ATTACHMENT 3

Clean Version Rule Drafts, as Distributed for Public Comment, of the Batch 4 Proposed Rules and the Previously Submitted Rules in Batches 1, 2 & 3 Returned to the Commission for Further Consideration

Clean Version Rule Drafts, as Distributed for Public Comment, of the Batch 4 Proposed Rules

Rule 1.8.6 Payments Not From Client

(Commission's Proposed Rule – Clean Version)

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

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

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

(c) information relating to representation of a client is protected as required by Rule 1.6 and by Business and Professions Code section 6068(e).

Comment

[1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This Rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7(b) and Rule 1.7, comments [12] and [13], regarding joint representations. The lawyer also must comply with Rule 1.7(d) when the lawyer has a potential conflict of interest because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e)(1) (concerning confidentiality) and Rule 5.4(c) (concerning interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).

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

[3] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) Thus, a lawyer is not obligated to obtain the client's consent under this Rule when

appointed and paid by an insurer to represent an insured pursuant to the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever the lawyer has a potential or actual conflict of interest. See Rule 1.7, Comment [37].

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule, such as when a lawyer is retained or paid by a family member on behalf of an incarcerated client. When this occurs, paragraph (a) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.

Rule 1.8.7 Aggregate Settlements
(Commission's Proposed Rule – Clean Version)

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

Comment

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

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

[3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule to accept an opposing party's aggregate settlement offer or to make an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure

also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also [Rule 1.0(e) (definition of informed consent).]

[4] This Rule does not prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, it does not prevent the lawyer from assisting the jointly-represented clients from agreeing at any time to a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.

Rule 1.15 Handling Funds and Property of Clients and Other Persons

(Commission's Proposed Rule* – Clean Version)

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

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

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

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

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

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

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

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

(1) funds reasonably sufficient to pay bank charges;

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

* Proposed Rule, Draft 15.3 (5/29/09).

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

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

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

(g) Duties when lawyer's entitlement to funds become fixed or the lawyer's entitlement is disputed. In the case of funds held in a trust account that belong in part to a client or other person and in part to a lawyer, the lawyer shall withdraw the portion belonging to the lawyer at the earliest reasonable time after the lawyer's interest in that portion becomes fixed, provided that:

(1) the client or other person may still dispute that the lawyer has earned the funds;

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

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

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

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

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

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

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

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

(2) identify and label securities and properties of a client or other person promptly upon receipt, place them in a safe deposit box or other place of safekeeping as soon as practicable, and notify the client or other person of the location of the property;

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

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

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

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

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

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

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

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

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

(m) Board of Governors' Standards. The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers in accordance with paragraph (k)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Comment

Definitions

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

[2] As used in this Rule "in connection with the performance of a legal service or representation" means that there is a relationship between the actions of a lawyer in his or her capacity as a lawyer and the receipt or holding of funds from a client or other person. The provisions of this Rule are also applicable when a lawyer serves a client both as a lawyer and as one who renders nonlegal services. (*Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298].) Although lawyers who provide fiduciary services that are not related to the performance of a legal service or representation may be required to handle funds in a fiduciary manner (e.g., when serving as an executor, escrow agent for parties to an escrow who are not clients, or as a trustee for a non-client), this Rule does not govern those activities. Because the

latter fiduciary accounts are governed by other law, funds should be maintained in separate fiduciary accounts and not in a trust account established under this Rule. However, the failure to discharge fiduciary duties in relation to the provision of such services may result in discipline for other violations. (See, e.g., Business and Professions Code section 6106.)

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

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

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

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

Application of Rule

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

Paragraph (a) – Application to true retainer fees

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

[9] If any part of a true retainer fee is paid for or applied to fees for the performance of legal services, the entire amount loses its character as a true retainer fee and is converted to an advance for fees. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164,

fn. 4 [154 Cal.Rptr. 752]; *In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757.) When this occurs, the lawyer must comply with paragraphs (d) and (k)(4) with respect to the entire fee. See also Comment [10].

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

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

Paragraph (e) – Duty to hold funds inviolate

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

Paragraphs (g) – (i) – Disputed fees

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

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

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

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

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

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

Other Guidance

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

Rule 3.3 Candor Toward the Tribunal

(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures , including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Business and Professions Code section 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false; or

(4) cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or fail to correct such a citation previously made to the tribunal by the lawyer.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all facts known to the lawyer that the lawyer knows, or reasonably should know, are needed to enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. However, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not make false statements of law or fact or present evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] A lawyer is responsible for pleadings and other documents prepared for litigation but is usually not required to have personal knowledge of the facts asserted therein because litigation documents ordinarily present assertions of fact by the client, or a witness, and not by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. (Bryan v. Bank of America (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148].) There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. (Di Sabatino v. State Bar (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458].) The obligation prescribed in Rule [1.2.1] not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule [1.2.1], see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. "Controlling legal authority" may include authority outside the jurisdiction in which the tribunal sits. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the tribunal.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. With respect to criminal defendants, see comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a criminal defense client insists on testifying, and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw. (Business and Professions Code section 6068(d); People v. Guzman (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467]; People v. Johnson (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; People v Jennings (1999) 70 Cal. App. 4th 899 [83 Cal.Rptr.2d 33]; People v. Brown (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762].) The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Remedial Measures

[9] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The lawyer's proper course is to remonstrate with the client confidentially, advise the client of the consequences of providing perjured testimony and of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the lawyer must take further remedial measures (see Comment [10]), and may be required to seek permission to withdraw under Rule 1.16(b), depending on the materiality of the false evidence.

[10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See e.g., Rules 1.2.1, 1.4, 1.16 and 8.4; Business and Professions Code Sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Business and Professions Code section 6068(e).

[11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence relating to the proceeding or failing to disclose information to the tribunal when required by law to do so. See Rule 3.4. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] Paragraph (c) establishes a practical time limit on the obligation to rectify false evidence or false statements of law and fact. The conclusion of the proceeding is a reasonably definite point for the termination of the mandatory obligations under this Rule. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8.

Withdrawal

[14] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's taking reasonable remedial measures. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in a deterioration of the client-lawyer relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. This Rule does not modify the lawyer's obligations under [Rule 1.6] or Business and Professions Code section 6068(e) or the California Rules of Court with respect to any request to withdraw that is premised on a client's misconduct.

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

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), and to the extent permitted by [Rule 1.6], a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

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

Comment

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

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

[2] Paragraph (a) applies to statements made by or on behalf of the lawyer.

[3] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[4] Whether an extrajudicial statement violates this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d) or [Rule 3.3]; and (3) the timing of the statement.

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

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

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

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

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

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to testify unless:

(1) the testimony relates to an uncontested matter;

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

(3) the lawyer has obtained the informed written consent of the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.

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

Comment

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

[2] This Rule is not applicable in non-adversarial proceedings, as where the lawyer testifies on behalf of the client in a hearing before a legislative body.

Rule 6.3 Membership in Legal Services Organization
(Commission's Proposed Rule – Clean Version)

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

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

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

Comment

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

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

Rule 6.4 Law Reform Activities Affecting Client Interests
(Commission's Proposed Rule – Clean Version)

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted or adversely affected by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer must comply with the lawyer's obligations to clients under other Rules and statutes, particularly Rules 1.6 and 1.7, and Business and Professions Code § 6068(e)(1). A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted or adversely affected.

Clean Version Rule Drafts, as Distributed for Public Comment,
of Previously Submitted Rules in Batches 1, 2 & 3 Returned
to the Commission for Further Consideration

Rule 1.5: Fees For Legal Services
(Commission's Proposed Rule - Clean Version)

(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:

(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.

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].

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

(Commission's Proposed Rule - Clean Version)

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

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

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

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

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)].

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 [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 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.

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.

Rule 1.8.10: Sexual Relations With Clients

(Commission's Proposed Rule - Clean Version)

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

(b) A lawyer shall not:

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

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

(3) Continue representation of a client with whom the lawyer has sexual relations if such sexual relations cause the lawyer to perform legal services incompetently in violation of Rule 1.1, or if the sexual relations would, or would be likely to, damage or prejudice the client's matter.

(c) Paragraphs (b)(1) and (b)(2) shall not apply to sexual relations between lawyers and their spouses or persons in an equivalent domestic relationship, or to ongoing consensual sexual relations which predate the initiation of the lawyer-client relationship.

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

COMMENT

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

[2] When the client is an organization, this Rule is applicable to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who

supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. (See Rule [1.13].)

[3] Although paragraph (c) excludes representation of certain clients from the scope of this Rule, the exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including Rule 1.1 and Rule [re: conflicts of interest].

Rule 8.3: Reporting Professional Misconduct

(Commission's Proposed Rule - Clean Version)

(a) A lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act unless precluded by the lawyer's duties to a client, or a former client, or by law.

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

COMMENT

[1] In deciding whether to report a violation of these Rules or the State Bar Act, a lawyer may consider among other things whether the violation raises a substantial question as to honesty, trustworthiness or fitness as a lawyer.

[2] This Rule is not intended to allow a lawyer to report a violation of these Rules or the State Bar Act if doing so would violate the lawyer's duty of protecting confidential information of a lawyer's client as provided in Business and Professions Code section 6068, subdivision (e), or would prejudice the interests of the lawyer's client, or would involve the unauthorized disclosure of information received by the lawyer in the course of participating in an approved lawyer's assistance program.

[3] This Rule is not intended to abrogate a lawyer's obligations to report conduct as required under the State Bar Act. (See, e.g., Business & Professions Code, subdivision 6068(o).)