

ALRP MCLE

APRIL 5, 2017

YOUR WORK ETHICS: ARE THEY  
ETHICAL?  
(1.0 ETHICS HOURS)

PANELISTS:

KENNETH D. MARTINSON, ESQ

FERNANDO HIDALGO, ESQ

---

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

**ISSUE:** When an attorney is engaged in negotiations on behalf of a client, are there ethical limitations on the statements the attorney may make to third parties, including statements that may be considered “puffing” or posturing?

**DIGEST:** Statements made by counsel during negotiations are subject to those rules prohibiting an attorney from engaging in dishonesty, deceit or collusion. Thus, it is improper for an attorney to make false statements of fact or implicit misrepresentations of material fact during negotiations. However, puffery and posturing, such as statements about a party’s negotiating goals or willingness to compromise, are generally permissible because they are not considered statements of fact.

**AUTHORITIES**

**INTERPRETED:** Rule 3-700(B)(2) of the Rules of Professional Conduct of the State Bar of California.<sup>1/</sup>

Business and Professions Code section 6068, subdivisions (b), (c), and (d).

Business and Professions Code section 6106.

Business and Professions Code section 6128(a).

**STATEMENT OF FACTS**

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

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

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

---

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



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

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

## DISCUSSION

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

---

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



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

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

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

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

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

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

---

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

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

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

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

<sup>5/</sup> The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do not conflict with California policy. (*City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771].) Thus, in the absence of related California authority, we may look to the ABA Model Rules, and the ABA Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. (Rule 1-100(A) ["Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."]; *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799].)



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

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

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

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

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

The California Rules of Professional Conduct do not contain a rule that corresponds to Model Rule 4.1. Under California's statutes and case law governing attorney honesty; however, California lawyers are not permitted to intentionally deceive opposing counsel. (See Business and Professions Code sections 6106, 6128(a), and 6068(d); *Coviello v. State Bar* (1955) 45 Cal.2d 57, 66 [286 P.2d 357] [upholding a six-month suspension based on lawyer's intentional deceit of opposing counsel because "[s]uch conduct falls short of the honesty and integrity required of an attorney at law in the performance of his professional duties."]; *Monroe v. State Bar* (1961) 55 Cal.2d 145, 152 [10 Cal.Rptr. 257] [upholding a nine-month suspension because "intentionally deceiving opposing counsel is ground for disciplinary action."]; *Hallinan v. State Bar* (1948) 33 Cal.2d 246 [200 P.2d 787] [attorney suspended for three months after attorney admitted that he simulated a client's name on a settlement release even though he knew that the opposing counsel wanted the attorney's client to personally sign the settlement papers]; *Scofield v. State Bar* (1965) 62 Cal.2d 624, 628 [43 Cal.Rptr. 825] ["Affirmative representations made with intent to deceive are grounds for discipline, even though no harm results."].)<sup>6/</sup>

<sup>6/</sup> For purposes of imposing discipline, an attorney's representations may be characterized as "moral turpitude," "dishonesty" or "corruption" under Business and Professions Code section 6106 only if the representations were made with an intent to mislead. (See *Wallis v. State Bar* (1942) 21 Cal.2d 322, 328 [131 P.2d 531].)



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

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

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

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

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

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

---

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



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

### **Specific Examples**

We will consider the examples set forth in the hypotheticals:

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

Second, Attorney was specifically instructed by Plaintiff not to make the disclosure. That instruction, conveyed by a client to his attorney, is a confidential communication that Attorney is obligated to protect under Rule 3-100 and Business and Professions Code section 6068(e). While an attorney is generally required to follow his client’s instructions, Rule 3-700(B)(2) requires withdrawal if an attorney’s representation would result in a violation of the ethical rules, of which a false representation of fact or implicit misrepresentation of a material fact would be. When faced with Plaintiff’s instruction, Attorney should first counsel his client against the misrepresentation and/or suppression. If Plaintiff refuses, Attorney must withdraw under Rule 3-700(B)(2), as Attorney may neither make the disclosure absent client consent, nor may Attorney take part in the misrepresentation and/or suppression. (California State Bar Form. Opn. No. 2013-189;<sup>8/</sup> see also Los Angeles County Bar Association Opn. 520).

<sup>8/</sup> California State Bar Form. Opn. No. 2013-189 contains a full discussion regarding an attorney’s ethical obligations when a client instructs his or her attorney to conceal material facts from the opposing party and/or opposing counsel. As addressed more fully in that opinion, an attorney should first counsel his or her client regarding the client’s request and, if the client refuses to reconsider, the attorney may be obligated to withdraw his or her representation, pursuant to Rule 3-700(B)(2).



## **CONCLUSION**

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

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

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

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

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

**AUTHORITIES  
INTERPRETED:**

Rule 2-100 of the Rules of Professional Conduct of the State Bar of California.<sup>1/</sup>

**STATEMENT OF FACTS**

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

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

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

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

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

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

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

---

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



## DISCUSSION

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

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

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

### 1. Consent of the Other Lawyer

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

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

### 2. Applicability of Implied Consent

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

---

<sup>2/</sup> While California has not adopted the ABA Model Rules, they may nevertheless serve as guidelines absent on-point California authority or a conflicting state public policy. *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771]. Thus, in the absence of related California authority, we may look to the Model Rules, and the ABA Formal Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. Rules Prof. Conduct, rule 1-100(A) (Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered). *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799].

<sup>3/</sup> Nonetheless, the presence of the opposing lawyer may be a mitigating factor. See discussion below. (See also *Wright v. Group Health Hospital* (1984) 103 Wash.2d 192, 197 [691 P.2d 564] (“the presence of the party’s attorney theoretically neutralizes the contact.”).)

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

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

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

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

---

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

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



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

### 3. Relevant Factors

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

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

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



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

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

### APPLICATION TO THE FACTS

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

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

### CONCLUSION

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

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 Governors, 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 November 9, 2011. Copy of these resources are on file with the State Bar's Office of Professional Competence.]*



# CALIFORNIA RULES OF PROFESSIONAL CONDUCT

*(Current rules as of January 1, 2015. The operative dates of select rule amendments are shown at the end of relevant rules.)*

## CHAPTER 1. PROFESSIONAL INTEGRITY IN GENERAL

### Rule 1-100 Rules of Professional Conduct, in General

#### (A) Purpose and Function.

The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.

For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.

The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, §6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.

#### (B) Definitions.

##### (1) "Law Firm" means:

- (a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or

- (b) a law corporation which employs more than one lawyer; or

- (c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or

- (d) a publicly funded entity which employs more than one lawyer to perform legal services.

##### (2) "Member" means a member of the State Bar of California.

- (3) "Lawyer" means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.

- (4) "Associate" means an employee or fellow employee who is employed as a lawyer.

- (5) "Shareholder" means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.

#### (C) Purpose of Discussions.

Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.

#### (D) Geographic Scope of Rules.

##### (1) As to members:

These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

## RULES OF PROFESSIONAL CONDUCT

(2) As to lawyers from other jurisdictions who are not members:

These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

(E) These rules may be cited and referred to as “Rules of Professional Conduct of the State Bar of California.”

### **Discussion:**

The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489].) The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324 [231 Cal.Rptr. 355].) These rules are not intended to supercede existing law relating to members in non-disciplinary contexts. (See, e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (motion for disqualification of counsel due to a conflict of interest); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (disqualification of member appropriate remedy for improper communication with adverse party).)

Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law. (Amended by order of the Supreme Court, operative September 14, 1992.)

**[Publisher’s Note re Rule 1-100(A):** Operative January 1, 2012, Business and Professions Code section 6010, in part, provides that the State Bar is governed by a board known as the board of trustees of the State Bar and that any provision of law referring to the “board of governors” shall be deemed to refer to

the “board of trustees.” In accordance with this law, references to the “board of governors” included in the current Rules of Professional Conduct are deemed to refer to the “board of trustees.”]

### **Rule 1-110 Disciplinary Authority of the State Bar**

A member shall comply with conditions attached to public or private reprovls or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19, California Rules of Court. (Amended by order of the Supreme Court, operative July 11, 2008.)

### **Rule 1-120 Assisting, Soliciting, or Inducing Violations**

A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.

### **Rule 1-200 False Statement Regarding Admission to the State Bar**

(A) A member shall not knowingly make a false statement regarding a material fact or knowingly fail to disclose a material fact in connection with an application for admission to the State Bar.

(B) A member shall not further an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes.

(C) This rule shall not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to such admission.

### **Discussion:**

For purposes of rule 1-200 “admission” includes readmission.

### **Rule 1-300 Unauthorized Practice of Law**

(A) A member shall not aid any person or entity in the unauthorized practice of law.



## RULES OF PROFESSIONAL CONDUCT

(B) A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

### **Rule 1-310 Forming a Partnership With a Non-Lawyer**

A member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.

#### ***Discussion:***

Rule 1-310 is not intended to govern members' activities which cannot be considered to constitute the practice of law. It is intended solely to preclude a member from being involved in the practice of law with a person who is not a lawyer. (Amended by order of Supreme Court, operative September 14, 1992.)

### **Rule 1-311 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member**

(A) For purposes of this rule:

(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(c), or California Rule of Court 9.31; and

(3) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.

(B) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the member's client:

(1) Render legal consultation or advice to the client;

(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) Appear as a representative of the client at a deposition or other discovery matter;

(4) Negotiate or transact any matter for or on behalf of the client with third parties;

(5) Receive, disburse or otherwise handle the client's funds; or

(6) Engage in activities which constitute the practice of law.

(C) A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:

(1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or

(3) Accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.

(D) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (B) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The



## RULES OF PROFESSIONAL CONDUCT

member shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the member's employment with the client.

(E) A member may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

(F) Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.

### **Discussion:**

For discussion of the activities that constitute the practice of law, see *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corporation* (1922) 189 Cal. 531, 535 [209 P. 363]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)

Paragraph (D) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a member's client is an organization, then the written notice required by paragraph (D) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600.)

Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 9.40, 9.41, 9.42, and 9.44 of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*. (Added by Order of Supreme Court, operative August 1, 1996. Amended by order of the Supreme Court, operative July 11, 2008.)

### **Rule 1-320 Financial Arrangements With Non-Lawyers**

(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:

(1) An agreement between a member and a law firm, partner, or associate may provide for the payment of money after the member's death to the member's estate or to one or more specified persons over a reasonable period of time; or

(2) A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or

(3) A member or law firm may include non-member employees in a compensation, profit-sharing, or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement, if such plan does not circumvent these rules or Business and Professions Code section 6000 et seq.; or

(4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.

(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.



## RULES OF PROFESSIONAL CONDUCT

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

### *Discussion:*

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

### **Rule 1-400 Advertising and Solicitation**

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

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

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

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

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

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

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

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

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



## RULES OF PROFESSIONAL CONDUCT

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

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

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

### **Standards:**

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

(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.

(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which

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

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

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

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

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

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

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



## RULES OF PROFESSIONAL CONDUCT

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

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

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

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

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

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

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

### Rule 1-500 Agreements Restricting a Member’s Practice

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

- (1) Is a part of an employment, shareholders’, or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or
- (2) Requires payments to a member upon the member’s retirement from the practice of law; or
- (3) Is authorized by Business and Professions Code sections 6092.5 subdivision (i), or 6093.

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

#### Discussion:

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



## RULES OF PROFESSIONAL CONDUCT

Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law. (Amended by order of Supreme Court, operative September 14, 1992.)

### Rule 1-600 Legal Service Programs

(A) A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.

(B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.

#### *Discussion:*

The participation of a member in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of these rules.

Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.

Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.

For purposes of paragraph (A), "a nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.

*[Publisher's Note re Rule 1-600(B): Operative January 1, 2012, Business and Professions Code section 6010, in part, provides that the State Bar is governed by a board known as the board of trustees of the State Bar and that any provision of law referring to the "board of governors" shall be deemed to refer to the "board of trustees." In accordance with this law, references to the "board of governors" included in the current Rules of Professional Conduct are deemed to refer to the "board of trustees."]*

### Rule 1-650 Limited Legal Services Programs

(A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:

(1) is subject to rule 3-310 only if the member knows that the representation of the client involves a conflict of interest; and

(2) has an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm would have a conflict of interest under rule 3-310 with respect to the matter.

(B) Except as provided in paragraph (A)(2), a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.

(C) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

#### *Discussion:*

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue



## RULES OF PROFESSIONAL CONDUCT

beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110. Except as provided in this rule 1-650, the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code § 6068(e)(1), are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (A)(2) imputes conflicts of interest to the member only if the member knows that another lawyer in the member's law firm would be disqualified under rule 3-310.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) imputes conflicts of interest to the participating member when the member knows that any lawyer in the member's firm would be disqualified under rule 3-310. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the

matter on an ongoing basis, rule 3-310 and all other rules become applicable. (Added by order of the Supreme Court, operative August 28, 2009.)

### **Rule 1-700 Member as Candidate for Judicial Office**

(A) A member who is a candidate for judicial office in California shall comply with Canon 5 of the Code of Judicial Ethics.

(B) For purposes of this rule, "candidate for judicial office" means a member seeking judicial office by election. The determination of when a member is a candidate for judicial office is defined in the terminology section of the California Code of Judicial Ethics. A member's duty to comply with paragraph (A) shall end when the member announces withdrawal of the member's candidacy or when the results of the election are final, whichever occurs first.

#### **Discussion:**

Nothing in rule 1-700 shall be deemed to limit the applicability of any other rule or law. (Added by order of the Supreme Court, operative November 21, 1997.)

### **Rule 1-710 Member as Temporary Judge, Referee, or Court-Appointed Arbitrator**

A member who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject under the Code of Judicial Ethics to Canon 6D, shall comply with the terms of that canon.

#### **Discussion:**

This rule is intended to permit the State Bar to discipline members who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law. (Added by order of the Supreme Court, operative March 18, 1999.)

**[Publisher's Note:** *The California Code of Judicial Ethics is available on-line at the official website of the California Courts located at [www.courts.ca.gov](http://www.courts.ca.gov). Navigate to the "Forms & Rules" area of the website and select "California Code of Judicial Ethics" under the "Related Links" box.]*



## RULES OF PROFESSIONAL CONDUCT

### CHAPTER 2. RELATIONSHIP AMONG MEMBERS

#### Rule 2-100 Communication With a Represented Party

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

(B) For purposes of this rule, a “party” includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party’s choice; or

(3) Communications otherwise authorized by law.

#### Discussion:

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and

investigators to conduct criminal investigations, as limited by the relevant decisional law.

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party’s counsel, seeks A’s independent advice. Since A is employed by the opposition, the member cannot give independent advice.

As used in paragraph (A), “the subject of the representation,” “matter,” and “party” are not limited to a litigation context.

Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)

Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)

#### Rule 2-200 Financial Arrangements Among Lawyers

(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing



## RULES OF PROFESSIONAL CONDUCT

that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

### **Rule 2-300 Sale or Purchase of a Law Practice of a Member, Living or Deceased**

All or substantially all of the law practice of a member, living or deceased, including goodwill, may be sold to another member or law firm subject to all the following conditions:

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

(B) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e), then;

(1) if the seller is deceased, or has a conservator or other person acting in a representative capacity, and no member has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer;

(a) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that

the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

(b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.

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

(a) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

(b) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer provided that such consent shall be presumed until otherwise notified by the client if no response is



## RULES OF PROFESSIONAL CONDUCT

received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller.

(C) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a member shall be taken.

(D) All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.

(E) Confidential information shall not be disclosed to a non-member in connection with a sale under this rule.

(F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

### *Discussion:*

Paragraph (A) is intended to prohibit the purchaser from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing clients.

"All or substantially all of the law practice of a member" means, for purposes of rule 2-300, that, for example, a member may retain one or two clients who have such a longstanding personal and professional relationship with the member that transfer of those clients' files is not feasible. Conversely, rule 2-300 is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by subparagraph (B)(1)(a) or paragraph (D).

Transfer of individual client matters, where permitted, is governed by rule 2-200. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by rule 1-320. (Amended by order of Supreme Court, operative September 14, 1992.)

### **Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice**

(A) For purposes of this rule:

(1) "law practice" includes sole practices, law partnerships, law corporations, corporate and

governmental legal departments, and other entities which employ members to practice law;

(2) "knowingly permit" means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or

(2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

### *Discussion:*

In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.

A complaint of misconduct based on this rule may be filed with the State Bar following a finding of