NEW RESPONSIBILITIES UNDER THE AMENDED CALIFORNIA RULES OF PROFESSIONAL CONDUCT

Hon. Ming Chin (Ret.)
Hon. James Lambden (Ret.)
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IN 2019 CALIFORNIA JOINED THE REST OF THE STATES (FINALLY) BY ADOPTING NEW ETHICS RULES CLOSER TO THE ABA RULES; WHAT HAVE WE LEARNED SINCE THEN

The first comprehensive revision in 29 years of the California Rules Of Profession Conduct took effect on November 1, 2018.

- California joined the other 49 states by adopting ethics rules patterned after the Model Rules of Professional Conduct adopted by the American Bar Association in 1983.
- New Numbering: The former numbering such as 1-100 or 1-120 is now 1.0, 1.0.1, 1.2.1, etc., consistent with the ABA Model Rules numbering.
- Relief for attorneys engaged in multi-jurisdictional practice, who have been required to look at multiple sources to understand California's outlier ethics rules.
- Two blue-ribbon panels examined and proposed revisions to the Rules of Professional Conduct since 2001. The first Commission for the Revision of the Rules of Professional Conduct worked on revisions to the rules from 2001 to 2010, only to have its work rejected by the California Supreme Court in 2014.
- The Court appointed a second Commission, whose work was approved by the State Bar Board of Trustees and presented to the Supreme Court, and redrafted during an extensive 14-month review. The Court unanimously approved the new rulebook in 2018.

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THE SUPREME COURT ISSUED 69 NEW RULES, EFFECTIVE NOVEMBER 1, 2018 AND CPRC OPINIONS HAVE FOLLOWED

- The Court approved 27 amended rules just as they were drafted by the Commission.
- However, the Court authorized 42 other rules with extensive modifications.
- The Justices entirely rejected one proposed rule regarding an attorney's obligations to clients "with diminished capacity."
- **The State Bar Standing Committee on Professional Responsibility and Conduct has issued seven formal Opinions since the new rules became effective. Formal Opinions No. 2019-197 through 2020-204.** calbar.ca.gov/ethics/opinions
- The Rules do not expressly mention lawyers serving clients in the emerging cannabis industry, although the Commission sent the Supreme Court a proposed **Rule 1.2.1** that would allow a lawyer to "discuss the legal consequences of any proposed course of conduct with a client" so long as they do not counsel a client to break the law.
- **Opinion 2020-202 clarifies that attorneys "may provide advice and assistance to clients with respect to conduct permitted by California's cannabis laws, despite the fact that the clients conduct…might violate federal law."**
- **Rule 1.2.1** should also apply in other areas, such as immigration, where state and federal laws diverge.
- The new conflict of interest rules are broader and less case specific under provisions that define what constitutes a legal "matter."
- New Definition of "Person" In **Rule 1.0**, the definition of "Person" has the same meaning as set forth in Evidence Code §175, which "includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity."
- Comparison between the old and new ethics rules: https://www.calbar.ca.gov/Portals/0/documents/rules/New-Rules-of-Professional-Conduct-2018.pdf

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PROHIBITIONS ON HARASSMENT, DISCRIMINATION AND RETALIATION BY LAWYERS IN THE WORKPLACE AND IN PRACTICE ARE AS BROAD AS ANY RULE IN THE COUNTRY

- **Rule 8.4.1** was vigorously debated at all stages of the revision process and broadens the scope of discipline as well as requiring lawyers to give notice to the State Bar of civil, administrative and criminal proceedings involving such charges.
- The Rule also requires lawyers to notify workplace-fairness agencies of such disciplinary actions.
- The State Bar can now open an investigation into alleged harassment or discrimination without the trigger of a civil finding form another enforcement agency.
- And lawyers who suffer a related disciplinary action from the State Bar are required to notify the California Department of Fair Employment and Housing, the U.S. Department of Justice and the U.S. Equal Employment Opportunity Commission.
- The Rule imposes on "all law firm lawyers" the responsibility to "advocate corrective measures" to address "known" improper conduct by the firm, other lawyers and law firm personnel.
- Prohibited conduct extends to court proceedings, where lawyers must refrain from "manifesting by words or conduct, bias or prejudice…" subject to limited relevance exceptions (e.g., "Wheeler" motions are not *prima facie* evidence of actionable bias; and protected First Amendment conduct may be excluded).
- **Rule 5.2 clarifies the duties of subordinate attorneys to "speak up."**

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HYPOTHETICALS

- A lawyer discovers that her firm has an unspoken but obvious policy against hiring a particular minority.
- The from also has an obvious unspoken policy to never represent a certain minority.
- The lawyer also observes a senior lawyer has serial liaisons with staff members and behaves inappropriately with clients.

DUTIES OF A SUBORDINATE LAWYER

- California has adopted **Model Rule 5.2**, which addresses the obligations of a subordinate lawyer.
- It provides a subordinate lawyer does not violate the rules if he or she acts in accordance with a supervisory lawyer's "reasonable resolution of an arguable question of professional duty." The subordinate still must exercise independent judgment to determine if there is an "arguable question" and whether the supervisor's resolution is reasonable.
- **Rule 5.2** eliminates a subordinate lawyer's defense that he or she "was simply following orders …" when charged with an ethical violation.
- **Rule 5.1** requires a supervising lawyer to make reasonable efforts to ensure ethical compliance by subordinates; and all firm lawyers may be "reasonably" responsible to the extent they exercise authority and/or ratify conduct.

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NEW OPINIONS ON THORNY ISSUES ILLUSTRATE THE EMPHASIS OF THE NEW RULES REGARDING THE PRIMACY OF PROTECTION OF CLIENTS' INTERESTS

- Opinion 2020-204 deals with the ethical obligations of lawyers representing clients whose cases are funded by a third-party litigation funder (including independence of judgment, confidentiality, and the competence and conflict issues raised when the same attorney negotiates the funding contracts as well as trying the case.)
- 2020-203 discusses the ethical obligations of lawyers who suffer data breaches of electronically stored client information.
- 2020-201 deals withe the ethical challengeesthat arise when a lawyer departs from her firm, stressing that each client's interests must have priority over the interests of the lawyer and the law firm.
- 2019-200 discusses three issues: #1 what must the attorney do when the attorney suspects that a witness in a civil trial has testified falsely; #2 what are the attorneys's duties when the attorney *knows* the witness has committed perjury; and #3 what if the attorney first learns of the perjury *after* the witness has testified at trial and the client has instructed the attorney to continue to use the perjured testimony.
- An attorney has concluded she must withdraw under Rule 1.16 (a) because the client's car lacks merit. Can she go ahead and settle the case before withdrawing from representation? See Opinion 2019-198.
- What obligations arise when lawyers in a firm consult with outside counsel concerning matters related to the firms representation of a current client, such as ethical compliance or possible malpractice. And do those obligations change if the lawyer consults another lawyer in the same firm, perhaps the law firm's in-house counsel? See 2019-197

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IN MOST CIRCUMSTANCES LAWYERS SHOULD NOT HAVE SEX WITH THEIR CLIENTS

- **Rule 1.8.10** has received the most public attention *(because sex always receives the most attention).*
- The former rules prohibited a lawyer from having sex with a client if the act was coerced, or if it was considered a form of payment for services.
- **Over thirty years ago Formal Opinion 1987-92 pointed out that despite the many obvious ethical perils presented by intimate relations between attorneys and clients (e.g., confidentiality, the client's ability to consent, independence of judgment, undue influence, and the conflict of interests created by a sexual relationship between the attorney and the spouse of a criminal defendant represented by the attorney.) There was at that time no rule governing such matters.**
- **The 1987 opinion also pointed out the problems presented by a *per se* ban (e.g., privacy, the ability of an attorney to represent the attorney's own spouse, the emotional issues in family law cases, including child custody and the policy of encouraging reconciliation).**
- The new rule prohibits lawyer-client sexual relations unless there was a preexisting consensual relationship.
- If the client is an "organization" the rule applies where the lawyer has sex with a "constituent of the organization" who "supervises, directs or regularly consults with that lawyer."
- If a person other than the client alleges a violation of the rule, no Notice of Disciplinary Charges may be filed until the State Bar has attempted to a obtain a statement from the client and determined whether the client would be "unduly burdened by further investigation."

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HYPOTHETICALS

- A lawyer has a pre-existing sexual relationship with a lower level employee with no control over legal affairs at a large corporation and the firm takes over representation of the corporation as a client. There is no violation of the corporation's policies.
- The employee is promoted to be special assistant to the corporation's general counsel and will be involved in all legal matters for the client.
- What are the lawyer's obligations?

NOT JUST COMPETENCE, BUT ALSO DILIGENCE, IS NECESSARY

- California's Rulebook has always emphasized the requirement competence when representing a client (former Rule 3-110), and this duty is substantially unchanged in new **Rule 1.1.**
- **Rule 1.3** adds a duty of diligence when representing a client. It provides a "lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to act with reasonable … diligence in representing a client."
- Per **subsection 1.3(b)** "'reasonable diligence' shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or without just cause, unduly delay a legal matter entrusted to the lawyer."
- **Rule 1.3** has no equivalent under the former Rules of Professional Conduct and differs from ABA Model Rule 1.3, which provides a "lawyer shall act with reasonable diligence and promptness in representing a client...."

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NOT JUST COMPETENCE, BUT ALSO DILIGENCE, IS NECESSARY (CONTINUED)

- **Rule 1.3** raises questions such as whether, for example, requesting multiple extensions to respond to discovery or other similar conduct might constitute a "diligence" violation.
- Also **Rule 1.3** must be read with **Rule 3.2**, which provides that a "lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense."
- **Remember the interplay of competence and lack of diligence may involve such matters as declining competence because of illness or age.**
- If you are now thinking about your opponent's behavior in a pending discovery dispute, consider new **Rule 3.10** (formerly Rule 5-100) which states "a lawyer shall not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute."

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CONFLICTS OF INTEREST

- **Rule 1.7** moves away from the former “checklist” approach to current client conflicts taken by former Rule 3-310.
- **Rule 1.7** adopts the Model Rules test: whether a client’s interest is “directly adverse” to that of another client in the same or separate matter, or whether there is a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationship with another client, a former client or a third person, or by the lawyer's own interests.
- **Rule 1.7** keeps the “informed written consent” standard.
- The new “directly adverse” language is vexing when read along side **Rule 1.9** (conflicts with former clients) which refers to a lawyer’s interests being “materially adverse” to a former client.
- “Adverse,” “directly adverse,” and “materially adverse.” What’s the difference? Those distinctions suggest one reason it took 29 years to revise the rules. (Answer: the main difference revolves around determining whether there is “harm” to the client). **Again: the best interest of the client is the primary consideration**
- **Rules 1.10 and 1.8.11 and 1.18(c)** codify common-law imputation principles. **Rule 1.10** permits ethical screening for lateral attorneys in a new firm who did not substantially work on a former client conflict producing matter in their previous firm. **Rule 1.11** permits screening for government lawyers moving into private practice.

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SAFEKEEPING OF CLIENT FUNDS AND PROPERTY

- New **Rule 1.15** requires that advance fee deposits (often mislabeled as a "retainer") be deposited into a client trust account maintained in California (subject to a limited exception).
- This rule uses the word "funds received or held," which means it applies to all such fees, even those received prior to effective date of the Rule. By contrast, current rule 4-100 only required advance costs to be deposited into a client trust account.
- The requirement to deposit advance fees into a trust account does not apply to a "true retainer," which is earned upon receipt and ensures the lawyer's availability to the client during a specified period or on a specified matter.
- The new rule also permits a flat fee paid in advance for legal services to be deposited into an operating account, but only if the lawyer makes the required written disclosure as set forth in **Rule 1.15(b).**
- Confidential information: Study **Rule 1.6** thoroughly.
- **And remember Opinion 2020-203 regarding unauthorized access to client's electronically stored data (including trade secrets and HIPPA data under the Health Insurance Portability and Accountability Act).**
- New **Rule 1.18** codifies common law that a lawyer owes a duty of confidentiality as to confidential information received from prospective clients. The lawyer shall not represent a client with material adverse interests to a prospective client in the same or substantially related matter if the lawyer received confidential information from the prospective client – even if the lawyer was never actually hired.

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THE FAVORITE RULE AMONG JUDGES

- **Remember the 3 issues presented by Opinion 2019-200 in slide #6?**
- **Rule 3.3** describes the lawyer's duty of candor toward the "Tribunal" as follows: 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 law….
    - **THESE ARE NOT NEW CONCEPTS-- JUST A REMINDER.**

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THANK YOU FOR ATTENDING

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