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GENDER AND OTHER ETHICS IN
THE LEGAL PROFESSION
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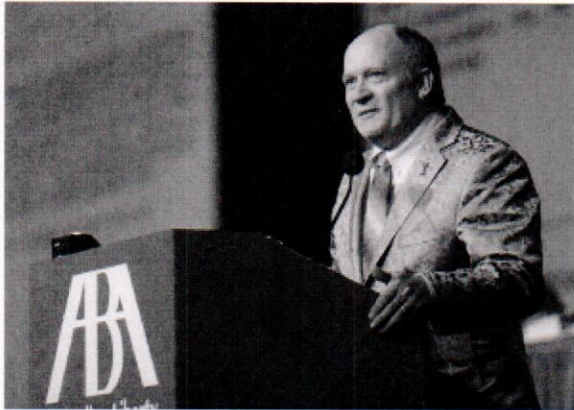
HEIDI A. MACHEN, ESQ.

Discrimination and harassment will be legal ethics violations under ABA model rule

BY LORELEI LAIRD

POSTED AUGUST 8, 2016, 6:36 PM CDT

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Mark Johnson Roberts, chair of the of the ABA Commission on Sexual Orientation and Gender Identity. Photo by Tony Avelar.

The ABA's Resolution 109 has attracted a lot of controversy outside the organization. The measure makes it a violation of professional responsibility to discriminate or harass in conduct related to the practice of law. It attracted coverage from the New York Times DealBook blog and condemnation from politically conservative attorneys, some of whom sent a letter to ABA House of Delegates Chair Patricia Lee Refo, arguing that the rule harms free speech and religious freedom, and wrote an op-ed in the National Law Journal(sub. req.) insisting that the resolution was driven by "PC politics" rather than professional ability.

But at the ABA House of Delegates meeting Monday afternoon, there were no speakers in opposition. And there were so many salmon slips from those wishing to speak in favor—69 altogether—that Refo said she was struggling for a new description of the volume. On a final voice vote, Resolution 109 was not without opposition, but it passed clearly.

The resolution was sponsored by the ABA's Standing Committee on Ethics and Professional Responsibility, the Section of Civil Rights and Social Justice, the Commission on Disability Rights, the Diversity & Inclusion 360 Commission, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Commission on Women in the Profession.

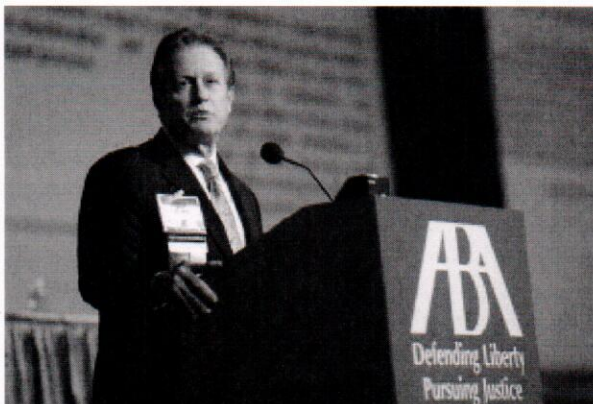
The discussion focused mainly on harassment and discrimination of women, though the amended Model Rule 8.4 will prohibit behaving in ways the attorney knows or should reasonably know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

The first speaker in favor, Chair Mark Johnson Roberts of the ABA Commission on Sexual Orientation and Gender Identity, mentioned that he was passed over by a law firm hiring committee as a new lawyer 28 years ago because he is gay. He focused his remarks, however, on a story about a young, female colleague who was groped by an older male opposing counsel at a holiday party. After she fled the scene, the man followed her and asked "in the crudest possible terms" about what sexual activity she might be planning with her husband that night.

The woman went to her bar association to file a complaint, only to discover that the man's behavior violated no ethics rule—unless he had been convicted of a crime. Despite concerns that she'd never work in her field again if she prosecuted, Roberts said, she filed a police report.

"Now the opposing counsel has a criminal conviction," said Roberts. "So be careful what you wish for when you say [victims] should pursue criminal remedies first."

Two delegates from ABA sections formerly opposed to Resolution 109 spoke about the reasons their sections had changed their minds. Don Bivens, a partner at Snell & Wilmer in Arizona, spoke on behalf of the Section of Litigation, and said that the section had a detailed discussion with the Standing Committee on Ethics and Professional Responsibility about its concerns, which centered on potential penalties for vigorous representation of clients. In response, he said, the committee added provisions saying the conduct is prohibited only if the lawyer knows or reasonably should know it constitutes harassment or discrimination, and explicitly does not preclude legal advice, particularly in regard to otherwise legal behavior in jury selection.



Don Bivens, the ABA Section of Litigation's member of the House of Delegates. Photo by Tony Avelar.

Don Slesnick, a delegate from the Section of Labor and Employment Law, observed that his section rarely speaks on the House floor because it requires unanimity, a difficult task for a section that includes employer-side and employee-side labor lawyers. Resolution 109 created an unusual unanimity twice, he said: At first, because the section was wholly opposed. But the Standing Committee was so responsive to their concerns, he said, that the section managed to reach unanimity a second time—in favor.

"We hereby express that support with all our heart and soul," said Slesnick, also a former mayor of Coral Gables, Florida, and former chair of the Fellows of the American Bar Foundation.

A related resolution concerning diversity in the legal profession had an easier time Monday. Resolution 102, sponsored by the National Conference of Federal Trial Judges, Judicial Division, called for more diversity on every part of the federal bench, including magistrate and bankruptcy judges.

Nannette Baker of Missouri, chair of the National Conference of Federal Trial Judges and chief magistrate judge of the U.S. District Court for the Eastern District of Missouri, specially emphasized the importance of diversity among federal magistrates and bankruptcy judges, who are often the first or only jurists seen by many Americans. The measure passed with no opposition.

Rule 8.4: Misconduct

Maintaining The Integrity Of The Profession **Rule 8.4 Misconduct**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Ethics



Special Announcement: 2018 Ethics Symposium

The 22nd Annual Statewide Ethics Symposium will be held on Friday, April 6, 2018 at The State Bar of California in San Francisco. This year's symposium will offer up to 3.75 hours of MCLE credit in legal ethics and 1.25 hours of credit in Recognition and Elimination of Bias. Attendees may appear in-person or view the Symposium online via webcast. Deadline to register is March 30. For more information, visit the Ethics Symposium page.

Ethics Information

Encouraging ethical practices is an important way for the State Bar to prevent and discourage attorney misconduct. This is where you'll find many resources, including ethics opinions, education programs and research tools that can aid attorneys in the course of practicing law.

Here's where you can find direct links to legal codes, ethics authorities, searchable full text resources and current and proposed Rules of Professional Conduct.

Ethics Hotline

800-238-4427 (toll free in California)

415-538-2150 (from outside California)

The Ethics Hotline is a confidential service for attorneys seeking guidance on their professional responsibilities.

Ethics Hotline Satisfaction Survey

Ethics Opinions

Read full text versions of ethics opinions issued by the Committee on Professional Responsibility and Conduct.

Rules and Statutes on Attorney Conduct

- California Rules of Professional Conduct
- The State Bar Act - Business & Professions Code §§ 6000 et seq.
- Selected Statutes Regarding Professional Conduct, Discipline of Attorneys and Duties of the State Bar of California
- California Rules of Court
- Rules of Procedure of the State Bar and Rules of Practice of the State Bar Court (Rules of the State Bar, Title 5)
- Law Corporation Rules (Rules of the State Bar, Title 3, Division 2, Chapter 3)



News > California News

California State Bar bans sex between attorneys and clients

By SUDHIN THANAWALA, ASSOCIATED PRESS |

PUBLISHED: March 12, 2017 at 8:16 am | UPDATED: March 13, 2017 at 3:33 am

SAN FRANCISCO — The State Bar of California approved an ethics rule that would subject lawyers to discipline for having sex with their clients.

California currently bars attorneys from coercing a client into sex or demanding sex in exchange for legal representation.

But voluntary sex between attorneys and clients is not prohibited as long as it does not cause the lawyers to "perform legal services incompetently."

The new rule would completely ban sex between lawyers and clients with some exceptions.

As of May 2015, 17 states had adopted a blanket sex ban drafted by the American Bar Association, according to an ABA committee that looked at implementation of the group's ban.

Still, California's proposal was divisive.

Supporters said the relationship between a lawyer and client is inherently unequal, so any sexual relationship is potentially coercive. But some attorneys said the blanket ban was an unjustified invasion of privacy.

The bar's Board of Trustees passed the rule Thursday as part of a long-awaited overhaul of attorney conduct standards that revised or crafted 70 ethics rules. The new rules approved Thursday will now go before the California Supreme Court, which has final say over them.

The bar's ethics rules for attorneys were last fully revised in 1987. Lawyers who violate the regulations are subject to discipline ranging from private censure to loss of their legal license.

James Ham, an attorney on a state bar commission that worked on the rules, said it's not a good idea for lawyers to have relationships with clients, but he objected to disciplining attorneys for consensual relationships "where there was no harm."

"The real issue is a philosophical, constitutional one about how intrusive government can be in people's lives," he said.

Daniel Eaton, another member of the commission, said the existing client sex rule wasn't working. He pointed to a lack of disciplinary action against attorneys.

Between September 1992 and January 2010, the state bar investigated 205 complaints of misconduct under the current sex restriction, according to an analysis of data that accompanied the proposal. It imposed discipline in only one case.

"It is important that the California State Bar prohibit as an ethical matter attorneys from exploiting their clients sexually," Eaton said.

He said the only way to accomplish that is with a blanket sex ban that removes uncertainty for attorneys and the challenge of proving exploitation for investigators.

The revisions commission modified the proposal at its meeting in October to create an exception from the sex ban for a lawyer who is representing a spouse or registered domestic partner. It also required the state bar to consider whether a client would be "unduly burdened" by an investigation of sexual misconduct if someone other than the client filed the complaint.

The rule also allows sex between a lawyer and client when the sexual relationship preceded the professional relationship.

Other approved changes would allow the state bar to discipline attorneys for discrimination even without a separate finding of wrongdoing. The current rule requires a final determination of wrongful discrimination in a lawsuit or other proceeding before the state bar can take action.

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By 

The Clarity Fuel Cell has a 366-mile range rating. It's eligible for HOV-lane access, and it's fun-to-drive. It is a Honda, after all.

Tags: Courts, Crime



SUDHIN THANAWALA, Associated Press

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**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2015-194**

- ISSUE:** When an attorney is engaged in negotiations on behalf of a client, are there ethical limitations on the statements the attorney may make to third parties, including statements that may be considered "puffing" or posturing?
- DIGEST:** Statements made by counsel during negotiations are subject to those rules prohibiting an attorney from engaging in dishonesty, deceit or collusion. Thus, it is improper for an attorney to make false statements of fact or implicit misrepresentations of material fact during negotiations. However, puffery and posturing, such as statements about a party's negotiating goals or willingness to compromise, are generally permissible because they are not considered statements of fact.
- AUTHORITIES
INTERPRETED:** Rule 3-700(B)(2) of the Rules of Professional Conduct of the State Bar of California.^{1/}
- Business and Professions Code section 6068, subdivisions (b), (c), and (d).
- Business and Professions Code section 6106.
- Business and Professions Code section 6128(a).

STATEMENT OF FACTS

Plaintiff is injured in an automobile accident and retains Attorney to sue the other driver (Defendant). As a result of the accident, Plaintiff incurs \$50,000 in medical expenses and Plaintiff tells Attorney she is no longer able to work. Prior to the accident Plaintiff was earning \$50,000 per year.

Attorney files a lawsuit on Plaintiff's behalf. Prior to any discovery, the parties agree to participate in a court-sponsored settlement conference that will be presided over by a local attorney volunteer. Leading up to and during the settlement conference, the following occurs:

1. In the settlement conference brief submitted on Plaintiff's behalf, Attorney asserts that he will have no difficulty proving that Defendant was texting while driving immediately prior to the accident. In that brief, Attorney references the existence of an eyewitness to the accident, asserts that the eyewitness's account is undisputed, asserts that the eyewitness specifically saw Defendant texting while driving immediately prior the accident, and asserts that the eyewitness's credibility is excellent. In fact, Attorney has been unable to locate any eyewitness to the accident.
2. While the settlement officer is talking privately with Attorney and Plaintiff, he asks Attorney and Plaintiff about Plaintiff's wage loss claim. Attorney tells the settlement officer that Plaintiff was

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

earning \$75,000 per year, which is \$25,000 more than Client was actually earning; Attorney is aware that the settlement officer will convey this figure to Defendant, which he does.

3. While talking privately outside the presence of the settlement officer, Attorney and Plaintiff discuss Plaintiff's "bottom line" settlement number. Plaintiff advises Attorney that Plaintiff's "bottom line" settlement number is \$175,000. When the settlement officer asks Attorney for Plaintiff's demand, Attorney says, "Plaintiff needs \$375,000 if you want to settle this case."
4. In response to Plaintiff's settlement demand, Defendant's lawyer informs the settlement officer that Defendant's insurance policy limit is \$50,000. In fact, Defendant has a \$500,000 insurance policy.
5. Defendant's lawyer also states that Defendant intends to file for bankruptcy if Defendant does not get a defense verdict. In fact, two weeks prior to the mediation, Defendant consulted with a bankruptcy lawyer and was advised that Defendant does not qualify for bankruptcy protection and could not receive a discharge of any judgment entered against him. Defendant has informed his lawyer of the results of his consultation with bankruptcy counsel and that Defendant does not intend to file for bankruptcy.
6. The matter does not resolve at the settlement conference, but the parties agree to participate in a follow-up settlement conference one month later, pending the exchange of additional information regarding Plaintiff's medical expenses and future earnings claim. In particular, Attorney agrees to provide additional information showing Plaintiff's efforts to obtain other employment in mitigation of her damages and the results of those efforts. During that month, Attorney learns that Plaintiff has accepted an offer of employment and that Plaintiff's starting salary will be \$75,000. Recognizing that accepting this position may negatively impact her future earnings claim, Plaintiff instructs Attorney not to mention Plaintiff's new employment at the upcoming settlement conference and not to include any information concerning her efforts to obtain employment with this employer in the exchange of additional documents with Defendant. At the settlement conference, Attorney makes a settlement demand that lists lost future earnings as a component of Plaintiff's damages and attributes a specific dollar amount to that component.

DISCUSSION

Although attorneys must advocate zealously for their clients (see *Davis v. State Bar* (1983) 33 Cal.3d 231, 238 [188 Cal.Rptr. 441]), there are limits to an attorney's conduct, as set forth in the Rules of Professional Conduct and the Business and Professions Code. (See *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126 [116 Cal.Rptr. 713] ["The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously *within the bounds of the law* . . ."].) Business and Professions Code section 6068 requires, among other things, that an attorney "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth." (Business and Professions Code section 6068(d).)²

² Attorneys further must "maintain the respect due to the courts of justice and judicial officers," and cannot "seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Business and Professions Code section 6068(b) and (d); see also Rule 5-200(B).) If a judicial officer was presiding over the settlement conference, these rules would prohibit the attorney from making a false statement of fact or law. Whether a lawyer who serves as a settlement officer is a "judicial officer" for purposes of these provisions is beyond the scope of this opinion.

Under Business and Professions Code section 6106, an attorney who commits any act of moral turpitude or dishonesty, whether or not in the course of the attorney's conduct as an attorney, is subject to disbarment or suspension. (Business and Professions Code section 6106.)^{3/}

Furthermore, Business and Professions Code section 6128(a) provides that "[e]very attorney is guilty of a misdemeanor who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party"

Finally, the State Bar's non-binding *California Attorney Guidelines of Civility and Professionalism*^{4/} address an attorney's conduct when negotiating a written agreement on behalf of a client. Specifically, Section 18, "Negotiation of Written Agreements" provides:

An attorney should avoid negotiating tactics that are abusive; that are not made in good faith; that threaten inappropriate legal action; that are not true; that set arbitrary deadlines; that are intended solely to gain an unfair advantage or take unfair advantage of a superior bargaining position; or that do not accurately reflect the client's wishes or previous oral agreements.

In addition to the applicable California authority, in 2006, the American Bar Association published ABA Formal Opinion No. 06-439, specifically addressing this issue. According to ABA Formal Opinion No. 06-439:

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules.^{5/}

^{3/} The Standards for Attorney Sanctions for Professional Misconduct ("Standards") are based on the State Bar Act and "are adopted by the Board of Trustees to set forth a means for determining the appropriate disciplinary sanction in a particular case." With respect to acts of dishonesty, Standard 2.11 states:

Disbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty, fraud, corruption, intentional or grossly negligent misrepresentation, or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the member's practice of law.

Moreover, "misrepresentation" is an aggravating circumstance in determining the appropriate sanction for attorney misconduct. (Standards, Section 1.5(e).)

^{4/} California State Bar's *California Attorney Guidelines of Civility and Professionalism* are non-binding, but do provide some general guidance to California lawyers. "[T]he Guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, [and] they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence."

^{5/} 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. (*City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771].) Thus, in the absence of related California authority, we may look to the ABA Model Rules, and the ABA Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. (Rule 1-100(A) ["Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."]; *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799].)

"Of the same nature are overstatements or understatement of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation." (ABA Form. Opn. 06-439, p. 6.) False statements of material fact, in addition to "implicit misrepresentations created by a lawyer's failure to make truthful statements," may result in ethical violations. An attorney may not, for example, settle a pending personal injury lawsuit filed on behalf of a client without disclosing that the client had died. This conclusion is based on "the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive." (ABA Form. Opn. 06-439, p. 5; discussing ABA Form. Opn. 95-397.)

The ABA cautions that a lower standard of lawyer truthfulness is not warranted because of the consensual nature of mediation or because the parties somehow waive protection from lawyer misrepresentation "by agreeing to engage in a process in which it is somehow 'understood' that false statements will be made." (ABA Form. Opn. 06-439, p. 8.) On the other hand, the ABA has recognized that "puffing" or posturing may be permissible based on the generally understood norms of negotiation. The ABA defines "puffing" or posturing as "statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely." (ABA Form. Opn. 06-439, p. 2.)

ABA Formal Opinion No. 06-439 relies on Rule 4.1 of the ABA Model Rules of Professional Conduct, which prohibits an attorney from making a false statement of material fact or law to a third person and failing to "disclose a material fact . . . when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

Comment [2] to Model Rule 4.1 clarifies that the Rule applies to statements of fact:

Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

The California Rules of Professional Conduct do not contain a rule that corresponds to Model Rule 4.1. Under California's statutes and case law governing attorney honesty; however, California lawyers are not permitted to intentionally deceive opposing counsel. (See Business and Professions Code sections 6106, 6128(a), and 6068(d); *Coviello v. State Bar* (1955) 45 Cal.2d 57, 66 [286 P.2d 357] [upholding a six-month suspension based on lawyer's intentional deceit of opposing counsel because "[s]uch conduct falls short of the honesty and integrity required of an attorney at law in the performance of his professional duties."]; *Monroe v. State Bar* (1961) 55 Cal.2d 145, 152 [10 Cal.Rptr. 257] [upholding a nine-month suspension because "intentionally deceiving opposing counsel is ground for disciplinary action."]; *Hallinan v. State Bar* (1948) 33 Cal.2d 246 [200 P.2d 787] [attorney suspended for three months after attorney admitted that he simulated a client's name on a settlement release even though he knew that the opposing counsel wanted the attorney's client to personally sign the settlement papers]; *Scofield v. State Bar* (1965) 62 Cal.2d 624, 628 [43 Cal.Rptr. 825] ["Affirmative representations made with intent to deceive are grounds for discipline, even though no harm results."].⁶¹

⁶¹ For purposes of imposing discipline, an attorney's representations may be characterized as "moral turpitude," "dishonesty" or "corruption" under Business and Professions Code section 6106 only if the representations were made with an intent to mislead. (See *Wallis v. State Bar* (1942) 21 Cal.2d 322, 328 [131 P.2d 531].)

Acts of moral turpitude, which are prohibited by Business and Professions Code section 6106, “include concealment as well as affirmative misrepresentations “[N]o distinction can . . . be drawn among concealment, half-truth, and false statement of fact.” (*In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 86, citations omitted, quoting *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 808.) In *Loftus*, an attorney who obtained a recorded statement from a putative defendant by creating the false impression that she was not an adverse party and the conversation was not being recorded was disciplined for violating Business and Professions Code section 6106. In *Dale*, an attorney was found culpable of moral turpitude for making misleading statements in order to induce an unrepresented party to sign a declaration confessing to arson.

“A member of the bar should not under any circumstances attempt to deceive another. [Citations.] ‘An attorney’s practice of deceit involves moral turpitude.’” (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 888 [126 Cal.Rptr. 793], quoting *Cutler v. State Bar* (1969) 71 Cal.2d 241, 252–53 [78 Cal.Rptr. 172].)

In addition, various California courts have found attorneys liable in tort for making, during the course of their representation of a client, false statements of material fact to third parties.⁷¹ In *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291 [17 Cal.Rptr.3d 26], for example, that court held: “a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient [citation], and may be liable to a nonclient for fraudulent statements made during business negotiations.” That court also stated: “A fraud claim against a lawyer is no different from a fraud claim against anyone else.” (*Id.*; see also *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 346 [134 Cal.Rptr. 375]; *Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 202 [227 Cal.Rptr. 887] [“the case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm’s length”]; see also California State Bar Formal Opn. No. 2013-189, fn. 11, 12.)

When considering what types of statements may give rise to civil liability under a variety of legal theories, such as false advertising or fraud, California courts consider the type of statement and whether the statement is likely to induce reliance. A statement of opinion is not actionable, nor is a statement of “puffery.” A statement of puffery is one that is “extremely unlikely” to induce reliance. “Ultimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim.” (*Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, 311 [175 Cal.Rptr.3d 131], *reh’g denied* (Aug. 20, 2014), *review denied* (Nov. 12, 2014), quoting *Newcal Industries, Inc. v. Ikon Office Solution* (9th Cir. 2008) 513 F.3d 1038, 1053.) A statement that is quantifiable, specific or absolute will generally be actionable, whereas a statement that is general or subjective will not. (*Id.*)

The standards for determining whether there is civil liability for fraud are different than those for determining an attorney’s ethical obligations of honesty. However, the factors considered in civil cases to determine whether a statement is one of verifiable fact are instructive in determining whether an attorney’s statements may fairly be characterized as deceitful, not “consistent with truth,” collusive or dishonest in violation of an attorney’s ethical duties.

In our scenario, the attorneys make two types of representations worthy of discussion here: (1) statements that constitute impermissible misrepresentations of material fact upon which the opposing party is

⁷¹ The intentional tort of fraud has various elements that go beyond making a false statement of material fact. Whether or not all of the elements of fraud exist, however, is a separate inquiry. Even if not satisfying all of the elements of the intentional tort, an attorney may violate ethical rules by making a false statement of fact to the opposing party in settlement negotiations because such statements could constitute deceit, employment of means not “consistent with truth” and dishonest conduct, all of which are ethically prohibited by Business and Professions Code sections 6106, 6128(a), and 6068(d).

intended to rely; and (2) statements that constitute acceptable exaggeration, posturing or “puffing” in negotiations.

Specific Examples

We will consider the examples set forth in the hypotheticals:

Example Number 1: Attorney’s misrepresentations about the existence of a favorable eyewitness and the substance of his expected testimony.

Attorney’s misrepresentations about the existence of a favorable eyewitness and the substance of the testimony the attorney purportedly expects the witness to give are improper false statements of fact, intended to mislead Defendant and his lawyer. Attorney is making representations regarding the existence of favorable evidence for the purpose of having Defendant rely on them. Attorney has no factual basis for the statements made. Further, Attorney’s misrepresentation is not an expression of opinion, but a material representation that “a reasonable [person] would attach importance to . . . in determining his choice of action in the transaction in question . . .” (*Charpentier v. Los Angeles Rams Football Co., Inc.* (1999) 75 Cal.App.4th 301, 313 [89 Cal.Rptr.2d 115] quoting Rest.2d Torts, § 538).

Thus, Attorney’s misrepresentations regarding the existence of a favorable eyewitness constitute improper false statements and are not ethically permissible. This is consistent with Business and Professions Code section 6128(a), *supra*, and Business and Professions Code section 6106, *supra*, which make any act involving deceit, moral turpitude, dishonesty or corruption a cause for disbarment or suspension.

Example Number 2: Attorney’s inaccurate representations to the settlement officer which Attorney intended be conveyed to Defendant and Defendant’s lawyer regarding Plaintiff’s wage loss claim.

Attorney’s statement that Plaintiff was earning \$75,000 per year, when Plaintiff was actually earning \$50,000, is an intentional misstatement of a fact. Attorney is not expressing his opinion, but rather is stating a fact that is likely to be material to the negotiations, and upon which he knows the other side may rely, particularly in the context of these settlement discussions, which are taking place prior to discovery. As with Example Number 1, above, Attorney’s statement constitutes an improper false statement and is not permissible.

Example Number 3: Attorney’s inaccurate representation regarding Client’s “bottom line” settlement number.

Statements regarding a party’s negotiating goals or willingness to compromise, as well as statements that constitute mere posturing or “puffery,” are among those that are not considered verifiable statements of fact. A party negotiating at arm’s length should realistically expect that an adversary will not reveal its true negotiating goals or willingness to compromise.

Here, Attorney’s statement of what Plaintiff will need to settle the matter is allowable “puffery” rather than a misrepresentation of fact. Attorney has not committed an ethical violation by overstating Plaintiff’s “bottom line” settlement number.

Example Number 4: Defendant’s lawyer’s representation that Defendant’s insurance policy is for \$50,000 although it is really \$500,000.

Defendant’s lawyer’s inaccurate representations regarding Defendant’s policy limits is an intentional misrepresentation of fact intended to mislead Plaintiff and her lawyer. (See *Shafer v. Berger, Kahn,*

Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal.App.4th 54, 76 [131 Cal.Rptr.2d 777] [plaintiffs “reasonably relied on the coverage representations made by counsel for an insurance company”].) As with Example Number 1, above, Defendant’s lawyer’s intentional misrepresentation about the available policy limits is improper.

Example Number 5: Defendant’s lawyer’s representation that Defendant will file for bankruptcy if there is not a defense verdict.

Whether Defendant’s lawyer’s representations regarding Defendant’s plans to file for bankruptcy in the event that Defendant does not win a defense verdict constitute a permissible negotiating tactic will hinge on the specific representations made and the facts known. Here, Defendant’s lawyer knows that Defendant does not intend to file for bankruptcy and that Defendant consulted with bankruptcy counsel before the mediation and was informed that Defendant is not legally eligible to file for bankruptcy. A statement by Defendant’s lawyer that expresses or implies that Defendant’s financial condition is such that he is in fact eligible to file for bankruptcy is therefore a false representation of fact. The conclusion may be different; however, if Defendant’s lawyer does not know whether or not his client intends to file for bankruptcy or whether his client is legally eligible to obtain a discharge.

Example Number 6: Plaintiff’s instruction to Attorney to conceal material facts from Defendant and Defendant’s lawyer prior to the follow-up settlement conference.

This example raises two issues: the failure to disclose the new employment, and Plaintiff’s instruction to Attorney to not disclose the information. First, as to the underlying fact of employment itself, it is assumed that Plaintiff would not be entitled to lost future earnings if Plaintiff found a new job. As such, including in the list of Plaintiff’s damages a separate component for lost future earnings is an implicit misrepresentation that Plaintiff has not yet found a job. This is particularly true because Plaintiff agreed to show documentation of her job search efforts to establish her mitigation efforts, but did not include any documentation showing that she had, in fact, been hired. Listing such damages, then, constitutes an impermissible misrepresentation. (See, e.g., *Scofield v. State Bar*, supra, 62 Cal.2d at 629 [attorney who combined special damages resulting from two different auto accidents in separate claims against each defendant disciplined for making affirmative misrepresentations with the intent to deceive]; *Pickering v. State Bar* (1944) 24 Cal.2d 141, 144 [148 P.2d 1] [attorney who alleged claim for loss of consortium knowing that plaintiff was not married and that her significant other was out of town during the relevant time period violated Business and Professions Code section 6068(d)].)

Second, Attorney was specifically instructed by Plaintiff not to make the disclosure. That instruction, conveyed by a client to his attorney, is a confidential communication that Attorney is obligated to protect under Rule 3-100 and Business and Professions Code section 6068(e). While an attorney is generally required to follow his client’s instructions, Rule 3-700(B)(2) requires withdrawal if an attorney’s representation would result in a violation of the ethical rules, of which a false representation of fact or implicit misrepresentation of a material fact would be. When faced with Plaintiff’s instruction, Attorney should first counsel his client against the misrepresentation and/or suppression. If Plaintiff refuses, Attorney must withdraw under Rule 3-700(B)(2), as Attorney may neither make the disclosure absent client consent, nor may Attorney take part in the misrepresentation and/or suppression. (California State Bar Form. Opn. No. 2013-189;⁸⁷ see also Los Angeles County Bar Association Opn. 520).

⁸⁷ California State Bar Form. Opn. No. 2013-189 contains a full discussion regarding an attorney’s ethical obligations when a client instructs his or her attorney to conceal material facts from the opposing party and/or opposing counsel. As addressed more fully in that opinion, an attorney should first counsel his or her client regarding the client’s request and, if the client refuses to reconsider, the attorney may be obligated to withdraw his or her representation, pursuant to Rule 3-700(B)(2).

CONCLUSION

Attorneys are prohibited from making false statements intended to be relied upon, including during the course of negotiating with a third party and even where those negotiations occur through a third party neutral. Such prohibited communications include an attorney's implicit misrepresentations. However, attorneys may engage in permissible posturing or "puffery" during negotiations and may generally make statements regarding a client's negotiation goals or willingness to compromise because such statements are not the type of statements upon which parties to a negotiation ordinarily would justifiably be expected to rely.

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.

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2011-181**

ISSUES: May consent under the "no contact" rule of California Rule of Professional Conduct 2-100 be implied, or must it be provided expressly? If consent may be implied, how is implied consent determined?

DIGEST: Consent under the "no contact" rule of California Rule of Professional Conduct 2-100 may be implied. Such consent may be implied by the facts and circumstances surrounding the communication with the represented party. Such facts and circumstances may include the following: whether the communication is within the presence of the other attorney; prior course of conduct; the nature of the matter; how the communication is initiated and by whom; the formality of the communication; the extent to which the communication might interfere with the attorney-client relationship; whether there exists a common interest or joint defense privilege between the parties; whether the other attorney will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication; and the instructions of the represented party's attorney.

AUTHORITIES

INTERPRETED: Rule 2-100 of the Rules of Professional Conduct of the State Bar of California.^{1/}

STATEMENT OF FACTS

Attorney A is conferring with her client (Client A) outside of court when approached by Attorney B. After exchanging pleasantries regarding the weather, the following conversation takes place among Attorney B, Attorney A and Client A:

Attorney A to Attorney B: "Do you really need to call my client's mother to testify in court tomorrow? It really seems unnecessary and abusive under the circumstances. I would ask that you reconsider."

Client A to Attorney B: "Yes, she's quite elderly and it could be traumatic for her."

Attorney B to Attorney A: "Look, I'm sorry, but unless you're willing to be reasonable and settle, I think she's essential to my case. She's a key witness to what happened."

Client A to Attorney B: "You should leave my mother alone! She wasn't even there that day and doesn't really know anything! Besides *your* client caused this whole mess!"

Attorney B to Client A: "Then we will see what your mother really knows tomorrow."

Has Attorney B violated rule 2-100 by responding in the manner described above?

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

DISCUSSION

Paragraph (A) of rule 2-100 of the California Rules of Professional Conduct, entitled "Communication with a Represented Party," provides as follows:

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the *consent* of the other lawyer. (italics added)

The Discussion to rule 2-100 provides an explanation of the purpose of the rule: "Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule." This is consistent with case law in California: "This rule [referring to a predecessor to rule 2-100] is necessary to the preservation of the attorney-client relationship and the proper functioning of the administration of justice. It shields the opposing party not only from an attorney's approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided. The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role." (*Abeles v. State Bar* (1973) 9 Cal.3d 603, 609 [108 Cal.Rptr. 359] (internal quotes and citations omitted). See also *Bobele v. Superior Court* (1988) 199 Cal.App.3d 708, 712 [245 Cal.Rptr. 144] ("[Predecessor rule to rule 2-100] operates to protect a represented party from being taken advantage of by adverse counsel. . . . [T]he ultimate purpose of rule 7-103 is to preserve the confidentiality of attorney-client communications."))

1. Consent of the Other Lawyer

Consent of the *represented party* is not sufficient. Rule 2-100 specifies that the consent of the *other lawyer* is required in order for a member to communicate with a represented party about the subject of the representation. (See also ABA Formal Opn. No. 92-362 (offering party's lawyer not permitted to communicate with opposing party about settlement offer absent consent of other lawyer or unless authorized by law).)²¹

A common misconception is that the rule prohibits communication outside the presence of the other lawyer. However, the *presence* of the other lawyer is not necessarily sufficient to satisfy the requirements of rule 2-100. The rule specifies that the *consent* of the other lawyer is required in order for a member to be permitted to communicate with a represented party about the subject of the representation. (Rule 2-100, paragraph (A).)²² Similarly, copying the other lawyer on correspondence is not necessarily sufficient—the rule requires consent. (See, e.g., *AIU Ins. Co. v. The Robert Plan Corp.* (2007) 17 Misc.3d 1104(A) [851 N.Y.S.2d 56] (citing *Niesig v. Team 1* (1990) 76 N.Y.2d 363 [558 N.Y.S.2d 493]) (concluding that sending a letter to the directors, even with a copy sent to the company's counsel, violated New York DR 7-104); ABA Informal Opn. No. 1348 (offering party's lawyer not permitted to send opposing party carbon copy of settlement offer sent to opposing party's lawyer).)

2. Applicability of Implied Consent

Rule 2-100 itself does not specify whether the requisite consent must be expressly given by the other lawyer, or whether the requisite consent may be implied by the facts and circumstances surrounding the communication with

²¹ While California has not adopted the ABA Model Rules, they may nevertheless serve as guidelines absent on-point California authority or a conflicting state public policy. *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771]. Thus, in the absence of related California authority, we may look to the Model Rules, and the ABA Formal Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. Rules Prof. Conduct, 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].

²² Nonetheless, the presence of the opposing lawyer may be a mitigating factor. See discussion below. (See also *Wright v. Group Health Hospital* (1984) 103 Wash.2d 192, 197 [691 P.2d 564] ("the presence of the party's attorney theoretically neutralizes the contact."))

the represented party, and we are aware of no California case addressing this issue. We conclude, for the reasons described below, that consent under rule 2-100 need not be express, but may be implied.^{4/}

Implied consent is often recognized under the law in the State of California. See, e.g., Cal. Penal Code, § 261.6 ("Consent" is defined as "positive cooperation in act or attitude. . ."); *People v. Jo Wilkinson* (1967) 248 Cal.App.2d Supp. 906, 908 [56 Cal.Rptr. 261] ("In finding that the appellants did not have consent [to enter the property of another], we are mindful of the fact that consent can be implied as well as express. . ."); *People v. Wm. D. Noland* (1948) 83 Cal.App.2d Supp. 819, 821 [189 P.2d 84] (recognizing that, in connection with a violation of the Vehicle Code, waiver of the right of way may "be inferred from circumstances indicating an intent to waive."); *Thompson v. City of Louisville* (1960) 362 U.S. 199, 205 [80 S.Ct. 624] (recognizing implied consent as a defense to criminal loitering); *People v. Linda Fay York* (1970) 3 Cal.App.3d 648, 654 [83 Cal.Rptr. 732] (a criminal law case relating to issues regarding unlawful entry and search, "hotel employees have the implied permission of a guest to enter a rented room for janitorial or maid services.") (italics added; citing *United States v. Jeffers* (1951) 342 U.S. 48 [72 S.Ct. 93]). (See also *People v. Wash Jones Williams* (1992) 4 Cal.4th 354 [14 Cal.Rptr.2d 441]; *People v. John Z.* (2003) 29 Cal.4th 756 [128 Cal.Rptr.2d 783].)^{5/}

We also note the existence of certain interpretive opinions in California which suggest consent under rule 2-100 may be implied. See Cal. State Bar Formal Opn. No. 1993-131 (citing *Milton v. State Bar* (1969) 71 Cal.2d 525, 534 [78 Cal.Rptr. 649]) (rule 2-100 anticipates that counsel who is present can correct errors in opposing counsel's communications, thus implying that conversations where clients are present can occur. See also Los Angeles County Bar Assn. Formal Opn. Nos. 472 & 490 (suggesting that when an attorney receives a communication on behalf of the client, and chooses to deliver the communication to the client, "consent to the communication may be implied;" further, where the receiving attorney can control the timing of the delivery of the message, can comment on the communication, and can suggest an appropriate response, such communication does not threaten the values or dictates of the rule). See also *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1401 [58 Cal.Rptr.2d 178] ("Rule 2-100 should be given a reasonable, commonsense interpretation . . .") (internal quotes and citations omitted)).

Authorities in other jurisdictions outside of the State of California recognize implied consent under ethical rules comparable to rule 2-100. (See, e.g., Assn. of the Bar of the City of N.Y. Com. on Prof. and Jud. Ethics, Formal Opn. No. 2009-1 [<http://www.nycbar.org/ethics/ethics-opinions-local/2009-opinions/787-the-no-contact-rule-and-communications-sent-simultaneously-to-represented-persons-and-their-lawyers>] ("consent may be inferred from the

^{4/} Even though we conclude that consent under rule 2-100 may be implied, we do not mean to suggest that the consent requirement of the rule be taken lightly nor that it is appropriate for attorneys to stretch improperly to find implied consent. Further, even where consent may be implied, it is good practice to expressly confirm the existence of the other attorney's consent, and to do so in writing. (See Washington State Bar Association, "Ethics and the Law: Communicating with a Represented Governmental Client," by Barrie Althoff, WSBA Chief Disciplinary Counsel (June 2001): Rule 4.2 of Washington's Rules of Professional Conduct "does not require that consent be written, but in good practice it should be, preferably signed by the opposing lawyer, or at least by sending a writing to that lawyer confirming his or her consent. Given the purpose and strictness of the rule, it is highly perilous to engage in otherwise prohibited communication solely in reliance on an 'implied' consent of the opposing counsel. A lawyer doing so should immediately seek written ratification from opposing counsel, but recognize that counsel may not at all agree such consent was implied." See also Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2009-1, <http://www.nycbar.org/ethics/ethics-opinions-local/2009-opinions/787-the-no-contact-rule-and-communications-sent-simultaneously-to-represented-persons-and-their-lawyers>: "To avoid any possibility of running afoul of the no-contract rule, the prudent course is to secure express consent.")

^{5/} See also *Health Maintenance Network v. Blue Cross of So. California* (1988) 202 Cal.App.3d 1043, 1064 [249 Cal.Rptr. 220, 220] where the Court found that the client had impliedly consented to the subsequent adverse representation by its former attorney: "[A] client or former client may consent to an attorney's acceptance of adverse employment and such consent may be implied by conduct." *Health Maintenance Network v. Blue Cross of So. California*, *supra*, 202 Cal.App.3d at p. 1064 (emphasis added and citations omitted). Note, however, that this case involved neither attorney discipline nor disqualification and the Court applied case law applicable with respect to certain predecessor rules to rule 3-310 [Avoiding the Representation of Adverse Interests]. We do not mean to suggest consent under rule 3-310, which expressly requires informed written consent to certain conflicts of interest, need not be express and in writing.

conduct or acquiescence of the represented person's lawyer"); Rest. (Third) of Law Governing Lawyers § 99, cmt. j. (a lawyer "may communicate with a represented nonclient when that person's lawyer has consented to or acquiesced in the communication. An opposing lawyer may acquiesce, for example, by being present at a meeting and observing the communication. Similarly, consent may be implied rather than express, such as where such direct contact occurs routinely as a matter of custom, unless the opposing lawyer affirmatively protests."); See also Assn. of the Bar of the City of N.Y. Com. on Prof. and Jud. Ethics, Formal Opn. No. 2005-4 (although the Association was unwilling to recognize implied consent under the facts presented in this opinion, the inquiry itself suggests the lawyer could have engaged in conduct from which consent could be implied); Tex. Atty. Gen. Opn. No. JC-0572 (Nov. 5, 2002) (referencing the Texas disciplinary rule: "[c]onsent may be implied as well as express, as, for example, where the communication occurs in the form of a private placement memorandum or similar document that obviously is intended for multiple recipients and that normally is furnished directly to persons, even if known to be represented by counsel.").

3. Relevant Factors

For the reasons stated above, we conclude that consent under rule 2-100 need not be express, but may be implied. Such consent may be implied by the facts and circumstances surrounding the communication with the represented party. Such facts and circumstances may include those set below. None of the factors below individually are necessarily determinative of whether consent has in fact been implied. Rather, an examination of all facts and circumstances surrounding the communication with the represented party is necessary to determine whether consent may be inferred.

- *Whether the communication is within the presence of the other attorney.* Presence gives the other attorney the opportunity to correct errors in such communication and otherwise protect the attorney-client relationship. (See Cal. State Bar Formal Opn. No. 1993-131.) Presence also gives the other attorney the opportunity to expressly object to such communication, thereby negating an implication of consent.
- *Prior course of conduct.* Prior conduct between the attorneys, whether in connection with the pending matter or other matters, may be indicative of implied consent.
- *The nature of the matters.*^{6/} Tacit consent to communications with a represented party may be found more often in transactional matters as compared with adversarial matters. Under certain circumstances, for example, transactional matters may be more collaborative or neutral than litigation matters. As a result, based on the totality of the facts and circumstances, the nature of the matter may be a relevant factor.
- *How the communication is initiated and by whom.* Consent may be implied by the fact that the attorney invited the communication with his or her client or otherwise facilitated such communication. In addition to the factual scenario of this opinion as set forth above, common contexts where consent may possibly be implied include email correspondence from an attorney to an opposing attorney which includes the attorney's client as a copied recipient, thereby facilitating a communication by the opposing attorney by use of the "Reply to All" email function. (See Assn. of the Bar of the City of N.Y. Com. on Prof. and Jud. Ethics, Formal Opn. No. 2009-1, *supra* ("We agree that in the context of group email communications involving multiple lawyers and their respective clients, consent to 'reply to all' communications may sometimes be inferred from the facts and circumstances presented."))
- *The formality of the communication.* The more formal the communication, the less likely it is that consent may be implied. For example, whereas under the proper circumstances, a "Reply to All" email communication might be acceptable, copying the represented party in a demand letter to the other attorney would be difficult to justify.
- *The extent to which the communication might interfere with the attorney-client relationship.* Among factors weighing against implied consent are the likelihood that the represented party may: (a) make

^{6/} Rule 2-100 is not limited to a litigation context. See Discussion to rule 2-100: "As used in paragraph (A), 'the subject of the representation,' 'matter,' and 'party' are not limited to a litigation context."

an admission or reveal confidential or privileged information; (b) be persuaded by the communication, reach certain conclusions or form certain opinions as a result of the communication; or (c) question the advice or ability of his or her attorney.

- *Whether there exists a common interest or joint defense privilege between the parties.* The existence of a common interest or joint defense privilege between the parties may be indicative of an implicit understanding that the attorneys be permitted to communicate with both parties.
- *Whether the other attorney will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication.* Where, for example, the communication is unilateral, coming from the other attorney to the represented party, and if such party's attorney has the opportunity to promptly dispel misinformation and otherwise counsel the client, there may be little impact on the attorney-client relationship and administration of justice.
- *The instructions of the represented party's attorney.* Certainly consent should not be inferred where the attorney expressly withholds such consent and/or instructs the other attorney not to communicate with his or her client.

APPLICATION TO THE FACTS

Applying these principles to our factual scenario, we conclude that Attorney A provided implied consent, and therefore the communications described therein do not violate rule 2-100.

We conclude that consent may be implied by the fact that Attorney A initiated the substantive conversation regarding the litigation between Client A and Client B, by asking Attorney B (in the presence of Client A) about the need to call a witness in the case. By doing so, Attorney A invited the communication. In further support of our conclusion, we note that Attorney B's communication is in direct response to Attorney A's inquiry and that Attorney A did not intercede and stop the communication.

CONCLUSION

We conclude that consent under rule 2-100 may be implied. Such consent may be implied by the facts and circumstances surrounding the communication with the represented party. Such facts and circumstances may include the following: whether the communication is within the presence of the other attorney; prior course of conduct; the nature of the matter; how the communication is initiated and by whom; the formality of the communication; the extent to which the communication might interfere with the attorney-client relationship; whether there exists a common interest or joint defense privilege between the parties; whether the other attorney will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication; and the instructions of the represented party's attorney.

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[Publisher's Note: Internet resources cited in this opinion were last accessed by staff on November 9, 2011. Copy of these resources are on file with the State Bar's Office of Professional Competence.]

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(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

Discussion:

Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 1-400 Advertising and Solicitation

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
- (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or
- (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or
- (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(B) For purposes of this rule, a "solicitation" means any communication:

- (1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and
- (2) Which is:
 - (a) delivered in person or by telephone, or

(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

(D) A communication or a solicitation (as defined herein) shall not:

- (1) Contain any untrue statement; or
- (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
- (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
- (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
- (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.
- (6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.

(E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof"

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means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

[Publisher's Note: Former rule 1-400(D)(6) repealed by order of the Supreme Court effective November 30, 1992. New rule 1-400(D)(6) added by order of the Supreme Court effective June 1, 1997.]

Standards:

Pursuant to rule 1-400(E) the Board has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

- (1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.
- (2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."
- (3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.
- (4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.
- (5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which

does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.

(6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

(7) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A "communication" which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

(9) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.

(10) A "communication" which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.

(11) (Repealed. See rule 1-400(D)(6) for the operative language on this subject.)

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(12) A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.

(13) A "communication" which contains a dramatization unless such communication contains a disclaimer which states "this is a dramatization" or words of similar import.

(14) A "communication" which states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.

(15) A "communication" which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

(16) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication

expressly specifies a shorter period of time regarding the advertised fee. (Amended by order of Supreme Court, operative September 14, 1992. Standard (5) amended by the Board, effective May 11, 1994. Standards (12) - (16) added by the Board, effective May 11, 1994. Standard (11) repealed June 1, 1997)

[Publisher's Note re Rule 1-400(D)(6) and (E): Operative January 1, 2012, Business and Professions Code section 6010, in part, provides that the State Bar is governed by a board known as the board of trustees of the State Bar and that any provision of law referring to the "board of governors" shall be deemed to refer to the "board of trustees." In accordance with this law, references to the "board of governors" included in the current Rules of Professional Conduct are deemed to refer to the "board of trustees."]

Rule 1-500 Agreements Restricting a Member's Practice

(A) A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law, except that this rule shall not prohibit such an agreement which:

(1) Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or

(2) Requires payments to a member upon the member's retirement from the practice of law; or

(3) Is authorized by Business and Professions Code sections 6092.5 subdivision (i), or 6093.

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

Discussion:

Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.

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thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

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

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.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) (Amended by order of Supreme Court, operative September 14, 1992; operative March 3, 2003.)

Rule 3-320 Relationship With Other Party's Lawyer

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

Discussion:

Rule 3-320 is not intended to apply to circumstances in which a member fails to advise the client of a relationship with another lawyer who is merely a partner or associate in the same law firm as the adverse party's counsel, and who has no direct involvement in the matter. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 3-400 Limiting Liability to Client

A member shall not:

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

(B) Settle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

Discussion:

Rule 3-400 is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent a member from reasonably limiting the scope of the member's employment or representation. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 3-410 Disclosure of Professional Liability Insurance

(A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the member, that the member does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours.

(B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member

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subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.

(C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity.

(D) This rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.

(E) This rule does not apply where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance.

Discussion:

[1] The disclosure obligation imposed by Paragraph (A) of this rule applies with respect to new clients and new engagements with returning clients.

[2] A member may use the following language in making the disclosure required by rule 3-410(A), and may include that language in a written fee agreement with the client or in a separate writing:

"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."

[3] A member may use the following language in making the disclosure required by rule 3-410(B):

"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I no longer have professional liability insurance."

[4] Rule 3-410(C) provides an exemption for a "government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and

provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. (Added by order of the Supreme Court, operative January 1, 2010.)

Rule 3-500 Communication

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

Discussion:

Rule 3-500 is not intended to change a member's duties to his or her clients. It is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be disciplined for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, subd. (m).)

A member may contract with the client in their employment agreement that the client assumes responsibility for the cost of copying significant documents. This rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

Rule 3-500 is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the member to provide work product to the client shall be governed by relevant statutory and decisional law. Additionally, this rule is not intended to apply to any document or correspondence that is subject to a protective order or non-disclosure agreement, or to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the member. (Amended by order of the Supreme Court, operative June 5, 1997.)

**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. Duty of Confidentiality

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

(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. 594.⁷⁷ Depending on the circumstances, courts may require additional factual information in order to rule on a motion to withdraw.⁸⁷

Aceves not only is consistent with cases like *Uhl* and *Leveresen*, 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."⁹⁷ 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. In Camera Review

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.¹⁰⁰ 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

⁷⁷ 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.

⁸⁷ 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 *Leveresen* 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*, *Leveresen*, 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.

⁹⁷ 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)."

¹⁰⁰ 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

^{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

(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 "violat[ing] 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 waiver 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.]