Session Date: Saturday, May 20, 2023

Session Time: 12:30pm – 1:30pm

Session Name: Young Insolvency Professionals (YIP) Lunch and Judges Roundtable: When to Hold 'Em and When to Fold 'Em: Ethical Considerations When Working With Clients

Total Minutes: 60

Total Credit Hours: 1

CALIFORNIA BANKRUPTCY FORUM

Young Insolvency Professionals Program

Roundtable: Ethical Considerations When Working With Clients

May 20, 2023

California Bankruptcy Forum –Young Insolvency Professionals Program

Roundtable: Ethical Considerations When Working With Clients

May 20, 2023, 12:00 p.m. to 1:30 p.m.

Materials prepared by Tanya Benham and Tim Evanston

Ethics generally: Federal courts usually look to the ethical rules of the **State** in which they are located, as well as **national** ethics guidelines. *See, e.g.,* Cent. Dist. Cal. Local Civ. R. 83-3.1.2 (applying "the standards of professional conduct required of members of the State Bar of California …" and providing that "[t]he Model Rules of Professional Conduct of the American Bar Association may be considered as guidance.") (made applicable in bankruptcy cases by LBR 2090-2(a)).

Topic 1 – Consent for Simultaneous Representation

Hypothetical 1:

Attorneys at Wilson, Garcia, and Nguyen LLP ("**WGN**") participate in a pro bono program sponsored by a non-profit agency. **Lexi Lawyer**, a partner at WGN, wants to take on a pro bono case through the non-profit agency that would help **Charlie Client** prepare for and commence a chapter 7 bankruptcy case.

Before the non-profit agency approaches WGN and Lexi with Charlie's case, the agency had pre-screened Charlie to ensure that there are no facts indicating that Charlie's bankruptcy case would be anything other than a simple, no-asset bankruptcy.

Lexi has reviewed Charlie's debts and confirmed that bankruptcy is an appropriate remedy for him. However, Lexi has also discovered that she represents **County Bank**, one of Charlie's creditors, in an unrelated matter.

Issue 1:

Can Lexi represent Charlie in his chapter 7 case even though she concurrently represents County Bank in an unrelated matter *without* first securing the informed written consent of both parties?

Topic 2 – Third Party Payors & Surplus Fees

Hypothetical 2:

After ensuring she could represent both County Bank and Charlie, Charlie engages Lexi and her firm (WGN), and Lexi files Charlie's chapter 7 petition. Charlie is thoroughly impressed with Lexi's work. A few months later, when Charlie's friend, **Carmen Client**, is looking for a lawyer to defend her in a preference action, Charlie immediately refers Carmen to Lexi.

Lexi clears conflicts and Carmen signs the engagement letter. Carmen, however, is tight on cash and does not have the funds for WGN's retainer. Carmen's mom, **Marie**, agrees to pay Lexi's attorney's fees on an hourly basis and, after the appropriate California Rule 1.8.6 disclosures and consent, Marie advances the agreed-upon retainer to WGN.

Three months later, Carmen's preference action is settled. A $3,500 balance remains in unused funds from Carmen's retainer. Carmen, who settled partly because she planned to apply the unused funds to some unexpected medical expenses, insists that the unused sums in the trust account belong to her because Marie did not say anything about limiting her gift to paying WGN, and Carmen tells Lexi that WGN's sole duty is to her, as its client, so WGN had better turn the money over to her. But Marie, who has had a falling out with her daughter, demands that the money be returned to her.

Issue 2:

Is Carmen or Marie entitled to the remaining advanced fees at the end of Lexi's representation?

Topic 3 – Withdrawal from Representation

Hypothetical 3:

Lexi Lawyer has filed a chapter 11 petition for a new client named **Brian**. After working on the case for several months, Lexi starts her day by reviewing a draft monthly operating report prepared by Brian and Lexi asks Brian for the supporting bank statement for the debtor in possession ("DIP") account. Brian emails the statement but, to Lexi's dismay, he mistakenly includes a bank statement for another account in his name that Lexi had no knowledge of and was ***never disclosed on Brian's schedules***. Even worse, the bank statement shows ***significant post-petition activity***, including transfers to and from the account, suggesting that there are ***other bank accounts*** that may not have been disclosed on Brian's schedules and are still being used.

Lexi immediately contacts Brian, who tells Lexi, "Don't worry about it," and instructs Lexi to file the monthly operating report and pretend she doesn't know about the other account. Following this conversation, Lexi emails and calls Brian multiple times, advising him to disclose all undisclosed account(s), but receives no response.

Issue 3A:

Is Lexi and WGN required to withdraw from representing Brian?

Issue 3B:

Are Lexi and WGN required to disclose the specific reasons underlying the withdrawal in the motion to withdraw? What can be disclosed in the motion?

Issue 3C:

What duties do Lexi and WGN have when withdrawing from representing Brian?

Topic 4 – Departure from Law Firm

Hypothetical 4:

A year later, Lexi Lawyer receives a call from a former classmate from law school, **Brenda Barrister**. Brenda tells Lexi that there is a new opening in Brenda's practice group in her firm. Lexi is excited to start working with Brenda and decides to leave WGN for the new opportunity. After applying and successfully interviewing, Lexi accepts a position with Brenda's firm. Before starting the process of moving to the new firm, Lexi wants to make sure she complies with California's ethics rules.

Issue 4A:

Is Lexi allowed to communicate with clients about her move to the new firm or must she not say anything? If Lexi is allowed to tell clients about her move, what can she tell the clients?

Issue 4B:

Before she starts, Lexi is asked to name and describe the cases she has worked on at WGN so that her new firm can run a conflicts check report before she starts. What can Lexi ethically disclose to her new firm?

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[1] Rule 1.1, Comment [1] was added by order of the Supreme Court, effective March 22, 2021.

[2] Rule 3-110(B) provides:

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

[3] But see Cal. Bus. & Prof. Code § 6068(e)(1).

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[4] ABA Model Rule 1.14 ("Client With Diminished Capacity") has not been adopted in California.

[5] Rule 1.16, Comment [5] was amended by order of the Supreme Court, effective June 1, 2020.

[6] ABA Model Rule 2.2 was deleted and has not been adopted in California.

[7] ABA Model Rule 2.3 ("Evaluation For Use By Third Persons") has not been adopted in California.

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[8] Rule 3.8, Comment [7] was amended by order of the Supreme Court, effective June 1, 2020.

[9] But see rule 3-110, Discussion ¶. 1.

[10] But see rule 3-110, Discussion ¶. 1.

[11] Rule 5.4 was amended by order of the Supreme Court, effective March 22, 2021.

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[12] ABA Model Rule 7.6 ("Political Contributions To Obtain Legal Engagements Or Appointments By Judges") has not been adopted in California.

[13] ABA Model Rule 8.3 ("Reporting Professional Misconduct") has not been adopted in California.

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[14] Rule 5.4 was amended by order of the Supreme Court, effective March 22, 2021.

[15] Rule 5.4 was amended by order of the Supreme Court, effective March 22, 2021.

[16] Rule 5.4 was amended by order of the Supreme Court, effective March 22, 2021.

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[17] Rule 1.1, Comment [1] was added by order of the Supreme Court, effective March 22, 2021.

[18] Rule 1.16, Comment [5] was amended by order of the Supreme Court, effective June 1, 2020.

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Rule 6.3 Membership in Legal Services Organizations

[19] Rule 3.8, Comment [7] was amended by order of the Supreme Court, effective June 1, 2020.

[20] But see Bus. & Prof. Code § 6068(e).

[21] But see current rule 3-600(D) regarding similar duties in an organizational context.

Topic 1 – Consent for Simultaneous Representation

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2014-191

ISSUE: If an attorney represents an individual as a debtor in a simple, no-asset Chapter 7 bankruptcy filing, while simultaneously representing one or more of the individual's creditors in unrelated matters, is the attorney required by rule 3-310(C)(3) to obtain informed written consent from both parties?

DIGEST: Simultaneous representation of a debtor in a simple, no-asset Chapter 7 bankruptcy filing and that debtor's creditors in unrelated matters does not create adversity triggering the informed written consent requirement of rule 3-310(C)(3), provided that the engagement is limited and certain intake procedures are employed to ensure that the Chapter 7 proceeding in which the attorney is involved is an *in rem* proceeding that focuses on the orderly distribution of the debtor's assets and the discharge of debts.[1/]

AUTHORITIES INTERPRETED: Rules 1-100, 1-650, 3-310 and 3-500 of the Rules of Professional Conduct of the State Bar of California.[2/]

Business and Professions Code section 6068(m).

STATEMENT OF FACTS

Attorney participates in a pro bono program[3/] sponsored by a non-profit agency ("Agency") helping individual debtors prepare for and commence Chapter 7 bankruptcy proceedings. The Agency prescreens potential clients, which includes a review of debts, assets and income, to ensure there are no facts indicating that the matter is anything other than a simple, no-asset bankruptcy.[4/] The Agency also assesses whether the potential client has any claims against any creditor, or whether any creditor may have a claim other than the debt against the potential client. Once prescreened, Attorney reviews a client's financial situation and confirms that a bankruptcy is an appropriate remedy for such client. The assessment includes reviewing the amount and nature of the client's assets, income and debts and determining if bankruptcy is the best way to resolve the financial difficulties for the client. In some cases, the engagement ends at that point. In others cases, Attorney prepares the necessary paper work to file a Chapter 7

1/ Although this opinion discusses bankruptcy case law, rules, statutes, and matters within a Bankruptcy Court's discretion, the Committee does not opine on such matters; rather, its opinions are limited to ethical rules and related authorities.

2/ Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

3/ While the analysis and conclusions of this opinion are not limited to a pro bono representation context, other contexts would require discussion of fee sharing and of third-party prescreening. This opinion does not address these topics.

4/ In a Chapter 7 bankruptcy proceeding, the debtor is required to turn certain property over to the bankruptcy trustee so that the property can be sold and the proceeds used to pay off the debtor's debts. Such property is referred to as "non-exempt" property or assets. Property that the debtor is allowed to retain is referred to as "exempt" property or assets. See, e.g., Bankruptcy Code section 522. For purposes of this opinion, a simple, no-asset bankruptcy is one in which there are no non-exempt assets, no filed objections to discharge from any creditor, and no reasonably foreseeable objections to discharge from any creditor.

proceeding. And in other cases, Attorney represents a client in the Chapter 7 proceeding through the section 341(a)[5/] meeting of creditors.[6/]

Attorney is engaged by one such individual ("Debtor-Client") through the pro bono program. Attorney is aware that he currently represents one of Debtor-Client's creditors in an unrelated matter ("Creditor-Client"). May Attorney proceed to represent Debtor-Client through the section 341(a) meeting of creditors despite his concurrent, unrelated representation of Creditor-Client, without securing the informed written consent of both parties pursuant to rule 3-310(C)(3)?

DISCUSSION

Attorneys are often limited in their ability to provide legal services due to conflicts of interest with their existing clients or with existing clients of their firm. Even if the matters are unrelated, an attorney generally may not represent a client in a matter adverse to another current client. Rule 3-310(C) (Avoiding the Representation of Adverse Interests); *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. Rule 3-310(C)(3) provides that a lawyer shall not "[r]epresent 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" without the informed written consent of each client. The question here is whether Attorney's concurrent representation of both Debtor-Client and Creditor-Client constitutes a conflict that would require the informed written consent of both clients.

The Committee recognizes that rule 3-310(C)(3) is intended to govern adversity involving concurrent client conflicts. However, there are situations in which ostensible adversity does not trigger the policies that 3-310(C)(3) is intended to promote and implement.[7/] Further, as we observed in Cal. State Bar Formal Opn. No. 1989-108, in certain adversity referred to as an "issues conflict" or "positional conflict," where an attorney represents two clients whose interests in the issue are adverse but who are not directly adverse (within the meaning of rule 3-310), disclosure to both clients is not required but would be prudent.

Ethics opinions from other jurisdictions, as well as some provisions of the Bankruptcy Code, while not binding, are informative as to whether or not written consent is required in this specific hypothetical.[8/] The Committee is not

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[5/] Unless otherwise indicated, all references to Bankruptcy Code sections in this opinion are available at 11 U.S.C. §§ 101 et seq.

[6/] Following the filing of a petition under Chapter 7 of the Bankruptcy Code, the United States Trustee conducts a meeting (the "section 341(a) meeting") at which the debtor appears and creditors may appear. The purpose of the meeting is to allow the Trustee and the creditors to question the debtor about his or her understanding of the effects of the bankruptcy and the nature of the assets and debts.

[7/] For example, in the insurance tripartite relationship, the financial interests of a carrier as an indemnifier may not be sufficient to trigger rule 3-310(C)(3) when an opposing lawyer also represents a carrier in an unrelated matter. See Discussion to rule 3-310:

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

[8/] See rule 1-100(A) ("Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."); *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799]; *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771].

aware of any cases or opinions directly on point in California. Ethics opinions by both the Association of the Bar of the City of New York[9/] and the Boston Bar Association[10/] addressed this question in the context of pro bono projects.[11/] Both opinions came to the conclusion that in the typical case a conflict does not arise when a pro bono attorney represents an individual on a limited basis in connection with the filing of a Chapter 7 petition while simultaneously representing one or more of the individual's creditors in unrelated matters, negating the need for the lawyer to obtain written consent from his or her clients.

The City of New York opinion concluded that the filing of a Chapter 7 proceeding does not invoke the same kind of adversity as would litigation because it is an *in rem* proceeding.[12/] Thus, a lawyer may represent a debtor-client in such a proceeding even though he concurrently represents a creditor of that debtor-client in an unrelated matter, provided that the case remains a simple, no-asset bankruptcy (e.g., no creditor objects to the debtor-client's discharge of debt).[13/] The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics stated:

> Unlike the commencement of litigation – which by definition is brought directly against one or more parties on behalf of another party with an adverse interest – the commencement of a typical Chapter 7 case is an *in rem* proceeding that triggers the automatic operation of a statutory framework for marshaling and distributing assets and discharging debt. Under that statutory framework, to the extent the debtor has non-exempt assets, those assets are distributed among the creditors in accordance with statutorily mandated criteria. To the extent debt is discharged (assuming no objection has been made to its discharge), that action likewise occurs by automatic operation of statute. In addition, to the extent adversary proceedings are brought by the Chapter 7

9/ The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2005-01, available at: http://www.nycbar.org/ethics/ethics-opinions-local/2005-opinions/808-1-pro-bono-consumer-bankruptcy-representation.

10/ Boston Bar Association Ethics Committee Opinion 2008-01, available at: http://www.bostonbar.org/docs/ethics-opinions/opinion-2008-1.pdf?sfvrsn=3.

11/ Rule 1-650 (Limited Legal Services Programs) clarifies and limits the application of rule 3-310 in some short-term, limited legal settings, ordinarily in pro bono cases. The limitation provided for in rule 1-650 does not apply in this hypothetical, both because the representation exceeds initial advice and brief service and because Attorney knows of the conflict.

12/ The term "*in rem*" is from Latin, and means "against or about a thing" (and is distinguishable from the Latin "*in personam*," which means "directed toward a particular person"). A proceeding *in rem* is "one 'against all the world.' In this type of proceeding, the court undertakes to determine all claims that anyone has to the thing in question." *Restatement 2d of Judgments, § 6, Cmt.(a).* See also *Woodruff v. Taylor* (1847) 20 Vt. 65, 73 ("A judgment *in rem* is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject matter itself . . . .").

13/ To the extent a lawyer believes at the outset there is a reasonable likelihood that any creditor will object to the debtor-client's discharge under 11 U.S.C. § 727, then it is not a simple, no-asset bankruptcy and, accordingly, is outside the scope of this opinion. As the City of New York opinion notes, "it is extremely rare for an objection to be made to the discharge of debt in Chapter 7 cases." Moreover, under the hypothetical facts of this opinion, the pre-screening process is designed, and thus would be expected, to ferret out any likelihood of an objection to discharge that existed in a particular case.

The Committee notes there may be other actions a creditor takes, beyond an objection to discharge, that could give rise to a conflict requiring consent or even withdrawal. For example, as noted by the City of New York Bar Association, where the debtor-client has only a single creditor (i.e., the creditor-client), and that creditor was on the verge of commencing a collection action against the debtor-client, the Chapter 7 filing "could have at least the appearance of being more directly aimed at that particular creditor." City of New York opinion 2005-01. The Committee does not attempt in this opinion to list all actions a creditor might take, other than objecting to the discharge, that could be considered directly adverse to the debtor-client.

> estate, the decision to do so is made by the court-appointed Chapter 7 trustee, not by the Chapter 7 debtor or his counsel.
>
> The Chapter 7 statutory framework is one specifically intended to strike a fair balance between the rights of debtors and creditors, [citations] and, together with other provisions of the Bankruptcy Code, to ensure equality of treatment for creditors holding claims of equal priority. [Citations.] As a result, both debtors and creditors alike can be said to derive substantial benefit from the availability of Chapter 7 proceedings.
>
> In light of the structure and purpose of the Chapter 7 statutory framework, we think it is reasonable to conclude that in the typical Chapter 7 case, there is no adversity between debtor and creditor sufficient to trigger the restrictions of DR 5-105 [the New York disciplinary rule on conflicts of interest] unless and until a creditor objects to the discharge of a debt or otherwise takes action that is directly adverse to the debtor.

The Boston opinion cited extensively to the City of New York opinion, but addressed it under Massachusetts rules rather than the (former) New York rules. In addition, the Boston opinion included an analogy to other sections of the Bankruptcy Code, particularly section 327(c):[14/]

> Congress expressly addressed the question -- with respect to a later stage of a Chapter 7 proceeding -- whether representation by a lawyer should be viewed as giving rise to a disqualifying conflict of interest. After the Chapter 7 Petition has been filed, a trustee is appointed. The trustee reviews the assets of the bankruptcy estate and pursues or defends any claims the estate may have. The trustee may retain an attorney. The "Bankruptcy Code contemplates that attorneys will, in unrelated matters, have multiple representations involving creditors and the debtor." [Citations.] . . . .
>
> . . .
>
> Congress provided in Section 327(c) that unless there is an objection, a lawyer may proceed to represent the trustee of the bankruptcy estate, even though the lawyer also simultaneously represents a creditor (in an unrelated matter). In the view of Congress, such a scenario does not, *per se*, present a disqualifying conflict of interest. By inference, the lawyer's representation of the trustee is not viewed as a representation directly adverse to the creditor.
>
> . . . Since the Chapter 7 trustee may later engage an attorney who simultaneously represents one of the creditors (in an unrelated matter), it seems natural that when the debtor initiates the Chapter 7 process, likewise, the debtor may engage an attorney who simultaneously represents one of the creditors (in an unrelated matter). Thus Section 327(c) teaches us, by analogy, that the scenario under consideration does not present a *per se* conflict of interest.

Neither the City of New York nor the Boston opinion expressly relied on the pro bono nature of the services being provided. Rather, they both reached this result based on the nature of a Chapter 7 Bankruptcy proceeding. "Critical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts." *Central Virginia Community College v. Katz* (2006) 546 U.S. 356, 363 – 64 [126 S.Ct. 990]. Absent specific claims between the debtor and one or more creditors, the focus of the case is the bankruptcy estate, not the individual parties. The goal is the gathering of the assets and debts, and the orderly and equitable distribution of the non-exempt assets (if any) to the creditors. The proceeding is essentially *in rem*, rather than adversarial. See *Central Virginia Community College, supra*, 546 U.S. at p. 362 ("Bankruptcy jurisdiction, at its core, is *in rem*."). See also *In re Soileau* (5th Cir. 2007) 488 F.3d

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[14/] Section 327(c) states: "In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is an objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest."

302, 307 [48 Bankr.Ct.Dec. 68]; *Shawhan v. Wherritt* (1849) 48 U.S. 627, 643. As the Supreme Court explained in *Gardner v. New Jersey* (1947) 329 U.S. 565, 574 [67 S.Ct. 467]: "The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res."[15/]

In a typical Chapter 7 proceeding, the individual debtor's debts are discharged, and the debtor's non-exempt assets, if any, are distributed to his or her creditors, with little dispute. Under the facts of this opinion, the Agency prescreens for scenarios that would make the case atypical, such as the presence of non-exempt assets, active litigation, potential concealment or transfer of assets, claims by Debtor-Client against particular debts or creditors, and facts indicating bad faith on the part of Debtor-Client. If Agency detects such scenarios, the case is rejected and the client is referred to an outside attorney. If Attorney detects such scenarios, he or she does not take on the representation (or withdraws from the representation if he or she detects such scenarios after taking on the representation) both under the rules of the program and to prevent conflict problems under rule 3-310(C). In any case, the services provided by Attorney do not include representing the client in true, adversarial actions against creditors. Absent such atypical scenarios, Attorney assisting the Chapter 7 individual debtor would be providing a net benefit to the estate by ensuring accurate and complete documentation of the Chapter 7 petition and ancillary filings.

The Bankruptcy Code provides support for this conclusion in a similar situation. Under section 327, the court must approve the post-petition hiring of counsel for the debtor or the trustee in a Chapter 11 proceeding. Section 327(a) provides, with the court's approval, the trustee "may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee . . . ." In *In re Fondiller* (Bankr. 9th Cir. 1981) 15 B.R. 890, 892 [8 Bankr.Ct.Dec. 532], the United States Bankruptcy Appellate Panel of the Ninth Circuit stated: "We interpret that part of s[ection] 327(a) which reads that attorneys for the trustee may 'not hold or represent an interest adverse to the estate' to mean that *the attorney must not represent an adverse interest relating to the services which are to be performed by that attorney*." (Emphasis added.) Under section 327(c), unless there is an objection, an attorney may represent the trustee, even though the attorney simultaneously represents a creditor in an unrelated matter. In the case of *In re McKinney Ranch Associates* (Bankr. C.D. Cal. 1986) 62 B.R. 249, 255 [14 Bankr.Ct.Dec. 670], the court, after an analysis of the history of conflict rules and of section 327, stated: "The policy behind disqualification for representing potentially conflicting interests provides the key to its extent. The jaundiced eye and scowling mien of counsel for the debtor should fall upon all who have done business with the debtor recently enough to be potential targets for the recovery of assets of the estate. The representation of any such party disqualifies counsel from representing a debtor. Any more remote potential conflict should not result in disqualification. [Footnote omitted.]" See also *In re Fondiller, supra,* 15 B.R. at p. 893.

In *In re Dynamark, Ltd.* (Bankr. S.D. Cal. 1991) 137 B.R. 380, the court found that there was no conflict preventing a law firm from representing both the creditor and the debtor.[16/] The opinion stated: "In the instant case, [the attorney] continues to represent [the creditor] on matters totally unrelated to the Chapter 11 proceeding. Thus, any potential conflict that may exist is too remote to warrant disqualification on these grounds."[17/] (*Id.* at p. 381.)

Because a simple Chapter 7 proceeding is *in rem*, it is the assets and debts of the debtor that are the party to the case, and in effect not the debtor or creditor directly. If a more complicated matter arises in the bankruptcy proceeding, the normal conflicts rules for representing adverse parties would apply. In the facts of this opinion there is no adversarial proceeding and the representation does not create a conflict that would disqualify Attorney from filing the proceeding and appearing at the section 341(a) meeting without the informed written consent of both clients.[18/]

[15/] The term "res" is also from Latin and means "a thing," and is the subject of an *in rem* proceeding.

[16/] Note that the law firm did secure informed written consent, but that fact was not controlling in the court's decision.

[17/] But see, *In re Envirodyne Industries, Inc.* (Bankr. N.D. Ill. 1993) 150 B.R. 1008, 1018 [23 Bankr.Ct. Dec. 1762] (disagreeing with the *Dynamark* court's use of a balancing approach to arrive at its result that "no actual conflict or adverse interest has surfaced which would outweigh the debtor's right to counsel of his choice." *Dynamark,* 137 B.R. at 381.).

[18/] While the Committee finds that no conflict exists under rule 3-310(C) requiring informed consent, written notice is required under rule 3-310(B). Rule 3-310(B)(1) requires written notice to the client when a lawyer has "a

CONCLUSION

If a potential debtor-client is adequately prescreened through a pro bono program like the one in our hypothetical facts to ensure that a simple, no-asset Chapter 7 bankruptcy proceeding is an *in rem* proceeding that focuses solely on the discharge of debts, a lawyer may represent the debtor-client, without first obtaining written consent, even if the attorney concurrently represents one or more creditors of the debtor-client in unrelated matters, so long as the proceeding remains a simple, no-asset Chapter 7 bankruptcy.

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

*[**Publisher's Note:** Internet resources cited in this opinion were last accessed by staff on December 16, 2014. A copy of these resources is on file with the State Bar's Office of Professional Competence.]*

(Footnote continued…)

legal, business, financial, professional, or personal relationship with a party or witness in the same matter . . . ." Attorney in this case has a professional relationship with a creditor, and must disclose that information to Debtor-Client. See also Business and Professions Code section 6068(m) and rule 3-500.

Rule 1.7 Conflict of Interest: Current Clients

(a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:

(1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

(2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

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

(2) the representation is not prohibited by law; and

(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.

(e) For purposes of this rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons,* or a discrete and identifiable class of persons.*

Comment

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. (See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537].) A directly adverse conflict under paragraph (a) can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; (ii) a lawyer, while representing a client, accepts in another matter the representation of a person* who, in the first matter, is directly adverse to the lawyer's client; or (iii) a lawyer accepts representation of a person* in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm.* Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

[2] Paragraphs (a) and (b) apply to all types of legal representations, 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 a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop

indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).

[3] 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 paragraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraph (a) does not 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.

[4] Even where there is no direct adversity, a conflict of interest requiring informed written consent* under paragraph (b) 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, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client. The risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm*, with a party, a witness, or another person* who may be affected substantially by the resolution of the matter.

[5] Paragraph (c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer's representation of the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent* is required under paragraph (b).

[6] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer takes inconsistent legal positions in different tribunals* at different times on behalf of different clients. Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter is not sufficient, standing alone, to create a conflict of interest requiring informed written consent.* Informed written consent* may be required, however, if there is a significant risk that: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the 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' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.

[7] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this rule. (See, e.g., Bus. & Prof. Code, § 6068, subd. (e)(1) and rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this rule is likewise precluded.

[8] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written

consent* may not suffice to permit representation. (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].)

[9] This rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably* understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. (See rule 1.8.8.)

[10] A material change in circumstances relevant to application of this rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more 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 clients from whose representation the lawyer has withdrawn. (See rule 1.9(c).)

[11] For special rules governing membership in a legal service organization, see rule 6.3; and for work in conjunction with certain limited legal services programs, see rule 6.5.

Rule 1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to a 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 the terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing* to the client in a manner that should reasonably* have been understood by the client;

(b) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing* 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 provides informed written consent* to the terms of the transaction or acquisition, and to the lawyer's role in it.

Comment

[1] A lawyer has an "other pecuniary interest adverse to a client" within the meaning of this rule when the lawyer possesses a legal right to significantly impair or prejudice the client's rights or interests without court action. (See *Fletcher v. Davis* (2004) 33 Cal.4th 61, 68 [14 Cal.Rptr.3d 58]; see also Bus. & Prof. Code, § 6175.3 [Sale of financial products to elder or dependent adult clients; Disclosure]; Fam. Code, §§ 2033-2034 [Attorney lien on community real property].) However, this rule does not apply to a charging lien given to secure payment of a contingency fee. (See *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38 [108 Cal.Rptr.3d 455].)

[2] For purposes of this rule, factors that can be considered in determining whether a lawyer is independent include whether the lawyer: (i) has a financial interest in the transaction or acquisition; and (ii) has a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent.

[3] Fairness and reasonableness under paragraph (a) are measured at the time of the transaction or acquisition based on the facts that then exist.

Section 327 – Employment of professional persons

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

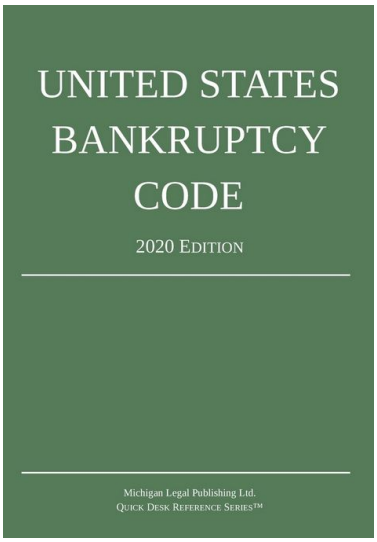
(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.



Topic 2 – Third Party Payors & Surplus Fees

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2013-187

ISSUE: Who is entitled to the refund of remaining advanced fees at the end of a case where fees were paid by a non-client?

DIGEST: Where a third-party pays the attorney's fees for a client and there are funds remaining after the representation is concluded, the attorney must return the balance to the payor, rather than to the client, unless the agreements with the client and the payor specify otherwise.

AUTHORITIES INTERPRETED: Rules 3-310(F), 3-700(D)(2), and 4-100 of the Rules of Professional Conduct of the State Bar of California.[1/]

Code of Civil Procedure section 285.1.

Labor Code section 2802.

STATEMENT OF FACTS

Attorney is retained by Spouse to handle Spouse's dissolution of marriage. Spouse's Parent agrees to pay the attorney's fees on an hourly basis and the attorney's costs, and advances a sum to the lawyer for that purpose. There is no dispute that Attorney made all proper disclosures under rule 3-310(F), including "disclosure" under rule 3-310(A)(1), and Spouse consented in writing after such disclosures. Spouse's Parent also signed an agreement, covering payment arrangements and her acknowledgement of the restrictions specified in rule 3-310(F). Neither agreement addresses the disposition of any surplus funds at the end of the case. Upon termination of the representation, Attorney files a Notice of Withdrawal pursuant to Code of Civil Procedure section 285.1.[2/] Spouse insists unused sums in the trust account be disbursed to her, while Spouse's Parent asks for the money to be returned to her.[3/]

DISCUSSION

There are several common circumstances in which a third-party may pay the attorney's fees and/or costs for a party to litigation or a transaction. For example, parents may pay the attorney for fees incurred on behalf of their adult child in a domestic relations or criminal matter. Employers often pay the fees for an employee being sued, such as pursuant to Labor Code section 2802.[4/] Sometimes the attorney is representing both the employee and the employer.

[1/] Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

[2/] Code of Civil Procedure Section 285.1 reads: "An attorney of record for any party in any civil action or proceeding for dissolution of marriage, . . . may withdraw at any time subsequent to the time when any judgment in such action or proceeding, other than an interlocutory judgment, becomes final, and prior to service upon him of pleadings or motion papers in any proceeding then pending in said cause, by filing a notice of withdrawal."

[3/] These facts assume that fees have been appropriately earned and paid and the only issue is with regard to surplus funds.

[4/] Labor Code section 2802 requires an employer to "indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her

In commercial lending transactions, the borrower sometimes pays the fees of the lender's attorney.[5/] In any such case, rule 3-310(F)[6/] sets forth that the third-party must not be allowed to interfere with the client-lawyer relationship, or have access to confidential client information. Rule 3-310(F) does not answer the question of what happens to surplus funds when the case ends.

Three state bar ethics committees have opined on this question. The Maryland State Bar Committee on Ethics said in Opinion 2001-6: "absent agreement to the contrary, once the retainer check was made payable to you and deposited in your escrow account as a retainer for your handling the representation, that you were accountable to your client for those funds and not to the client's mother." They went on to say: "the only person who could demand the return of any funds would be the client." The North Carolina State Bar, in 2005 Formal Ethics Opinion 12, analyzed it this way: "The lawyer understands that the legal fees were paid by a third-party for the purpose of Client's representation. See ABA Model Rule 1.8(f). The unearned funds held in trust belong to the third-party, not the client. In the event the payor wants the funds returned, Lawyer is obliged to do so."[7/] South Carolina Formal Opinion 02-07 provides the fullest analysis of the issue. It states: "The present case may be reduced to the question of which individual is 'entitled to receive' the funds at issue – client or his brother, the third-party payor. The comments to ABA Model Rule 1.15 acknowledge that a third-party may have just claims against property in a lawyer's custody.… In addition, a lawyer must balance this duty to third parties with the duty of loyalty owed to his client." After analyzing ABA Model Rule 1.15 and its comments, the South Carolina Ethics Advisory Committee concluded: "The lawyer should retain the disputed fees in trust until the parties reach an agreement resolving the dispute or an appropriate court determines the rights of the parties."

In California, rule 4-100(B)(4) requires an attorney to "[p]romptly pay or deliver, as requested by the client, any funds . . . in the possession of the member which the client is entitled to receive." [Emphasis added.] This raises the question of whether the client is entitled to receive the money.

This Committee, in Cal. State Bar Formal Opn. No. 2008-175, concluded that rule 4-100(B)(4), although it refers to the duty to deliver funds to the client, also includes the duty to deliver funds to a third-party who is entitled to receive them. Rule 3-700(D)(2) requires an attorney, at the end of the matter, to "[p]romptly refund any part of a fee

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[footnote continued…]

obedience to the directions of the employer…." This requires an employer to defend or indemnify an employee who is sued by third persons for conduct in the course and scope of his employment. *Douglas v. Los Angeles Herald-Examiner* (1975) 50 Cal.App.3d 449 [123 Cal.Rptr. 683].

[5/] This opinion only addresses the situation where the paying party is not a party to the action. Also it does not address payment by an insurer, payment by a parent for a minor child, or third-party financing of matters, where the third-party is loaning money to the attorney or client, rather than paying the funds.

[6/] Rule 3-310(F) states: 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.

[7/] The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do not conflict with California policy. See *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 655-656 [82 Cal.Rptr.2d 799].

paid in advance that has not been earned." [Emphasis added.] The rules do not define "refund." The dictionary defines it as "to return (money) in restitution, repayment, or balancing of accounts."[8/] [Emphasis added.] The concept of a refund implies that the money is returned to its source, in this case the third-party payor. We conclude that, absent a fee agreement with the payor spelling out the disposition of the surplus funds, the money should be returned to the payor.

Under our hypothetical, the client asked that the balance in the trust account be paid to her. The California Supreme Court discussed a similar issue in *Johnstone v. State* Bar (1966) 64 Cal.2d 153, 155-156 [49 Cal.Rptr. 97]. The court looked at what an attorney does when receiving funds in a settlement that are subject to a third-party lien. The court held that the attorney receiving funds holds the funds as a fiduciary for that third-party. ("When an attorney receives money on behalf of a third-party who is not his client, he nevertheless is a fiduciary as to such third-party. Thus the funds in his possession are impressed with a trust, and his conversion of such funds is a breach of the trust." (*Johnstone*, at pp. 155-156.) See also *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91.) While both *Johnstone* and *Riley* dealt with medical liens, the issue here is similar—funds held by the lawyer belonging to a third-party. Giving the funds to the third-party complies with this fiduciary duty, but violates the express direction of the client.[9/] The lawyer is faced with a quandary. If he delivers the funds to the client, he can be held liable for a conversion. (*Johnstone*, at pp. 155-156.) If he gives the funds to the payor, he is violating the direct instructions of his client. Under the facts of our hypothetical, we conclude that the third-party payor is entitled to the funds, and therefore, the attorney has a fiduciary duty to advise the payor of the availability of the funds and to turn them over to her.[10/] Cal. State Bar Formal Opn. No. 2008-175 ("An attorney cannot follow a client's direction not to pay a lienholder from settlement proceeds because to do so would be a breach of the attorney's fiduciary duty to the lienholder."). Since the funds in the account belong to the payor, the attorney cannot give the money to the client.[11/]

The issue of who is entitled to the remaining amount can be avoided by the use of carefully drafted agreements with the paying party and the client.

CONCLUSION

When an attorney receives payment for fees from a third-party payor, any refund of excess fees at the conclusion of the case should be paid to the payor, unless the parties have contracted a different result.

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

*[**Publisher's Note:** Internet resources cited in this opinion were last accessed by staff on March 4, 2013. A copy of these resources is on file with the State Bar's Office of Professional Competence.]*

8/ See http://www.merriam-webster.com/dictionary/refund.

9/ Cf. *Virtanen v O'Connell* (2006) 140 Cal.App.4th 688 [44 Cal.Rptr.3d 702], where lawyer held property as escrow holder and had duties both to his client and to the opposing party.

10/ To the extent the facts are such that the payor's entitlement to the refund is less clear than under our hypothetical facts, the lawyer may interplead the funds with the court in order to allow the court to make the determination. In any event, it would not violate the lawyer's ethical duties to interplead the funds under any factual scenario in which he had a good faith basis for questioning the payor's right to the surplus funds. Cal. State Bar Formal Opn. 2008-175.

11/ The lawyer in this situation may have to face two additional issues: (1) what happens if the client requests that the lawyer retain the money for further services after the completion of the agreed work or the payor requests the refund before the work is completed, and (2) what happens if the payor questions the refund amount? This opinion does not address these additional issues.

Rule 1.8.4 [Reserved]

Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client

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

(b) Notwithstanding paragraph (a), a lawyer may:

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

(2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written* promise to repay the loan, provided the lawyer complies with rules 1.7(b), 1.7(c), and 1.8.1 before making the loan or agreeing to do so;

(3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter; and

(4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person* in a matter in which the lawyer represents the client.

(c) "Costs" within the meaning of paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable* expenses of litigation, including court costs, and reasonable* expenses in preparing for litigation or in providing other legal services to the client.

(d) Nothing in this rule shall be deemed to limit the application of rule 1.8.9.

Rule 1.8.6 Compensation from One Other than Client

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) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship;

(b) information is protected as required by Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6; and

(c) the lawyer obtains the client's informed written consent* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably* practicable, provided that no disclosure or consent is required if:

(1) nondisclosure or the compensation is otherwise authorized by law or a court order; or

(2) the lawyer is rendering legal services on behalf of any public agency or nonprofit organization that provides legal services to other public agencies or the public.

Comment

[1] 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.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[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].).

[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. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this rule as soon thereafter as is reasonably* practicable.

[5] This rule is not intended to alter or diminish a lawyer's obligations under rule 5.4(c).

Rule 1.8.7 Aggregate Settlements

(a) A lawyer who represents two or more clients shall not enter into 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 the existence and nature of all the claims or pleas involved and of the participation of each person* in the settlement.

(b) This rule does not apply to class action settlements subject to court approval.

Rule 1.8.8 Limiting Liability to Client

A lawyer shall not:

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

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

(1) represented by an independent lawyer concerning the settlement; or

(2) advised in writing* by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and given a reasonable* opportunity to seek that advice.

Comment

[1] Paragraph (b) does not absolve the lawyer of the obligation to comply with other law. (See, e.g., Bus. & Prof. Code, § 6090.5.)

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

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

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

(b) A lawyer shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the lawyer or of another lawyer in the lawyer's law firm* or is an employee of the lawyer or the lawyer's law firm.*

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

Comment

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

Governmental Organizations

[6] It is beyond the scope of this rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. 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. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person* to serve as the designated recipient of whistle-blower reports from the organization's lawyers, consistent with Business and Professions Code section 6068, subdivision (e) and rule 1.6. This rule is not intended to limit that authority.

Rule 1.14 [Reserved]

Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons*

(a) All funds received or held by a lawyer or law firm* for the benefit of a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account" or words of similar import, maintained in the State of California, or, with written* consent of the client, in any other jurisdiction where there is a substantial* relationship between the client or the client's business and the other jurisdiction.

(b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:

(1) the lawyer or law firm* discloses to the client in writing* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and

(2) if the flat fee exceeds $1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client.

(c) Funds belonging to the lawyer or the law firm* shall not be deposited or otherwise commingled with funds held in a trust account except:

(1) funds reasonably* sufficient to pay bank charges; and

(2) funds belonging in part to a client or other person* and in part presently or potentially to the lawyer or the law firm,* in which case the portion belonging to the lawyer or law firm* must be withdrawn at the earliest reasonable* time after the lawyer or law firm's interest in that portion becomes fixed. However, if a client or other person* disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(d) A lawyer shall:

(1) absent good cause, notify a client or other person* no later than 14 days of the receipt of funds, securities, or other property in which the lawyer knows* or reasonably should know* the client or other person* has an interest;

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

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

(4) promptly account in writing* to the client or other person* for whom the lawyer holds funds or property;

(5) preserve records of all funds and property held by a lawyer or law firm* under this rule 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 pursuant to the Rules of Procedure of the State Bar; and

(7) promptly distribute any undisputed funds or property in the possession of the lawyer or law firm* that the client or other person* is entitled to receive.

(e) The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers and law firms* in accordance with subparagraph (d)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

(f) For purposes of determining a lawyer's compliance with paragraph (d)(7), unless the lawyer, and the client or other person* agree in writing that the funds or property will continue to be held by the lawyer, there shall be a rebuttable presumption affecting the burden of proof as defined in Evidence Code sections 605 and 606 that a violation of paragraph (d)(7) has occurred if the lawyer, absent good cause, fails to distribute undisputed funds or property within 45-days of the date when the funds become undisputed as defined by paragraph (g). This presumption may be rebutted by proof by a preponderance of evidence that there was good cause for not distributing funds within 45 days of the date when the funds or property became undisputed as defined in paragraph (g).

(g) As used in this rule, "undisputed funds or property" refers to funds or property, or a portion of any such funds or property, in the possession of a lawyer or law firm* where the lawyer knows* or reasonably should know* that the ownership interest of the client or other person* in the funds or property, or any portion thereof, has become fixed and there are no unresolved disputes as to the client's or other person's* entitlement to receive the funds or property.

Standards:

Pursuant to this rule, the Board of Trustees of the State Bar adopted the following standards, effective November 1, 2018, as to what "records" shall be maintained by lawyers and law firms* in accordance with paragraph (d)(3).

(1) A lawyer shall, from the date of receipt of funds of the client or other person* through the period ending five years from the date of appropriate disbursement of such funds, maintain:

(a) a written* ledger for each client or other person* on whose behalf funds are held that sets forth:

(i) the name of such client or other person;*

(ii) the date, amount and source of all funds received on behalf of such client or other person;*

(iii) the date, amount, payee and purpose of each disbursement made on behalf of such client or other person;* and

(iv) the current balance for such client or other person;*

(b) a written* journal for each bank account that sets forth:

(i) the name of such account;

(ii) the date, amount and client affected by each debit and credit; and

(iii) the current balance in such account;

(c) all bank statements and cancelled checks for each bank account; and

(d) each monthly reconciliation (balancing) of (a), (b), and (c).

(2) A lawyer shall, from the date of receipt of all securities and other properties held for the benefit of client or other person* through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written* journal that specifies:

(a) each item of security and property held;

(b) the person* on whose behalf the security or property is held;

(c) the date of receipt of the security or property;

(d) the date of distribution of the security or property; and

(e) person* to whom the security or property was distributed.

Comment

[1] Whether a lawyer owes a contractual, statutory or other legal duty under paragraph (a) to hold funds on behalf of a person* other than a client in situations where client funds are subject to a third-party lien will depend on the relationship between the lawyer and the third-party, whether the lawyer has assumed a contractual obligation to the third person* and whether the lawyer has an independent obligation to honor the lien under a statute or other law. In certain circumstances, a lawyer may be civilly liable when the lawyer has notice of a lien and disburses funds in contravention of the lien. (See *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302 [54 Cal.Rptr.2d 665].) However, civil liability by itself does not establish a violation of this rule. (Compare *Johnstone v. State Bar of California* (1966) 64 Cal.2d 153, 155-156 [49 Cal.Rptr. 97] ["'When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.'"] with *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358 [90 Cal.Rptr. 600] [lawyer who agrees to act as escrow or stakeholder for a client and a third-party owes a duty to the nonclient with regard to held funds].)

[2] As used in this rule, "advances for fees" means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client's behalf. With respect to the difference between a true retainer and a flat fee, which is one type of advance fee, see rule 1.5(d) and (e). Subject to rule 1.5, a lawyer or law firm* may enter into an agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account.

[3] Absent written* disclosure and the client's agreement in a writing* signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer's trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer's obligations under paragraph (d) or the lawyer's burden to establish that the fee has been earned.

[4] Subparagraph (d)(7) is not intended to apply to a fee or expense the client has agreed to pay in advance, or the client file, or any other property that the client or other person* has agreed in writing that the lawyer will keep or maintain. Regarding a lawyer's refund of a fee or expense paid in advance, see rule 1.16(e)(2). Regarding the release of a client's file to the client, see rule 1.16(e)(1).

[5] Upon rebuttal by proof by a preponderance of the evidence of the presumption set forth in paragraph (f), a violation of paragraph (d)(7) must be established by clear and convincing evidence without the benefit of the rebuttable presumption.

[6] Whether or not the rebuttable presumption in paragraph (f) applies, a lawyer must still comply will all other applicable provisions of this rule. This includes a lawyer's duty to take diligent steps to initiate and complete the resolution of disputes concerning a client's or other person's* entitlement to funds or property received by a lawyer.

[7] Under paragraph (g), possible disputes requiring resolution may include, but are not limited to, disputes concerning entitlement to funds arising from: medical liens; statutory liens; prior attorney liens; costs or expenses; attorney fees; a bank's policies and fees for clearing a check or draft; any applicable conditions on entitlement such as a plaintiff's execution of a release and dismissal; or any legal proceeding, such as an interpleader action, concerning the entitlement of any person to receive all or a portion of the funds or property.

[***Publisher's Note:*** *Rule 1.15 was amended by order of the Supreme Court, effective January 1, 2023.*]

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 reasonably 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;*

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

(3) the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively; or

(4) 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 representation effectively;

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

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

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

(8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation 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, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings,* exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably* necessary to the client's representation, whether the client has paid for them or not; and

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

Comment

[1] This rule applies, without limitation, to a sale of a law practice under rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. (See *In the Matter of*

Shalant (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.)

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

[3] Withdrawal under paragraph (a)(1) is not mandated where a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, defends the proceeding by requiring that every element of the case be established. (See rule 3.1(b).)

[4] Lawyers must comply with their obligations to their clients under Business and Professions Code section 6068, subdivision (e) and rule 1.6, 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 Bus. & Prof. Code, §§ 6068, subd. (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 applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. (See, e.g., Pen. Code, §§ 1054.2 and 1054.10.) A lawyer in certain criminal matters may be required to retain a copy of a former client's file for the term of his or her imprisonment. (See, Pen. Code, § 1054.9.)

[6] Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

[***Publisher's Note:*** *Comment [5] was amended by order of the Supreme Court, effective June 1, 2020.*]

Rule 1.17 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 another lawyer or law firm* subject to all the following conditions:

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

(b) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e)(1), 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 each client whose matter is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client materials and property, as required by rule 1.16(e)(1); and that if no response is received to the notice within 90 days after it is sent, or if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client, and

(ii) the purchaser shall obtain the written* consent of the client. If reasonable* efforts have been made to locate the client and no response to the paragraph (b)(1)(i) notice is received within 90 days, consent shall be presumed until otherwise notified by the client.

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

(i) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written* notice to be given to each

Rule 1.8: Current Clients: Specific Rules

Share:

Client-Lawyer Relationship

(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:

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

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(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.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

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

(1) the client gives informed consent;

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

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) 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 aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

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

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Comment | Table of Contents | Next Rule

Topic 3 – Withdrawal from Representation

West's Annotated California Codes
Business and Professions Code (Refs & Annos)
Division 3. Professions and Vocations Generally (Refs & Annos)
Chapter 4. Attorneys (Refs & Annos)
Article 4. Admission to the Practice of Law (Refs & Annos)

West's Ann.Cal.Bus. & Prof.Code § 6068

§ 6068. Duties of attorney

Effective: January 1, 2019
Currentness

It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

(i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

(j) To comply with the requirements of Section 6002.1.

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

(*l*) To keep all agreements made in lieu of disciplinary prosecution with the State Bar.

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

(n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

(*o*) To report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.

(2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

(3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000).

(4) The bringing of an indictment or information charging a felony against the attorney.

(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

(6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

(8) As used in this subdivision, "against the attorney" includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney's knowledge already been reported by the law firm or corporation.

(9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.

(10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.

Credits

(Added by Stats.1939, c. 34, p. 355, § 1. Amended by Stats.1985, c. 453, § 11; Stats.1986, c. 475, § 2; Stats.1988, c. 1159, § 5; Stats.1990, c. 1639 (A.B.3991), § 4; Stats.1999, c. 221 (S.B.143), § 1; Stats.1999, c. 342 (S.B.144), § 2; Stats.2001, c. 24 (S.B.352), § 4; Stats.2003, c. 765 (A.B.1101), § 1, operative July 1, 2004; Stats.2018, c. 659 (A.B.3249), § 50, eff. Jan. 1, 2019.)

Notes of Decisions (299)

West's Ann. Cal. Bus. & Prof. Code § 6068, CA BUS & PROF § 6068
Current with all laws through Ch. 997 of 2022 Reg.Sess.

End of Document

Rule 1.6 Confidential Information of a Client
(Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,* or the disclosure is permitted by paragraph (b) of this rule.

(b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes* the disclosure is 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, as provided in paragraph (c).

(c) Before revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable* under the circumstances:

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

(2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b).

(d) In revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known* to the lawyer at the time of the disclosure.

(e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this rule.

Comment

Duty of confidentiality

[1] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to

refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know* that almost all clients follow the advice given, and the law is upheld. Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client's informed consent,* a lawyer must not reveal information protected by Business and Professions Code section 6068, subdivision (e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

Lawyer-client confidentiality encompasses the lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality

[2] The principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].) The lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A lawyer's ethical duty of confidentiality is not so limited in its scope of protection for the lawyer-client relationship of trust and prevents a lawyer from revealing the client's information even when not subjected to such compulsion. Thus, a lawyer may not reveal such information except with the informed consent* of the client or as authorized or required by the State Bar Act, these rules, or other law.

Narrow exception to duty of confidentiality under this rule

[3] Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited by Business and Professions Code section 6068, subdivision (e)(1). Paragraph (b) is based on Business and Professions Code section 6068, subdivision (e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code section 6068, subdivision (e)(1) even without client consent. Evidence Code section 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal information protected by section 6068, subdivision (e)(1) concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

Lawyer not subject to discipline for revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted under this rule

[4] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes* is

likely to result in death or substantial* bodily harm to an individual. A lawyer who reveals information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted under this rule is not subject to discipline.

No duty to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1)

[5] Neither Business and Professions Code section 6068, subdivision (e)(2) nor paragraph (b) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal information protected by section 6068, subdivision (e)(1) as permitted under this rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in Comment [6] of this rule.

Whether to reveal information protected by Business and Professions Code section 6068, subdivision (e) as permitted under paragraph (b)

[6] Disclosure permitted under paragraph (b) is ordinarily a last resort, when no other available action is reasonably* likely to prevent the criminal act. Prior to revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted by paragraph (b), the lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose information protected by section 6068, subdivision (e)(1) are the following:

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

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

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

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

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

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

A lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the information protected by section 6068, subdivision (e)(1). However, the imminence of the harm is not a prerequisite to disclosure and a lawyer may disclose the information protected by section 6068, subdivision (e)(1) without waiting until immediately before the harm is likely to occur.

Whether to counsel client or third person not to commit a criminal act reasonably* likely to result in death or substantial* bodily harm*

[7] Paragraph (c)(1) provides that before a lawyer may reveal information protected by Business and Professions Code section 6068, subdivision (e)(1), the lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial* bodily harm, including persuading the client to take action to prevent a third person* from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of information protected by section 6068, subdivision (e) and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action — such as by ceasing the client's own criminal act or by dissuading a third person* from committing or continuing a criminal act before harm is caused — the option for permissive disclosure by the lawyer would cease because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the lawyer who contemplates making adverse disclosure of protected information may reasonably* conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable* under the circumstances, first advise the client of the lawyer's intended course of action. If a client or another person* has already acted but the intended harm has not yet occurred, the lawyer should consider, if reasonable* under the circumstances, efforts to persuade the client or third person* to warn the victim or consider other appropriate action to prevent the harm. Even when the lawyer has concluded that paragraph (b) does not permit the lawyer to reveal information protected by section 6068, subdivision (e)(1), the lawyer nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

Disclosure of information protected by Business and Professions Code section 6068, subdivision (e)(1) must be no more than is reasonably necessary to prevent the criminal act*

[8] Paragraph (d) requires that disclosure of information protected by Business and Professions Code section 6068, subdivision (e) as permitted by paragraph (b), when made, must be no more extensive than is necessary to prevent the criminal act. Disclosure should allow access to the information to only those persons* who the lawyer reasonably believes* can act to prevent the harm. Under some circumstances, a lawyer may determine that the best course to pursue is to make an anonymous disclosure to

the potential victim or relevant law-enforcement authorities. What particular measures are reasonable* depends on the circumstances known* to the lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the lawyer.

Informing client pursuant to paragraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1)

[9] A lawyer is required to keep a client reasonably* informed about significant developments regarding the representation. (See rule 1.4; Bus. & Prof. Code, § 6068, subd. (m).) Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal information protected by section 6068, subdivision (e)(1) as permitted in paragraph (b) would likely increase the risk of death or substantial* bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal information protected by section 6068, subdivision (e)(1) as permitted in paragraph (b) only if it is reasonable* to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. (See Comment [10] of this rule.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

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

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

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

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

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

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

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

Avoiding a chilling effect on the lawyer-client relationship

[10] The foregoing flexible approach to the lawyer's informing a client of his or her ability or decision to reveal information protected by Business and Professions Code

section 6068, subdivision (e)(1) recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Comment [1].) To avoid that chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal information protected by section 6068, subdivision (e)(1) as early as the outset of the representation, while another lawyer may choose to inform a client only at a point when that client has imparted information that comes within paragraph (b), or even choose not to inform a client until such time as the lawyer attempts to counsel the client as contemplated in Comment [7]. In each situation, the lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

Informing client that disclosure has been made; termination of the lawyer-client relationship

[11] When a lawyer has revealed information protected by Business and Professions Code section 6068, subdivision (e) as permitted in paragraph (b), in all but extraordinary cases the relationship between lawyer and client that is based on trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation, unless the client has given informed consent* to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling interest in not informing the client, such as to protect the lawyer, the lawyer's family or a third person* from the risk of death or substantial* bodily harm, the lawyer must withdraw from the representation. (See rule 1.16.)

Other consequences of the lawyer's disclosure

[12] Depending upon the circumstances of a lawyer's disclosure of information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted by this rule, there may be other important issues that a lawyer must address. For example, a lawyer who is likely to testify as a witness in a matter involving a client must comply with rule 3.7. Similarly, the lawyer must also consider his or her duties of loyalty and competence. (See rules 1.7 and 1.1.)

Other exceptions to confidentiality under California law

[13] This rule is not intended to augment, diminish, or preclude any other exceptions to the duty to preserve information protected by Business and Professions Code section 6068, subdivision (e)(1) recognized under California law.

The repealed prior version of this rule that was effective from November 1, 2018 to May 31, 2020, and the Executive Summary concerning those amendments can be found here.

Rule 1.16 Declining or Terminating Representation
(Rule Approved by the Supreme Court, Effective June 1, 2020)

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

(1) the lawyer knows* or reasonably should know* that the 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;*

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

(3) the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively; or

(4) 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 representation effectively;

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

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

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

(8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation 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, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings,* exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably* necessary to the client's representation, whether the client has paid for them or not; and

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

Comment

[1] This rule applies, without limitation, to a sale of a law practice under rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. (See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.)

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

[3] Withdrawal under paragraph (a)(1) is not mandated where a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, defends the proceeding by requiring that every element of the case be established. (See rule 3.1(b).)

[4] Lawyers must comply with their obligations to their clients under Business and Professions Code section 6068, subdivision (e) and rule 1.6, 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 Bus. & Prof. Code, §§ 6068, subd. (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 applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. (See, e.g., Pen. Code, §§ 1054.2 and 1054.10.) A lawyer in certain criminal matters may be required to retain a copy of a former client's file for the term of his or her imprisonment. (See, Pen. Code, § 1054.9.)

[6] Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

Rule 3.3 Candor Toward the Tribunal*
(Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) A lawyer shall not:

(1) knowingly* 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* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly* misquote to a tribunal* the language of a book, statute, decision or other authority; or

(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, subdivision (e) and rule 1.6. 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.

(b) A lawyer who represents a client in a proceeding before a tribunal* 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 to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6.

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

(d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal* of all material facts known* to the lawyer that will enable the tribunal* to make an informed decision, whether or not the facts are adverse to the position of the client.

Comment

[1] This rule governs the conduct of a lawyer in proceedings of a tribunal,* including ancillary proceedings such as a deposition conducted pursuant to a tribunal's* authority. See rule 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal* by the lawyer.

Legal Argument

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal* sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows* that a 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 and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant 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 as required by rule 1.16. (See, e.g., *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].) The obligations of a lawyer under these rules and the State Bar Act are subordinate to applicable constitutional provisions.

Remedial Measures

[5] 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(a)(4), 1.16(a), 8.4; Bus. & Prof. Code, §§ 6068, subd. (d), 6128.) Remedial measures also include explaining to the client the lawyer's obligations under this rule and, where applicable, the reasons for the 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 protect under Business and Professions Code section 6068, subdivision (e) and rule 1.6.

Duration of Obligation

[6] 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. A prosecutor may have obligations that go beyond the scope of this rule. (See, e.g., rule 3.8(f) and (g).)

Ex Parte Communications

[7] Paragraph (d) does not apply to ex parte communications that are not otherwise prohibited by law or the tribunal.*

Withdrawal

[8] A lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation. The lawyer may, however, be required by rule 1.16 to seek permission of the tribunal* to withdraw if the lawyer's compliance with this rule results in a deterioration of the lawyer-client 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. A lawyer must comply with Business and Professions Code section 6068, subdivision (e) and rule 1.6 with respect to a request to withdraw that is premised on a client's misconduct.

[9] In addition to this rule, lawyers remain bound by Business and Professions Code sections 6068, subdivision (d) and 6106.

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2015-192

ISSUE: What information may an attorney ethically disclose to the court to explain her need to withdraw from a representation – particularly in the face of an order to submit to the court, in camera or otherwise, the substance of the attorney-client communications leading to the need to withdraw?

DIGEST: An attorney may disclose to the court only as much as is reasonably necessary to demonstrate her need to withdraw, and ordinarily it will be sufficient to say only words to the effect that ethical considerations require withdrawal or that there has been an irreconcilable breakdown in the attorney-client relationship. In attempting to demonstrate to the court her need to withdraw, an attorney may not disclose confidential communications with the client, either in open court or in camera. To the extent the court orders an attorney to disclose confidential information, the attorney faces a dilemma in that she may not be able to comply with both the duty to maintain client confidences and the duty to obey court orders. Once an attorney has exhausted reasonable avenues of appeal or other further review of such an order, the attorney must evaluate for herself the relevant legal authorities and the particular circumstances, including the potential prejudice to the client, and reach her own conclusion on how to proceed. Although this Committee cannot categorically opine on whether or not it is acceptable to disclose client confidences even when faced with an order compelling disclosure, this Committee does opine that, whatever choice the attorney makes, she must take reasonable steps to minimize the impact of that choice on the client.

AUTHORITIES INTERPRETED: Rules 3-100 and 3-700 of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code sections 6068(b), 6068(e)(1), and 6103.

STATEMENT OF FACTS

CEO is the Chief Executive Officer of Client, a closely held corporation. Client hired Attorney to prosecute a trade secret misappropriation case against a former employee of Client who left Client to join Client's primary competitor ("Competitor"). Near the close of discovery, about six weeks before trial, Attorney learns some information that causes her to conclude Client's claim lacks probable cause. Attorney meets with CEO to discuss this new information and advises CEO that Client should dismiss the claim, and that Attorney may not ethically continue to prosecute the claim for Client. CEO tells Attorney he does not want to do anything until the day before trial at the earliest because that is the date of a big trade show in which Client and Competitor both will be participating. CEO further tells Attorney that he does not really care about winning or losing the lawsuit, but that he merely wants to keep the lawsuit going in order to damage Competitor's public image leading up to the trade show.

Attorney advises CEO she cannot continue to represent Client in a lawsuit in which the Client's position lacks probable cause and the primary purpose is to harass or maliciously injure another person or company. Under such circumstances, Attorney tells CEO, she would have a mandatory duty to withdraw from the representation. CEO becomes angry and says, "I am paying you a lot of money, and I expect you to do what I say." Attorney leaves the meeting and says she will call CEO the next day after they both have slept on the issue.

[1/] Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

The next day, Attorney phones CEO and asks him if he has reconsidered whether to continue prosecuting the case. Again, CEO becomes angry and says he does not want to hear another word about dropping the case until after the trade show. Attorney then informs CEO that she will need to withdraw from the representation, and asks CEO if Client will consent to the withdrawal. CEO refuses to consent, saying he would not be able to find another lawyer this close to trial.

Attorney immediately begins drafting a motion to withdraw, which she convinces the court to hear on shortened time. In the moving papers, Attorney states, "Ethical considerations require my withdrawal as counsel for Client."

Client appears at the hearing to oppose Attorney's motion. The judge asks Attorney to explain the reason for her need to withdraw. The following colloquy ensues:

Attorney:	My duty of confidentiality to Client prevents me from saying more.
Judge:	I'm concerned about potential prejudice to Client, so you'll have to give me a little more information.
Attorney:	Your Honor, I have an irreconcilable conflict of interest with Client that precludes my continued representation. My duty of confidentiality to Client prevents me from saying any more.
Judge:	Here is what we are going to do. You are ordered to provide me a detailed declaration, filed under seal, about what your client said to you that makes you think you need to withdraw. Then, one week from today you will appear in my chambers for an in camera hearing to discuss the declaration.

DISCUSSION

The Statement of Facts raises several issues and pits certain ethical duties of Attorney directly against her other ethical duties. First, to the extent Attorney knows or should know – as is apparent from the Statement of Facts – that Client is pursuing the lawsuit "for the purpose of harassing or maliciously injuring any person," Attorney has a mandatory duty to withdraw.[2/] Rule 3-700(B)(1). Second, in seeking to withdraw, Attorney must take reasonable steps to avoid reasonably foreseeable prejudice to Client's rights, pursuant to rule 3-700(A)(2). Third, in asking the court for permission to withdraw, Attorney must continue to uphold her duty of confidentiality under rule 3-100 and Business and Professions Code section 6068(e)(1).

1. Duty To Withdraw

Rule 3-700(B)(1) provides that withdrawal is mandatory where, "[t]he 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." Rule 3-700(B)(2) provides that withdrawal is mandatory where, "[t]he member knows or should know that continued employment will result in violation of these rules or of the State Bar Act." Thus, in light of the Statement of Facts, Attorney correctly concluded that she had a mandatory duty to withdraw.[3/]

[2/] For purposes of this opinion, we assume Attorney has exhausted any reporting up obligations she might have under rule 3-600(B). We also assume no conflict between CEO and Client.

[3/] In addition, rule 3-700(C)(1)(d) provides that withdrawal is permissive where the client "by other conduct renders it unreasonably difficult for the member to carry out the employment effectively." Thus, even if withdrawal was not mandated by rule 3-700(B)(1) or (2) under the facts, Attorney still may withdraw if she concludes that hostility between her and CEO was such that she could not effectively continue to represent Client. See *People v. Robles* (1970) 2 Cal.3d 205, 215 [85 Cal.Rptr. 166] (finding that a breakdown in the attorney-client relationship may be "of such magnitude as to jeopardize the defendant's right to effective assistance of counsel," thereby necessitating substitution of counsel); *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 592 [59 Cal.Rptr.2d 280] (citing "complete breakdown in the attorney-client relationship" as a basis for withdrawal). Moreover, it is an open question whether, after deciding that she must withdraw, Attorney still could try to settle the case for Client. See *Estate of Falco* (1987) 188 Cal.App.3d 1004, 1015, n.11 [233 Cal.Rptr. 807] ("We refrain from determining the

Rule 3-700(A)(2), however, provides in part that, "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, [and] allowing time for employment of other counsel . . . ." See also *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 915 [26 Cal.Rptr.2d 554] ("A lawyer violates his or her ethical mandate by *abandoning* a client [citation], or by withdrawing at a critical point and thereby prejudicing the client's case." (Original italics)); see also *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 115 (finding that attorney's duties to client continue until a substitution of counsel is filed or the court grants leave to withdraw); Cal. State Bar Formal Opn. No. 1994-134 (discussing duty to provide competent representation pending court determination on issue of withdrawal). Moreover, notwithstanding Attorney's ethical obligation to withdraw – and how she may weigh her need to withdraw against any prejudice to Client – Attorney may not withdraw absent either client consent or a court order. (Code Civ. Proc., § 284; rule 3-700(A)(1).)

Here, both Client and the court have raised concerns about potential prejudice to Client should Attorney withdraw. In particular, trial is only six weeks away, and it is unclear whether Client will be able to obtain substitute counsel.[4/] Thus, Attorney's duty to withdraw appears to clash with her separate duty to ensure that Client suffers no prejudice as a result of her withdrawal. Ultimately, it will be the court that weighs Attorney's duty to withdraw against prejudice to Client. See *Mandell v. Superior Court* (1977) 67 Cal.App.3d 1, 4 [136 Cal.Rptr. 354]. Attorney, however, must take reasonable steps to convince the court of her need to withdraw, all the while taking reasonable steps to minimize the prejudice to Client and to maintain her duty of confidentiality under rule 3-100(A) and Business and Professions Code section 6068(e)(1).[5/]

2. <u>Duty of Confidentiality</u>

One of the most important duties of an attorney is to preserve the confidences of her client. "No rule in the ethics of the legal profession is better established nor more rigorously enforced than this one." *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 572 [15 P.2d 505]. Business and Professions Code section 6068(e)(1) requires an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Rule 3-100(A) provides, "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client . . ." except under certain limited exceptions not applicable here. An attorney moving to withdraw from representation faces a difficult dilemma – how to present sufficient facts to enable the court to consider the motion, while still maintaining the client's confidences.[6/] See California Rules of Court, rule 3.1362(c) (requiring party moving to

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(Footnote continued...)

corollary issue of whether an attorney who is ethically prohibited from proceeding to trial in a case the attorney believes lacks merit is similarly prohibited from settling the case.").

[4/] Because Client is a corporation, it may not represent itself; thus, it only can proceed with the lawsuit if it is represented by counsel. See *Paradise v. Nowlin* (1948) 86 Cal.App.2d 897, 898 [195 P.2d 867]. However, at least one court has found that this ban on corporate self-representation does not prevent a court from granting a motion to withdraw as attorney of record, even if it leaves the corporation without representation, because such an order puts pressure on the corporation to obtain new counsel. *Ferruzzo v. Superior Court* (1980) 104 Cal.App.3d 501, 504 [163 Cal.Rptr. 573].

[5/] What specific steps Attorney should take if the court ultimately denies her motion to withdraw is beyond the scope of this opinion. At a minimum, however, Attorney must continue to competently represent Client, notwithstanding any animosity that may have developed between them. See rule 3-110. In addition, under these facts, Attorney likely has a duty to advise Client of potential adverse consequences under Code of Civil Procedure Code section 128.7, or even civil liability for malicious prosecution, should Client continue to pursue its lawsuit for improper purposes. See Cal. Code Civ. Proc., § 128.7; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54] (finding that lawyer could be liable for malicious prosecution where he continues to prosecute a lawsuit after learning that it lacked probable cause).

[6/] The client's confidences or secrets, of course, go beyond just attorney-client privileged communications. "Client secrets means any information obtained by the lawyer during the professional relationship, or relating to the

withdraw to file a declaration stating "in general terms and without compromising the confidentiality of the attorney-client relationship why a motion" is necessary).

In *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584 [59 Cal.Rptr.2d 280], the Court of Appeal reversed (on a writ of mandate) the trial court's denial of a motion to withdraw filed by a public defender. In that case, the public defender advised the trial court on the morning of the scheduled trial that he had an actual conflict with his client, declaring that "the conflict caused a 'complete, utter and absolute' breakdown in the attorney-client relationship and precluded him from continuing the representation." *Id.* at p. 588. The public defender also told the trial court that "he could not reveal the nature of the conflict without divulging client confidences or breaching ethical duties." *Id.* The trial court denied the motion after the public defender refused to reveal privileged communications to further explain the conflict. The Court of Appeal then denied the public defender's first writ of mandate "'without prejudice to file a renewed application to be relieved as counsel founded upon a showing of the nature of the conflict, which showing may be made in camera.'" *Id.* (Citation omitted.) The public defender subsequently renewed his motion, but still refused to reveal privileged or confidential information. Rather, the public defender explained in open court that the conflict arose from a statement by defendant: "'[i]t's a statement no one can ignore,' the statement caused an absolute, irretrievable breakdown in the attorney-client relationship such that no member of the public defender's office could represent [defendant] . . . ." *Id.* at p. 589. He further stated that he "could not describe the facts which generated the conflict without violating the privilege or breaching ethical obligations." *Id.* The court again denied the motion because it "was unsatisfied it knew anything more about the conflict than it knew at the last juncture . . . ." *Id.*

Following the denial of its second motion, the public defender's office filed a second writ, which the Court of Appeal this time granted. In so doing, the court first discussed a number of cases addressing a criminal defendant's constitutional right to effective assistance of counsel free from conflict of interest. *Id.* at p. 590 (discussing, *e.g.*, *Uhl v. Municipal Court* (1974) 37 Cal.App.3d 526, 528-29 [112 Cal.Rptr. 478]). On the issue of the duty of confidentiality, the court quoted *Leversen v. Superior Court* (1983) 34 Cal.3d 530 [194 Cal.Rptr. 448], where the Supreme Court criticized a trial court's failure to accept the attorney's representation that a conflict existed:

> [Counsel's] duty not to use [the witness's] confidences against him prevented [counsel] from even discussing these or other possibilities with his client, [the defendant], let alone revealing them in open court. Having accepted the good faith and honesty of [counsel's] statements on the subject, the court was bound under the circumstances to rule that a conflict of interest had been sufficiently established.

Aceves, *supra,* 51 Cal.App.4th at p. 591 (quoting *Leversen*, *supra,* 34 Cal.3d at p. 539). The court ultimately held, "Where as here the duty not to reveal confidences prevented counsel from further disclosure and the court accepted the good faith of counsel's representations, the court should find the conflict sufficiently established and permit withdrawal." *Id.* at p. 592. The court rejected the argument that a defense lawyer's word alone is not sufficient absent additional evidence of a conflict:

> [I]f there is no reason to doubt counsel's sincerity, the trial court properly relies on the lawyer. [Citation omitted.] Regardless of how others might react, only the trial lawyer can realistically appraise whether the conflict may have an impact on the quality of the representation or whether counsel's self-interest might stand in the way. [Citations omitted.] In such cases, the court by necessity relies on the lawyer.

(Footnote continued…)

representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client." Cal. State Bar Formal Opn. No. 1993-133. Information can be "confidential" even if it is not "privileged." See *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 n.5 [120 Cal.Rptr. 253] ("The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client.") (citations omitted); see also rule 3-100, Cmt. [2]; Cal. State Bar Formal Opn. Nos. 2003-161 and 1986-87.

Id. at p. 594.[7/] Depending on the circumstances, courts may require additional factual information in order to rule on a motion to withdraw.[8/]

Aceves not only is consistent with cases like *Uhl* and *Leversen*, but is supported by non-California authorities and opinions as well. For example, Comment [3] to ABA Model Rule 1.16 (the ABA counterpart to rule 3-700) provides, "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." Comment [15] to ABA Model Rule 3.3 provides, "In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6."[9/] See also Or. Formal Opn. No. 2011-185 (finding that, under Oregon Rule 1.6(b), a lawyer may not reveal the basis for his withdrawal unless disclosure is permitted by one of the narrow exceptions to Rule 1.6); Ariz. Ethics Opn. No. 09-02 (discussing the general requirement that an attorney disclose no more than is reasonably necessary when moving to withdraw).

a. <u>In Camera Review</u>

One issue raised in *Aceves* but not decided is whether an attorney can satisfy her obligations under rule 3-100 by providing the court more detailed information in camera.[10/] In *Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1136 [78 Cal.Rptr.2d 494], the court noted that the attorney "could have requested an in camera hearing. This would have afforded the opportunity to furnish details on the claim of conflict and to provide the court with sufficient information as to why the law firm could not continue to represent [the client]." *Manfredi* did not, however, expressly address whether an attorney fulfills her obligations under rule 3-100 by disclosing confidential information in camera rather than in open court. Similarly, *Forrest v. State of California Dept. of Corporations* (2007) 150 Cal.App.4th 183 [58 Cal.Rptr.3d 466], discussed the possibility of an in camera hearing, but did not expressly decide whether it is appropriate in light of rule 3-100. In *Forrest*, the Court of Appeal merely recited that

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[7/] The dissent in *Aceves* distinguished between a request for withdrawal made early in a case and one that occurs on the eve of trial, like the one before it. In the latter case, the dissent was less willing to accept the attorney's representation "without an inquiry sufficient to convince the court a conflict exists." *Aceves*, *supra*, 51 Cal.App.4th at p. 599.

[8/] In *Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1135-36 [78 Cal.Rptr.2d 494], the court cited *Aceves*, *Uhl,* and *Leversen* approvingly, but distinguished those cases from the facts before it. In *Manfredi*, the attorney sought to withdraw from an ongoing arbitration matter based on his receipt of unsolicited and confidential information, which he claimed created a conflict between him and his client. *Id.* at p. 1131. The court was skeptical, based on what it characterized as the prior "use of every [delaying] tactic known to man," and requested further details of the alleged conflict. *Id.* at p. 1131. The lawyer would not provide any additional information, and the court denied the motion. The Court of Appeal noted, "Counsel would have done well to give the court some information as to the shape and size of the conflict here." *Id.* at p. 1134. For example whether it concerned "divided loyalty between current client and former clients," a pecuniary interest by counsel adverse to the client's interest, a breakdown in the relationship between counsel and client, or other types of conflicts. *Id.* at pp. 1134-35. Instead, unlike counsel in *Aceves*, *Leversen*, and *Uhl*, "[Counsel] failed to supply the trial court with the slightest inkling of the nature of the alleged conflict." *Id*. at pp. 1135-36.

[9/] ABA Model Rule 1.6, paragraph (a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."

[10/] When the trial court suggested an in camera hearing, the public defender declined, saying:

> Our obligation to the client is to maintain his confidences, period. I don't think that telling the court, even in camera with [the transcript] sealed, lives up to that obligation. I would gladly do it . . . if I thought I could serve both masters at the same time. [¶] But my understanding of the law is I can't disclose that information to anyone outside of the law firm – outside of the attorneys that represent this gentleman. I cannot disclose [that information] to the court.

Aceves, *supra*, 51 Cal.App.4th at p. 588, n.4.

the trial court in fact had conducted an in camera hearing to accept evidence of a claimed conflict of interest. *Id.* at p. 194. Specifically, the Court of Appeal stated, "In order to protect attorney-client privileged matters, the court conducted a hearing with [counsel] in camera with a court reporter present." *Id.* One could infer from this language that the court believed in camera disclosure was permissible as a way to protect the attorney-client privilege. We believe, however, that such a reading of *Forrest* goes too far.

The issue of reviewing potentially privileged information in camera is addressed in Evidence Code section 915(a), but only in the context of determining whether the information is privileged in the first instance. Section 915(a) states that, with certain inapplicable exceptions, "the presiding officer may not require disclosure of information claimed to be privileged . . . in order to rule on the claim of privilege." The California Supreme Court has ruled similarly, specifically addressing in camera inspections. *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 739 [101 Cal.Rptr.3d 758] ("Evidence Code section 915 prohibits a court from ordering in camera review of information claimed to be privileged in order to rule on the claim of privilege."); see also *Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 45, n.19 [265 Cal.Rptr. 801] (prohibiting in camera inspection of privileged document to determine whether attorney-client privilege had been waived). Because a court cannot order an in camera inspection or otherwise review potentially privileged communications in order to rule on a claim of privilege, it logically follows that a court may not review information that unquestionably is privileged – like the communications between Attorney and Client here – for purposes of ruling on a motion to withdraw.[11/]

For purposes of ruling on a claim of privilege, an attorney may testify about certain circumstances giving rise to the privileged communication – just ***not to the communication itself***. *Costco*, *supra,* 47 Cal.4th at p. 737 ("Evidence Code section 915, while prohibiting examination of assertedly privileged information, does not prohibit disclosure or examination of *other* information to permit the court to evaluate the basis for the claim, such as whether the privilege is held by the party asserting it.") (original italics). The duty of confidentiality, however, is broader than the privilege, and may prevent or limit an attorney from testifying in detail even about the circumstances of a confidential communication where doing so would disclose client "confidences" or "secrets." See Cal. State Bar Formal Opn. Nos. 1993-133, 1988-96, 1986-87, 1981-58, and 1980-52.

b. Court Order To Disclose

Finally, in the Statement of Facts, the court ordered Attorney to provide additional facts in camera. As discussed above, Attorney may be able to tell the court some of the circumstances leading to her request to withdraw, but she must not cross the line and disclose confidential client information – here, for instance, CEO's statements about his reasons for wanting to continue the litigation or any facts about the representation that would tend to portray Client in a poor light. To the extent, however, the court expressly orders Attorney to disclose any confidential client information, Attorney faces a dilemma: disclose confidential client information or risk disobeying a court order, and possibly being held in contempt. In such a case, we believe Attorney has a duty to take all reasonable steps to avoid the dilemma – either by obtaining Client's consent to the in camera disclosure[12/] or some other compromise measure, or by filing a writ petition with the Court of Appeal challenging the court's order. In short, Attorney must exhaust all reasonable measures short of disclosing confidential client information against Client's wishes before making the ultimate decision of whether to disclose confidential information or disobey the court's order. If Client will not consent to the in camera disclosure, the court will not stay its ruling pending the filing of a writ petition, and Attorney cannot find a way to satisfy both Client and the court, then Attorney ultimately must choose between the important and conflicting obligations of protecting Client's confidential information and obeying a court order.

[11/] We do not believe the Supreme Court's discussion in *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164 [32 Cal.Rptr.2d 1], of possible procedures, including in camera inspections, to allow limited disclosure suggests a different result, as the Court declined to articulate what circumstances would warrant such disclosures. See *id.* at p. 1191 ("The use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings, are but some of a number of measures that might usefully be explored by the trial courts *as circumstances warrant.*") (Emphasis added).

[12/] Under the hypothetical facts, it likely is not in Client's best interests to consent to an in camera disclosure, as that disclosure will paint Client in a bad light to the trial judge. Thus, Attorney must explain this possibility, even while requesting Client's consent. See rule 3-500.

With one exception, where the issue was addressed only in a concurring opinion,[13/] no California case or ethics opinion directly addresses this dilemma.[14/] Given that fact, and given that the two duties are central to an attorney's ethical obligations, it is this Committee's view that there is no one rule that should apply in every situation. Attorneys must decide whether to obey the court order, or whether to continue to protect client confidences, and the Committee cannot categorically opine which ethical obligation should prevail. The Committee endeavors here to provide some guidance to assist attorneys in making this important decision.

Business and Professions Code section 6103 states that an attorney's "willful disobedience or violation of an order of the court requiring him to do or forbear an act . . . which he ought in good faith to do or forbear. . . constitute[s] [cause] for disbarment or suspension."[15/] Several State Bar Court opinions address an attorney's challenge to

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[13/] The only California case of which the Committee is aware that squarely addresses the issue is the concurring opinion in *People v. Kor* (1954) 129 Cal.App.2d 436 [277 P.2d 94]. In *Kor*, an attorney was ordered to testify about his privileged conversation with his client under threat of contempt. *Id.* at pp. 440-41. The Court of Appeal ultimately found that the order was in error, and vacated the judgment as a result. *Id.* at pp. 446-47. The court did not make any findings about the propriety or lack of propriety of the lawyer following the court's order to testify. In a concurring opinion, however, Justice Shinn stated, "Defendant's attorney should have chosen to go to jail and take his chances of release by a higher court. This is not intended as a criticism of the action of the attorney. It is, however, a suggestion to any and all attorneys who may have the misfortune to be confronted by the same or a similar problem." *Id.* at p. 447.

More recently, in *Zimmerman v. Superior Court* (2013) 220 Cal.App.4th 389 [163 Cal.Rptr.3d 135], a public defender was found in contempt for refusing to testify about the details of how she received an envelope containing incriminating evidence about her client. The public defender argued that those details were privileged because she received them from a third party who was an agent of her client, but she refused to identify the third party or provide evidence supporting the claim of agency. The court found that the public defender had not established the preliminary fact that an agency relationship existed and, thus, could not establish the existence of the attorney-client privilege. Consequently, the court ordered the public defender to testify about the circumstances under which she obtained the envelope, including the identity of the third party. When the public defender refused to do so, the court found her in contempt, and the court of appeal denied her writ petition. Although the facts in *Zimmerman* have some similarities to the hypothetical facts in this opinion, one significant difference is that the court in *Zimmerman* found that the public defender failed to establish the existence of the privilege; in our hypothetical, the court did not make any such finding and it was unlikely that such a finding could or would be made because the privileged nature of the communication cannot reasonably be disputed.

[14/] Courts and bar opinions in other jurisdictions – all Model Rules states – have addressed this issue, with decisions falling on both sides. *Compare* Ariz. Ethics Opn. No. 00-11 (2000) (attorney may refuse to disclose confidential client information responsive to a subpoena until tribunal enters final order requiring such disclosure); D.C. Ethics Opn. No. 288 (1999) (lawyer subpoenaed by Congressional subcommittee to produce client file may, but is not required to, produce the file if threatened with contempt); R.I. Ethics Opn. No. 98-02 (1998) (lawyer has duty to object to subpoena of client documents, but must comply with final court order requiring disclosure); Mass. Ethics Opn. No. 94-7 (1994) (lawyer must resist identifying client on Form 8300 until Department of Justice obtains court order requiring disclosure) *with Ex parte Enzor* (1960) 270 Ala. 254, 260 [117 So.2d 361] (finding that "petitioner correctly refused to answer the propounded question," even though he was cited for contempt and committed to jail); *Dike v. Dike* (1968) 75 Wash.2d 1, 16 [448 P.2d 490] (noting that attorney should not be held in contempt for failing to disclose privileged communication, but stating, "[i]f the attorney's position, in the opinion of the trial court, is wrong to the point of contempt, he should be so adjudged . . . ."); see also H. Brent Helms, *Financial Institutions Reform, Recovery, and Enforcement Act: An Ethical Quagmire for Attorneys Representing Financial Institutions* (1992) 27 Wake Forest L. Rev. 277, 295 (discussing whistleblowing under FIRREA, noting attorneys' duty to challenge "the over-aggressive nature of the federal regulatory agencies," and stating that "attorneys practicing in states having ethical rules modeled after the Model Code should not feel compelled to disclose the confidences of their client financial institutions, even in the face of a court order.").

[15/] Section 6103 states: "A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension." In addition to disobedience of a court order constituting possible grounds for attorney discipline, it also may

disciplinary findings under section 6103 based on the attorney's contention that the court order at issue was void or otherwise improper. See, e.g., *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9 (affirming lower court's decision that the attorney's failure to return his client's husband's money collected under a writ of execution constituted a violation of the court order quashing the writ, and holding, "Regardless of respondent's belief that the order was issued in error, he was obligated to obey the order unless he took steps to have it modified or vacated, which he did not do [fn. omitted]");[16/] *In re Jackson* (1985) 170 Cal.App.3d 773, 778 [216 Cal.Rptr. 539] ("Once a court has jurisdiction and makes a ruling, an attorney has a duty 'to respectfully yield to the rulings of the court, *whether right or wrong*. [Citation omitted.] "[I]f the ruling is adverse, it is not counsel's right to resist it or to insult the judge – his right is only respectfully to preserve his point for appeal."""). (Citations omitted, original italics).[17/] We point out, however, that section 6103 expressly applies only to orders with which the attorney "ought in good faith" comply. It is certainly not obvious that an attorney ought in good faith comply with an order compelling a violation of her duty to maintain client confidences. Thus, this Committee cannot conclude that section 6103 by itself justifies disclosure under the circumstances.[18/]

In several cases, courts have found violations of section 6103 over an attorney's argument that her noncompliance with a court order or other apparent disrespect for the court was necessitated by the pursuit of the client's interests. In *Arm v. State Bar* (1990) 50 Cal.3d 763 [268 Cal.Rptr. 741], the California Supreme Court affirmed a discipline order against an attorney who failed to notify his client or the court of a pending suspension order against him. The attorney had argued that he chose not to make the disclosure because "it was in his client's interest that he continue representing her. . . ." *Id.* at p. 775. The court rejected this argument, finding that "protection of the client's interests does not necessitate or justify concealing the fact of the attorney's suspension from practice." *Id.* Although *Arm* specifically addressed the attorney's violation of his duties to the court under section 6103, and did not address the violation of an express court order, *Arm* nonetheless pits an attorney's duty to the client against the duty to the court. In *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, an attorney was

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(Footnote continued…)

constitute contempt. Thus, unlike reporters – who are constitutionally protected from a finding of contempt for refusing to reveal their sources (Cal. Const. Art. I, Sec. 2(b)) – attorneys face significant legal ramifications for refusing to obey a court order.

[16/] The court noted that an attorney's belief as to the validity of the order may be relevant to a charge of moral turpitude under Business and Professions Code section 6106. *In the Matter of Klein*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 11; see also *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 47 (finding that "bad faith must be proved if the State Bar alleges that respondent's noncompliance with the Court's orders involves moral turpitude").

[17/] At least one State Bar Court opinion describes the attorney as having a choice as to whether to disobey an order and challenge it on appeal:

> Moreover, in California, a person affected by an injunctive order has available to him two alternative methods by which he may challenge the validity of such order on the ground that it was issued without or in excess of jurisdiction. He may consider it a more prudent course to comply with the order while seeking a judicial determination as to its jurisdictional validity. On the other hand, he may conclude that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril. In the latter event, such a person, under California law, may disobey the order and raise his jurisdictional contentions *when he is sought to be punished for such disobedience*. If he has correctly assessed his legal position, and it is therefore, finally determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong.

In Matter of Respondent X (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 604 (internal quotations and citations omitted) (explaining that collateral bar rule is not the rule in California). This does not answer the question, however, of whether an attorney can be disciplined if he chooses to obey the court order, declining to risk that the Court of Appeal ultimately will agree with the trial court's disclosure order.

[18/] Section 6103 subjects an attorney to discipline not only for disobeying a court order, but also for "violati[ng] the oath taken by him, or of his duties as such attorney . . . ." Thus, violation of the duty of confidentiality could subject a lawyer to discipline under section 6103, as well as under section 6068(e)(1) and rule 3-100.

disciplined for, among other things, failing to pay a sanctions order. In concluding that the attorney had willfully failed to comply with the court's order, and thereby violated both section 6103 and section 6068(b), the court stated, "Obedience to court orders is intrinsic to the respect attorneys and their clients must accord the judicial system. As officers of the court, attorneys have duties to the judicial system which may override those owed to their clients." *Id.* at p. 403. Thus, both the Supreme Court and the State Bar Court appear to have rejected the argument that the client's interests necessarily justify an attorney's breach of the duty to the court, including the obligation to follow a court order.

Neither *Arm* nor *Boyne*, however, addressed an argument that an attorney had to violate a court order in order to comply with the duty of confidentiality. Thus, neither of these opinions directly puts at issue an attorney's conflicting duty of confidentiality under section 6068(e) and rule 3-100 and the duty under section 6103 to comply with court orders. This Committee acknowledges the duty of confidentiality to be among the most sacred duties an attorney owes to a client and cannot lightly – without direct supporting authority – conclude that it is ever acceptable to violate that duty, even in the face of a court order compelling disclosure.[19/] Nor, however, is this Committee willing to conclude the opposite – that is, that an attorney may violate any court order, even one with which the attorney has a good faith basis to disagree.[20/]

Although this Committee is unable to categorically opine on how an attorney should respond to an order compelling disclosure of confidential information after she has exhausted all reasonable efforts short of disobedience, this Committee can conclude that an attorney indeed must exhaust all reasonable efforts before concluding that the only options remaining are disclosing confidential information or disobeying a court order. As discussed above, the attorney should seek appropriate relief from the court's order, including filing a writ petition. She also should renew efforts to reach a compromise with the client and the court, which may include further attempts to obtain the client's consent to the withdrawal (albeit with full disclosure to the client of any adverse consequences of such disclosure). To the extent the duty to withdraw is a permissive one (unlike the mandatory one in our hypothetical facts), then the attorney should consider withdrawing the motion to withdraw.

[19/] Although the Committee is not opining on the evidentiary issue of wavier of the attorney-client privilege, it is significant to note that, in the event an attorney discloses privileged information under the compulsion of a court order, the attorney's disclosure likely would not be held to constitute a waiver of the privilege. See Evidence Code, section 912(a) ("[T]he right of any person to claim a privilege provided by section 954 (lawyer-client privilege) . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, *without coercion*, has disclosed a significant part of the communication or has consented to disclosure made by anyone.") (emphasis added); *Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672, 683 [81 Cal.Rptr.3d 186] (holding, "no waiver of the privilege will occur if the holder of the privilege has taken reasonable steps under the circumstances to prevent disclosure. The law does not require that the holder of the privilege take 'strenuous or Herculean efforts' to resist disclosure."); *Schlumberger Limited v. Superior Court* (1981) 115 Cal.App.3d 386, 391-92 [171 Cal.Rptr. 413] ("Disclosure pursuant to a court order is coerced and does not constitute a waiver."); see also *Duplan Corp. v. Deering Milliken, Inc.* (D.S.C. 1974) 397 F.Supp. 1146, 1163 [184 U.S.P.Q. 775] (finding no waiver of the privilege when party turned over the privileged documents to the court for an in camera inspection "upon the suggestion of the court") (discussed in *Regents of University of California, supra.*).

[20/] The ABA addressed and resolved this issue in Model Rule 1.6(b)(6), which provides, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . (6) to comply with other law or a court order . . . ." Comment [15] to Model Rule 1.6 further explains:

> A lawyer may be ordered to reveal information relating to the representation of a client by a court . . . . Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal . . . . Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

California has never followed the approach of Model Rule 1.6, and thus this rule is not particularly helpful to our analysis.

In addition, whichever choice the attorney makes, she must take reasonable steps to avoid prejudice to the client. Thus, if the attorney opts to obey the court order and disclose the client information, she must take all reasonable steps to minimize the harm to the client caused by such disclosure. For example, in the hypothetical, Attorney knows that Client's case is likely to be compromised if the trial judge learns that CEO is pursuing the case for improper purposes. Thus, Attorney should consider, for example, asking the court to appoint a judge pro tem or transfer the withdrawal motion to another judge, thus allowing the disclosure – if one ultimately is made – to be made to a judge other than the trial judge. On the other hand, if the attorney refuses to disclose confidential information, even when faced with the court's order to disclose, the attorney must take all reasonable steps to mitigate any potential harm to the client.

CONCLUSION

When an attorney knows or should know that her client is pursuing an action without probable cause and for the purpose of harassing or maliciously injuring another person, the attorney has a mandatory duty to withdraw from the representation if efforts to remonstrate fail. To the extent the attorney cannot obtain the client's consent to the withdrawal, the attorney will need to file a motion to withdraw, taking reasonable steps to avoid reasonably foreseeable prejudice to the client. In attempting to justify the need to withdraw, the attorney may not disclose client confidences. Ordinarily, for purposes of the motion to withdraw, it will be sufficient to state words to the effect that ethical considerations require withdrawal or that there has been an irreconcilable breakdown in the attorney-client relationship. To the extent such general language is deemed insufficient by the court, however, the attorney may only provide additional background information, but may not disclose confidential communications or other confidential information – either in open court or even in camera. If, notwithstanding all efforts by the attorney to prevent the court from entering an order compelling disclosure – including by requesting a stay of the order to allow time to file a writ petition – the court nonetheless orders disclosure, this Committee cannot categorically opine on how the attorney must choose between her competing duties to maintain the client's confidences and to obey the court's order. Whatever the attorney's decision, however, she must take reasonable steps to minimize the impact of that decision on the client.

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

*[**Publisher's Note:** Internet resources cited in this opinion were last accessed by staff on February 9, 2015. A copy of these resources is on file with the State Bar's Office of Professional Competence.]*

Topic 4 – Departure from Law Firm

The repealed prior version of this rule that was effective from November 1, 2018 to December 31, 2022, and the Executive Summary concerning those amendments can be found here.

Rule 1.4 Communication with Clients
(Rule Approved by the Supreme Court, Effective January 1, 2023)

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act;

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

(3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and

(4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

(c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.

(d) A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

Comment

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, subd. (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances. For example, a lawyer's receipt of funds on behalf of a client requires communication with the client pursuant to rule 1.15, paragraphs (d)(1) and (d)(4) and ordinarily is also a significant development requiring communication with the client pursuant to this rule.

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation. (See rule 1.16(e)(1).)

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

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2020-201

ISSUE: What ethical obligations arise when a lawyer departs from her law firm?

DIGEST: The departing lawyer and the law firm each have ethical obligations in connection with the departure and must prioritize their ethical obligations to each client above their own competing interests. Specifically, if the departure of the lawyer is a significant development to a particular client, the lawyer and the law firm each have a duty to communicate the fact of the departure to the client and to explain the significance of the change in representation so that the client may make an informed choice regarding counsel going forward. During all phases of the departure, the lawyer and the law firm must also be mindful of their continuing obligations to protect client confidences and to avoid conflicts of interests with clients. If the lawyer or law firm is unable to competently handle the client's representation as a result of the departure and cannot remedy that situation, or if the client chooses to make a change in representation, the lawyer or law firm must comply with rule 1.16, including taking "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." Finally, both the departing lawyer and the law firm have a duty to cooperate in the transition of any client matter in order to protect the client's interests.

AUTHORITIES INTERPRETED: Rule 1.1, 1.4, 1.7, 1.10, 1.16, 1.18, 5.1, 5.2, 7.1, 7.2, and 7.3 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code section 6068(e).

STATEMENT OF FACTS

A lawyer is leaving her law firm ("Law Firm") and transitioning her practice to a new firm ("New Firm"). Prior to making this transition, the lawyer ("Lawyer" or "Departing Lawyer") wants to know what ethical obligations arise for her and the Law Firm as a result of her departure.

DISCUSSION

Lawyer mobility is a reality in today's legal marketplace. Legal headlines are filled with news of lawyers moving from one firm to another, sometimes alone, sometimes with groups, and often accompanied by tales of acrimony or contentiousness between the departing lawyer(s) and the former law firm.

Almost all lawyer departures involve the balancing of competing interests between the departing lawyer and the departed law firm. In analyzing the rights and obligations of the lawyer and the law firm to one another, there is frequently a tension between compliance with the California Rules of Professional

Conduct and other ethical guidelines, the fiduciary duties among and between attorneys at the law firm, and any contractual obligations that the attorneys and law firms may have to one another that govern the departure. Notwithstanding this tension, the primary directive is that the client's interests must come first. Specifically, lawyers and law firms must prioritize their ethical obligations to clients above their own competing interests. These ethical obligations center around the fundamental concepts that the client has the right to the counsel of his or her choice and lawyers must protect their clients' interests during all phases of any transition.

This opinion will discuss the ethical obligations lawyers and law firms have to a client when a lawyer leaves her current law firm and moves to another law firm. Much of the discussion is also applicable to lawyers who are moving to an in-house position or leaving the practice of law altogether. While the opinion will not seek to resolve all issues of substantive law, it will identify issues that are often implicated in attorney transitions since many of these ethical obligations cannot be analyzed in isolation.

I. The Client's Freedom of Choice in Selection of Counsel and Protection of the Client's Best Interests are Guiding Principles

The guiding ethical principles governing any attorney departure are the protection of the client's best interests and the client's right to the counsel of its choice. (See Cal. State Bar Formal Opn. No. 1985-86 ["the interests of the clients must prevail over all competing considerations . . . if the practitioner's withdrawal from the firm is to be accomplished in a manner consistent with professional responsibility"]; ABA Formal Opn. No. 99-414 ["A lawyer's ethical obligations upon withdrawal from one firm to join another derive from the concepts that clients' interests must be protected and that each client has the right to choose the departing lawyer or the firm, or another lawyer to represent him."].) Thus, the ethical obligations triggered when a lawyer leaves her law firm should be viewed through the lens of these client-centered directives.

The client's right to the counsel of its choice has a long history in American jurisprudence.[1/] (*Echlin v. Superior Court of San Mateo County* (1939) 13 Cal.2d 368.) It derives from the concept that a client has the right to discharge its lawyer at will, with or without cause, a right that has been recognized in both California statute and case law. (See, *Heller Ehrman v. Davis Wright*, Cal. Supreme Court Case No. S236208, March 5, 2018, citing *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790 [100 Cal.Rptr. 385]; Code Civ. Proc., § 284; and *General Dynamics v. Superior Court (Rose)* (1994) 7 Cal.4th 1164, 1174–1175 [32 Cal.Rptr.2d 1].)

Because clients have the freedom to discharge their lawyer at will and hire another one, they do not "belong" either to the law firm or the lawyers that are providing the legal services. Many law firms use compensation structures that are tied, in part, to rewarding attorneys for bringing in clients and generating matters for a particular client, often known as client origination credits. When those law

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[1/] A client's right to the counsel of its choice is not absolute. (See, *Howard v. Babcock* (1993) 6 Cal.4th 409, 422-423 [25 Cal.Rptr.2d 80].) There are numerous impediments that may affect that choice, especially in the civil context. For example, the lawyer may be unable or unwilling to take on a certain matter, may have conflicts that preclude representation, or the parties may disagree on an acceptable price for legal services. However, in the context of an attorney departure, assuming that both Departing Lawyer and the Law Firm are willing and able to perform the required legal services for the client, the client has the freedom and right to choose between the two or to hire a new counsel.

firms allocate compensation among certain attorneys, clients may be seen by lawyers at the firm as belonging to a particular attorney.[2/] As the California Supreme Court has made clear, however, clients are not the property of any law firm or lawyer.[3/] In a competitive legal marketplace, law firms and lawyers must earn each client's continued loyalty through outstanding service, quality of representation and an agreement regarding the value and cost of legal services.

II. Departing Lawyer and Law Firm Each Have Ethical Obligations to Clients in Connection with Lawyer's Departure

Departing Lawyer and Law Firm each have ethical obligations to all clients who will be materially affected by the departure and/or whose active matters on which Departing Lawyer is currently working. The ethical obligations are the same whether Departing Lawyer is a partner or shareholder, a non-equity partner, an associate, or some other category of lawyer such as one designated as "Of Counsel." "All attorneys in a law firm owe duties – including ethical duties – to each of the firm's clients." (See, Cal. State Bar Formal Opn. No. 2014-190 ["When a client retains a law firm, the client's relationship generally extends to all attorneys in the firm"]; see also Cal. State Bar Formal Opn. No. 1981-64 [opining that all attorneys employed by a legal services program owe identical professional responsibilities to clients of the program].) This point also is made in numerous cases in the professional malpractice context. See, e.g., *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 392 [58 Cal.Rptr.3d 516] ["Unless there is an agreement to the contrary, the retention of an attorney in a law firm constitutes the retention of the entire firm."].

Departing Lawyer and Law Firm must be cognizant of the ethical obligations they have throughout the transition period, irrespective of whether the client decides to leave with Departing Lawyer, to stay at Law Firm, or choose otherwise. (See Cal. State Bar Opn. No.2014-190; see also rule 1.16.) These ethical obligations sometimes can be at odds with the business interests of Law Firm or Departing Lawyer. In such circumstances, the client's interest always remains paramount.

During the transition process, Departing Lawyer and Law Firm also may have legal obligations to one another, which could include fiduciary duties and contractual obligations. To the extent possible, when there is a conflict between a lawyer's and a law firm's ethical obligations to a client and a lawyer's and a law firm's obligations to each other, the former should prevail. For example, Law Firm should not attempt to enforce contractual obligations on Departing Lawyer that would prevent Departing Lawyer from complying with ethical obligations to clients or interfere with the client's right to choice of counsel.

[2/] The Committee takes no position on law firm compensation structures, or the need and desire to compensate attorneys for bringing in valuable new business to law firms. It merely wishes to note that the scenario described sometimes contributes to a belief that a client belongs to a particular attorney at the law firm or the law firm itself. This also can create conflicts during an attorney departure where an origination credit is given to one attorney, but another attorney is actually handling the day-to-day aspects of the client relationship and managing most of the client's matters. The attorney who "originated" the matter who is staying with the firm sometimes objects to the departing lawyer, who is handling the day-to-day communications with the client, from communicating with the client about her departure. The fact that Departing Lawyer did not "originate" the matter is not a ground for prohibiting an otherwise required or permitted communication about the departure with the client.

[3/] See *Heller Ehrman v. Davis Wright*, *supra*, (2018) 4 Cal.5th 467, 556 [299 Cal.Rptr.3d 371]["we affirm that client matters belong to the clients, not the law firms, and the latter may not assert an ongoing interest in the matters once they have been paid and discharged."]

With respect to a lawyer's departure, lawyers with managerial authority "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these rules and the State Bar Act." Rule 5.1(a). Further, a supervisory lawyer cannot prevent or otherwise obstruct a departing lawyer from complying with ethical obligations during a departure. Rule 5.1(b) and (c). A subordinate lawyer shall comply with the Rules of Professional Conduct and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person. Rule 5.2(a). A subordinate lawyer is permitted, but not required, to act in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. Rule 5.2(b) and Comment.

III. The Duty to Communicate to Clients Regarding Lawyer's Departure

California Rule of Professional Conduct, rule 1.4(a)(3), states:

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

The departure of a lawyer is a "significant development" with respect to current clients of the law firm for whom the lawyer is providing meaningful legal services, as discussed below in subsection A. Thus, under rule 1.4(a)(3), Departing Lawyer and Law Firm must inform certain clients about Lawyer's departure as soon as reasonably practical to allow clients to make an informed choice in counsel and to provide for a smooth transition to avoid prejudice to clients. Cal. State Bar Formal Opn. No. 1985-86 states, in pertinent part: "whenever there is a material change in the representation of the client caused by a change in an attorney's employment status, all members of the Bar involved directly in this change have a responsibility to see that the client receives the protections required by this rule, including timely and accurate notice of the change. The policy behind the notice requirement is to allow the client an opportunity to be advised of the changed status of the attorneys, so the client can make an informed choice of counsel." (citing to *Jewel v. Boxer*, *supra*, (1984) 156 Cal.App.3d 171 [203 Cal.Rptr. 13] and *Little v. Caldwell*, *supra*, (1894) 101 Cal. 553, and referring to former rule 2-111(A) related to an attorney's duties when withdrawing from employment.)

Departing Lawyer does not violate rule 7.3 by notifying current clients of her departure from Law Firm. Such notification does not constitute an impermissible solicitation and, as discussed above, Departing Lawyer is ethically obligated to communicate this information to current clients.

A. Which Clients Should Be Notified of Lawyer's Departure?

Notice is only required as to clients whose matter(s) Departing Lawyer is responsible for, for whom she plays a principal role in Law Firm's delivery of legal services, and any client Departing Lawyer reasonably believes may wish to transfer its files to Departing Lawyer at New Firm.[4/] (ABA Formal Opn. No. 99-414

[4/] The notice obligation in the event of an attorney departure is more limited than the obligation of a lawyer in a law firm dissolution context which, pursuant to Cal. State Bar Formal Opn. No. 2014-190, requires all attorneys employed by the firm to comply with rule 1.16(d) as to all clients of the firm, regardless of their connection to any specific client or the specific nature of their affiliation with the firm.

["[t]he impending departure of a lawyer who is responsible for the client's representation or who plays a principal role in the law firm's delivery of legal services currently in a matter (i.e., the lawyer's current clients), is information that may affect the status of a client's matter . . ."].)

The general test of whether a client should be informed of a lawyer's departure is to consider it from the client's point of view, since communications should always be "governed by the overall principle of what is in the best interest of the client." (See, *Jewel* and Cal. State Bar Formal Opn. No. 1985-86.) If the client was asked who its attorney is, or attorneys are, Departing Lawyer would be one of the principal attorneys identified by the client. This does not mean that Departing Lawyer is necessarily the only attorney providing legal services to that client. For example, some clients may consider a group of attorneys to be their principal attorneys at the firm, depending on the complexity of a client matter, how a particular client matter is staffed and how client communications are handled within the firm.

On the other hand, if Departing Lawyer had limited involvement in the client's matter, or the client has had little to no communication with Departing Lawyer, it is unlikely the client would consider Lawyer's departure as a "significant development" in its case. In those circumstances, notice to the client is not required. However, whether Departing Lawyer played a principal role in the client's matter should be weighed from the client's perspective with any doubts being resolved in favor of informing the client.

B. When Should Clients Be Told of Lawyer's Departure?

Determining when it is appropriate to notify a client of a lawyer's departure depends on a variety of factors. Generally, notice to a client should be timely, fair and reasonable under the circumstances. It should enable Departing Lawyer and Law Firm to discharge their ethical obligations in a responsible and orderly way while facilitating client's ability to choose counsel. Most importantly, it should be provided in a manner that enables the client to make a reasonable, informed decision about who should carry on with the representation. (See, ABA Formal Opn. No. 99-414; PA Joint Formal Opn. No. 2007-300.) However, what is reasonable notice to a client of any transition is often fact-specific and may depend on the client and its needs.

With respect to Law Firm, any directive to Departing Lawyer not to contact a client, whether from management, other partners or Law Firm's executive committee, should be viewed skeptically and as potentially violating rule 1.4(a)(3). As a preliminary matter, any suggestion that Departing Lawyer should not be permitted to communicate the fact of departure until after Departing Lawyer has left the Law Firm has been widely rejected. (See, e.g., ABA Formal Opn. No. 99-414 at 5 n.11 ["We reject any implication of Informal Opinions 1457 or 1466 that notices to current clients as a matter of ethics must await departure from the firm."]) Such a demand is directly at odds with the notion that the client must be allowed to make an informed choice with respect to its future representation upon news of a lawyer's departure and does not lend itself to facilitating a smooth transition of the client's matters to avoid prejudice.

Law firms also should be cautious in attempting to enforce firm policies or contractual provisions that expressly limit Departing Lawyer's contact with a client after Law Firm has been given notice of Lawyer's departure.[5/] For example, if the policy or provision called for a short delay in contacting clients so that

[5/] Furthermore, except as set forth in rule 5.6 and its comments, no partnership, shareholder or employment agreement can restrict a lawyer's right to practice law following the lawyer's departure.

Law Firm and Departing Lawyer could agree on an approach and joint message to send to clients about Lawyer's departure, this would likely be acceptable because it has a client-centered objective. However, if Law Firm's policy or provision were used to prevent or to delay Departing Lawyer from contacting clients, all the while Law Firm was using this delay to talk to the clients first and make their own case for keeping the clients at the firm, such actions conflict with Law Firm's ethical obligations to prioritize its clients' interest in making an informed choice of counsel above their own competing interests during the transition.

With respect to Departing Lawyer, absent circumstances where a delay in doing so would prejudice the client's interests or interfere with its right to choice of counsel, Departing Lawyer should not tell clients she is leaving until she tells her Law Firm. This allows both Departing Lawyer and Law Firm the opportunity to communicate with the client about the departure so that each can present options to the client about future representation and allow the client to make an informed choice regarding counsel.

This is an area where there is a potential for overlap with other legal issues. For example, any notification by Departing Lawyer to the client that she is leaving Law Firm prior to the time that she provides notice to Law Firm may be construed as a breach of Departing Lawyer's fiduciary duties or contractual obligations to Law Firm and its partners. However, such an analysis would be fact-specific and goes beyond the scope of this opinion.

Prompt notice to the client is also very important when Departing Lawyer does not intend to continue her representation of the client in her post-departure affiliation and/or Law Firm is unable or unwilling to continue on with the representation.[6/] In such circumstances, if Law Firm and Departing Lawyer were seeking to terminate their attorney-client relationship with the client, they would need to comply with rule 1.16(d) before withdrawing as the lawyer(s) for the client, including taking "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client" and "giving the client sufficient notice to permit the client to retain other counsel." This will be discussed in more detail later in the opinion.

C. What Form and Substance Should These Client Communications Take?

To the extent practical, Law Firm and Departing Lawyer should attempt to agree upon and provide joint written notice to all clients on whose matter(s) Departing Lawyer is responsible or for whom she plays a principal role in Law Firm's delivery of legal services. (Cal. State Bar Formal Opn. No. 1985-86.) Joint notice, if it is truly the result of a cooperative endeavor between the parties, is preferable to unilateral notice because it is a better way in which to protect clients' interests. (ABA Formal Opn. No. 99-414.)

However, since not all departures are amicable, if the parties cannot agree on joint notice, or drafting the joint notice is being used by a party to delay formal client notification while informal notice talks have already begun, unilateral notice is ethically permissible and may be required in some circumstances. "When the departing lawyer reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters

6/ If the attorney's departure will cause a law firm dissolution, (i.e. in a two-person law firm that is structured as a limited liability partnership), Departing Lawyer must give sufficient notice to their partner and clients of their intent to depart. There are many important ethical considerations implicated in these circumstances, and sufficient notice may include allowing the other partner reasonable time to find employment and/or another law firm in which to serve existing firm clients to avoid prejudice to those clients.

she currently is responsible or plays a principal role in the delivery of legal services…" (See, ABA Formal Opn. No. 99-414 at p. 5.) It is not imperative that both Departing Lawyer and Law Firm notify the client of an impending departure, although both are permitted to if they so choose. However, if one fails to notify a client, or refuses to do so, the other one must.

The notice, whether joint or unilateral, should provide the client with enough information for the client to understand both the significance of the departure on the representation and to permit the client to make an informed decision regarding the representation going forward. Rule 1.4(a)(3) and (b). As such, any notice[7/] should inform the client:

- Departing Lawyer is leaving;
- The timing of the departure;
- Where Departing Lawyer is going and related contact information, both currently and after the lawyer's actual departure;
- Departing Lawyer's and Law Firm's ability and willingness or inability and unwillingness to continue to represent the client;[8/]
- The client may choose to stay with Law Firm, go with Departing Lawyer or choose another lawyer or law firm entirely; and
- Where the client's file will be and who will be handling the client's matter until the client expresses a choice.

D. Communications Related to the Lawyer's Departure

In conjunction with providing notice to the client, both Departing Lawyer or any lawyer from Law Firm may, and in some instances, should, provide the client with additional information about Lawyer's departure. In fact, as discussed, rule 1.4(b) requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4(a)(3) also requires prompt compliance with reasonable client requests for information related to the future representation. For example, Departing Lawyer should provide the client with additional information reasonably necessary for the client to make an informed decision about future representation. Depending on the situation, this may include providing the client with an update on the

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[7/] There are certain factual scenarios that may require Departing Lawyer and Law Firm to address notice to clients differently. One example is when a tripartite attorney-client relationship exists with an insurer and an insured. In that situation, each client must be notified of the lawyer's departure and the choice of counsel, however, choice of counsel may ultimately be determined by the terms of the insurance contract between the insurer and the insured. In accordance with rule 1.4, the notification to the insurer and the insured of the departure and choice of counsel should further inform such clients that the contract between the insurer and insured may determine choice of counsel should a conflict arise between the insurer and the insured as to continued representation.

[8/] Rule 1.4(a)(4) requires lawyers to "advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law." If this is unilateral notice, however, one lawyer should be cautious about opining on the willingness, ability or competence of the other lawyer or law firm to handle the client's matter. Making such statements poses a risk that the information could be false or misleading. Furthermore, as discussed herein, if neither Departing Lawyer nor Law Firm is willing and able to continue with the representation, each would need to comply with rule 1.16(d) before withdrawing as the lawyer(s) for the client.

status of the matter (if one has not been recently given), information on New Firm's billing rates, resources of New Firm, and who would be working on the client's matter(s) at New Firm. Similarly, Law Firm should also provide the client with relevant information related to the future representation. Depending on the situation, this may also include providing the client with an update on the status of its matter (if one has not been recently given), information on any changes to the billing arrangements at Law Firm, how client's matter(s) will be staffed at Law Firm, and competence of Law Firm to handle the matter going forward notwithstanding the departure of Lawyer, etc. However, all lawyers should continue to make clear the client has the right to choose whether Law Firm, Departing Lawyer, or some other firm will continue the representation. (ABA Formal Opn. No. 99-414.)

In some circumstances, Departing Lawyer may move on to New Firm prior to the time that the client has been given notice of the Lawyer's departure or chosen counsel. These circumstances do not change each lawyers' ethical obligations to provide notice to the client of the departure along with relevant information to allow the client to make an informed choice in counsel. If Departing Lawyer has already left Law Firm this includes information related to where Departing Lawyer is now practicing law. In addition, Law Firm should never withhold information from any client that asks for the whereabouts of Departing Lawyer or mislead the client about Departing Lawyer in any way. Each lawyer should also refrain from making any false or misleading comments about the other when communicating to the client. (See, rule 8.4(c): "It is professional misconduct for a lawyer to…engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation.")

IV. Client Solicitation is Ethically Permitted in Certain Situations

Beyond notification and providing follow up information that is required to be communicated to the client by rule 1.4, the question often arises as to whether it is proper for Departing Lawyer to solicit[9/] any client to come with her to New Firm.[10/] For any client with whom Departing Lawyer has a "prior professional relationship," she is ethically permitted to solicit those clients in accordance with California's Rules of Professional Conduct and related statutes governing solicitation.[11/] (See rules 7.1-7.3.) Specifically, any lawyer is ethically permitted to solicit in person, by telephone or by email any client with whom the lawyer "has a family, close personal, or prior professional relationship," provided

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[9/] As used in rule 7.3(e), "the terms 'solicitation' and 'solicit' refer to an oral or written targeted communication initiated by or on behalf of the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services."

[10/] It should be noted that we have limited our discussion in this section to the applicable California Rules of Professional Conduct and specifically do not address California substantive law that governs business competition. It should go without saying, however, that both Departing Lawyer and Law Firm must comply with California law in the post-departure competition for clients.

[11/] We do not opine here on whether the clients with whom Departing Lawyer has a "prior professional relationship" under rule 7.3 are the same set of clients to whom notice would be required of Lawyer's departure (i.e., to whom Departing Lawyer plays a principal role in the law firm's delivery of legal services). However, we do note that the executive summary to rule 7.3 states: "The two exceptions to such solicitations are included because there is significantly less concern of overreaching when the solicitation target is another lawyer or has an existing relationship with the soliciting lawyer." Thus, the summary supports the idea that the rule intended to limit solicitation to situations in which there is an existing relationship between the soliciting lawyer and the client, and not just that the client is a client of the law firm where the departing lawyer works or worked. By way of contrast, the ABA Model Rule 7.3 has broader language that permits solicitation in a wider variety of situations.

that in the course of said solicitation the lawyer does not make any false or misleading communications to the client.

In addition, neither Departing Lawyer nor Law Firm should solicit, or continue to solicit, any client that has made it known that they do not want to be solicited, or in any "manner which involves intrusion, coercion, duress or harassment." (Rule 7.3(b).) No lawyer should attempt to keep a client at a law firm by imposing conditions on how or when the client can leave the firm, transfer its matters or receive its file. For example, a lawyer should never: (1) condition the release of a client file or willingness to transfer the matter to new counsel on the client's payment of any outstanding balances or costs to duplicate the files; (2) impose any contractual obligations on the client as a condition of signing a transfer authorization letter; or (3) improperly suggest that it would cost the client additional fees or costs to leave the firm. Such actions likely would violate rule 7.3(b).

Furthermore, once a client has chosen his or her counsel as to the particular legal matter at issue, neither Law Firm nor Departing Lawyer should engage in further conduct which could be viewed as violating rule 7.3(b) in an effort to get the client to change their mind about their stated choice for representation.

Finally, questions often arise about whether solicitation is permissible after Departing Lawyer provides notice to Law Firm of her departure, but before she actually leaves the firm. The same rules that permit a lawyer in certain circumstances to solicit clients (rules 7.1-7.3) would apply here. However, this situation involves a decided intersection between the ethical rules requiring notice and permiting solicitation, the scope of the fiduciary duties among partners and potential contractual obligations between the parties. Thus, the question of whether such conduct would violate fiduciary duties between partners or amount to unfair competition is an open question that is likely to be a very fact-specific inquiry. It could be argued, however, that prohibiting lawyers who have already given notice to the law firm of their departure from properly soliciting clients and competing for clients on equal footing as the law firm undermines client choice.

V. Duty of Competence

When a client wants to transfer its matter to a departing lawyer at her new firm, the lawyer must ensure that she is competent to handle the representation. (Rule 1.1.) Specifically, Departing Lawyer would need to be sure that she has the skill, support and resources necessary to handle the matter at New Firm. Similarly, if the client elects to stay at Law Firm, it must ensure that there are other lawyers in the firm with the experience and ability to handle the client's matters once Departing Lawyer leaves Law Firm. If neither Departing Lawyer nor Law Firm has the ability to handle any client matter with competence, rule 1.1(c) describes circumstances in which the representation may continue. These options include consulting with a competent lawyer, acquiring sufficient knowledge before performance is required, or referring the matter to a competent lawyer. (Rule 1.1(c).) However, there is an obligation to withdraw if continued representation would result in violation of the rules. (Rule 1.16(a)(2).)

VI. Duty of Confidentiality

Pursuant to Business & Professions Code section 6068(e), an attorney has a duty to: "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Also, under rule 1.6(a), "[a] lawyer shall not reveal information protected from disclosure by Business and

Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule."

During all phases of any transition or departure, Departing Lawyer should be mindful of her obligations to protect client confidences. This duty often is implicated when a departing lawyer must check for conflicts with a potential new law firm; however, it can also arise in the context of communicating with a new firm before, during and after the departure. There is often a tension between the duty of confidentiality and other ethical duties the Departing Lawyer and Law Firm face as part of the departure process, but nevertheless should be managed by every lawyer involved in the transition to protect and preserve confidential client information.

VII. Duty of Departing Lawyer and Law Firm to Cooperate in Transitioning Client Matters

Both Departing Lawyer and Law Firm must protect the interests of clients during the period of transition and must take reasonable steps to assure that the withdrawal of Departing Lawyer, Law Firm, or both, is accomplished in a way that does not prejudice the rights of clients. (Rule 1.16(d).) In addition, both Departing Lawyer and Law Firm have ethical obligations during the transition period to ensure that active client matters continue to be handled diligently and with competence. (Rule 1.1.) Thus, Departing Lawyer and Law Firm have a duty to cooperate with each other during the transition process to protect clients' interests. Law Firm should also "make reasonable efforts" to ensure that the Law Firm has measures in effect "giving reasonable assurance" that all lawyers in the firm comply with these rules and the State Bar Act. Rule 5.1.

Departing Lawyer, for example, may not delay or postpone work that must be done on a matter she expects to follow her to New Firm until after her departure in the hopes of generating more fees for New Firm. (PA Joint Formal Opn. No. 2007-300.) Prior to her departure, Departing Lawyer also should cooperate with any reasonable Law Firm protocols and requests for information from Law Firm where the goal is to evaluate Law Firm's capacity to continue to service any client, facilitate the transition or comply with Law Firm's ethical obligations to clients.

However, Law Firm may not, after being notified of Departing Lawyer's intent to leave, render Departing Lawyer's continued representation of any client unreasonably difficult or impossible. For example, Law Firm should not deprive Departing Lawyer access to documents or information needed to carry out the continued representation; nor should Law Firm take Departing Lawyer off of an ongoing matter that she is principally handling before she has actually left Law Firm, unless the client has already made the choice to stay with Law Firm notwithstanding Lawyer's departure.

VIII. Conflicts of Interest

Various potential conflict issues may arise during any attorney transition. It is imperative that a detailed conflicts check is conducted with respect to Departing Lawyer's client relationships and those of New Firm that she will be joining. Such a comprehensive inquiry should not only bring to light whether any of Departing Lawyer's clients will have a conflict or potential conflict with New Firm, but also whether Departing Lawyer may have a conflict with any clients of New Firm by virtue of its current, and sometimes former, client relationships. (See rule 1.7 for discussion on what constitutes a conflict with a client.) Departing Lawyer and New Firm also should consider whether any screening protocols should be implemented once Departing Lawyer joins New Firm (rule 1.10) and whether there are potential conflicts with respect to prospective clients (rule 1.18).

As discussed above, this is an area where there is an obvious tension between the duty to maintain client confidences and the duty to avoid conflicts of interests with clients. In such cases where Departing Lawyer must provide information to New Firm related to her present and former client relationships in order for the New Firm to run a conflicts check, Departing Lawyer should be mindful of her duties under rule 1.6.[12] The issue of whether and under what circumstances information protected by rule 1.6 can be provided in order to permit a conflict check is beyond the scope of this opinion.

IX. Withdrawal by Law Firm or Departing Lawyer

Most attorney transitions involve the termination of the attorney-client relationship by either Departing Lawyer, Law Firm, or both, which requires that all lawyers involved in the transition comply with rule 1.16.[13] Specifically, rule 1.16(d) states: "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)."

As such, the key aspects of this rule are:

- Providing reasonable notice to clients;
- Avoiding reasonably foreseeable prejudice to clients;
- Giving clients a reasonable opportunity to employ new counsel;
- Court approval may be required if there is litigation;
- Surrendering the client file as soon as possible if requested; and
- Refunding any unearned fee

In situations where neither Departing Lawyer nor Law Firm wants to continue the representation, the ethical obligations are the same as in other situations in which a lawyer wants to withdraw from representation. Departing Lawyer and Law Firm must bear in mind the ethical obligations regarding competent and diligent representation, communication, and termination of representation.

X. Client File

Rule 1.16(e) also addresses the client's right to the return of its file when the attorney-client relationship is terminated. Specifically, "subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. 'Client materials and property' includes correspondence, pleadings,

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[12/] ABA Formal Opinion 09-455, entitled "Disclosure of Conflicts Information When Lawyers Move Between Law Firms," may be instructive and provide guidance on how to best navigate disclosure of confidential information in order to avoid conflicts. However, it should be noted that the ABA model rule 1.6 is not identical to California's rule 1.6, and, as stated in section VI above, California lawyers have an independent obligation to maintain client confidences under Business and Professions Code section 6068(e).

[13/] In circumstances where the client chooses to remain at Law Firm, notwithstanding the departure of Lawyer, the client representation has not been terminated with Law Firm and Departing Lawyer is not obligated to comply with rule 1.16(e).

deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not."

Thus, in the context of an attorney departure, if the client elects to follow Departing Lawyer or retains another firm, Law Firm must promptly forward any requested part of the client's file to the client or its new attorney. Pending the client's instruction, however, Law Firm and Departing Lawyer should have reasonable access to the file in order to protect the client's interests. Departing Lawyer should never remove the client's files without the client's consent. Even where the client has requested that file be transferred to Departing Lawyer, Law Firm should be given reasonable notice and an opportunity to copy the file. However, Law Firm should do so as quickly as possible to avoid any potential prejudice to the client, prioritizing getting files to clients where there are time-sensitive and pressing client matters that are in active litigation or with pending deadlines.

In addition, if the client is leaving a law firm, any original client property and unearned client funds should be returned promptly to the client so as not to prejudice the client's ability to retain new counsel. While an attorney-client fee agreement can hold a client responsible for costs of copying client files, a firm can never condition the return of client files or property on receipt of those costs or the payment of any outstanding legal fees. The client's papers and property belong to the client, not to the attorney. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 655 [262 Cal.Rptr. 702].) The client's ownership is not altered by the circumstances or the timing of the termination of the attorney-client relationship, or by whether the attorney has been paid for his or her services. (*Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999, 1005-06 [24 Cal.Rptr. 668]; See also Cal. State Bar Formal Opn. No. 1994-134 and Cal. State Bar Formal Opn. No. 2001-157.)

CONCLUSION

The client's right to the counsel of its choice and the protection of the client's best interests are the ethical principles that should guide any attorney departure. Departing Lawyer and Law Firm each have ethical obligations related to the departure and must prioritize their ethical obligations to clients over their own competing interests. These ethical obligations include properly notifying relevant clients of the departure, protecting client confidences, addressing conflicts of interests with clients, ensuring that clients continue to have competent representation, and avoiding reasonably foreseeable prejudice to the rights of clients during any changes in the representation. Both Departing Lawyer and Law Firm also have a duty to cooperate in the transition of any client matter.

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

Speaker Biography

U.S. Bankruptcy Judge Neil W. Bason

Judge Bason was appointed to the bench in 2011, and sits in downtown Los Angeles. In private practice he represented a wide variety of interests in commercial bankruptcy and insolvency matters including secured and unsecured creditors, trustees, receivers, debtors/borrowers, guarantors, prospective asset purchasers, and other parties in interest. He practiced at Howard Rice Nemerovski Canady Falk & Rabkin, P.C. (subsequently combined with Arnold & Porter Kaye Scholer LLP) and at Duane Morris LLP. Before that he clerked for the Honorable Dennis Montali, Bankruptcy Judge of the Northern District of California and Chief Judge of the Bankruptcy Appellate Panel of the Ninth Circuit. He graduated magna cum laude from the Boston University School of Law in 1988, where he was a Note Editor on the law review. He enjoys dining, and working off the resulting calories with biking, hiking, and travel.