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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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unlawfulness in the first instance even though that finding is thereafter appealed.

A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard. (Added by order of Supreme Court, effective March 1, 1994.)

CHAPTER 3. PROFESSIONAL RELATIONSHIP WITH CLIENTS

Rule 3-100 Confidential Information of a Client

(A) 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, or as provided in paragraph (B) of this rule.

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

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

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

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the

criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

Discussion:

[1] *Duty of confidentiality.* Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr. 393].)

[2] *Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.* The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other

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proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.

[3] *Narrow exception to duty of confidentiality under this Rule.* Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business & Professions Code section 6068, subdivision (e)(1). Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception. Although a member is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

[4] *Member not subject to discipline for revealing confidential information as permitted under this Rule.* Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes is likely to result in death or substantial bodily harm to an individual. A member who reveals information as permitted under this rule is not subject to discipline.

[5] *No duty to reveal confidential information.* Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule 1-100(A).) A member may decide not to reveal confidential information. Whether a member chooses to reveal confidential information as permitted under

this rule is a matter for the individual member to decide, based on all the facts and circumstances, such as those discussed in paragraph [6] of this discussion.

[6] *Deciding to reveal confidential information as permitted under paragraph (B).* Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information as permitted under paragraph (B), the member must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:

- (1) the amount of time that the member has to make a decision about disclosure;
- (2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;
- (3) whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;
- (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and
- (6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur.

[7] *Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.* Subparagraph (C)(1)

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

[8] *Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.* Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant

circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.

[9] *Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).* A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the member's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the client's matter will involve information within paragraph (B);
- (6) the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and

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

[10] *Avoiding a chilling effect on the lawyer-client relationship.* The foregoing flexible approach to the member's informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph [1].) To avoid that chilling effect, one member may choose to inform the client of the member's ability to reveal information as early as the outset of the representation, while another member may choose to inform a client only at a point when that client has imparted information that may fall under paragraph (B), or even choose not to inform a client until such time as the member attempts to counsel the client as contemplated in Discussion paragraph [7]. In each situation, the member will have discharged properly the requirement under subparagraph (C)(2), and will not be subject to discipline.

[11] *Informing client that disclosure has been made; termination of the lawyer-client relationship.* When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client's informed consent to the member's continued representation. The member must inform the client of the fact of the member's disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm.

[12] *Other consequences of the member's disclosure.* Depending upon the circumstances of a member's disclosure of confidential information, there may be other important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).

[13] *Other exceptions to confidentiality under California law.* Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the

confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)

Rule 3-110 Failing to Act Competently

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

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

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Discussion:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 3-120 Sexual Relations With Client

(A) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an

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intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

(B) A member shall not:

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

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

(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.

(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

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

Discussion:

Rule 3-120 is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr. 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal.Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939

[88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all client matters, a member is advised to keep clients' interests paramount in the course of the member's representation.

For purposes of this rule, if the client is an organization, any individual overseeing the representation shall be deemed to be the client. (See rule 3-600.)

Although paragraph (C) excludes representation of certain clients from the scope of rule 3-120, such exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including rule 3-110. (Added by order of Supreme Court, operative September 14, 1992.)

Rule 3-200 Prohibited Objectives of Employment

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

(A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

Rule 3-210 Advising the Violation of Law

A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

Discussion:

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the

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member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

Rule 3-300 Avoiding Interests Adverse to a Client

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

(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and

(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

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

Discussion:

Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 4-200.

Rule 3-300 is not intended to apply where the member and client each make an investment on terms offered to the general public or a significant portion thereof. For example, rule 3-300 is not intended to apply where A, a member, invests in a limited partnership syndicated by a third party. B, A's client, makes the same investment. Although A and B are each investing in the same business, A did not enter into the transaction "with" B for the purposes of the rule.

Rule 3-300 is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 3-310 Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;

(3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The member knows or reasonably should know that:

(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the member's representation; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

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(C) A member shall not, without the informed written consent of each client:

- (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
- (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
- (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

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

- (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
- (2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and
- (3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:
 - (a) such nondisclosure is otherwise authorized by law; or
 - (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written consent of the clients

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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.)

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Rule 3-510 Communication of Settlement Offer

(A) A member shall promptly communicate to the member's client:

- (1) All terms and conditions of any offer made to the client in a criminal matter; and
- (2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

(B) As used in this rule, "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

Discussion:

Rule 3-510 is intended to require that counsel in a criminal matter convey all offers, whether written or oral, to the client, as give and take negotiations are less common in criminal matters, and, even were they to occur, such negotiations should require the participation of the accused.

Any oral offers of settlement made to the client in a civil matter should also be communicated if they are "significant" for the purposes of rule 3-500.

Rule 3-600 Organization as Client

(A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

(B) If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(C) If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with rule 3-700.

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

(E) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

Discussion:

Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.

Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.

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Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.

Rule 3-700 Termination of Employment

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) 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, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal.

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

(1) The 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; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

(f) breaches an agreement or obligation to the member as to expenses or fees.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or

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

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(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The client knowingly and freely assents to termination of the employment; or

(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

(D) Papers, Property, and Fees.

A member whose employment has terminated shall:

(1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and

(2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

Discussion:

Subparagraph (A)(2) provides 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 clients." What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.

Paragraph (D) makes clear the member's duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member "promptly" return unearned fees paid in advance. If

a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).

Paragraph (D) is not intended to prohibit a member from making, at the member's own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

CHAPTER 4. FINANCIAL RELATIONSHIP WITH CLIENTS

Rule 4-100 Preserving Identity of Funds and Property of a Client

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

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

(B) A member shall:

(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt

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and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

(4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

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

[Publisher's Note re Rule 4-100(C): 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."]

Standards:

Pursuant to rule 4-100(C) the Board adopted the following standards, effective January 1, 1993, as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3).

(1) A member shall, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintain:

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

(i) the name of such client,

(ii) the date, amount and source of all funds received on behalf of such client,

(iii) the date, amount, payee and purpose of each disbursement made on behalf of such client, and

(iv) the current balance for such client;

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

(i) the name of such account,

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

(iii) the current balance in such account;

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

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

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

(a) each item of security and property held;

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

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

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

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

[Publisher's Note: Trust Account Record Keeping Standards as adopted by the Board on July 11, 1992, effective January 1, 1993.]

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Rule 4-200 Fees for Legal Services

(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.

(B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

- (1) The amount of the fee in proportion to the value of the services performed.
- (2) The relative sophistication of the member and the client.
- (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
- (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
- (5) The amount involved and the results obtained.
- (6) The time limitations imposed by the client or by the circumstances.
- (7) The nature and length of the professional relationship with the client.
- (8) The experience, reputation, and ability of the member or members performing the services.
- (9) Whether the fee is fixed or contingent.
- (10) The time and labor required.
- (11) The informed consent of the client to the fee.

(Amended by order of Supreme Court, operative September 14, 1992.)

Rule 4-210 Payment of Personal or Business Expenses Incurred by or for a Client

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member:

- (1) With the consent of the client, from paying or agreeing to pay such expenses to third persons from funds collected or to be collected for the client as a result of the representation; or
- (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan; or
- (3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

(B) Nothing in rule 4-210 shall be deemed to limit rules 3-300, 3-310, and 4-300.

Rule 4-300 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

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

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

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firm. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 4-400 Gifts From Client

A member shall not induce a client to make a substantial gift, including a testamentary gift, to the member or to the member's parent, child, sibling, or spouse, except where the client is related to the member.

Discussion:

A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence. The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

CHAPTER 5. ADVOCACY AND REPRESENTATION

Rule 5-100 Threatening Criminal, Administrative, or Disciplinary Charges

(A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(B) As used in paragraph (A) of this rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(C) As used in paragraph (A) of this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature

pending before a federal, state, or local governmental entity.

Discussion:

Rule 5-100 is not intended to apply to a member's threatening to initiate contempt proceedings against a party for a failure to comply with a court order.

Paragraph (B) is intended to exempt the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.

For purposes of paragraph (C), the definition of "civil dispute" makes clear that the rule is applicable prior to the formal filing of a civil action.

Rule 5-110 Performing the Duty of Member in Government Service

A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.

Rule 5-120 Trial Publicity

(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(B) Notwithstanding paragraph (A), a member may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) the information contained in a public record;

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- (3) that an investigation of the matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (a) the identity, residence, occupation, and family status of the accused;
 - (b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
 - (c) the fact, time, and place of arrest; and
 - (d) the identity of investigating and arresting officers or agencies and the length of the investigation.

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

Discussion:

Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.

Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d);

(3) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and (4) the timing of the statement.

Paragraph (A) is intended to apply to statements made by or on behalf of the member.

Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the member's duty to maintain client confidence and secrets. (Added by order of the Supreme Court, operative October 1, 1995.)

Rule 5-200 Trial Conduct

In presenting a matter to a tribunal, a member:

- (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
- (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;
- (C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;
- (D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and
- (E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

Rule 5-210 Member as Witness

A member shall not act as an advocate before a jury which will hear testimony from the member unless:

- (A) The testimony relates to an uncontested matter; or
- (B) The testimony relates to the nature and value of legal services rendered in the case; or

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(C) The member has the informed, written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal.

Discussion:

Rule 5-210 is intended to apply to situations in which the member knows or should know that he or she ought to be called as a witness in litigation in which there is a jury. This rule is not intended to encompass situations in which the member is representing the client in an adversarial proceeding and is testifying before a judge. In non-adversarial proceedings, as where the member testifies on behalf of the client in a hearing before a legislative body, rule 5-210 is not applicable.

Rule 5-210 is not intended to apply to circumstances in which a lawyer in an advocate's firm will be a witness. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 5-220 Suppression of Evidence

A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

Rule 5-300 Contact With Officials

(A) A member shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.

(B) A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:

- (1) In open court; or

(2) With the consent of all other counsel in such matter; or

(3) In the presence of all other counsel in such matter; or

(4) In writing with a copy thereof furnished to such other counsel; or

(5) In ex parte matters.

(C) As used in this rule, "judge" and "judicial officer" shall include law clerks, research attorneys, or other court personnel who participate in the decision-making process. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 5-310 Prohibited Contact With Witnesses

A member shall not:

(A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

Rule 5-320 Contact With Jurors

(A) A member connected with a case shall not communicate directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case.

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(B) During trial a member connected with the case shall not communicate directly or indirectly with any juror.

(C) During trial a member who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the member knows is a juror in the case.

(D) After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(E) A member shall not directly or indirectly conduct an out of court investigation of a person who is either a member of the venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.

(F) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person who is either a member of the venire or a juror.

(G) A member shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the member has knowledge.

(H) This rule does not prohibit a member from communicating with persons who are members of a venire or jurors as a part of the official proceedings.

(I) For purposes of this rule, "juror" means any empanelled, discharged, or excused juror. (Amended by order of Supreme Court, operative September 14, 1992.)

**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.

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

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

Aceves not only is consistent with cases like *Uhl* and *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.”^{9/} See also Or. Formal Opn. No. 2011-185 (finding that, under Oregon Rule 1.6(b), a lawyer may not reveal the basis for his withdrawal unless disclosure is permitted by one of the narrow exceptions to Rule 1.6); Ariz. Ethics Opn. No. 09-02 (discussing the general requirement that an attorney disclose no more than is reasonably necessary when moving to withdraw).

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

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

^{8/} In *Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1135-36 [78 Cal.Rptr.2d 494], the court cited *Aceves*, *Uhl*, and *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.

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

^{10/} When the trial court suggested an in camera hearing, the public defender declined, saying:

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

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

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

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

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

b. Court Order To Disclose

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

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

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

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

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

^{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.]