

Presented by Patrick M. Kelly, Esq.
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SELECTED ETHICAL ISSUES ARISING UNDER THE NEW RULES OF PROFESSIONAL CONDUCT

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INTRODUCTION TO NEW RULES

- Effective November 1, 2018.
- First major change in Rules of Professional Conduct since 1989.
- Located on the California State Bar Website calbar.ca.gov
- Also Includes Rules Cross - Reference Table (Old Rule to New Rule to ABA Model Rules) and History of Current Rules Development

DETAILS OF NEW RULES

- 69 New Rules replace the 46 Old Rules.
- 42 of the New Rules restate concepts from the Old Rules.
- 27 of the New Rules state entirely new concepts derived from the ABA Model Rules or California common law.
- New Rules do not adopt the ABA Model Rules of Professional Conduct. California is the only state not to adopt them.
- For ease of comparison across various jurisdictions the New Rules did adopt the ABA Model Rule numbering scheme.

CAUTIONARY NOTES

- Every California Attorney is ethically bound to review and adhere to these Rules.
- Failure to comply with the Rules can result in discipline including disbarment and disqualification from a litigation matter.
- Today's discussion focuses on an overview of the new Rules and selected new and particularly significant Rules. It is not a substitute for a careful individual review of the Rules.
- Please send any questions by email to pkelly@adrservices.com. I will try to answer them at the end of the program.

ORGANIZATION OF NEW RULES

- Rules are organized by two preliminary rules followed by 67 Rules organized into 8 chapters.
- Purpose and Function of the Rules of Professional Conduct (Rule 1.0).
- Terminology (Rule 1.0.1).
- Chapter 1 Lawyer - Client Relationship (Rules 1.1 - 1.18).
- Chapter 2 Counselor (Rules 2.1 - 2.4.1).
- Chapter 3 Advocate (Rules 3.1 - 3.10).

ORGANIZATION OF NEW RULES (CONTINUED)

- Chapter 4 Transactions With Persons Other Than Clients (Rules 4.1 - 4.4).
- Chapter 5 Law Firms and Associations (Rules 5.1 - 5.7).
- Chapter 6 Public Service (Rules 6.1 - 6.5).
- Chapter 7 Information About Legal Services (Rules 7.1 - 7.5).
- Chapter 8 Maintaining The Integrity Of The Profession (Rules 8.1 - 8.5).

PURPOSE AND FUNCTION OF THE RULES OF PROFESSIONAL CONDUCT (RULE 1.0)

- Intended to regulate the professional conduct of lawyers through discipline.
- Willful violation of the Rules is a basis for discipline.
- Willful violation does not require intent to violate the rule.
- Violation of the Rules does not in and of itself give rise to a cause of action for damages but can be evidence of a breach of duty.
- Rules do not modify the law regarding the liability of lawyers to others.

TERMINOLOGY (RULE 1.0.1)

- Defines significant terms used in the rule including among others: “belief,” “informed,” “consent,” “knowingly,” “reasonable,” “screened” and “substantial.”

CHAPTER 1. LAWYER-CLIENT RELATIONSHIP (RULES 1.1 - 1.18)

- **Rule 1.1 Competence**

- Requires lawyers to have sufficient mental, emotional, and physical ability and learning and skill to undertake the representation.
- That competence can be supplied by association with a lawyer who does have the requisite skill.
- Caution: This expansion of the Rules can trap those who are not technologically proficient in the required tasks. Important to be proficient in document organization, hosting and indexing functions and the use of technology assisted discovery and video communication.
- Avoid “Dabbling.”
- With the many changes of due dates it is important to keep them individually calendared and the client advised. Many dates will hit in a very short time.
- Note Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinion 2020-300. A lawyer’s duty to provide competent representation includes the obligation to understand the risks and benefits of technology, which this Committee and numerous other similar committees believe includes the obligation to understand or to take reasonable measures to use appropriate technology to protect the confidentiality of communications in both physical and electronic form.

CHAPTER 1. LAWYER-CLIENT RELATIONSHIP (RULES 1.1 - 1.18 CONTINUED)

- **Rule 1.4 Communication with Clients.**

- Replaces Rule 3-500, elaborates on the former Rule provisions.
- Requires in part that an attorney “promptly” inform their clients with respect to matters for which informed consent is required. Important to keep clients apprised of changes in due dates and case development even though the “office is closed.”
- Advise the client of any limitation on the lawyer’s conduct under the Rules where the attorney knows the client desires conduct that violates the Rules.
- Reasonable consultation with the client so the client may make informed decisions. In effect now lawyers must advise clients of what they can and cannot do.
- RETURN PHONE CALLS.

CHAPTER 1. LAWYER-CLIENT RELATIONSHIP (RULES 1.1 - 1.18 CONTINUED)

- **Rule 1.6 Confidential Information of a Client.**

- Incorporates by reference **B&P Code § 6068 (e)(1)** which requires an attorney to “maintain inviolate...the secrets of the client” with certain exceptions for criminal acts or substantial bodily harm.
- Relates to virtual meetings, mediations and document transfers.
- NOTE: As to remote activities, how is the duty of confidentiality being protected? 1) Passwords, firewalls and VPN; 2) Store documents in secure locations (briefcase left at restaurant); 3) avoid people looking over your shoulder; 4) know who is in the room at the other end of a call, video meeting or mediation; 5) don't allow recording; 6) policies of the platform you are using re confidentiality; 7) be aware of your environment.
- Note Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinion 2020-300.
 - An attorney working from home or another remote location is under the same obligations to maintain client confidentiality as is the attorney when working within a traditional physical office.
 - Rule 1.6 (“Confidentiality of Information”) states in relevant part:
 - (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
 - (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

CHAPTER 1. LAWYER-CLIENT RELATIONSHIP (RULES 1.1 - 1.18 CONTINUED)

- **Rule 1.7 Conflict of Interest: Current Clients.**

- Replaces old Rule 3-310 conflict list approach with a more amorphous either - or standard i.e. whether there is direct adversity “to another current client in the same or a separate matter” or a “significant risk” that the representation of a current client will be “materially limited” by the attorney’s responsibilities or relationship with another present or former client - or by the attorney’s own interests.
- In either case the attorney cannot proceed without informed written consent by all affected prospective and current clients.
- Deal with the issue up front and remember you will have to let Client A know everything Client B told you.
- Representing an employee along with an organization or multiple defendants in the same claim.
 - Make sure everyone knows who you represent.
 - Get a knowing waiver that says if a conflict is discovered you can continue to represent the other party or parties.
 - Otherwise you could have to withdraw from all with an accusation that you have a duty to disclose everything you learned from Client A to Client B.

CHAPTER 1. LAWYER-CLIENT RELATIONSHIP (RULES 1.1 - 1.18 CONTINUED)

- **Rule 1.8.10 Sexual Relations with Current Client.**

- Significant departure from former Rule 3-120 and
- Provides a bright line rule prohibiting sexual relations as defined in the Rule with a client unless:
 - The client is a spouse or registered domestic partner; or,
 - The sexual relationship existed before the lawyer-client relationship commenced

CHAPTER 1. LAWYER-CLIENT RELATIONSHIP (RULES 1.1 - 1.18 CONTINUED)

- **Rule 1.10 Imputation of Conflicts of Interest.**

- New Rule
- Provides that subject to certain exceptions conflicts of interest of an attorney may be imputed to all attorneys in the firm.
- The Rule provides a “knowingly” requirement and
- Recognizes the concept of ethical screens which may be effective in limited circumstances to mitigate the consequence of what would otherwise be a conflict.
- However there are many cases which show the inquiry is very fact specific. See *The National Grange of the Order of Patrons of Husbandry v. California Guild*, 38 Cal. App. 5th 706 (2019); *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776 (2019); *Hendrickson v. Great Am. Sav. & Loan* 11 Cal. App. 4th 109 (1992)

CHAPTER 1. LAWYER-CLIENT RELATIONSHIP (RULES 1.1 - 1.18 CONTINUED)

- **Rule 1.13 Organization as Client.**

- Replaces old Rule 3-600.
- Provides that when representing an organization, the organization itself is the client, not any director, officer, employee or other third person even though the attorney may take direction from that person.
- The new Rule requires reporting up the corporate ladder in defined circumstances such as where an employee intends to engage in conduct that violates the law and is imputable to the corporation; but,
- Is precluded by a duty of confidentiality under B&P § 6068(e) from reporting the misconduct outside the organization.
- The new Rule defines the circumstances when an attorney must report up the chain of command and requires the attorney to notify higher authority if they are discharged or forced to withdraw as a result of their reporting obligation.
- Counsel can represent constituents subject to:
 - Enumerated rules which may require dual consent
 - Explanation to the constituent who the lawyer represents if they know interests could be adverse.
- NOTE: Representing employee in the organization. This is where the potential conflict comes up most often. Make sure everyone knows who you are representing and get consent even if the employee is not a party.

CHAPTER 2. COUNSELOR (RULES 2.1 - 2.4.1)

- **Rule 2.4 Lawyer as Third Party Neutral.**

- Assists two or more persons who are not clients.
- May refer to matters other than law

- **Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court Appointed Arbitrator.**

- Appointed under CCP §§ 638 or 639.
- Must comply with California Cannons of Judicial Ethics Section 6D which provides among other things: mandatory compliance with enumerated sections of Cannons 2 and 3.
- Comply with enumerated restrictions relating to inter alia solicitation of donations, acceptance of gifts by the officer or their family.
- Special additional restrictions for temporary judges.
- Monster Energy Case

CHAPTER 3. ADVOCATE (RULES 3.1 - 3.10)

- **Rule 3.3 Candor Toward the Tribunal.**

- Replaces old Rule 5-200.
- Prohibits knowingly making a false statement of law or fact to a tribunal or the failure to correct a misstatement previously made including the failure to disclose controlling legal authority, misquoting any book, statute, decision or authority or proffering evidence counsel knows to be false.
- The new Rule provides this duty continues to the end of the proceeding even if counsel's representation terminates before that time.
- Rule 3.3(b) remedial measures when client intends to, is engaging or has engaged in criminal or fraudulent conduct related to a proceeding.
- NOTE: 1) unlike the ABA Model Rules CA does not require disclosure to the tribunal; and, 2) remedial measures do not include disclosure of client confidential information which the lawyer is required to protect under B&P Code § 6068(e).
- Not did you do it, but "what happened."

- **Rule 3.8 Special Responsibilities of Prosecutors.**

CHAPTER 4. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS (RULES 4.1 - 4.4)

- **Rule 4.1 Truthfulness in Statements to Others.**

- New rule imposes a disciplinary standard for misrepresentations to third parties.
- It provides counsel may be disciplined for deceiving a tribunal or opposing counsel and may be civilly liable for false statements of material fact.
- Business and Professions Code 6106 also makes counsel subject to discipline for acts of moral turpitude, dishonesty or corruption.
- This new rule prohibits counsel from mailing a false statement or failing to disclose a material fact necessary to assist a client in criminal or fraudulent conduct.

CHAPTER 4. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS (RULES 4.1 - 4.4 CONTINUED)

- **Rule 4.3 Communicating with an Unrepresented Person.**

- Replaces the no contact rule of old Rule 2-100 and defines the rules applicable to this encounter.
- Emphasizes that the lawyer cannot misrepresent that they are disinterested and must correct that impression if they know or should know it exists.
- The lawyer cannot seek information they know or should know is privileged or confidential and cannot be divulged without violating a duty to another.
- Caution - friend requests can count as a misrepresentation and the impact before a trier of fact can be devastating if the witness is called at trial.
- Caution - employee depositions and need to clarify who counsel represents.

CHAPTER 5. LAW FIRMS AND ASSOCIATIONS (RULES 5.1 - 5.7)

- **Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers.**

- New Rule which requires lawyers who manage law firms individually or collectively shall make reasonable efforts to ensure that all lawyers in the firm comply.
- That supervising lawyers whether or not an employee of the same firm make reasonable efforts to ensure compliance with the Rules by the lawyer supervised.
- To make reasonable efforts to ensure that all attorneys under their management supervision comply with the Rules.
- A managing or supervising attorney will be vicariously responsible for the lawyer's violation if: 1) the lawyer orders or ratifies the conduct; or 2) the lawyer possesses managerial authority in the other attorneys' s law firm or has direct authority over the other lawyer and knows of these offending conduct but fails to take remedial action when the consequences can be avoided or mitigated.

CHAPTER 5. LAW FIRMS AND ASSOCIATIONS (RULES 5.1 - 5.7 CONTINUED)

- **Rule 5.2 Responsibilities of a Subordinate Lawyer.**

- New Rule which provides a subordinate lawyer has an independent duty to comply with the Rules and
- If the subordinate lawyer believes the senior lawyer's proposed resolution of the issue will violate the Rules, the subordinate lawyer has a duty to communicate their disagreement to the supervising lawyer.
- Remote practice creates special challenges in adhering to this rule.

- **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants.**

- New Rule which provides managerial and supervisory lawyers must make reasonable efforts to ensure the conduct of the non lawyers is consistent with the Rules that dictate the conduct of the lawyer.

CHAPTER 6. PUBLIC SERVICE (RULES 6.1 - 6.5)

- **Rule 6.3 Membership in Legal Service Organizations.**

- Potential conflicts with firm clients.
- A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer.
- The lawyer shall not knowingly participate in a decision or action of the organization: (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Business and Professions Code section 6068, subdivision (e)(1) or rules 1.6(a), 1.7, 1.9, or 1.18; or (b) where the decision or action could have a material adverse effect on the representation of a client of the firm.

- **Rule 6.5 Limited Legal Services Programs.**

- Limitation on application of conflict Rules 1.7 (conflict with current clients), 1.9(a) (duties to former clients) and 1.10 (imputation of conflicts by other attorneys).

CHAPTER 7. INFORMATION ABOUT LEGAL SERVICES (RULES 7.1 - 7.5)

- **Rule 7.1 Communications Concerning a Lawyer's Services.**
 - False or Misleading communications about a lawyer or their services
 - State Bar to formulate standards.

CHAPTER 8. MAINTAINING THE INTEGRITY OF THE PROFESSION (RULES 8.1 - 8.5)

- **Rule 8.4 Misconduct.**

- Identifies specific instances of misconduct some of which are: 1) knowingly violate the Rules or assist another in doing so; 2) commit certain criminal acts; 3) engage in conduct prejudicial to the administration of justice; 4) engage in dishonesty, fraud or intentional misrepresentation; 5) state or imply an ability to improperly influence a government agency or official; or 6) assist or induce a judge to violate the code of judicial ethics, code of conduct or other law.

CHAPTER 8. MAINTAINING THE INTEGRITY OF THE PROFESSION (RULES 8.1 - 8.5 CONTINUED)

- **Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation.**

- Replaces Rule 2-400 and provides an entirely new and complex scheme for dealing with claims of wrongful conduct in: 1) the representation of a client; 2) the termination or refusal to accept representation of a client; and, 3) law firm operations.
- Some highlights of changes to the former Rule:
 - Retaliation is now included;
 - Removes the requirement that there be prior adjudication that unlawful conduct occurred before a investigation or proceeding can be commenced under this section;
 - Imposes a self reporting obligation to relevant state and federal agencies on a lawyer who receives a notice of disciplinary charges for violating the Rule.

ADDITIONAL REFERENCES

- See also Business and Professions Code Section 6068 which defines the statutory duties of attorneys. For example B&P Code § 6068(e)(1) which defines the duty of confidentiality. Some new Rules implement these duty concepts (See e.g. RULE 1.6(a) revealing protected information; and, Rule 3.3(b) remedial measures when client intends to, is engaging or has engaged in criminal or fraudulent conduct related to a proceeding).

ADDITIONAL REFERENCES (CONTINUED)

- Ethics Hotline. A confidential research service of the State Bar (415) 538-2148. Because of limited service during closure of State Bar office, use the “Ethics Hotline Research Assistance Request Form” on the State Bar website calbar.ca.gov
- See additional references at calbar.ca.gov:Attorneys: Ethics.
- Local bar association ethics committees and opinions.

CASES ON CIVILITY

- *LaSalle v. Vogel*, 36 Cal. App. 5th 127 (2019) where the court of appeal reversed the trial court's refusal to set aside a default. Colorful language from Justice Bedsworth noting that law is a profession not a business and lawyers are officers of the court and are supposed to act with honor and integrity and cooperate with one another under CCP§ 583.130.
- *Martinez v. O'Hara*, 32 Cal. App. 5th 853 (2019) where the appellant used spurious derogatory language toward the female trial judge on the basis that it evidenced gender bias violated B&P § 6048 (b) which provides an attorney's duty to maintain respect for the judiciary. The 4th District reported the misconduct to the state bar.
- *Brigantine v Chow* 42 Cal. App. 5th 504 (2019) the court felt counsel was over complimentary of the trial judge and found calling a woman judge "attractive" was both irrelevant and sexist.

QUESTIONS

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THANK YOU.

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