8.1 to [1.8.12]. [For conflicts duties to former clients, see Rule 1.9.] [For conflicts of interest involving prospective clients, see Rule 1.18.] [For definitions of "disclosure," "informed consent" and "written," see Rule 1.0(e) and (b), and see Comments [18] – [20].]

~~[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).~~

~~Identifying Conflicts of Interest~~Paragraph (a): Representation Directly Adverse to Current Client

~~[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.~~

[4] A lawyer owes a duty of undivided loyalty to each current client. For purposes of paragraph (a), the duty of undivided loyalty means that, without the informed written consent of each affected client, a lawyer may not act as an advocate or counselor in a matter against a person or organization the lawyer represents in another matter, even when the matters are wholly unrelated. The duty of loyalty reflected in paragraph (a) applies equally in transactional and litigation matters. For example, a lawyer may not represent the seller of a business in negotiations when the lawyer represents the buyer in another matter, even if unrelated, without the informed written consent of each client.

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Paragraph (a) would apply even if the parties to the transaction expect to, or are, working cooperatively toward a goal of common interest to them. (If a lawyer proposes to represent two or more parties concerning the same negotiation or lawsuit, the situation should be analyzed under paragraph (b), not paragraph (a). As an example, if a lawyer proposes to represent two parties concerning a transaction between them, the lawyer should consult paragraph (b).)

[5] Paragraph (a) applies only to engagements in which the lawyer's work in a matter is *directly* adverse to a current client in any matter. The term "direct adversity" reflects a balancing of competing interests. The primary interest is to prohibit a lawyer from taking actions "adverse" to his or her client and thus inconsistent with the client's reasonable expectation that the lawyer will be loyal to the client. The word "direct" limits the scope of the rule to take into account the public policy favoring the right to select counsel of one's choice and the reality that the conflicts rules, if construed overly broadly, could become unworkable. As a consequence of this balancing and the variety of situations in which the issue can arise, there is no single definition of when a lawyer's actions are directly adverse to a current client for purposes of this Rule.

[6] Generally speaking, a lawyer's work on a matter will not be directly adverse to a person if that person is not a party to the matter. If the non-party's interests could be affected adversely by the outcome of the matter, then the adversity is indirect, not direct. However, in some situations, a lawyer's work could be directly adverse to a non-party if that non-party is an identifiable target of a litigation or non-litigation representation, or a competitor for a particular transaction (as would occur, for example, if one client were in competition with another of the lawyer's clients on other matters to purchase or lease an asset or to acquire an exclusive license). Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. (See *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 463-469 [134 Cal.Rptr.2d 756, 764-767].)

~~[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.~~

[7] Not all representations that might be harmful to the interests of a client create direct adversity governed by paragraph (a). The following are among the instances that ordinarily would not constitute direct adversity: (1) the representation of business competitors in different matters, even if a positive outcome for one might strengthen its competitive position against the other; (2) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, *e.g.*, if a client is the landlord of, or a lender to, the non-client; (3) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent

either client competently, as might occur, *e.g.*, if the lawyer were advocating inconsistent positions in front of the same tribunal; and (5) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute.

[8] **[RESERVED]**

~~**Identifying Conflicts of Interest: Material Limitation**~~

[9] If a conflict arises during a representation, the lawyer must in all events continue to protect the confidentiality of information of each affected client and former client. [Regarding former clients, see Rule 1.9(c).]

Paragraph (b): Representation of multiple clients in a matter

[10] Paragraph (b) applies when a lawyer represents multiple clients in a single matter, as when multiple clients intend to work cooperatively as co-plaintiffs or co-defendants in a single litigation, or as co-participants to a transaction or other common enterprise. In some situations, the employment of a single counsel might have benefits of convenience, economy or strategy, but paragraph (b) requires the lawyer to make disclosure to, and to obtain informed written consent from, each client whenever the lawyer's full performance of the duties owed to one of the joint clients might or does interfere with the lawyer's full performance of the duties owed to another of the joint clients. See Comment [38] with respect to the application of paragraph (b) to an insurer's appointment of counsel to defend an insured.

[11] A potential conflict exists when one can reasonably foresee an actual conflict arising among the joint clients in the matter in the future.

~~[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.~~

[12] The following are examples of actual conflicts in representing multiple clients in a single matter: (1) the lawyer receives conflicting instructions from the clients and the lawyer cannot follow one client's instructions without violating another client's instruction; (2) the clients have inconsistent interests or objectives so that it becomes impossible for the lawyer to advance one client's interests or objectives without detrimentally affecting another client's interests or objectives; (3) the clients have antagonistic positions and the

lawyer's duty requires the lawyer to advise each client about how to advance that client's position relative to the other's position, because the lawyer cannot be expected to exercise independent judgment in that circumstance; (4) the clients have inconsistent expectations of confidentiality because one client expects the lawyer to keep secret information that is material to the matter; (5) the lawyer has a preexisting relationship with one client that affects the lawyer's independent professional judgment on behalf of the other client(s); and (6) the clients make inconsistent demands for the original file.

[13] A lawyer's representation of two or more clients in a single matter can create potential confidentiality issues on which the lawyer must obtain each client's informed written consent under paragraph (b). First, although each client's communications with the lawyer are protected as to third persons by the lawyer's duty of confidentiality and the lawyer-client privilege, the communications might not be privileged in a civil dispute between the joint clients. (See Business and Professions Code section 6068, subdivision (e), Rule 3-100, and Evidence Code sections 952 and 962.) Second, because the lawyer is obligated to make disclosures to each jointly represented client to the full extent required by Rule 1.4, and because the lawyer may not favor one joint client over any other, each joint client normally should expect that its communications with the lawyer will be shared with other jointly represented clients.

~~Lawyer's Responsibilities to Former Clients and Other Third Persons~~

[14] If a lawyer obtains the consent of multiple clients to the lawyer's representation of them in a matter notwithstanding the existence of a potential conflict under paragraph (b)(1), the lawyer must obtain the further informed written consent of each client pursuant to paragraph (b)(2) if a potential conflict becomes an actual conflict. Likewise, if a previously unanticipated or unidentified potential or actual conflict arises, the lawyer must obtain consent of each client in the matter under paragraph (b)(1). Clients may provide such consents in advance of the conflict arising, subject to the criteria set forth below in Comment [33].

[15] Even if the clients have a dispute about one aspect of the matter, there often remain issues about which they have aligned interests. In litigation, for instance, joint clients might have an interest in presenting a unified front to the opposing party and in reducing their litigation expenses, but have an actual conflict about allocation of the proceeds of the litigation (for plaintiffs) or of liability (for defendants). A lawyer might be able to benefit the clients by representing them on issues on which they have aligned interests while excluding from the scope of the representation the areas in which they have a dispute or different interests, subject to the informed written consent requirements of paragraph (b). [See Rule 1.2 (c) (limiting the scope of representation)].

[16] A client, who has consented to a joint representation under paragraph (b), may terminate the lawyer's representation at any time with or without a reason. If a jointly represented client terminates the lawyer-client relationship, the lawyer may not continue to represent the other jointly represented client or clients if the continued representation would be directly adverse to the client who terminated the representation unless the client terminating the representation consents or previously did so.

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Lawyer Acting in Dual Roles

[~~9~~17] ~~In addition to conflicts with other current clients, a lawyer's~~A lawyer might owe fiduciary duties ~~of loyalty and independence may be materially limited by responsibilities~~in capacities other than as a lawyer that could conflict with the duties the lawyer owes to clients or former clients ~~under Rule 1.9 or by the lawyer's responsibilities to other persons~~, such as fiduciary duties arising from a lawyer's service as a trustee, executor, or corporate director. (See, e.g., *William H. Raley Co, Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].)

~~Personal Interest Conflicts~~
Paragraph (c): Representing a Client's Adversary.

[18] Paragraph (c) applies when a lawyer represents client A in a matter adverse to B, and B proposes to retain the lawyer on another matter in which the lawyer's work will not be adverse to A. (If B were to seek to retain the lawyer in a matter directly adverse to A, then paragraph (a) would apply, not paragraph (c).) The purpose of paragraph (c) is (1) to ensure that client A's relationship with, and trust in, the lawyer are not disturbed by the lawyer accepting the representation of client A's adversary, B, without A's informed written consent; (2) to ensure B understands that the lawyer will continue to owe all of his or her duties in the first matter solely to A, notwithstanding the lawyer's representation of B on another matter; and (3) to apprise B of the lawyer's obligation to disclose to A all information that is material to the representation of A even if that information otherwise is the confidential information of B. Paragraph (c) applies in litigation and in non-litigation representations.

Paragraph (d): Disclosure of Relationships and Interests

[19] Paragraph (d) requires a lawyer to disclose to a potential or current client certain of the lawyer's present or past relationships with others, and the lawyer's own interest in the subject matter of the representation. The purpose of this disclosure is to permit the client or potential client to make a more informed decision about whether and on what conditions to retain, or continue to retain, the lawyer. Paragraph (d) applies in litigation and in non-litigation representations.

~~[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number~~

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~~of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).~~

[20] A lawyer should not allow his or her own interests to have an adverse effect on the representation of a client. Paragraph (d)(4) requires a lawyer to make a disclosure to the client when the lawyer has an interest in the subject matter of the representation. Examples of this include the following: (1) the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; and (2) the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. In addition, the subject of a representation might raise questions about the lawyer's own conduct, such as questions about the correctness of the lawyer's earlier advice to the client; this situation would be governed by Paragraph (d)(4) unless the lawyer and client have agreed to take a common position in compliance with Rule 1.4, as might occur, for example, in response to a motion for discovery sanctions. [See Rule 1.8.1 through 1.8.12 for additional Rules pertaining to other personal interest conflicts, including business transactions with clients, and Rule 3.7 concerning lawyer as witness.]

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

~~[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).~~

~~**Interest of Person Paying for a Lawyer's Service**~~

~~[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.~~

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[21] Paragraph (d)(4) does not require a lawyer to investigate whether mutual funds or similar investment vehicles in which the lawyer holds an interest own interests in parties to a matter. However, if the lawyer knows that a mutual fund in which the lawyer owns an interest in a party to a matter the lawyer is handling, paragraph (d)(4) would apply.

~~**Prohibited Representations**~~

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

[22] Paragraph (d)(4) requires disclosure to the lawyer's client if the lawyer has been having, or when the lawyer decides to have, substantive discussions concerning possible employment with an opponent of the lawyer's client or with a lawyer or law firm representing the opponent.

~~[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).~~

[23] Paragraph (d) applies only to a lawyer's own relationships and interests, unless the lawyer knows that another lawyer in the same firm as the lawyer has or had a relationship with another party, witness or has or had an interest in the subject matter of the representation. [See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).]

[24] Paragraph (d) does not apply to the relationship of a lawyer to another person's lawyer. [See Rule 1.8.12].

[25] Paragraph (d) requires disclosures only to current clients. Rule 1.9 specifies when a lawyer must obtain informed written consent from a former client.

[26] Paragraph (a) applies, rather than paragraph (d)(1) or (3), whenever a representation is directly adverse to another current client of the lawyer. (See Comment [4].)

Prohibited Representations

~~[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes~~

~~certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.~~
[27] There are some situations governed by this Rule for which a lawyer cannot obtain effective client consent. These include at least the following: (1) when the lawyer cannot provide competent representation to each affected client (See Rule 1.8.8(a)); (2) when the lawyer cannot make an adequate disclosure, for example, because of confidentiality obligations to another client or former client (See Business and Professions Code section 6068, subdivision (e) and Rule 3-100); (3) when the representation would involve the assertion of a claim by one client against another client, where the lawyer is asked to represent both clients in that matter. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] ["the attorney of a family-owned business, corporate or otherwise, should not represent one owner against the other in a [marital] dissolution action"]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] [attorney may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict]; and *Forrest v. Baeza* (1997) 58 Cal.App.4th 65, 74–75 [67 Cal.Rptr.2d 857, 863] [attorney may not represent both a closely-held corporation and directors/shareholders who are accused of wrongdoing or whose interests are otherwise adverse to the corporation]); and (4) when the person who grants consent lacks capacity or authority. (See Civil Code section 38, and see Rule 1.14 regarding clients with diminished capacity.)

~~[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).~~
[28] If a lawyer seeks permission from a tribunal to terminate a representation and that permission is denied, the lawyer is obligated to continue the representation even if the representation creates a conflict to which not all affected clients have given consent, and even if the lawyer has a conflict to which client consent is not available. (See Rule 1.16(c).)

Disclosure and Informed Written Consent

[~~18~~29] Informed written consent requires ~~that~~the lawyer to disclose in writing to each affected client ~~be aware of~~ the relevant circumstances and ~~of~~ the ~~material~~actual and reasonably foreseeable ~~ways that the conflict could have~~ adverse ~~effects on~~consequences to the ~~interests of that~~client or former client. [See Rule 1.0(e) (informed written consent).] The ~~information required depends~~facts and explanation the lawyer must disclose will depend on the nature of the potential or actual conflict and the nature of the risks involved for the client or potential client. When undertaking the representation of multiple clients in a single matter ~~is undertaken~~, the information must

include the implications of the ~~common~~joint representation, including possible effects on loyalty, ~~confidentiality~~ and the ~~attorney~~confidentiality and lawyer-client privilege ~~and the advantages and risks involved. See Comments~~issues described in Comment [~~30~~13] ~~and [31] (effect of common representation on confidentiality)~~.

~~[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.~~

[30] A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the material facts and circumstances remain unchanged. With any material change, the lawyer may not continue the representation without making a new written disclosure to each affected client and, if applicable, obtaining a new written consent under paragraph (a), (b), or (c).

~~Consent Confirmed in Writing~~

~~[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.~~

[31] If the lawyer is required by this Rule or another Rule to make a disclosure, but the lawyer cannot do so without violating a duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. (See, e.g., Business and Professions Code section 6068, subdivision (e), Rule 3-100.) A lawyer might be prevented from making a required disclosure because of a duty of confidentiality to former, current or potential clients, because of other fiduciary relationships such as service on a board directors, or because of contractual or court-ordered restrictions.

~~Revoking Consent~~

COMPARISON TO ABA MODEL RULE

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

[32] In some situations, Rule 1.13(g) limits who has authority to grant consent on behalf of an organization.

Consent to Future Conflict

[2233] Whether a lawyerLawyers may properly request a clientask clients to waivegive advance consent to conflicts that might arise in the future, but this is subject to the test of paragraphusual requirement that a client's consent must be "informed" to comply with this Rule. Determining whether a client's advance consent is "informed," and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comment [30] (binformed written consent). The effectiveness of such waivers is generally determined byHowever, an advance consent can comply with this Rule even where the extentlawyer cannot provide all the information and explanation Comment [30] ordinarily requires. Whenever seeking an advance consent, the lawyer's disclosure to which the client reasonably understands the material risksshould include an explanation that the waiver entailslawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The more comprehensivelawyer also should disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, including litigation, or whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on such things as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future representationsconflicts that might arise and of the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood thatto the client will have; (2) the requisite understanding. Thus, if the client agrees to consent to a particular typeclient's degree of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experiencedexperience as a user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g.,including experience with the type of legal services involved; (3) whether the client is independently represented by other counsel inhas consented to the use of an adequate ethics screen and whether the screen was adequately instituted and maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the

subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education and language skills. An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved. In any case, advance consent ~~cannot~~will not be ~~effective if the circumstances that materialize~~in compliance in the ~~future are such as would make the conflict nonconsentable under paragraph~~circumstances described in Comment [29] (~~b~~prohibited representations). [See Rule 1.0(g) ("informed consent").]

~~**Conflicts in Litigation**~~

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

Representation of a Class

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

COMPARISON TO ABA MODEL RULE

[~~25~~34] ~~When~~This Rule applies to a lawyer's representation of named class representatives. For purposes of this Rule, an unnamed current or potential member of a plaintiff class or a defendant class in a class action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent ~~a class of plaintiffs or defendants in a class action lawsuit, unnamed members of~~ the class ~~are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule~~. Thus, the lawyer does not ~~typically~~ need to ~~get~~obtain the consent of such a person before representing a client ~~suing the~~who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent ~~an opponent in~~a party opposing a class action does not ~~typically~~ need the consent of ~~an~~any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

~~Nonlitigation Conflicts~~

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

~~[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.~~

~~[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.~~

COMPARISON TO ABA MODEL RULE

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater

~~responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).~~

~~[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.~~

Organizational Clients

[~~34~~35] A lawyer who represents ~~a corporation or other~~an organization does not, by virtue of that representation alone, ~~necessarily~~ represent any constituent ~~or affiliated~~of the organization~~, such as a parent or subsidiary~~. (See Rule 1.13(a). ~~Thus, the~~) The lawyer for an organization ~~is~~also does not, by virtue of that representation alone, represent any affiliated organization, such as a subsidiary or organization under common ownership. The lawyer nevertheless could be barred under case law from accepting a representation adverse to an affiliate ~~in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client~~ of ~~the lawyer, there is~~ an ~~understanding between the lawyer and the~~ organizational client ~~that the lawyer will avoid representation adverse to the client's affiliates~~, ~~or the lawyer's obligations~~even in a matter unrelated to ~~either the organizational client or the new client are likely to limit materially~~ the lawyer's representation of the ~~other~~ client, under certain circumstances.

[~~35~~36] A lawyer for a corporation ~~or other organization~~ who ~~is~~ also is a member of its board of directors (or a lawyer for another type of organization who has corresponding fiduciary duties to it) should determine whether it is reasonably foreseeable that the responsibilities of the two roles ~~may~~might conflict~~. The~~, for example, because, as its lawyer ~~may~~, he or she might be called on to advise the corporation ~~in~~on matters involving actions of the directors. ~~Consideration~~The lawyer should ~~be given to~~consider such things as the frequency with which ~~such~~these situations ~~may~~might arise, the potential ~~intensity~~materiality of the conflict~~, the effect of~~to the lawyer's ~~resignation from the board~~performance of his or her duties as a lawyer, and the possibility of the ~~corporation's~~corporation obtaining legal advice from another lawyer in ~~such~~these situations. If there is material risk that the dual role will compromise the lawyer's ~~independence~~ability to perform any of ~~professional judgment~~his or her duties to the client, the lawyer should not serve as a director or should cease to act as the corporation's lawyer ~~when conflicts of interest arise~~. The lawyer should advise the other members of the board ~~that in some circumstances~~whenever matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege, and that conflict of interest considerations might require the ~~lawyer's recusal~~lawyer to withdraw as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Insurance Defense

COMPARISON TO ABA MODEL RULE

[37] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that the predecessor to paragraph (c) was violated when a lawyer, retained by an insurer to defend one suit against an insured, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, neither paragraph (a) nor (c) is intended to apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[38] Paragraph (b) is not intended to modify the tripartite relationship among a lawyer, an insurer, and an insured that is created when the insurer appoints the lawyer to represent the insured under the contract between the insurer and the insured. Although the lawyer's appointment by the insurer makes the insurer and the insured the lawyer's joint-clients in the matter, the appointment does not by itself create a potential conflict of interest for the lawyer under paragraph (b).

Public Service

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

PROPOSED RULE (CLEAN VERSION)

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

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

(a) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that reasonably can be understood by the client; and

(b) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

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

Comment

Scope of Rule

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

[2] Except as set forth in comments [5] and [6], this Rule does not apply when a lawyer enters into a transaction with or acquires a pecuniary interest adverse to a client prior to the commencement of a lawyer-client relationship with the client. However, when a lawyer's interest in the transaction or in the adverse pecuniary interest results in the lawyer having a legal, business, financial or professional interest in the subject matter in which the lawyer is representing the client, the lawyer is required to comply with Rule 1.7(d)(4)[B3]

PROPOSED RULE (CLEAN VERSION)

Business Transactions With Clients

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

[4] Not all business transactions with a client are within the scope of this Rule. This Rule does not apply to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client, and the requirements of the Rule are unnecessary and impractical. Examples of such products and services include banking and brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. The Rule also does not apply to similar types of standard commercial transactions for goods or services offered by a lawyer when the lawyer has no advantage in dealing with the clients, such as when a client purchases a meal at a restaurant owned by the lawyer or when the client pays for parking in a parking lot owned by the lawyer. (See State Bar Formal Opn. 1995-141.) This Rule also ordinarily would not apply where the lawyer and client each make an investment on terms offered to the general public or a significant portion thereof as when, for example, a lawyer invests in a limited partnership syndicated by a third party, and the lawyer's client makes the same investment on the same terms. When a lawyer and a client each invest in the same business on the same terms offered to the public or a significant portion thereof, and the lawyer does not advise, influence or solicit the client with respect to the transaction, the lawyer does not enter into the transaction "with" the client for purposes of this Rule.

[5] This Rule is not intended to apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees. An agreement by which a lawyer is retained by a client and modifications to such agreements are governed, in part, by Rule 1.5[B3]. An agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future is not an ownership, possessory, security, or other pecuniary interest adverse to the client for purposes of this Rule. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case.

[6] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms-length transaction. *Setzer v. Robinson* (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. However, even when this Rule does not apply to the negotiation of the agreement by which a lawyer is retained by a client, other fiduciary principles might apply. Once a lawyer-client relationship has been established, the lawyer owes

fiduciary duties to the client that apply to the modification of the agreement. Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. (See, e.*g.*, *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; *Berk v. Twentynine Palms Ranchos, Inc*. (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212 [64 Cal.Rptr. 915].)

Adverse Pecuniary Interests

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

Full Disclosure to the Client

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

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

PROPOSED RULE (CLEAN VERSION)

[10] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction or acquisition itself. Under this Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction or acquisition, such as the risk that the lawyer will structure the transaction or acquisition or give legal advice in a way that favors the lawyer's interests at the expense of the client. The lawyer must also comply with Rule 1.7(d) [B3]. In some cases, the lawyer's interest may be such that Rule 1.7[B3] will preclude the lawyer from representing the client in the transaction or acquisition.

[11] There are additional considerations when the lawyer-client relationship will continue after the transaction or acquisition. For example, if the lawyer and the client enter into a transaction to form or acquire a business, the client might expect the lawyer to represent the business or the client with respect to the business after the transaction is completed. When the lawyer knows or reasonably should know that the client expects the lawyer to represent the business or the client with respect to the business or interest after the transaction or acquisition is completed, the lawyer must act in either of two ways. The lawyer must either (i) inform the client that the lawyer will not represent the business, or the client with respect to the business or interest, and must then act accordingly; or (ii) disclose in writing the risks associated with the lawyer's dual role as both legal adviser and participant in the business or owner of the interest. The client consent requirement in paragraph (c) includes a requirement that the client consent to the risks to the lawyer's representation of the client, which the lawyer has disclosed to the client as required by this Rule. A lawyer must also comply with the requirements of Rule 1.7(d)[B3] when the lawyer has an interest in the subject matter of the representation as a result of the transaction or acquisition.

[12] Even when the lawyer does not represent the client in the transaction or acquisition, there may be circumstances when the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client in another matter. When the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client, the lawyer must also disclose in writing the potential adverse effect on the lawyer-client relationship that may result from the lawyer's interest in the transaction or acquisition and must obtain the client's consent under paragraph (c). A lawyer must also comply with the requirements of Rule 1.7(d)[B3] when the lawyer has an interest in the subject matter of the representation as a result of the transaction or acquisition.

Full Disclosure and Consent

[13] In some cases, the lawyer's interest will preclude the lawyer from obtaining the client's consent to the transaction or acquisition, such as when the lawyer cannot continue to represent the client competently as a result of the transaction or acquisition. When a lawyer is precluded from obtaining a client's consent, the lawyer cannot enter into the transaction or acquisition with the client.

PROPOSED RULE (CLEAN VERSION)

Opportunity to Seek Advice of Independent Counsel

[14] Under paragraph (b), a lawyer must encourage the client to seek the advice of an independent lawyer and may not imply that obtaining the advice of an independent lawyer is unnecessary. An independent lawyer is a lawyer who does not have a financial interest in the transaction or acquisition and who does not have an ongoing, close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent. Once the lawyer has advised the client to seek the advice of an independent lawyer, the lawyer must afford the client a reasonable period of time to obtain such advice.

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

COMPARISON TO CURRENT CA RULE

Rule ~~3-300 Avoiding~~1.8.1: Business Transactions with a Client and Acquiring Interests Adverse to ~~a~~the Client

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

(~~A~~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~~that reasonably ~~have been~~can be understood by the client; and

(~~B~~b) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or is advised in writing ~~that~~by the ~~client may~~lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

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

~~DISCUSSION~~

Comment

Scope of Rule

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

[2] Except as set forth in comments [5] and [6], this Rule does not apply when a lawyer enters into a transaction with or acquires a pecuniary interest adverse to a client prior to the commencement of a lawyer-client relationship with the client. However, when a lawyer's interest in the transaction or in the adverse pecuniary interest results in the lawyer having a legal, business, financial or professional interest in the subject matter in which the lawyer is representing the client, the lawyer is required to comply with Rule 1.7(d)(4) [Rule 3-310(B)(4)].

COMPARISON TO CURRENT CA RULE

Business Transactions With Clients

~~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.~~

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

[4] Not all business transactions with a client are within the scope of this Rule ~~3-300 is~~. This Rule does not ~~intended~~apply to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client, and the requirements of the Rule are unnecessary and impractical. Examples of such products and services include banking and brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. The Rule also does not apply to similar types of standard commercial transactions for goods or services offered by a lawyer when the lawyer has no advantage in dealing with the clients, such as when a client purchases a meal at a restaurant owned by the lawyer or when the client pays for parking in a parking lot owned by the lawyer. (See State Bar Formal Opn. 1995-141.) This Rule also ordinarily would not apply where the ~~member~~lawyer and client each make an investment on terms offered to the general public or a significant portion thereof~~. For~~as when, for example, ~~rule 3-300 is not intended to apply where A,~~ a ~~member,~~lawyer invests in a limited partnership syndicated by a third party~~. B~~, ~~A's~~and the lawyer's client~~,~~ makes the same investment on the same terms. ~~Although A~~When a lawyer and ~~B are~~a client each ~~investing~~invest in the same business on the same terms offered to the public or a significant portion thereof, ~~A did~~and the lawyer does not advise, influence or solicit the client with respect to the transaction, the lawyer does not enter into the transaction "with" ~~B for~~ the client for purposes of ~~the rule~~this 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.~~

[5] This Rule is not intended to apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees. An agreement by which a lawyer is retained by a client and modifications to such agreements are governed, in part, by Rule 1.5 [Rule 4-200]. An agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future is not an ownership, possessory, security, or other pecuniary interest adverse to the client

for purposes of this Rule. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case.

[6] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms-length transaction. *Setzer v. Robinson* (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. However, even when this Rule does not apply to the negotiation of the agreement by which a lawyer is retained by a client, other fiduciary principles might apply. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement. Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. (See, e.*g.*, *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; *Berk v. Twentynine Palms Ranchos, Inc.* (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212 [64 Cal.Rptr. 915].)

Adverse Pecuniary Interests

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

Full Disclosure to the Client

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

[9] The requirement for full disclosure in writing in paragraph (a) requires a lawyer to provide the client with the same advice regarding the transaction or acquisition that the lawyer would provide to the client in a transaction with a third party. *Beery v. State Bar* (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]. It requires a lawyer to inform the client of all of the terms and all relevant facts of the transaction or acquisition, including the nature and extent of the lawyer's role and compensation in connection the transaction or acquisition. It also requires the lawyer to fully inform the client of the risks of the

COMPARISON TO CURRENT CA RULE

transaction or acquisition and facts that might discourage the client from engaging in the transaction or acquisition. (See *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; *Clancy v. State Bar* (1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; *Brockway v. State Bar* (1991) 53 Cal.3d 51 [278 Cal.Rptr. 836].) The burden is always on the lawyer to show that the transaction or acquisition and its terms were fair and just and that the client was fully advised. *Felton v. Le Breton* (1891) 92 Cal. 457, 469 [28 P. 490, 494].

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

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

[12] Even when the lawyer does not represent the client in the transaction or acquisition, there may be circumstances when the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client in another matter. When the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client, the lawyer must also disclose in writing the potential adverse effect on the lawyer-client relationship that may result from the lawyer's interest in the transaction or acquisition and must obtain the client's consent under paragraph (c). A lawyer must also comply with the requirements of Rule 1.7(d) when the lawyer has an interest in the subject matter of the representation as a result of the transaction or acquisition.

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Full Disclosure and Consent

[13] In some cases, the lawyer's interest will preclude the lawyer from obtaining the client's consent to the transaction or acquisition, such as when the lawyer cannot continue to represent the client competently as a result of the transaction or acquisition. When a lawyer is precluded from obtaining a client's consent, the lawyer cannot enter into the transaction or acquisition with the client.

Opportunity to Seek Advice of Independent Counsel

[14] Under paragraph (b), a lawyer must encourage the client to seek the advice of an independent lawyer and may not imply that obtaining the advice of an independent lawyer is unnecessary. An independent lawyer is a lawyer who does not have a financial interest in the transaction or acquisition and who does not have an ongoing, close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent. Once the lawyer has advised the client to seek the advice of an independent lawyer, the lawyer must afford the client a reasonable period of time to obtain such advice.

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

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Rule ~~1.8 Conflict Of Interest~~1.8.1: ~~Current Clients: Specific Rules~~Business Transactions with a Client and Acquiring Interests Adverse to the Client

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

(~~1~~a) ~~the~~The transaction or acquisition and its terms ~~on which the lawyer acquires the interest~~ are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that reasonably can be ~~reasonably~~ understood by the client; and

(~~2~~b) ~~the~~The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or is advised in writing by the lawyer to seek the advice of an independent lawyer of the ~~desirability of seeking~~client's choice and is given a reasonable opportunity to seek ~~the~~that advice ~~of independent legal counsel on the transaction~~; and

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

Comment

Scope of Rule

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

~~(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.~~

[2] Except as set forth in comments [5] and [6], this Rule does not apply when a lawyer enters into a transaction with or acquires a pecuniary interest adverse to a client prior to the commencement of a lawyer-client relationship with the client. However, when a lawyer's interest in the transaction or in the adverse pecuniary interest results in

the lawyer having a legal, business, financial or professional interest in the subject matter in which the lawyer is representing the client, the lawyer is required to comply with Rule 1.7(d)(4) [Rule 3-310(B)(4)].

~~**Comment**~~

Business Transactions ~~Between Client and Lawyer~~With Clients

[~~1~~3] ~~A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met~~This Rule applies even when the transaction is not ~~closely~~ related to the subject matter of the representation, as when a lawyer drafting a will for a client ~~learns that the client needs money for unrelated expenses and offers~~agrees to make a loan to ~~the~~a client to pay expenses that are not related to the representation. ~~The~~This Rule also applies to lawyers engaged in the sale of goods or non-legal services that are related to the practice of law, ~~for example, the sale of title~~such as when a lawyer sells insurance, brokerage or investment ~~services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for~~ products or services ~~that the client generally markets~~ to ~~others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable~~client.

[4] Not all business transactions with a client are within the scope of this Rule. This Rule does not apply to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client, and the requirements of the Rule are unnecessary and impractical. Examples of such products and services include banking and brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. The Rule also does not apply to similar types of standard commercial transactions for goods or services offered by a lawyer when the lawyer has no advantage in dealing with the clients, such as when a client purchases a meal at a restaurant owned by the lawyer or when the client pays for parking in a parking lot owned by the lawyer. (See State Bar Formal Opn. 1995-141.) This Rule also ordinarily would not apply where the lawyer and client each make an investment on terms offered to the general public or a significant portion thereof as when, for example, a lawyer invests in a limited partnership syndicated by a third party, and the lawyer's client makes the same investment on the same terms. When a lawyer

and a client each invest in the same business on the same terms offered to the public or a significant portion thereof, and the lawyer does not advise, influence or solicit the client with respect to the transaction, the lawyer does not enter into the transaction "with" the client for purposes of this Rule.

[5] This Rule is not intended to apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees. An agreement by which a lawyer is retained by a client and modifications to such agreements are governed, in part, by Rule 1.5 [Rule 4-200]. An agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future is not an ownership, possessory, security, or other pecuniary interest adverse to the client for purposes of this Rule. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case.

[6] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms-length transaction. *Setzer v. Robinson* (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. However, even when this Rule does not apply to the negotiation of the agreement by which a lawyer is retained by a client, other fiduciary principles might apply. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement. Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. (See, e.*g.*, *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; *Berk v. Twentynine Palms Ranchos, Inc*. (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212 [64 Cal.Rptr. 915].)

Adverse Pecuniary Interests

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

COMPARISON TO ABA MODEL RULE

Full Disclosure to the Client

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

~~[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).~~

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

[~~3~~10] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction ~~itself~~ or ~~when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction~~acquisition itself. ~~Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7.~~ Under ~~that~~this Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction or acquisition, such as the risk that the lawyer will structure the transaction or acquisition or give legal advice in a way that favors the lawyer's interests at the expense of the client. ~~Moreover, the~~The lawyer must ~~obtain the client's informed consent~~also comply with Rule 1.7(d). In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from ~~seeking~~representing the ~~client's consent to~~client in the transaction or acquisition.

COMPARISON TO ABA MODEL RULE

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

[12] Even when the lawyer does not represent the client in the transaction or acquisition, there may be circumstances when the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client in another matter. When the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client, the lawyer must also disclose in writing the potential adverse effect on the lawyer-client relationship that may result from the lawyer's interest in the transaction or acquisition and must obtain the client's consent under paragraph (c). A lawyer must also comply with the requirements of Rule 1.7(d) when the lawyer has an interest in the subject matter of the representation as a result of the transaction or acquisition.

Full Disclosure and Consent

[13] In some cases, the lawyer's interest will preclude the lawyer from obtaining the client's consent to the transaction or acquisition, such as when the lawyer cannot continue to represent the client competently as a result of the transaction or acquisition. When a lawyer is precluded from obtaining a client's consent, the lawyer cannot enter into the transaction or acquisition with the client.

Opportunity to Seek Advice of Independent Counsel

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

of an independent lawyer, the lawyer must afford the client a reasonable period of time to obtain such advice.

[4~~1~~5] ~~If~~A lawyer is not required to advise the client ~~is independently represented in~~to seek the advice of independent counsel if the client already has independent counsel with respect to the transaction or acquisition; however, the lawyer must still afford the client a reasonable opportunity to seek the advice of such independent counsel. Under such circumstances, the lawyer is not required to provide legal advice to the client; however, the lawyer is still required under paragraph (a)~~(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for~~to make full disclosure ~~is satisfied either by a written disclosure by~~to the ~~lawyer involved~~client in writing of all material facts related to the transaction or ~~by~~acquisition when the ~~client's independent counsel~~lawyer knows or reasonably should know that the client has not been informed of such facts. The fact that the client was independently represented in the transaction or acquisition is relevant in determining whether the ~~agreement was~~terms of the transaction or acquisition are fair and reasonable to the client as paragraph (a)~~(1) further~~ requires.

* * *

~~*Imputation of Prohibitions*~~

~~[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.~~

PROPOSED RULE (CLEAN VERSION)

Proposed Rule 1.13: Organization As Client

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

(c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e)(1).

(d) If, despite the lawyer's actions in accordance with paragraph (b), the officer, employee or other person insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right, and where appropriate, duty to resign or withdraw in accordance with Rule 1.16[B3].

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall inform the organization's highest authority of the lawyer's discharge, resignation or withdrawal, unless the lawyer reasonably believes that it is not in the best lawful interest of the organization to do so.

(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer representing an organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know (i) that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing or (ii) that the constituent is under the mistaken belief that he or she is in a client-lawyer relationship with the

lawyer. (See Rule 4.3[B3].) The lawyer shall not mislead such a constituent into believing, and shall make a reasonable effort to correct the constituent's mistaken belief, that the constituent is in a lawyer-client relationship with the lawyer or that the constituent may communicate confidential information to the lawyer that will not be disclosed to the organization or used for the organization's benefit.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rules 1.7[B3], 1.8.2 (3-310(E))[B4], 1.8.7 (3-310(D))[B4], 1.8.6 (3-310(F))[B4]. If the organization's consent to the dual representation is required by any of these Rules, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

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

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

[3] When a constituent of an organizational client communicates with the organization's lawyer in that constituent's organizational capacity, the lawyer has a duty to the organization under Business and Professions Code section 6068, subdivision (e)(1) to protect the confidential information imparted. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or [impliedly authorized] by the organizational client in order to carry out the representation or as otherwise permitted by Rule 3-100[B4] or by law.

PROPOSED RULE (CLEAN VERSION)

[4] When constituents of an organization make decisions for it, a lawyer ordinarily must accept those decisions even if their utility or prudence is doubtful. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Rule 1.4[B1] and Business and Professions Code, section 6068, subdivision (m). Paragraph (b) involves one aspect of that duty. It applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in conduct that the lawyer knows or reasonably should know violates a legal obligation to the organization or is a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization. In those circumstances, the lawyer must proceed as is reasonably necessary in the best lawful interest of the organization.

[5] Paragraph (b) applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in the conduct. Under this knowledge standard, a lawyer is not required to audit the client's activities or initiate an investigation to uncover the existence of such conduct. (Nevertheless, knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. See Rule 1.0(f)[B4].)

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

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

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

[9] Even in circumstances where a lawyer is not obligated by Rule 1.13[B3] to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. For example, if a lawyer acting on behalf of an organizational client knows that an actual or apparent agent of the organization acts or intends or refuses to act in a matter related to the representation in a manner that is or may be a violation of a legal duty to the organization or a violation of law reasonably imputable to the organization, but the lawyer does not know such conduct is likely to result in substantial injury to the organization, paragraph (b) does not apply. Nevertheless, in such circumstances, subject to Business and Professions Code section 6068, subdivision (e)(1), the lawyer may take such actions as appear to the lawyer to be in the best lawful interest of the organization. Such actions may include among others (i) urging reconsideration of the matter while explaining its likely consequences to the organization; or (ii) referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority, as determined by applicable law, that can act on behalf of the organization.

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

Relation to Other Rules

[11] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.4[B1], 1.8[B4], 1.16[B3], 3.3[B4] or 4.1[B4].

[12] Absent circumstances that would require withdrawal under paragraph (d), the lawyer may continue to represent an organizational client if, despite the lawyer's actions

under paragraph (b), the constituent continues to insist on or continues to act or refuse to act in a manner that triggers the application of paragraph (b). Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16[B3]. Where the lawyer continues to represent the organization, the lawyer must proceed as is reasonably necessary in the best lawful interests of the organization, including continuing to urge reconsideration, where appropriate. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2.1[B1] may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1) [B3].

Government Agencies and Organizations

[13] This Rule applies to the representation of governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. (See Scope [18].) Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. This Rule does not limit that authority.

[14] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068, subdivision (e) or Rule 3-100[B4], a governmental organization has the option of considering and establishing internal organizational policies that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.

Clarifying the Lawyer's Role

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

organization and may be disclosed to the organization or used for the benefit of the organization. (See Rule 4.3[B3].)

Dual Representation

[16] Paragraph (g) allows lawyers to represent both an organization and a constituent of an organization in the same matter, so long as the lawyer complies with these Rules, including Rules 1.7[B3], 1.8.2[3-310(E)][B4], 1.8.6[3-310(F)][B4], and 1.8.7[3-310(D)][B4]. Paragraph (g) requires that the organization's consent to dual representation of representation of the organization and a constituent of the organization must be provided by someone other than the constituent who is to be represented. However, when there is no other constituent who can consent for the organization, the constituent to be represented in the dual representation may provide such consent in some cases. (See State Bar Formal Opn. 1999-153.)

[17] This Rule is not intended to prohibit lawyers from representing both an organization and a constituent of an organization in separate matters, so long as the lawyer has addressed the conflicts of interest that may arise. (See State Bar Formal Opn. 2003-163.) In dealing with a close corporation or small association, lawyers commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law. (See *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) Similar issues can arise in a derivative action. (See *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].)

COMPARISON TO CURRENT CA RULE

Proposed Rule ~~3-600~~1.13: Organization ~~as~~As Client

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

(c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e)(1).

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

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall inform the organization's highest authority of the lawyer's discharge, resignation or withdrawal, unless the lawyer reasonably believes that it is not in the best lawful interest of the organization to do so.

(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer representing an organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know (i) that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing or (ii) that the constituent is under the mistaken belief that he or she is in a client-lawyer relationship with the

lawyer. [See Rule 4.3.] The lawyer shall not mislead such a constituent into believing, and shall make a reasonable effort to correct the constituent's mistaken belief, that the constituent is in a lawyer-client relationship with the lawyer or that the constituent may communicate confidential information to the lawyer that will not be disclosed to the organization or used for the organization's benefit.

(g) *A* lawyer *representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of* Rules *3*-310 [1.7 (3-310(B), (C)), 1.8.2 (3-310(E)), 1.8.7 (3-310(D)), 1.8.6 (3-310(F))]. *If the organization's consent to the dual representation is required by* any of these Rules, *the consent shall be given by an appropriate* official *of the organization other than the individual who is to be represented, or by the* shareholders.

Comment

The Entity as the Client

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

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

[3] When a constituent of an organizational client communicates with the organization's lawyer in that constituent's organizational capacity, the lawyer has a duty to the organization under Business and Professions Code section 6068, subdivision (e)(1) to protect the confidential information imparted. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or [impliedly authorized] by the organizational client in order to carry out the representation or as otherwise permitted by Rule 3-100 or by law.

COMPARISON TO CURRENT CA RULE

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

[5] Paragraph (b) applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in the conduct. Under this knowledge standard, a lawyer is not required to audit the client's activities or initiate an investigation to uncover the existence of such conduct. (Nevertheless, knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. [See Rule 1.0(f).])

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

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

COMPARISON TO CURRENT CA RULE

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

~~(B)~~[9] ~~If~~Even in circumstances where a ~~member~~lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. For example, if a lawyer acting on behalf of an ~~organization~~organizational client knows that an actual or apparent agent of the organization acts or intends or refuses to act in a matter related to the representation in a manner that is or may be a violation of a legal duty to the organization or a violation of law reasonably imputable to the organization, ~~or in a manner which~~but the lawyer does not know such conduct 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~~paragraph (~~e~~b) does not apply. ~~Subject~~Nevertheless, in such circumstances, subject to Business and Professions Code section 6068, subdivision (e)(1), the ~~member~~lawyer may take such actions as appear to the ~~member~~lawyer to be in the best lawful interest of the organization. Such actions may include among others~~:~~ *(*i) urging reconsideration of the matter while explaining its likely consequences to the organization; or (ii) referring *the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority,* as determined by applicable law, *that can act on behalf of the organization.*

~~(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.*~~

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

Relation to Other Rules

COMPARISON TO CURRENT CA RULE

[11] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.4, 1.8, 1.16, [3.3] or [4.1].

~~(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.~~

[12] Absent circumstances that would require withdrawal under paragraph (d), the lawyer may continue to represent an organizational client if, despite the lawyer's actions under paragraph (b), the constituent continues to insist on or continues to act or refuse to act in a manner that triggers the application of paragraph (b). Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16 [3-700]. Where the lawyer continues to represent the organization, the lawyer must proceed as is reasonably necessary in the best lawful interests of the organization, including continuing to urge reconsideration, where appropriate. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2.1 [1.2(d)] may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1).

Government Agencies and Organizations

[13] This Rule applies to the representation of governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. [See Scope [18].] Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. This Rule does not limit that authority.

[14] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068, subdivision (e) or Rule 3-100, a governmental organization has the option of considering and establishing internal organizational policies that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.

COMPARISON TO CURRENT CA RULE

Clarifying the Lawyer's Role

~~(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.~~

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

Dual Representation

~~(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.~~

[16] Paragraph (g) allows lawyers to represent both an organization and a constituent of an organization in the same matter, so long as the lawyer complies with these Rules, including Rules 1.7, [1.8.2], [1.8.6], and [1.8.7]. Paragraph (g) requires that the organization's consent to dual representation of representation of the organization and a constituent of the organization must be provided by someone other than the constituent who is to be represented. However, when there is no other constituent who can consent for the organization, the constituent to be represented in the dual representation may provide such consent in some cases. (See State Bar Formal Opn. 1999-153.)

~~DISCUSSION~~

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

COMPARISON TO CURRENT CA RULE

~~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.~~

[17] This Rule ~~3-600~~ is not intended to ~~create or to validate artificial distinctions between entities~~prohibit lawyers from representing both an organization and ~~their officers, employees, or members, nor is it the purpose~~a constituent of an organization in separate matters, so long as the ~~rule to deny~~lawyer has addressed the ~~existence or importance~~conflicts of ~~such formal distinctions~~interest that may arise. (See State Bar Formal Opn. 2003-163.) In dealing with a close corporation or small association, ~~members~~lawyers 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~~a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in ~~perceiving their correct duty~~matters related to control of the organization. *In resolving such multiple relationships,* lawyers *must rely on case law*. (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*~~ Similar issues can arise in a derivative action. (See *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].)

COMPARISON TO ABA MODEL RULE

~~Model~~Proposed Rule 1.13: Organization As Client

(a) ~~A lawyer employed or retained by~~In representing an organization ~~represents~~, a lawyer shall conform his or her representation to the concept that the client is the organization itself, acting through its ~~duly~~highest authorized ~~constituents~~officer, employee, body, or constituent overseeing the particular engagement.

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

(c) ~~Except~~In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all confidential information as provided in ~~paragraph~~Business and Professions Code section 6068, subdivision (~~d~~e)~~, if~~(1).

(~~1~~d) If, despite the lawyer's ~~efforts~~actions in accordance with paragraph (b), the ~~highest authority that can act on behalf of the organization~~officer, employee or other person insists upon action, or fails to ~~address in a timely and appropriate manner an action or a refusal to~~ act, in a manner that is ~~clearly~~ a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right, and where appropriate, duty to resign or withdraw in accordance with Rule 1.16.

~~(2) the lawyer reasonably believes that the violation is reasonably certain *to result in substantial injury to the organization,*~~
~~then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.~~

~~(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.~~

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to ~~paragraphs~~paragraph (b) ~~or (c)~~, or who resigns or withdraws under circumstances ~~that require or permit the lawyer to take action under either of those paragraphs~~described in paragraph (d), shall ~~proceed as the lawyer reasonably believes necessary to assure that~~inform the organization's highest authority ~~is informed~~ of the lawyer's discharge, resignation or withdrawal, unless the lawyer reasonably believes that it is not in the best lawful interest of the organization to do so.

(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer representing an organization shall explain the identity of the lawyer's client ~~when~~whenever the lawyer knows or reasonably should know (i) that the organization's interests are adverse to those of the ~~constituents~~constituent(s) with whom the lawyer is dealing or (ii) that the constituent is under the mistaken belief that he or she is in a client-lawyer relationship with the lawyer. [See Rule 4.3.] The lawyer shall not mislead such a constituent into believing, and shall make a reasonable effort to correct the constituent's mistaken belief, that the constituent is in a lawyer-client relationship with the lawyer or that the constituent may communicate confidential information to the lawyer that will not be disclosed to the organization or used for the organization's benefit.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of ~~Rule 1.7.~~Rules 3-310 [1.7 (3-310(B), (C)), 1.8.2 (3-310(E), 1.8.7 (3-310(D), 1.8.6 (3-310(F)]. If the organization's consent to the dual representation is required by ~~Rule 1.7,~~any of these Rules, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

~~[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.~~

[1] This Rule is intended to apply to all forms of legal organizations such as corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. An organizational client cannot act except through individuals who are authorized to conduct its affairs. The identity of an organization's

COMPARISON TO ABA MODEL RULE

constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. Any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization for purposes of the authorized matter.

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

[23] When ~~one of the constituents~~a constituent of an organizational client communicates with the organization's lawyer in that ~~person's~~constituent's organizational capacity, the ~~communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its~~ lawyer has a duty to ~~investigate allegations of wrongdoing, interviews made in~~ the ~~course of that investigation between the lawyer~~organization under Business and Professions Code section 6068, subdivision (e)(1) to protect the ~~client's employees or other constituents are covered by Rule 1.6.~~confidential information imparted. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or [impliedly authorized] by the organizational client in order to carry out the representation or as otherwise permitted by Rule ~~1.6.~~3-100 or by law.

[34] When constituents of ~~the~~an organization make decisions for it, ~~the decisions~~a lawyer ordinarily must ~~be accepted by the lawyer~~accept those decisions even if their utility or prudence is doubtful. ~~Decisions~~It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, ~~are not as such in~~however, has a duty to inform the ~~lawyer's province~~client of significant developments related to the representation under Rule 1.4 and Business and Professions Code, section 6068, subdivision (m). Paragraph (b) ~~makes clear, however,~~involves one aspect of that duty. It applies when ~~the~~a lawyer knows that ~~the organization is likely to be substantially injured by action of~~ an officer or other constituent of the organization intends to engage, is engaging or has engaged in conduct that the lawyer knows or reasonably should know violates a legal obligation to the organization or is ~~in~~a violation of law ~~that might be imputed~~reasonably imputable to the organization, and is likely *to result in substantial injury to the organization*. In those circumstances, the lawyer must proceed as is reasonably necessary in the best lawful interest of the organization. ~~As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.~~

[5] Paragraph (b) applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in the conduct. Under this knowledge standard, a lawyer is not required to audit the client's activities or initiate an investigation to uncover the existence of such conduct. (Nevertheless, knowledge

can be inferred from circumstances, and a lawyer cannot ignore the obvious. [See Rule 1.0(f).])

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

[47] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter~~; for~~. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. ~~Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.~~

[~~5~~8] Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority ~~reposes~~is elsewhere, for example, ~~in~~ the independent directors of a corporation.

[9] Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to

warrant doing so in the best interest of the organization. For example, if a lawyer acting on behalf of an organizational client knows that an actual or apparent agent of the organization acts or intends or refuses to act in a matter related to the representation in a manner that is or may be a violation of a legal duty to the organization or a violation of law reasonably imputable to the organization, but the lawyer does not know such conduct is likely to result in substantial injury to the organization, paragraph (b) does not apply. Nevertheless, in such circumstances, subject to Business and Professions Code section 6068, subdivision (e)(1), the lawyer may take such actions as appear to the lawyer to be in the best lawful interest of the organization. Such actions may include among others (i) urging reconsideration of the matter while explaining its likely consequences to the organization; or (ii) referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority, as determined by applicable law, that can act on behalf of the organization.

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

Relation to Other Rules

[11] *The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility* under Rules 1.4, 1.8, 1.16, [3.3] or [4.1].

[~~6~~12] ~~*The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility*~~Absent circumstances that would require withdrawal under ~~Rules 1.8, 1.16, 3.3 or 4.1. Paragraph~~paragraph (~~c~~d) ~~of this Rule supplements Rule 1.6(b) by providing an additional basis upon which~~, the lawyer may ~~reveal information relating~~continue to ~~the representation~~represent an organizational client if, ~~but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that~~despite the lawyer's ~~services be used in furtherance of the violation~~actions under paragraph (b), ~~but it is required that~~ the ~~matter be related~~constituent continues to insist on or continues to act or refuse to act in a manner that triggers the ~~lawyer's representation~~application of paragraph (b). Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the

lawyer is permitted or required to do so under Rule 1.16 [3-700]. Where the lawyer continues to represent the organization, the lawyer must proceed as is reasonably necessary in the best lawful interests of the organization, including continuing to urge reconsideration, where appropriate. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, ~~Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances~~ Rule 1.2.1 [1.2(d)] may also be applicable, in which event~~, withdrawal~~the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1) ~~may be required~~.

~~[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.~~

~~[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.~~

Government ~~Agency~~Agencies and Organizations

[~~9~~13] ~~The duty defined in this~~This Rule applies to the representation of governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. [See Scope [18].] Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. ~~Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.~~ In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and ~~regulation~~regulations. This Rule does not limit that authority. ~~See Scope.~~

[14] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068,

subdivision (e) or Rule 3-100, a governmental organization has the option of considering and establishing internal organizational policies that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.

Clarifying the Lawyer's Role

[~~10~~15] There are times when the lawyer knows or reasonably should know that the organization's interest may be or become adverse to those of one or more of its constituents or when the constituent with whom the lawyer is communicating mistakenly believes that the lawyer has formed a lawyer-client relationship with that constituent. ~~In~~Under paragraph (f), in such circumstances the lawyer ~~should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care~~ must ~~be taken to assure that~~not mislead the ~~individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that~~ constituent ~~individual, and~~into believing that ~~discussions~~a lawyer-client relationship exists between the lawyer ~~for~~and the constituent when such is not the case and shall make a reasonable effort to correct a constituent's mistaken belief in that regard. In such circumstances, the lawyer must advise the constituent that the lawyer does not represent the constituent and that communication between the lawyer and the constituent are not confidential as to the organization and ~~the individual~~ may ~~not~~ be ~~privileged~~disclosed to the organization or used for the benefit of the organization. [See Rule 4.3]

~~[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.~~

Dual Representation

~~[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.~~

~~**Derivative Actions**~~

~~[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.~~

~~[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to~~

COMPARISON TO ABA MODEL RULE

~~be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors an~~

[16] Paragraph (g) allows lawyers to represent both an organization and a constituent of an organization in the same matter, so long as the lawyer complies with these Rules, including Rules 1.7, [1.8.2], [1.8.6], and [1.8.7]. Paragraph (g) requires that the organization's consent to dual representation of representation of the organization and a constituent of the organization must be provided by someone other than the constituent who is to be represented. However, when there is no other constituent who can consent for the organization, the constituent to be represented in the dual representation may provide such consent in some cases. (See State Bar Formal Opn. 1999-153.)

[17] This Rule is not intended to prohibit lawyers from representing both an organization and a constituent of an organization in separate matters, so long as the lawyer has addressed the conflicts of interest that may arise. (See State Bar Formal Opn. 2003-163.) In dealing with a close corporation or small association, lawyers commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law. (See *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) Similar issues can arise in a derivative action. (See *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].)

PROPOSED RULE (CLEAN VERSION)

Rule 1.16: Declining Or Terminating Representation

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

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

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

(3) the client discharges the lawyer.

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

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

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

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

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

(5) the client breaches an agreement or obligation to the lawyer as to expenses or fees, and the lawyer has given the client a reasonable warning after the breach that the lawyer will withdraw unless the agreement or obligation is fulfilled;

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

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

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

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

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

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

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

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

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

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

Comment

[1] A lawyer should not accept a representation unless the lawyer reasonably believes the lawyer can complete the representation in compliance with these Rules and the State Bar Act. A lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule. This requirement applies, without limitation, to any sale under Rules 1.17.1[B3] and 1.17.2[B3]. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. (See Rules 1.2(c)[B4] and 6.5[B4].)

PROPOSED RULE (CLEAN VERSION)

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that would violate the Rules of Professional Conduct or the State Bar Act. The references to these Rules and to the State Bar Act in paragraphs (a)(1) and (b)(3) reflect the primacy of the lawyer's duties, for example, under Business and Professions Code sections 6067, 6068, 6103, and 6106. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client might make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Depending on the circumstances, when the client's conduct permits the lawyer to withdraw, or to seek permission to withdraw where that is required, the lawyer might consider counseling the client regarding the client's conduct, limiting the scope of the representation, or aiding the client in rectifying the client's prior conduct. (See Rules 1.2(c)[B4] and 1.4[B1].)

[3] [When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. (See also Rule 6.2[B4].)

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

Optional Withdrawal

[5] Paragraph (b)(2) is intended to permit a lawyer to withdraw from a representation even if the lawyer is not asked to participate in or further a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct. Even when a withdrawal is in these circumstances, the lawyer must comply with his or her duties under Business and Professions Code, section 6068, subdivision (e)(1) and Rule 3-100[B4].

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

Permission to Withdraw

[7] Lawyers must comply with their obligations to their clients under Rule 3-100 and to the courts under Rule 3.3[B4] when seeking permission to withdraw under paragraph (c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. (See Business and Professions Code sections 6068, subdivision (b), and 6103.) This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with Rules 3.36 and 5.71 of the California Rules of Court satisfies paragraph (c).

Assisting the Client upon Withdrawal

[8] Paragraph (d) requires the lawyer to take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." These steps will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and the lawyer has satisfied paragraph (e). The lawyer must satisfy paragraph (d) even if the lawyer has been unfairly discharged by the client.

[9] Paragraph (e) states a lawyer's duties when, after termination of a representation for any reason, new counsel seeks to obtain client files from the lawyer. It applies to client papers and property held by a lawyer in any form or format and codifies existing case law. (See *Academy of California Optometrists v. Superior* Court (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) See Penal C. sections 1054.2 and 1054.10 for examples of statutory restrictions on whether a lawyer may release client papers. Other statutory provisions might require the lawyer to provide client papers to someone other than the client, and in those situations paragraph (e) is intended to apply equally to the duty to provide papers to that other person. (See Penal Code section 1054.2(b).) Paragraph (e) also requires the lawyer to "promptly" return unearned fees paid in advance. If a client disputes the amount to be returned, the lawyer shall comply with Rule 1.15[B4].

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

COMPARISON TO CURRENT CA RULE

Rule ~~3-700. Termination of Employment~~1.16: Declining Or Terminating Representation

~~(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) Except as stated in paragraph (c), a lawyer shall not represent a client ~~before a tribunal~~or, where representation has commenced, shall withdraw from ~~employment with~~ the ~~permission~~representation 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~~1) ~~The member~~the lawyer knows or should know that ~~continued employment~~the representation will result in violation of these ~~rules~~Rules or of the State Bar Act; ~~or~~

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

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

~~(C) Permissive Withdrawal.~~

~~If rule 3-700~~(~~B~~b) ~~is not applicable~~ Except as stated in paragraph (c), a ~~member~~lawyer may ~~not request permission to~~ withdraw ~~in matters pending before~~from representing a ~~tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because~~client if:

~~(1) The client~~

COMPARISON TO CURRENT CA RULE

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

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

(~~c~~3) the client insists that the ~~member~~lawyer pursue a course of conduct that is ~~illegal~~criminal or ~~that is prohibited under these rules or the State Bar Act, or~~fraudulent;

(~~d~~4) the client by other conduct renders it unreasonably difficult for the ~~member~~lawyer 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~~5) the client breaches an agreement or obligation to the ~~member~~lawyer as to expenses or fees~~.~~, and the lawyer has given the client a reasonable warning after the breach that the lawyer will withdraw unless the agreement or obligation is fulfilled;

(~~2~~6) ~~The continued employment is likely~~the *client knowingly and freely assents* to ~~result in a violation of these rules or~~termination of the ~~State Bar Act~~representation; ~~or~~

(~~3~~7) ~~The~~the lawyer believes in good faith that the inability to work with co-counsel ~~indicates that~~makes it in the best interests of the client ~~likely will be served by withdrawal~~to withdraw from the representation; ~~or~~

(~~4~~8) ~~The member's~~the lawyer's mental or physical condition renders it difficult for the ~~member~~lawyer to carry out the employment effectively; ~~or~~

(~~5~~9) ~~The *client knowingly and freely assents* to termination~~a continuation of the ~~employment~~representation is likely to result in a violation of these Rules or the State Bar Act; or

(~~6~~10) ~~The member~~the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

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

~~A member whose employment has terminated shall:~~

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

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

(1) Subject to any applicable protective order ~~or~~, non-disclosure agreement or statutory limitation, the lawyer promptly shall 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, expert's reports and other writings, 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~~The lawyer promptly shall refund any part of a fee paid in advance that the lawyer 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~~lawyer for the matter.

Comment

~~*Discussion*~~

[1] A lawyer should not accept a representation unless the lawyer reasonably believes the lawyer can complete the representation in compliance with these Rules and the State Bar Act. A lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule. This requirement applies, without limitation, to any sale under Rules 1.17.1 and 1.17.2. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. (See Rules [1.2(c)] and [6.5].)

Mandatory Withdrawal

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

the client's conduct permits the lawyer to withdraw, or to seek permission to withdraw where that is required, the lawyer might consider counseling the client regarding the client's conduct, limiting the scope of the representation, or aiding the client in rectifying the client's prior conduct. (See Rules 1.2(c) and 1.4.)

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

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

Optional Withdrawal

[5] Paragraph (b)(2) is intended to permit a lawyer to withdraw from a representation even if the lawyer is not asked to participate in or further a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct. Even when a withdrawal is in these circumstances, the lawyer must comply with his or her duties under Business and Professions Code, section 6068, subdivision (e)(1) and Rule 3-100.

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

Permission to Withdraw

[7] Lawyers must comply with their obligations to their clients under Rule 3-100 and to the courts under [Rule 3.3] when seeking permission to withdraw under paragraph (c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. (See Business and Professions Code sections 6068, subdivision (b), and 6103.) This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with Rules 3.36 and 5.71 of the California Rules of Court satisfies paragraph (c).

Assisting the Client upon Withdrawal

~~Subparagraph~~[8] Paragraph (~~A~~d)~~(2) provides that "a member shall not withdraw from employment until~~requires the ~~member has taken~~lawyer to take " reasonable steps to avoid reasonably foreseeable prejudice to the rights of the ~~clients~~client." ~~What such~~These 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~~the

COMPARISON TO CURRENT CA RULE

lawyer has satisfied paragraph (~~D~~e). The lawyer must satisfy paragraph (d) even if the lawyer has been ~~satisfied~~unfairly discharged by the client.

[9] Paragraph (~~D~~e) ~~makes clear the member's~~states a lawyer's duties ~~in the recurring situation in which~~when, after termination of a representation for any reason, new counsel seeks to obtain client files from ~~a member discharged by~~ the ~~client~~lawyer. It applies to client papers and property held by a lawyer in any form or format and codifies existing case law. (See *Academy of California Optometrists v. Superior* Court (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) See Penal C. sections 1054.2 and 1054.10 for examples of statutory restrictions on whether a lawyer may release client papers. Other statutory provisions might require the lawyer to provide client papers to someone other than the client, and in those situations paragraph (e) is intended to apply equally to the duty to provide papers to that other person. (See Penal Code. section 1054.2(b).) Paragraph (~~D~~e) also requires ~~that~~ the ~~member~~lawyer to "promptly" return unearned fees paid in advance. If a client disputes the amount to be returned, the ~~member~~lawyer shall comply with ~~rule 4-100(A)(2)~~Rule [1.15].

[10] A lawyer must comply with paragraph (e)(1) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. Paragraph (~~D~~e)(1) is not intended to prohibit a ~~member~~lawyer from making, at the ~~member's~~lawyer's own expense, and retaining copies of papers released to the client, ~~nor~~or to prohibit a claim for the recovery of the ~~member's~~lawyer's expense in any subsequent legal proceeding. Paragraph (e)(1) also does not affirmatively grant to the lawyer a right to retain copies of client papers or to recover the cost of copying them; these are issues that might be determined by contract, court order, or rule of law.

COMPARISON TO ABA MODEL RULE

Rule 1.16: Declining Or Terminating Representation

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

(1) the lawyer knows or should know that the representation will result in violation of ~~the rules of professional conduct~~these Rules or ~~other law~~of the State Bar Act;

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

(3) the client discharges the lawyer ~~is discharged~~.

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

~~(1) withdrawal can be accomplished without material adverse effect on the interests of the client;~~

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

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

~~(3) the client has used the lawyer's services to perpetrate a crime or fraud;~~

(4~~3~~) ~~a~~ the client insists ~~upon taking action~~ that the lawyer ~~considers repugnant or with which the lawyer has~~pursue a ~~fundamental disagreement~~course of conduct that is criminal or fraudulent;

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

(5) the client ~~fails substantially to fulfill~~breaches an agreement or obligation to the lawyer ~~regarding the lawyer's services~~as to expenses or fees, and the lawyer has ~~been~~ given the client a reasonable warning after the breach that the lawyer will withdraw unless the agreement or obligation is fulfilled;

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

COMPARISON TO ABA MODEL RULE

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

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

(~~6~~9) a continuation of the representation ~~will~~is likely to result in ~~an unreasonable financial burden on the lawyer~~a violation of these Rules or ~~has been rendered unreasonably difficult by~~ the ~~client~~State Bar Act; or

(~~7~~10) the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal ~~exists~~.

(c) ~~A lawyer must comply with applicable law requiring notice to or~~If permission for termination of a representation is required by the rules of a tribunal ~~when terminating a representation. When ordered to do so by a tribunal~~, a lawyer shall ~~continue~~not terminate a representation ~~notwithstanding good cause for terminating the representation~~before that tribunal without its permission.

(d) ~~Upon termination of representation, a~~A lawyer shall ~~take~~not terminate a representation until the lawyer has taken reasonable steps to ~~the extent~~avoid reasonably ~~practicable~~foreseeable prejudice to ~~protect a client's interests~~the rights of the client, such as giving ~~reasonable notice to~~ the client~~, allowing time for employment of other counsel, surrendering papers and property~~sufficient notice to ~~which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to~~permit the client to ~~the extent permitted by~~retain other ~~law~~counsel, and complying with paragraph (e).

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

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

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

COMPARISON TO ABA MODEL RULE

Comment

[1] A lawyer should not accept a representation unless the lawyer reasonably believes the lawyer can complete the representation in ~~a matter unless it can be performed competently, promptly~~compliance with these Rules and the State Bar Act. A lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule. This requirement applies, without ~~improper conflict of interest and~~limitation, to ~~completion.~~any sale under Rules 1.17.1 and 1.17.2. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. (See Rules [1.2(c)] and ~~6.5. See also Rule 1.3, Comment~~ [~~4~~6.5].)

Mandatory Withdrawal

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

[3] [When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. (See also Rule 6.2. ~~Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.~~)]

~~*Discharge*~~

[4] A ~~client has a right to discharge a~~ lawyer ~~at any time, with or without cause,~~is not subject to ~~liability~~discipline for ~~payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare~~withdrawing under paragraph (a ~~written statement reciting~~)(1) or (2) if the lawyer has acted

reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong.

~~[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.~~

~~[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.~~

Optional Withdrawal

[~~7~~5] AParagraph (b)(2) is intended to permit a lawyer ~~may withdraw from representation in some circumstances. The lawyer has the option~~ to withdraw ~~if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified~~from a representation even if the ~~client persists~~lawyer is not asked to participate in or further a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct ~~even if~~. Even when a withdrawal is in these circumstances, the lawyer ~~does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on a taking action that the lawyer considers repugnant or~~must comply with ~~which the lawyer has a fundamental disagreement.~~his or her duties under Business and Professions Code, section 6068, subdivision (e)(1) and Rule 3-100.

[~~8~~6] AParagraph (b)(5) is intended to allow a lawyer ~~may~~to withdraw from a representation if the client refuses to abide by ~~the terms~~a material term of an agreement relating to the representation, such as an agreement concerning fees ~~or~~, court costs or other expenses, or an agreement limiting the objectives of the representation.

Permission to Withdraw

[7] Lawyers must comply with their obligations to their clients under Rule 3-100 and to the courts under [Rule 3.3] when seeking permission to withdraw under paragraph (c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. (See Business and Professions Code sections 6068, subdivision (b), and 6103.) This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with Rules 3.36 and 5.71 of the California Rules of Court satisfies paragraph (c).

COMPARISON TO ABA MODEL RULE

Assisting the Client upon Withdrawal

[8] Paragraph (d) requires the lawyer to take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." These steps will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and the lawyer has satisfied paragraph (e). The lawyer must satisfy paragraph (d) even if the lawyer has been unfairly discharged by the client.

[9] Paragraph (e) states a lawyer's duties when, after termination of a representation for any reason, new counsel seeks to obtain client files from the lawyer. It applies to client papers and property held by a lawyer in any form or format and codifies existing case law. (See *Academy of California Optometrists v. Superior* Court (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) See Penal C. sections 1054.2 and 1054.10 for examples of statutory restrictions on whether a lawyer may release client papers. Other statutory provisions might require the lawyer to provide client papers to someone other than the client, and in those situations paragraph (e) is intended to apply equally to the duty to provide papers to that other person. (See Penal Code. section 1054.2(b).) Paragraph (e) also requires the lawyer to "promptly" return unearned fees paid in advance. If a client disputes the amount to be returned, the lawyer shall comply with Rule [1.15].

~~[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.~~

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

PROPOSED RULE (CLEAN VERSION)

Rule 1.17.1: Purchase and Sale of a Law Practice

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

(a) Fees charged to clients shall not be increased solely by reason of the purchase or sale.

(b) If the purchase or sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Rule 3-100[B4] and 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 lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer:

(i) 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 and might have the right to act in his or her own behalf; that the client may take possession of any client papers and property held by the lawyer in any form or format as provided by Rule 1.16(e)[B3]; and that, if no response is received to the notification within 90 days after it is sent or, if 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, and

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

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

(i) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to 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 or might have the right to act in his or her own behalf; that the client may take possession of any client papers and property held by the lawyer in any form or format as provided by Rule 1.16(e)[B3]; and that, if no response is received

to the notification within 90 days after it is sent, the purchaser may act on behalf of the client until otherwise notified by the client, and

(ii) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer, provided that the client's consent shall be presumed until otherwise notified by the client if the purchaser receives no response to the paragraph (b)(1)(i) notification within 90 days after it is sent 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 lawyer shall be taken.

(d) A lawyer shall not disclose confidential information to a non-lawyer in connection with a sale under this Rule.

(e) This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice.

Comment

[1] Any sale of a law practice necessarily raises substantive issues regarding the rights and interests of the seller's clients and the public's perception of the Bar. Accordingly, this Rule permits a lawyer to sell a practice only in accordance with the limitations contained in this Rule and in other Rules and in State Bar Act provisions to which this Rule and Comment refer. These limitations are intended to assure that the interests and reasonable expectations of the seller's clients have priority over the seller's interests.

Sale of Entire Practice

[2] The requirement that substantially all of the seller's practice be sold is intended to prohibit piecemeal sales of individual cases and to protect those clients whose matters are less lucrative or who for other reasons might find it difficult to secure other counsel if a sale could be limited to only some lucrative matters. This Rule also recognizes that, in some instances, a seller will be unable to transfer some matters to the purchaser because, for example, the purchaser has a conflict of interest or lacks pertinent expertise, and the seller is permitted to retain those individual files. (See Comments [4] and [10].) However, when a seller seeks only to sell some substantive fields or geographic areas of practice but retain other substantive fields or other geographic areas, the seller must comply with Rule 1.17.2[B3] (Area of Practice Rule).

[3] Paragraph (a) is satisfied even if the seller retains clients who decide not to accept the purchaser as their lawyer or whom the purchaser cannot represent because of conflicts of interest. Paragraph (a) also is satisfied even if seller is employed after the sale as a lawyer for a public agency, by a legal services organization, or as in-house counsel to a business.

[4] Transfer of individual client matters, where permitted, is governed by Rule 1.5.1[B1]. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by Rule 5.4(a)[B3].

Termination of Practice by the Seller

[5] This Rule is not intended to prohibit a selling lawyer from returning to the private practice of law after the entire practice has been sold.

Fee Arrangement Between Client and Purchaser

[6] Paragraph (a) applies to the seller, who may not raise fees solely for the purpose of a sale, and to the purchaser, who may not raise fees solely because of the sale. If a client agrees to retain the purchaser, the purchaser may assume the seller's fee agreement with the client or enter into a fee agreement with the client. (See, for example, Business and Professions Code sections 6147, 6147.5, and 6148.) If a client decides not to retain the purchaser, the selling lawyer might have to continue to represent the client unless the selling lawyer is disabled or is deceased.

[7] This rule is not intended to create a contract by estoppel between the purchaser and any client. If the purchaser acts to protect the interests of a client following the 90-day period described paragraphs (b)(1) or (2) but has not entered into a written fee agreement with the client, or does so during the 90-day period as described in paragraph (b), the purchaser might be entitled to payment on a quantum meruit basis.

Sale of Practice of Disabled or Deceased Lawyer

[8] When the selling lawyer is disabled or deceased, relevant statutes may also be applicable. (See, e.g. Probate Code, sections 2468, 9764, and Business and Professions Code sections 6180, et seq. and 6190, et seq.)

Other Applicable Ethical Standards

[9] If the purchaser would have a potential or actual conflict of interest by accepting the representation of any client of the seller, the transaction may not proceed as to that client absent compliance with Rules 1.7[B3], 1.8[B4] and 1.9[B4], as applicable. The notice required by paragraph (b) shall comply with the requirements of Rule 7.1(b) and (c)[B1] and with Rule 1.5[B3].

Confidential Information and Client Consent

[10] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a reasonably identifiable client no more violate the seller's duty of confidentiality than do similar discussions concerning the possible association of another lawyer or mergers between firms, and to engage in such discussions the seller is not required to give notice to or obtain consent form any client. However, the seller is required to obtain client consent before providing to a potential purchaser any confidential client information. The obligation to obtain client consent under paragraphs (b) and (c) does not require disclosure of the terms of the agreement between purchaser and seller, but there might be circumstances in which disclosure of particular terms might be required under Rule 1.4[B1] and Business and Professions Code section 6068, subdivision (m).

[11] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive any sale under this Rule.

Applicability of the Rule

[12] This Rule does not apply to the formation of a law firm, admission of a lawyer to a law firm, retirement from a law firm, or retirement plans and similar arrangements, when done in good faith as part of engaging in the practice of law together and not for the purpose of avoiding the limitations of this Rule. This Rule also does not apply to a sale of tangible assets of a law practice. This Rule also does not apply to the sale only of a substantive field of practice or of a geographic area of practice, both of which are governed by Rule 1.17.2[B3] (Area of Practice Rule).

COMPARISON TO CURRENT CA RULE

Rule ~~2-300 Sale or~~1.17.1: Purchase and Sale of a Law Practice ~~of a Member, Living or Deceased~~

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

(~~A~~a) Fees charged to clients shall not be increased solely by reason of ~~such~~the purchase or sale.

(~~B~~b) If the purchase or sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Rule 3-100 and Business and Professions Code section 6068, subdivision (e), then~~;~~:

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

(~~a~~i) 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 and might have the right to act in his or her own behalf; that the client may take possession of any client papers and property~~, as required~~held by ~~rule 3-700~~the lawyer in any form or format as provided by Rule 1.16(~~D~~e); and that, if no response is received to the notification within 90 days ~~of the sending of such notice,~~after it is sent or ~~in the event~~, if 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~~ii) the purchaser shall obtain the written consent of the client, provided that ~~such~~the client's consent shall be presumed until otherwise notified by the client if the purchaser receives no response ~~is received~~ to the ~~notification specified in subparagraph~~paragraph (~~a~~b)(1)(i) notification within 90 days ~~of the date of the sending of such notification~~after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure to act during ~~such~~the 90-day period.

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

(~~a~~i) the seller, or the ~~member~~lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall

cause a written notice to be given to 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 or might have the right to act in his or her own behalf; that the client may take possession of any client papers and property~~, as required~~held by ~~rule 3-700~~the lawyer in any form or format as provided by Rule 1.16(~~D~~e); and that, if no response is received to the notification within 90 days ~~of the sending of such notice~~after it is sent, 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~~ii) the seller, or the ~~member~~lawyer 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~~the client's consent shall be presumed until otherwise notified by the client if the purchaser receives no response ~~is received~~ to the ~~notification specified in subparagraph~~paragraph (~~a~~b)(1)(i) notification within 90 days ~~of the date of the sending of such notification~~after it is sent to the client's last address as shown on the records of the seller.

(~~C~~c) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a ~~member~~lawyer 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~~d) ~~Confidential information~~A lawyer shall not ~~be disclosed~~disclose confidential information to a non-~~member~~lawyer in connection with a sale under this ~~rule~~Rule.

(~~F~~e) ~~Admission~~This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice ~~shall not be deemed a sale or purchase under this rule~~.

Comment

[1] Any sale of a law practice necessarily raises substantive issues regarding the rights and interests of the seller's clients and the public's perception of the Bar. Accordingly, this Rule permits a lawyer to sell a practice only in accordance with the limitations contained in this Rule and in other Rules and in State Bar Act provisions to which this Rule and Comment refer. These limitations are intended to assure that the

interests and reasonable expectations of the seller's clients have priority over the seller's interests.

~~Discussion:~~

Sale of Entire Practice

~~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.~~

[2] The requirement that substantially all of the seller's practice be sold is intended to prohibit piecemeal sales of individual cases and to protect those clients whose matters are less lucrative or who for other reasons might find it difficult to secure other counsel if a sale could be limited to only some lucrative matters. This Rule also recognizes that, in some instances, a seller will be unable to transfer some matters to the purchaser because, for example, the purchaser has a conflict of interest or lacks pertinent expertise, and the seller is permitted to retain those individual files. (See Comments [4] and [10].) However, when a seller seeks only to sell some substantive fields or geographic areas of practice but retain other substantive fields or other geographic areas, the seller must comply with Rule 1.17.2 (Area of Practice Rule).

~~"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).~~

[3] Paragraph (a) is satisfied even if the seller retains clients who decide not to accept the purchaser as their lawyer or whom the purchaser cannot represent because of conflicts of interest. Paragraph (a) also is satisfied even if seller is employed after the sale as a lawyer for a public agency, by a legal services organization, or as in-house counsel to a business.

[4] Transfer of individual client matters, where permitted, is governed by ~~rule~~Rule 1.5.1 [2-~~200.~~200]. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by ~~rule~~Rule 5.4(a) [1-~~320.~~320 (~~Amended by order of Supreme Court, operative September 14, 1992.~~A)].

Termination of Practice by the Seller

[5] This Rule is not intended to prohibit a selling lawyer from returning to the private practice of law after the entire practice has been sold.

Fee Arrangement Between Client and Purchaser

[6] Paragraph (a) applies to the seller, who may not raise fees solely for the purpose of a sale, and to the purchaser, who may not raise fees solely because of the sale. If a client agrees to retain the purchaser, the purchaser may assume the seller's fee

agreement with the client or enter into a fee agreement with the client. (See, for example, Business and Professions Code sections 6147, 6147.5, and 6148.) If a client decides not to retain the purchaser, the selling lawyer might have to continue to represent the client unless the selling lawyer is disabled or is deceased.

[7] This rule is not intended to create a contract by estoppel between the purchaser and any client. If the purchaser acts to protect the interests of a client following the 90-day period described paragraphs (b)(1) or (2) but has not entered into a written fee agreement with the client, or does so during the 90-day period as described in paragraph (b), the purchaser might be entitled to payment on a quantum meruit basis.

Sale of Practice of Disabled or Deceased Lawyer

[8] When the selling lawyer is disabled or deceased, relevant statutes may also be applicable. (See, e.g. Probate Code, sections 2468, 9764, and Business and Professions Code sections 6180, et seq. and 6190, et seq.)

Other Applicable Ethical Standards

[9] If the purchaser would have a potential or actual conflict of interest by accepting the representation of any client of the seller, the transaction may not proceed as to that client absent compliance with Rules 1.7, 1.8 and 1.9, as applicable. The notice required by paragraph (b) shall comply with the requirements of Rule 7.1(b) and (c) and with Rule 1.5.

Confidential Information and Client Consent

[10] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a reasonably identifiable client no more violate the seller's duty of confidentiality than do similar discussions concerning the possible association of another lawyer or mergers between firms, and to engage in such discussions the seller is not required to give notice to or obtain consent form any client. However, the seller is required to obtain client consent before providing to a potential purchaser any confidential client information. The obligation to obtain client consent under paragraphs (b) and (c) does not require disclosure of the terms of the agreement between purchaser and seller, but there might be circumstances in which disclosure of particular terms might be required under Rule 1.4 and Business and Professions Code section 6068, subdivision (m).

[11] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive any sale under this Rule.

COMPARISON TO CURRENT CA RULE

Applicability of the Rule

[12] This Rule does not apply to the formation of a law firm, admission of a lawyer to a law firm, retirement from a law firm, or retirement plans and similar arrangements, when done in good faith as part of engaging in the practice of law together and not for the purpose of avoiding the limitations of this Rule. This Rule also does not apply to a sale of tangible assets of a law practice. This Rule also does not apply to the sale only of a substantive field of practice or of a geographic area of practice, both of which are governed by Rule 1.17.2 (Area of Practice Rule).

PROPOSED RULE (CLEAN VERSION)

Rule 1.17.2: Purchase and Sale of Geographic Area or Substantive Field of Law Practice

(a) A lawyer or personal representative of the estate of a lawyer may sell a geographic area or substantive field of a law practice, including goodwill, if:

(1) the seller in good faith makes all of the geographic area or substantive field of the practice available for sale;

(2) the seller sells substantially all of the geographic area or substantive field of the practice;

(3) if a geographic area of practice is sold, the seller ceases practicing law in that geographic area;

(4) fees charged to clients in the seller's geographic area of practice or clients of the seller's substantive area of practice are not increased solely by reason of the sale;

(5) the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work;

(6) notice is given to clients of the lawyer or of the firm whose geographic area or substantive area of practice will be sold, and consents are obtained from them, as stated in paragraphs (c) and (d) of this Rule;

(7) confidential information is not disclosed to a non-lawyer in connection with the sale;

(8) the sale is directly to one or more lawyers or law firms;

(9) absent extraordinary circumstances, the seller sells that substantive field of the practice only one time;

(10) the seller never resumes practice in a geographic area covered by a sale; and

(11) absent extraordinary circumstances, the seller never resumes practice in the substantive field of law that is the subject of a sale.

(b) Notice to Clients if the Lawyer Whose Geographic Area or Substantive Field of Practice Is Sold Is Dead or Incapacitated. If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer:

PROPOSED RULE (CLEAN VERSION)

(1) the purchaser shall cause a written notice to be given to the client stating that the particular interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and may have the right to act in his or her own behalf; that the client may take possession of any client papers and property held by the lawyer in any form or format, as provided by Rule 1.16[B3]; and that, if no response is received to the notification within 90 days after it is sent or, if the client's rights would be prejudiced by failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client; and

(2) the purchaser shall obtain the written consent of the client, provided that the client's consent shall be presumed until otherwise notified by the client if the purchaser receives no response to the paragraph (c)(1) notification within ninety days after it is sent 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 the ninety-day period.

(c) Notice to Clients in All Other Circumstances. In all other circumstances, not less than 90 days prior to the transfer:

(1) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to the client stating that the particular interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel or might have the right to act in his or her own behalf; that the client may take possession of any client papers and property held by the lawyer in any form or format, as provided by Rule 1.16[B3]; and that, if no response is received to the notification within 90 days after it is sent, the purchaser may act on behalf of the client until otherwise notified by the client; and

(2) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer, provided that the client's consent shall be presumed until otherwise notified by the client if the purchaser receives no response to the paragraph (c)(1) notification within 90 days after it is sent to the client's last address as shown on the records of the seller.

(d) Extraordinary Circumstances. For purposes of this Rule, the phrase "extraordinary circumstances" shall include, without limitation:

(1) a change of the lawyer's health, so that he or she must change the substantive fields or geographic area in which he or she practices; and

(2) a lawyer may resume handling cases in a substantive field or practice or in a geographic area of practice previously sold if the lawyer previously sold all of his or her practice to enter government service and later returned to private practice.

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

(f) A lawyer shall not disclose confidential information to a non-lawyer in connection with a sale under this Rule.

(g) This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice.

Comment

[1] Any sale of part of a law practice necessarily raises substantive issues regarding the rights and interests of the seller's clients and the public's perception of the Bar. Accordingly, this Rule permits a lawyer or law firm to sell part of its practice only in accordance with the limitations contained in this Rule, and in other Rules and in State Bar Act provisions to which this Rule and Comment refer. These limitations are intended to assure that the interests and reasonable expectations of the seller's clients have priority over the seller's interests.

Direct Sale of a Geographic Area or Substantive Field of Practice

[2] The requirement that substantially all of the geographic area or substantive field of the seller's practice be sold is intended to prohibit piecemeal sales of individual cases and to protect those clients whose matters are less lucrative or who might find it difficult to secure other counsel if a sale could be limited to only some lucrative matters.

[3] Paragraph (a) is satisfied even if the seller retains clients who decide not to accept the purchaser as their lawyer or whom the purchaser cannot represent because of conflicts of interest. Paragraph (a) also is satisfied even if seller is employed after the sale as a lawyer for a public agency, by a legal services organization, or as in-house counsel to a business.

[4] Paragraph (a)(8) requires that any sale under this Rule be direct to the purchaser without compensation to any broker, finder, or middleman.

Termination of Practice by the Seller

[5] This rule does not prohibit a lawyer who has sold a substantive field of the practice from resuming practice in that field of the law in the event of extraordinary

circumstances. However, a seller of a geographic area of practice may never resume practicing in that geographic area, regardless of future circumstances.

Fee Arrangement Between Client and Purchaser

[6] Paragraph (a)(4) applies to the seller, who may not raise fees solely for the purpose of a sale, and to the purchaser, who may not raise fees solely because of the sale. If a client agrees to retain the purchaser, the purchaser may assume the seller's fee agreement with the client or enter into a fee agreement with the client that complies with paragraphs (a)(4) and (5). See Business and Professions Code sections 6147, 6147.5, and 6148. If a client decides not to retain the purchaser, the selling lawyer or law firm might have to continue to represent the client unless the selling lawyer is disabled or is deceased.

Sale of Practice of Disabled or Deceased Lawyer

[7] When the selling lawyer is disabled or deceased, relevant statutes may also be applicable. (See, e.g. Probate Code sections 2468, 9764, and Business and Professions Code sections 6180, et seq. and 6190, et seq.)

[8] This rule is not intended to create a contract by estoppel between the purchaser and any client. If the purchaser acts to protect the interests of a client following the 90-day period described paragraphs (b)(1) or (c)(1) but has not entered into a written fee agreement with the client, or does so during the 90-day period as described in paragraph (b)(2),the purchaser might be entitled to payment on a *quantum meruit* basis.

Other Applicable Ethical Standards

[9] If the purchaser would have a potential or actual conflict of interest by accepting the representation of any client of the seller, the transaction may not proceed as to that client absent compliance with Rules 1.7[B3], 1.8[B4] and 1.9[B4], as applicable. The notice required by paragraph (b) shall comply with the requirements of Rule 7.1(b)[B1] and (c).

[10] Lawyers who engage in a transaction described in this Rule also must comply with Rules 1.5.1[B1] and 5.4[B3] when applicable.

Confidential Information and Client Consent

[11] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a reasonably identifiable client no more violate the seller's duty of confidentiality than do similar discussions concerning the possible association of another lawyer or mergers between firms, and to engage in such discussions the seller is not required to give notice to or obtain consent form any client. However, the seller is required to obtain client consent before providing to a potential purchaser any confidential client information. The obligation to obtain client consent under paragraphs (b) and (c) do not require disclosure of the terms of the agreement between purchaser

and seller, but there might be circumstances in which disclosure of particular terms might be required under Rule 1.4[B1] and Business and Professions Code section 6068, subdivision (m).

[12] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive any sale under this Rule.

Applicability of the Rule

[13] This Rule does not apply to the formation of a law firm, admission of a lawyer to a law firm, retirement from a law firm, or retirement plans and similar arrangements, when done in good faith as part of engaging in the practice of law together and not for the purpose of avoiding the limitations of this Rule. This Rule also does not apply to a sale of tangible assets of a law practice.

[14] This Rule does not apply to a transfer of legal representation between lawyers or law firms that is unrelated to the sale of a geographic area of practice or a substantive field of practice.

COMPARISON TO ABA MODEL RULE

Rule ~~1.17~~1.17.2: Purchase and Sale ~~Of~~of Geographic Area or Substantive Field of Law Practice

(a) A lawyer or personal representative of the estate of a ~~law firm~~lawyer may sell a geographic area or ~~purchase~~substantive field of a law practice, ~~or an area of practice,~~ including ~~good will~~goodwill, if ~~the following conditions are satisfied~~:

(1) the seller in good faith makes all of the geographic area or substantive field of the practice available for sale;

(2) the seller sells substantially all of the geographic area or substantive field of the practice;

(3) if a geographic area of practice is sold, the seller ceases practicing law in that geographic area;

(~~a~~4) ~~The seller ceases~~fees charged to ~~engage~~clients in the ~~private practice~~seller's geographic area of ~~law,~~practice or ~~in~~clients of the seller's substantive area of practice ~~that has been sold, [in~~are not increased solely by reason of the ~~geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted~~sale;

(5) the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work;

(6) notice is given to clients of the lawyer or of the firm whose geographic area or substantive area of practice will be sold, and consents are obtained from them, as stated in paragraphs (c) and (d) of this Rule;

(7) confidential information is not disclosed to a non-lawyer in connection with the sale;

(~~b~~8) ~~The entire practice, or~~ the ~~entire area of practice,~~sale is ~~sold~~directly to one or more lawyers or law firms;

~~(c) The seller gives written notice to each of the seller's clients regarding:~~

~~(1) the proposed sale;~~

(~~2~~9) absent extraordinary circumstances, the ~~client's right to retain other counsel or to take possession~~seller sells that substantive field of the ~~file~~practice only one time; ~~and~~

(10) the seller never resumes practice in a geographic area covered by a sale; and

COMPARISON TO ABA MODEL RULE

(3~~1~~11) absent extraordinary circumstances, the ~~fact that~~seller never resumes practice in the ~~client's consent to the transfer~~substantive field of law that is the ~~client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days~~subject of ~~receipt of the notice~~a sale.

(b) Notice to Clients if the Lawyer Whose Geographic Area or Substantive Field of Practice Is Sold Is Dead or Incapacitated. If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer:

~~If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.~~

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

~~(d) The fees charged clients shall not be increased by reason of the sale.~~

~~**Comment**~~

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

(2) the purchaser shall obtain the written consent of the client, provided that the client's consent shall be presumed until otherwise notified by the client if the purchaser receives no response to the paragraph (c)(1) notification within ninety days after it is sent 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 the ninety-day period.

~~*Termination of Practice by the Seller*~~

(c) Notice to Clients in All Other Circumstances. In all other circumstances, not less than 90 days prior to the transfer:

COMPARISON TO ABA MODEL RULE

~~[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.~~

(1) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to the client stating that the particular interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel or might have the right to act in his or her own behalf; that the client may take possession of any client papers and property held by the lawyer in any form or format, as provided by Rule 1.16; and that, if no response is received to the notification within 90 days after it is sent, the purchaser may act on behalf of the client until otherwise notified by the client; and

(2) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer, provided that the client's consent shall be presumed until otherwise notified by the client if the purchaser receives no response to the paragraph (c)(1) notification within 90 days after it is sent to the client's last address as shown on the records of the seller.

(d) Extraordinary Circumstances. For purposes of this Rule, the phrase "extraordinary circumstances" shall include, without limitation:

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

(1) a change of the lawyer's health, so that he or she must change the substantive fields or geographic area in which he or she practices; and

(2) a lawyer may resume handling cases in a substantive field or practice or in a geographic area of practice previously sold if the lawyer previously sold all of his or her practice to enter government service and later returned to private practice.

COMPARISON TO ABA MODEL RULE

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

(f) A lawyer shall not disclose confidential information to a non-lawyer in connection with a sale under this Rule.

~~[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice when the lawyer leaves the geographic area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17(a).~~

(g) This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice.

Comment

~~[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.~~

[1] Any sale of part of a law practice necessarily raises substantive issues regarding the rights and interests of the seller's clients and the public's perception of the Bar. Accordingly, this Rule permits a lawyer or law firm to sell part of its practice only in accordance with the limitations contained in this Rule, and in other Rules and in State Bar Act provisions to which this Rule and Comment refer. These limitations are intended to assure that the interests and reasonable expectations of the seller's clients have priority over the seller's interests.

COMPARISON TO ABA MODEL RULE

Direct Sale of ~~*Entire Practice or Entire*~~a Geographic Area or Substantive Field of Practice

[~~6~~2] The ~~Rule requires~~requirement that substantially all of the geographic area or substantive field of the seller's ~~entire~~ practice~~, or an entire area of practice,~~ be sold~~. The prohibition against sale~~is intended to prohibit piecemeal sales of ~~a less than an entire practice area protects~~individual cases and to protect those clients whose matters are less lucrative ~~and~~or who might find it difficult to secure other counsel if a sale could be limited to ~~substantial fee generating~~only some lucrative matters. ~~The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.~~

[3] Paragraph (a) is satisfied even if the seller retains clients who decide not to accept the purchaser as their lawyer or whom the purchaser cannot represent because of conflicts of interest. Paragraph (a) also is satisfied even if seller is employed after the sale as a lawyer for a public agency, by a legal services organization, or as in-house counsel to a business.

[4] Paragraph (a)(8) requires that any sale under this Rule be direct to the purchaser without compensation to any broker, finder, or middleman.

Termination of Practice by the Seller

[5] This rule does not prohibit a lawyer who has sold a substantive field of the practice from resuming practice in that field of the law in the event of extraordinary circumstances. However, a seller of a geographic area of practice may never resume practicing in that geographic area, regardless of future circumstances.

Fee Arrangement Between Client ~~*Confidences, Consent*~~ and ~~*Notice*~~Purchaser

[6] Paragraph (a)(4) applies to the seller, who may not raise fees solely for the purpose of a sale, and to the purchaser, who may not raise fees solely because of the sale. If a client agrees to retain the purchaser, the purchaser may assume the seller's fee agreement with the client or enter into a fee agreement with the client that complies with paragraphs (a)(4) and (5). See Business and Professions Code sections 6147, 6147.5, and 6148. If a client decides not to retain the purchaser, the selling lawyer or law firm might have to continue to represent the client unless the selling lawyer is disabled or is deceased.

Sale of Practice of Disabled or Deceased Lawyer

[7] When the selling lawyer is disabled or deceased, relevant statutes may also be applicable. (See, e.g. Probate Code sections 2468, 9764, and Business and Professions Code sections 6180, et seq. and 6190, et seq.)

COMPARISON TO ABA MODEL RULE

[8] This rule is not intended to create a contract by estoppel between the purchaser and any client. If the purchaser acts to protect the interests of a client following the 90-day period described paragraphs (b)(1) or (c)(1) but has not entered into a written fee agreement with the client, or does so during the 90-day period as described in paragraph (b)(2),the purchaser might be entitled to payment on a *quantum meruit* basis.

Other Applicable Ethical Standards

[9] If the purchaser would have a potential or actual conflict of interest by accepting the representation of any client of the seller, the transaction may not proceed as to that client absent compliance with Rules 1.7, 1.8 and 1.9, as applicable. The notice required by paragraph (b) shall comply with the requirements of Rule 7.1(b) and (c).

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

Confidential Information and Client Consent

[~~7~~11] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a ~~specific representation of an~~reasonably identifiable client no more violate the ~~confidentiality provisions~~seller's duty of ~~Model Rule 1.6~~confidentiality than do ~~preliminary~~similar discussions concerning the possible association of another lawyer or mergers between firms, ~~with respect~~and to ~~which client consent~~engage in such discussions the seller is not required~~. Providing the purchaser access~~ to ~~client-specific information relating~~give notice to ~~the representation and to the file, however, requires client~~or obtain consent form any client. ~~The Rule provides that before such information can be disclosed by~~However, the seller is required to ~~the purchaser the~~obtain client ~~must be given actual written notice~~consent before providing to a potential purchaser any confidential client information. The obligation to obtain client consent under paragraphs (b) and (c) do not require disclosure of the ~~contemplated sale, including the identity~~terms of the agreement between purchaser~~,~~ and ~~must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time~~seller, ~~consent to the sale is presumed~~but there might be circumstances in which disclosure of particular terms might be required under Rule 1.4 and Business and Professions Code section 6068, subdivision (m).

~~[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by~~

~~which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist.)~~

[~~9~~12] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive ~~the~~any sale ~~of the practice or area of practice~~under this Rule.

~~*Fee Arrangements Between Client and Purchaser*~~

~~[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.~~

~~*Other Applicable Ethical Standards*~~

~~[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).~~

~~[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).~~

Applicability of the Rule

~~[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.~~

[~~14~~13] ~~Admission~~This Rule does not apply to ~~or~~the formation of a law firm, admission of a lawyer to a law firm, retirement from a law ~~partnership or professional association~~firm, or retirement plans and similar arrangements, when done in good faith as part of engaging in the practice of law together and not for the purpose of avoiding the limitations of this Rule. This Rule also does not apply to a sale of tangible assets of a law practice~~, do not constitute a sale or purchase governed by this Rule~~.

COMPARISON TO ABA MODEL RULE

[~~15~~14] This Rule does not apply to ~~the transfers~~a transfer of legal representation between lawyers ~~when such transfers are~~or law firms that is unrelated to the sale of a geographic area of practice or ~~an area~~a substantive field of practice.

PROPOSED RULE (CLEAN VERSION)

Rule 3.4: Fairness To Opposing Party And Counsel

A lawyer shall not:

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

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

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

(d) A lawyer shall not advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein;

(e) offer an inducement to a witness that is prohibited by law, or directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying.

(2) reasonable compensation to a witness for loss of time in attending or testifying.

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

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

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

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

(1) the person is a relative or an employee or other agent of a client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(2) the person may be required by law to refrain from disclosing the information.

PROPOSED RULE (CLEAN VERSION)

Comment

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

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. e, e.g., Penal Code section 135; 18 United States Code section 1501-1520.) Falsifying evidence is also generally a criminal offense. (See, e.g., Penal Code section 132; 18 United States Code section 1519.) Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. (See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].)

[3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule. Nor is this Rule intended to establish a standard that governs civil or criminal discovery disputes.

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

[5] Paragraph (h) permits a lawyer to request employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. (See also Rules 4.2[B3] and 4.3[B3].)

COMPARISON TO CURRENT CA RULES

Rule ~~5-220. Suppression of Evidence~~3.4: Fairness To Opposing Party And Counsel

A lawyer *shall not*:

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

~~*A* member *shall not*~~(b) suppress any evidence that the ~~member~~lawyer or the ~~member's~~lawyer's client has a legal obligation to reveal or to produce~~.~~;

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

~~Rule 5-310. Prohibited Contact With Witnesses~~

(~~A~~d) ~~Advise~~A lawyer shall not 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~~e) ~~Directly~~offer an inducement to a witness that is prohibited by law, or directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a ~~member~~lawyer may advance, guarantee, or acquiesce in the payment of:

(1) ~~Expenses~~expenses reasonably incurred by a witness in attending or testifying.

(2) ~~Reasonable~~reasonable compensation to a witness for loss of time in attending or testifying.

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

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

~~Rule 5-200. Trial Conduct~~

(~~E~~g) ~~Shall not~~in trial, assert personal knowledge of ~~the~~ facts ~~at~~in issue~~,~~ except when testifying as a witness~~.~~; or

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

(1) the person is a relative or an employee or other agent of a client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(2) the person may be required by law to refrain from disclosing the information.

Comment

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

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. (See, e.g., Penal Code section 135; 18 United States Code section 1501-1520.) Falsifying evidence is also generally a criminal offense. (See, e.g., Penal Code section 132; 18 United States Code section 1519.) Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. (See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].)

[3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule. Nor is this Rule intended to establish a standard that governs civil or criminal discovery disputes.

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

[5] Paragraph (h) permits a lawyer to request employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. (See also Rules 4.2 and 4.3.)

COMPARISON TO ABA MODEL RULE

Rule 3.4: Fairness To Opposing Party And Counsel

A lawyer shall not:

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

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

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

(d) A lawyer shall not 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~~e) ~~*falsify evidence*, *counsel or assist a witness to testify falsely*, or~~ offer an inducement to a witness that is prohibited by law~~;~~, or directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying.

(2) reasonable compensation to a witness for loss of time in attending or testifying.

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

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

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

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

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

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

COMPARISON TO ABA MODEL RULE

(~~2~~1) *the person is a relative or an employee or other agent of a client and* the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(2) the person may be required by law to refrain from disclosing the information.

Comment

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

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. ~~Applicable law in many jurisdictions makes it an~~It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. (See, e.g., Penal Code section 135; 18 United States Code section 1501-1520.) Falsifying evidence is also generally a criminal offense. (See, e.g., Penal Code section 132; 18 United States Code section 1519.) Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. ~~In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances~~(See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].)

[3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule. Nor is this Rule intended to establish a standard that governs civil or criminal discovery disputes.

~~[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.~~

[4] Paragraph (e) permits a lawyer to pay a non-expert witness for the time spent preparing for a deposition or trial. Compensation for preparation time or for time spent testifying must be reasonable in light of all the circumstances and cannot be contingent

COMPARISON TO ABA MODEL RULE

upon the content of the witness's testimony or on the outcome of the matter. Possible bases upon which to determine reasonable compensation include the witness' normal rate of pay if currently employed, what the witness last earned if currently unemployed, or what others earn for comparable activity.

[45] Paragraph (fh) permits a lawyer to adviserequest employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. (See also Rule 4.2.Rules 4.2 and 4.3.)

PROPOSED RULE (CLEAN VERSION)

Rule 3.5: Impartiality and Decorum of the Tribunal

(a) Except as permitted by the Code of Judicial Ethics, a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the lawyer and the judge, official, or employee is such that gifts are customarily given and exchanged.This Rule shall not prohibit a lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.

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

(1) in open court;

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

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

(4) in writing with a copy thereof furnished promptly to all other counsel; or6

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

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

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

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

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

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

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

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

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

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

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

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

(j) A lawyer shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

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

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

Comment

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

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order. A lawyer who is serving as a temporary judge, referee or court-appointed arbitrator under Rule 2.4.1[B1] may communicate ex parte with such persons in the performance of that service.

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

[4] It is improper for a lawyer to communicate with a juror who has been removed from an empaneled jury, regardless of whether notice is given to other counsel, until

such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

COMPARISON TO CURRENT CA RULE (Part 1)

Rule ~~5-300. Contact With Officials~~3.5: Impartiality and Decorum of the Tribunal

(~~A~~a) ~~A member~~Except as permitted by the Code of Judicial Ethics, a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the ~~member~~lawyer and the judge, official, or employee is such that gifts are customarily given and exchanged. ~~Nothing contained in this rule~~This Rule shall not prohibit a ~~member~~lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.

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

(1) ~~In~~in open court; ~~or~~

(2) ~~With~~with the consent of all other counsel in ~~such~~the matter; ~~or~~

(3) ~~In~~in the presence of all other counsel in ~~such~~the matter; ~~or~~

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

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

(~~C~~c) As used in this ~~rule~~Rule, ~~the phrase~~ "judge ~~or~~" and " judicial officer" shall include law clerks, research attorneys, or other court personnel who participate in the ~~decision-making~~decisionmaking process, and arbitrators.

COMPARISON TO CURRENT CA RULE (Part 2)

Rule ~~5-320. Contact With Jurors~~3.5: Impartiality and Decorum of the Tribunal

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

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

*(*f) *During a trial a* lawyer *who is not connected with the case shall not communicate*
(~~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~~lawyer knows is a juror in the case.

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

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

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

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

(~~D~~4) ~~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~~communication is intended to ~~harass or embarrass the juror or to~~ influence the juror's actions in future jury service.

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

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

*(*j) *A* lawyer *shall reveal promptly to the court improper conduct by a person who is*
(~~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 ~~a~~ either a member of a venire or a juror or a member of his or her family, of which the ~~member~~lawyer has knowledge.

COMPARISON TO CURRENT CA RULE (Part 2)

(k) *This* Rule *does not prohibit a* lawyer *from communicating with persons who are* ~~(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~~l) For the purposes of this ~~rule~~Rule, "juror" means any empaneled, discharged, or excused juror. ~~(Amended by order of Supreme Court, operative September 14, 1992.)~~

Comment

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

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order. A lawyer who is serving as a temporary judge, referee or court-appointed arbitrator under Rule 2.4.1 may communicate ex parte with such persons in the performance of that service.

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

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

COMPARISON TO ABA MODEL RULE

Rule 3.5: Impartiality ~~And~~and Decorum ~~Of The~~of the Tribunal

~~*A lawyer shall not*:~~

~~(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;~~

(a) Except as permitted by the Code of Judicial Ethics, a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the lawyer and the judge, official, or employee is such that gifts are customarily given and exchanged.This Rule shall not prohibit a lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.

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

(1) in open court;

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

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

(4) in writing with a copy thereof furnished promptly to all other counsel; or6

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

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

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

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

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

COMPARISON TO ABA MODEL RULE

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

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

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

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

(~~d~~4) ~~engage in conduct~~the communication is intended to ~~disrupt a tribunal.~~influence the juror's actions in future jury service.

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

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

(j) A lawyer shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

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

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

Comment

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

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order. A lawyer who is serving as a

COMPARISON TO ABA MODEL RULE

temporary judge, referee or court-appointed arbitrator under Rule 2.4.1 [1-710] may communicate ex parte with such persons in the performance of that service.

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

[~~3~~4] ~~A~~It is improper for a lawyer ~~may on occasion want~~ to communicate with a juror ~~or prospective juror after~~who has been removed from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged~~. The lawyer may do so~~from further service or unless the communication is ~~prohibited by law or a court order but must respect the desire~~part of the ~~juror not to talk with~~official proceedings of the ~~lawyer. The lawyer may not engage in improper conduct during the communication~~case.

~~[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.~~

~~[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).~~

PROPOSED RULE (CLEAN VERSION)

Rule 3.10: Threatening Criminal, Administrative, or Disciplinary Charges

(a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(b) As used in paragraph (a) of this Rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(c) As used in this Rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Comment

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

[2] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code sections 1377-78. This Rule also does not apply to an offer made in good faith by a lawyer who represents a governmental agency to settle all, or a portion of, the civil, administrative, and criminal aspects of the case. For example, where there is a good faith basis for believing that a defendant in a civil action who has not yet been criminally charged might be criminally liable for his or her conduct, a lawyer representing a governmental agency would be acting in good faith if the lawyer offers to pursue a settlement of all aspects of the defendant's case, including any potential criminal liability, so as not to have the government incur the further expense of a criminal investigation. On the other hand, a lawyer representing a governmental agency would not be acting in good faith if, without a good faith basis for believing that criminal liability might be established, the lawyer were to offer not to seek the filing of criminal charges in return for the defendant's agreement not to file a claim for false arrest against law enforcement personnel or the government.

PROPOSED RULE (CLEAN VERSION)

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

COMPARISON TO CURRENT CA RULE

Rule ~~5-100.~~3.10: Threatening Criminal, Administrative, or Disciplinary Charges

(~~A~~a) A ~~member~~lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(~~B~~b) As used in paragraph (~~A~~a) of this ~~rule~~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~~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~~c) As used in ~~paragraph (A) of~~ this ~~rule~~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:~~

Comment

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

~~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.~~

[2] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code sections 1377-78. This Rule also does not apply to an offer made in good faith by a lawyer who represents a governmental agency to settle all, or a portion of, the civil, administrative, and criminal aspects of the case. For example, where there is a good faith basis for believing that a defendant in a civil action who has not yet been criminally charged might be criminally liable for his or her conduct, a lawyer representing a governmental agency would be acting in good faith if the lawyer offers to pursue a settlement of all aspects of the defendant's case, including any potential criminal liability, so as not to have the government incur the further expense of a criminal investigation. On the other hand, a lawyer representing a governmental agency would not be acting in good faith if, without a good faith basis for believing that

COMPARISON TO CURRENT CA RULE

criminal liability might be established, the lawyer were to offer not to seek the filing of criminal charges in return for the defendant's agreement not to file a claim for false arrest against law enforcement personnel or the government.

[3] Paragraph (~~B~~b) ~~is intended to exempt~~exempts 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.~~

PROPOSED RULE (CLEAN VERSION)

Rule 4.2: Communication With a Person Represented By Counsel

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

(b) For purposes of this Rule, a "person" includes:

(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or

(2) A current employee, member, agent or other constituent of a represented organization if the subject matter of the communication is any act or omission of the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or if the statement of such person may constitute an admission on the part of the organization.

(c) This Rule shall not prohibit:

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

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

(3) Communications authorized by law or a court order.

(d) When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(e) In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

(f) A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true

(g) As used in this Rule, "public official" means a duly-appointed or elected public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization.

Comment

Overview and Purpose

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] As used in paragraph (a), "the subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[5] The prohibition against "indirect" communication with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator.

[6] This Rule does not prohibit communications with a represented person, or an employee, member, agent, or other constituent of a represented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between the government and a private person, or between two organizations, does not prohibit a lawyer for either from communicating with the other, or with nonlawyer representatives of the other, regarding a separate matter.

Communications Between Represented Persons

[7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer's client that such communication may be made. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client's communications with a represented person, subject to paragraph (e).

[8] This Rule is not intended to prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (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.

Knowledge of Representation and Limited Scope Representation

[9] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances. (See Rule 1.0.1[B1].)

[10] When a lawyer knows that a person is represented by another lawyer on a limited basis, the lawyer may communicate with that person with respect to matters outside the scope of the limited representation. (See Comment [6].) In addition, this Rule is not intended to prevent a lawyer from communicating with a person who is represented by another lawyer on a limited basis where the lawyer who seeks to communicate does not know about the other lawyer's limited representation because that representation has not been disclosed. In either event, a lawyer seeking to communicate with such person must comply with paragraphs (d) and (e) or with Rule 4.3[B3].

Represented Organizations and Constituents of Organizations

[11] "Represented organization" as used in paragraph (b) includes all forms of private and governmental organizations, such as corporations, partnerships, limited liability companies, and unincorporated associations.

[12] As used in paragraph (b)(1) "managing agent" means an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.

[13] Paragraph (b)(2) applies to current employees, members, agents, and constituents of the organization, who, whether because of their rank or implicit or explicit conferred authority, are authorized to speak on behalf of the organization in connection with the subject matter of the representation, with the result that their statements may constitute an admission on the part of the organization under the applicable California laws of agency or evidence. (See Evidence Code §1222.)

[14] If an employee, member, agent, or other constituent of an organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this Rule.

[15] [*This Rule generally does not apply to communications with an organization's in-house lawyer who is acting as a legal representative of the organization where the organization is also represented by outside legal counsel in the matter that is the subject of the communication. However, this Rule does apply when the in-house lawyer is a "person" under paragraph (b)(2) with whom communications are prohibited by the Rule.*"]***

Represented Government Organizations

[16] Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. A lawyer seeking to communicate on behalf of a client with a governmental organization must comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3[B3].

Represented Person Seeking Second Opinion

[17] Paragraph (c)(2) is intended to permit a lawyer who is not already representing another person in the matter to communicate with a person seeking to hire new counsel or to obtain a second opinion where the communication is initiated by that person. A lawyer contacted by such a person continues to be bound by other Rules of Professional Conduct. (See, e.g., Rules 7.3[B1] and 1.7[B3].)

Communications Authorized by Law or Court Order

[18] This Rule is intended to control communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule, case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that 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.

[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the "authorized by law" exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy

***** The Commission has not yet adopted this comment, but desires public input before considering whether to adopt a comment of this type.**

considerations, including a person's right to counsel under the 5th and 6th Amendments of the United States. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.

[20] Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law.

[21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

Prohibited Objectives of Communications Permitted Under This Rule

[22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).

[23] In communicating with a current employee, member, agent, or other constituent of an organization as permitted under paragraph (b)(2), including a public official or employee of a governmental organization, a lawyer must comply with paragraphs (d) and (e). A lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. (See Rule 4.4[B4].) Obtaining information from a current or former employee, member, agent, or other constituent of an organization that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules 4.4[B4], 8.4(c)[B1] and 8.4(d)[B1].

[24] When a lawyer's communications with a person are not subject to this Rule because the lawyer does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3[B3].

COMPARISON TO CURRENT CA RULE

Rule ~~2-100~~4.2: Communication With a Person Represented ~~Party~~By Counsel

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

(~~B~~b) For purposes of this ~~rule~~Rule, a "~~party~~person" includes:

(1) ~~An~~A current officer, director, partner, or managing agent of a corporation ~~or~~, partnership, association, ~~and a partner~~ or ~~managing agent of a partnership~~other represented organization; or

(2) ~~An association member or an~~A current employee ~~of an association~~, ~~corporation~~member, agent or ~~partnership,~~other constituent of a represented organization if the subject matter of the communication is any act or omission of ~~such person~~the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or ~~whose~~if the statement of such person may constitute an admission on the part of the organization.

(~~C~~c) This ~~rule~~Rule shall not prohibit:

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

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

(3) Communications ~~otherwise~~ authorized by law or a court order.

~~DISCUSSION~~

(d) When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(e) In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

COMPARISON TO CURRENT CA RULE

(f) A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true.

(g) As used in this Rule, "public official" means a duly-appointed or elected public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization.

Comment

Overview and Purpose

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] As used in paragraph (a), "the subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[5] The prohibition against "indirect" communication with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator.

[6] This Rule does not prohibit communications with a represented person, or an employee, member, agent, or other constituent of a represented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between the government and a private person, or between two organizations, does not prohibit a lawyer for either from communicating with the other, or with nonlawyer representatives of the other, regarding a separate matter.

COMPARISON TO CURRENT CA RULE

Communications Between Represented Persons

[7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer's client that such communication may be made. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client's communications with a represented person, subject to paragraph (e).

[8] This Rule is not intended to prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (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.

Knowledge of Representation and Limited Scope Representation

[9] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances. (See Rule 1.0.1.)

[10] When a lawyer knows that a person is represented by another lawyer on a limited basis, the lawyer may communicate with that person with respect to matters outside the scope of the limited representation. (See Comment [6].) In addition, this Rule is not intended to prevent a lawyer from communicating with a person who is represented by another lawyer on a limited basis where the lawyer who seeks to communicate does not know about the other lawyer's limited representation because that representation has not been disclosed. In either event, a lawyer seeking to communicate with such person must comply with paragraphs (d) and (e) or with Rule 4.3.

Represented Organizations and Constituents of Organizations

[11] "Represented organization" as used in paragraph (b) includes all forms of private and governmental organizations, such as corporations, partnerships, limited liability companies, and unincorporated associations.

[12] As used in paragraph (b)(1) "managing agent" means an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.

[13] Paragraph (b)(2) applies to current employees, members, agents, and constituents of the organization, who, whether because of their rank or implicit or explicit conferred authority, are authorized to speak on behalf of the organization in connection with the subject matter of the representation, with the result that their statements may

constitute an admission on the part of the organization under the applicable California laws of agency or evidence. (See Evidence Code §1222.)

[14] If an employee, member, agent, or other constituent of an organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this Rule.

[15] [This Rule generally does not apply to communications with an organization's in-house lawyer who is acting as a legal representative of the organization where the organization is also represented by outside legal counsel in the matter that is the subject of the communication. However, this Rule does apply when the in-house lawyer is a "person" under paragraph b(2) with whom communications are prohibited by the Rule."]

Represented Government Organizations

[16] Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. A lawyer seeking to communicate on behalf of a client with a governmental organization must comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3.

Represented Person Seeking Second Opinion

[17] Paragraph *(c)(2) is intended to permit a* lawyer who is not already representing another person in the matter *to communicate with a* person *seeking to hire new counsel or to obtain a second opinion* where the communication is initiated by that person. *A* lawyer *contacted by such a* person *continues to be bound by other Rules of Professional Conduct. (See, e.g.,* Rules 7.3 *and* 1.7.*)*

Communications Authorized by Law or Court Order

[18] This Rule ~~2-100~~ is intended to control communications between a ~~member~~lawyer and persons the ~~member~~lawyer knows to be represented by counsel unless a statutory scheme ~~or~~, court rule, case law ~~will override~~, or court order overrides the ~~rule~~Rule. There are a number of express statutory schemes which authorize communications ~~between a member and person who~~that would otherwise be subject to this ~~rule~~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.~~

COMPARISON TO CURRENT CA RULE

[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the "authorized by law" exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy considerations, including a person's right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.

~~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.~~

[20] Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law.

~~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.~~

COMPARISON TO CURRENT CA RULE

~~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.*)*~~

[21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

Prohibited Objectives of Communications Permitted Under This Rule

[22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).

[23] In communicating with a current employee, member, agent, or other constituent of an organization as permitted under paragraph (b)(2), including a public official or employee of a governmental organization, a lawyer must comply with paragraphs (d) and (e). A lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. (See [Rule 4.4.]) Obtaining information from a current or former employee, member, agent, or other constituent of an organization that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules [4.4], 8.4(c) and 8.4(d).

[24] When a lawyer's communications with a person are not subject to this Rule because the lawyer does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

COMPARISON TO ABA MODEL RULE

Rule 4.2: Communication ~~with~~With a Person Represented ~~by~~By Counsel

(a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer ~~or is authorized to do so by law or a court order~~.

(b) For purposes of this Rule, a "person" includes:

(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or

(2) A current employee, member, agent or other constituent of a represented organization if the subject matter of the communication is any act or omission of the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or if the statement of such person may constitute an admission on the part of the organization.

(c) This Rule shall not prohibit:

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

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

(3) Communications authorized by law or a court order.

(d) When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(e) In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

(f) A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true.

(g) As used in this Rule, "public official" means a duly-appointed or elected public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization.

COMPARISON TO ABA MODEL RULE

Comment

Overview and Purpose

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the ~~uncounselled~~uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] ~~The~~This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] As used in paragraph (a), "the subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[5] The prohibition against "indirect" communication with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator.

[4~~5~~6] This Rule does not prohibit ~~communication~~communications with a represented person, or an employee ~~or~~, member, agent, or other constituent of ~~such~~ a ~~person~~represented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between ~~a~~the government ~~agency~~ and a private ~~party~~person, or between two organizations, does not prohibit a lawyer for either from communicating with the other, or with nonlawyer representatives of the other, regarding a separate matter. ~~Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.~~

COMPARISON TO ABA MODEL RULE

Communications Between Represented Persons

[7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer's client that such communication may be made. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client's communications with a represented person, subject to paragraph (e).

[8] This Rule is not intended to prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (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.

Knowledge of Representation and Limited Scope Representation

[9] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances. (See Rule 1.0.1.)

[10] When a lawyer knows that a person is represented by another lawyer on a limited basis, the lawyer may communicate with that person with respect to matters outside the scope of the limited representation. (See Comment [6].) In addition, this Rule is not intended to prevent a lawyer from communicating with a person who is represented by another lawyer on a limited basis where the lawyer who seeks to communicate does not know about the other lawyer's limited representation because that representation has not been disclosed. In either event, a lawyer seeking to communicate with such person must comply with paragraphs (d) and (e) or with Rule 4.3.

Represented Organizations and Constituents of Organizations

[11] "Represented organization" as used in paragraph (b) includes all forms of private and governmental organizations, such as corporations, partnerships, limited liability companies, and unincorporated associations.

[12] As used in paragraph (b)(1) "managing agent" means an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.

[13] Paragraph (b)(2) applies to current employees, members, agents, and constituents of the organization, who, whether because of their rank or implicit or explicit conferred authority, are authorized to speak on behalf of the organization in connection with the subject matter of the representation, with the result that their statements may

constitute an admission on the part of the organization under the applicable California laws of agency or evidence. (See Evidence Code §1222.)

[14] If an employee, member, agent, or other constituent of an organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this Rule.

[15] [This Rule generally does not apply to communications with an organization's in-house lawyer who is acting as a legal representative of the organization where the organization is also represented by outside legal counsel in the matter that is the subject of the communication. However, this Rule does apply when the in-house lawyer is a "person" under paragraph b(2) with whom communications are prohibited by the Rule."]

Represented Government Organizations

~~[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.~~

[16] Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. A lawyer seeking to communicate on behalf of a client with a governmental organization must comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3.

Represented Person Seeking Second Opinion

[17] Paragraph (c)(2) is intended to permit a lawyer who is not already representing another person in the matter to communicate with a person seeking to hire new counsel or to obtain a second opinion where the communication is initiated by that person. A lawyer contacted by such a person continues to be bound by other Rules of Professional Conduct. (See, e.g., Rules 7.3 and 1.7.)

Communications Authorized by Law or Court Order

[18] This Rule is intended to control communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule,

case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that 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.

[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the "authorized by law" exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy considerations, including a person's right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.

[20] Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law.

[~~6~~21] A lawyer who is uncertain whether a communication with a represented person is permissible ~~may~~might be able to seek a court order. A lawyer ~~may~~ also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

Prohibited Objectives of Communications Permitted Under This Rule

[22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).

~~[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the~~

COMPARISON TO ABA MODEL RULE

~~organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.~~

[23] In communicating with a current employee, member, agent, or other constituent of an organization as permitted under paragraph (b)(2), including a public official or employee of a governmental organization, a lawyer must comply with paragraphs (d) and (e). A lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. (See [Rule 4.4.]) Obtaining information from a current or former employee, member, agent, or other constituent of an organization that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules [4.4], 8.4(c) and 8.4(d).

~~[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.~~

[~~9~~24] ~~In the event the person~~When a lawyer's communications with ~~whom~~a person are not subject to this Rule because the lawyer ~~communicates~~does not know the person is represented by counsel in the matter, or because the lawyer knows the person is ~~known to be~~ represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

PROPOSED RULE (CLEAN VERSION)

Rule 4.3: Dealing With Unrepresented Person

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

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

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In acting to correct a misunderstanding about the lawyer's role, a lawyer may disclose the client's identity if it is not confidential. Whether the lawyer identifies the lawyer's client, the lawyer shall explain, where necessary, that the client has interests opposed to those of the unrepresented person. For guidance when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f)[B3].

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

[3] The Rule distinguishes between situations involving an unrepresented person whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented

person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

[4] Paragraph (b) prohibits a lawyer, in communicating with a person who is not represented by counsel, from seeking to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege, or is otherwise protected from disclosure by a legally cognizable duty owed by the unrepresented person. Obtaining information from an unrepresented person that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules 4.4[B4], 8.4(c)[B1] and 8.4(d)[B1]. Paragraph (b) does not prohibit a lawyer from seeking to obtain such information in a legal proceeding pending before a tribunal where the person to whom the duty is owed is present or is represented by counsel.

[5] Paragraph (b) does not prohibit a lawyer from seeking to obtain, during a legal proceeding, information from an unrepresented person that is protected from disclosure by a legally cognizable duty owed by the unrepresented person, where the person to whom the duty is owed is present or is represented by counsel at the proceeding.

[6] Paragraph (a) is not intended to apply to covert criminal and civil enforcement investigations. Paragraph (a) is also not intended to apply to the exceptional situation where a lawyer supervises an investigator posing as a consumer or other person engaged in an otherwise lawful transaction for the purpose of gathering evidence that is not otherwise available where the lawyer reasonably believes that a violation of civil rights or intellectual property rights exists and the conduct of the lawyer and the conduct of the investigator the lawyer is supervising does not otherwise violate this Rules or the State Bar Act.

COMPARISON TO ABA MODEL RULE

Rule 4.3: Dealing With Unrepresented Person

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

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

Comment

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

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

[~~2~~3] The Rule distinguishes between situations involving an unrepresented ~~persons~~person whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend

COMPARISON TO ABA MODEL RULE

on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

[4] Paragraph (b) prohibits a lawyer, in communicating with a person who is not represented by counsel, from seeking to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege, or is otherwise protected from disclosure by a legally cognizable duty owed by the unrepresented person. Obtaining information from an unrepresented person that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules [4.4], 8.4(c) and 8.4(d). Paragraph (b) does not prohibit a lawyer from seeking to obtain such information in a legal proceeding pending before a tribunal where the person to whom the duty is owed is present or is represented by counsel.

[5] Paragraph (b) does not prohibit a lawyer from seeking to obtain, during a legal proceeding, information from an unrepresented person that is protected from disclosure by a legally cognizable duty owed by the unrepresented person, where the person to whom the duty is owed is present or is represented by counsel at the proceeding.

[6] Paragraph (a) is not intended to apply to covert criminal and civil enforcement investigations. Paragraph (a) is also not intended to apply to the exceptional situation where a lawyer supervises an investigator posing as a consumer or other person engaged in an otherwise lawful transaction for the purpose of gathering evidence that is not otherwise available where the lawyer reasonably believes that a violation of civil rights or intellectual property rights exists and the conduct of the lawyer and the conduct of the investigator the lawyer is supervising does not otherwise violate this Rules or the State Bar Act.

PROPOSED RULE (CLEAN VERSION)

Rule 5.4: Duty to Avoid Interference with a Lawyer's Professional Independence

(a) A lawyer or law firm shall not share legal fees directly or indirectly with a person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph is not intended to prohibit:

(1) the payment of money or other consideration at once or over a reasonable period of time after the lawyer's death to the lawyer's estate or to one or more specified persons pursuant to an agreement between a lawyer and either the lawyer's law firm or another lawyer in the firm.

(2) any payment authorized by Rules 1.17.1[B3] or 1.17.2[B3].

(3) a lawyer or law firm including non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not violate these Rules or the California State Bar Act.

(4) the payment of a prescribed registration, referral, or other fee by a lawyer 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 lawyer shall not form a partnership or other organization with a person who is not a lawyer if any of the activities of the partnership or other organization consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct, regulate or interfere with the lawyer's independence of professional judgment, or with the client-lawyer relationship, in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or organization authorized to practice law for a profit if:

(1) a person who is not a lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of organization other than a corporation; or

(3) a person who is not a lawyer has the right or authority to direct, influence or control the professional judgment of a lawyer.

PROPOSED RULE (CLEAN VERSION)

(e) A lawyer shall comply with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors of the State Bar.

Comment

[1] A lawyer is required to maintain professional independence of judgment in rendering legal services. The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a non-lawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.

[2] Other rules also protect the lawyer's professional independence of judgment. (See, e.g., Rule 1.5.1[B1], Rule 1.8(f) (Rule 3-310(F))[B4], and Rule 5.1[B1].)

[3] A lawyer's shares of stock in a professional law corporation may be held by the lawyer trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any non-lawyer trustee to direct or control the activities of the professional law corporation.

[4] A lawyer's participation 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 this Rule.

[5] This Rule is intended to apply to group, prepaid, and voluntary legal service programs, activities and organizations and to non-profit legal aid, mutual benefit and advocacy groups but nothing in this Rule shall be deemed to authorize the practice of law by any program, organization or group. This Rule is not intended to prohibit the payment of court-awarded legal fees to non-profit legal aid, mutual benefit and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].) (See also Rule 6.3[B4].)

[6] This Rule is not intended to abrogate case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

COMPARISON TO CURRENT CA RULE (Part 1)

Rule ~~1-320. Financial Arrangements With Non-Lawyers~~5.4: Duty to Avoid Interference with a Lawyer's Professional Independence

(~~A~~a) ~~Neither a member nor a~~A lawyer or law firm shall ~~*directly or indirectly*~~ not share legal fees *directly or indirectly* with a person who is not a lawyer~~, except~~or with an organization that is not authorized to practice law. This paragraph is not intended to prohibit:

(1) ~~An agreement between a member and a law firm, partner, or associate may provide for~~ the payment of money or other consideration at once or over a reasonable period of time after the ~~member's~~lawyer's death to the ~~member's~~lawyer's estate or to one or more specified persons ~~over~~pursuant to an agreement between a ~~reasonable period of time;~~lawyer and either the lawyer's law firm or another lawyer in the firm.

~~(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~~
(2) any payment authorized by Rules [1.17.1 or 1.17.2].

(3) ~~A member~~a lawyer or law firm ~~may include~~including non-~~member~~lawyer 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~~provided the plan does not ~~circumvent~~violate these ~~rules~~Rules or ~~Business and professions Code section 6000 et seq~~the California State Bar Act.~~; or~~

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

COMPARISON TO CURRENT CA RULE (Part 1)

~~(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.~~

COMPARISON TO CURRENT CA RULE (Part 2)

Rule ~~1-310. Forming~~5.4: Duty to Avoid Interference with a ~~partnership With a Non-~~Lawyer~~'s Professional Independence~~

(b) A ~~member~~lawyer shall not form a partnership or other organization with a person who is not a lawyer if any of the activities of ~~that~~the partnership or other organization 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.~~

COMPARISON TO CURRENT CA RULE (Part 3)

Rule ~~1-600. Legal Service programs~~5.4: Duty to Avoid Interference with a Lawyer's Professional Independence

(~~A~~c) A ~~member~~lawyer shall not ~~participate in~~permit a ~~nongovernmental program~~person who recommends, ~~activity~~employs, or ~~organization furnishing, recommending, or paying for~~pays the lawyer to render legal services~~, which allows any third person or organization~~for another to direct, regulate or interfere with the ~~member's~~lawyer'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~~in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or organization authorized to practice law for a profit if:

(1) a person who is not a lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of organization other than a corporation; or

(3) a person who is not a lawyer has the right or authority to direct, influence or control the professional judgment of a lawyer.

(~~B~~e) ~~The~~A lawyer shall comply with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by 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:~~
Comment

[1] A lawyer is required to maintain professional independence of judgment in rendering legal services. The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a non-lawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.

[2] Other rules also protect the lawyer's professional independence of judgment. (See, e.g., Rule 1.5(e), Rule 1.8(f) [Rule 3-310(F)], and Rule 5.1.)

COMPARISON TO CURRENT CA RULE (Part 3)

[3] A lawyer's shares of stock in a professional law corporation may be held by the lawyer trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any non-lawyer trustee to direct or control the activities of the professional law corporation.

~~The~~[4] A lawyer's 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~~this Rule.

[5] This Rule is intended to apply to group, prepaid, and voluntary legal service programs, activities and organizations and to non-profit legal aid, mutual benefit and advocacy groups but nothing in this Rule shall be deemed to authorize the practice of law by any program, organization or group. This Rule is not intended to prohibit the payment of court-awarded legal fees to non-profit legal aid, mutual benefit and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].) (See also Rule [6.3].)

[6] This Rule ~~1-600~~ is not intended to ~~override any contractual agreement or~~abrogate case law regarding the relationship between insurers and ~~insureds regarding the provision of~~lawyers providing legal services to insureds. (See *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

~~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.~~

COMPARISON TO ABA MODEL RULE

Rule 5.4 ~~Professional Independence of~~: Duty to Avoid Interference with a Lawyer~~'~~s Professional Independence

(a) A lawyer or law firm shall not share legal fees directly or indirectly with a ~~nonlawyer, except~~person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph is not intended to prohibit:

(1) ~~an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for~~ the payment of money~~,~~or other consideration at once or over a reasonable period of time after the ~~lawyer's~~lawyer's death~~,~~ to the ~~lawyer's~~lawyer's estate or to one or more specified persons~~;~~pursuant to an agreement between a lawyer and either the lawyer's law firm or another lawyer in the firm.

~~(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;~~
(2) any payment authorized by Rules [1.17.1 or 1.17.2] [Rule 2-300].

(3) a lawyer or law firm ~~may include nonlawyer~~including non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement~~; and~~, provided the plan does not violate these Rules or the California State Bar Act.

(4) the payment of a prescribed registration, referral, or other fee by a lawyer ~~may share court-awarded legal fees with~~to a ~~nonprofit organization that employed, retained or recommended employment of the~~ lawyer referral service established, sponsored and operated in accordance with the ~~matter~~State Bar of California's minimum standards for a lawyer referral service in California.

(b) A lawyer shall not form a partnership or other organization with a ~~nonlawyer~~person who is not a lawyer if any of the activities of the partnership or other organization consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct ~~or~~, regulate or interfere with the ~~lawyer's~~lawyer's independence of professional judgment, or with the client-lawyer relationship, in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or ~~association~~organization authorized to practice law for a profit~~,~~ if:

(1) a ~~nonlawyer~~person who is not a lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a ~~nonlawyer~~person who is not a lawyer is a corporate director or officer thereof or occupies ~~the~~a position of similar responsibility in any form of ~~association~~organization other than a corporation ; or

(3) a ~~nonlawyer~~person who is not a lawyer has the right or authority to direct, influence or control the professional judgment of a lawyer.

(e) A lawyer shall comply with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors of the State Bar.

Comment

[1] A lawyer is required to maintain professional independence of judgment in rendering legal services. The provisions of this Rule ~~express traditional limitations on sharing fees. These limitations are to~~ protect the lawyer's ~~professional~~ independence of professional judgment~~. Where someone other than~~by restricting the ~~client pays the lawyer's fee or salary, or recommends employment~~sharing of ~~the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere~~fees with a person or organization that is not authorized to practice law and by prohibiting a non-lawyer from directing or controlling the lawyer's professional judgment when *rendering legal services to another*.

[2] ~~This Rule~~Other rules also ~~expresses traditional limitations on permitting a third party to direct or regulate~~protect the lawyer's professional independence of judgment ~~in *rendering legal services to another*~~. (See ~~also~~, e.g., Rule 1.5(e) [Rule 2-200], Rule 1.8(f) [Rule 3-310 (~~lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent~~F)~~.~~], and Rule 5.1.)

[3] A lawyer's shares of stock in a professional law corporation may be held by the lawyer trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any non-lawyer trustee to direct or control the activities of the professional law corporation.

[4] A lawyer's participation 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 this Rule.

[5] This Rule is intended to apply to group, prepaid, and voluntary legal service programs, activities and organizations and to non-profit legal aid, mutual benefit and advocacy groups but nothing in this Rule shall be deemed to authorize the practice of law by any program, organization or group. This Rule is not intended to prohibit the payment of court-awarded legal fees to non-profit legal aid, mutual benefit and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v.*

COMPARISON TO ABA MODEL RULE

Tenderloin Housing Clinic, Inc. (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].) (See also Rule [6.3].)

[6] This Rule is not intended to abrogate case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)