2012 Bridging the Gap

Participant Materials

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Contents

BRIDGING THE GAP 2012 AGENDA

January 21, 2012
Ventura County Administration Building
Lower Plaza

8:00 to 8:25 a.m. *REGISTRATION/BREAKFAST*

Robert S. Krimmer, 2012 Barristers President

8:30 to 9:20 a.m.

JUDICIAL PERSPECTIVE

Hon. Vincent J. O'Neill
Hon. Kevin G. DeNoce
Hon. John R. Smiley
Moderator: Joseph L. Strohman, Esq.

9:20 to 10:10 a.m.

ELIMINATING BIAS IN JURY SELECTION (Batson/Wheeler Motions)

(1 Elimination of Bias MCLE Credit)

Michael C. McMahon, Chief Deputy, Ventura County Public Defender

10:20 to 11:10 a.m.

ACCESS TO JUSTICE-SERVING CLIENTS LOST IN THE EPROCESS

Michael D. Sudman, Esq.

11:10 to Noon

AVOIDING PITFALLS IN GOVERNMENT CLAIMS

Alberto Boada, Litigation Supervisor, Ventura County Counsel
Jaclyn Smith, Assistant County Counsel, Ventura County Counsel

Noon to 12:30 p.m. LUNCH

In Appreciation - Merrill Corporation, Tasha Holcomb

12:30 to 1:20 p.m.

ETHICAL RULES FOR THE CALIFORNIA PRACTITIONER-AN OVERVIEW

(1 Ethics MCLE Credit)

Joel Mark, Esq.

1:20 to 2:10 p.m. ADDICTION: IT'S REALLY A BRAIN DISEASE!

(1 Substance Abuse MCLE Credit)

William Shilley

Welcome, Participants!

On behalf of the Barristers section of the Ventura County Bar Association, we wish to welcome you to 2012 Bridging the Gap. This is a bi-annual seminar that brings together local talent to educate and, hopefully, entertain while providing MCLE credits in all required categories.

Any member of the Ventura County Bar Association who is under age 36, or who has been practicing law for less than seven years, is automatically a Barrister. Bridging the Gap is designed to bring together local attorneys of all levels of experience, to promote the cohesive and collegial nature of the Ventura County legal community. Today's presentations, therefore, are designed to appeal to the novice and seasoned practitioner alike.

The task of organizing 2012 Bridging the Gap encompassed an entire year of hard work by each and every member of the 2011 Barristers Board of Directors. But we could not have put this event together without the tireless assistance of VCBA Executive Director Steve Henderson and his staff, as well as the community leaders who are giving their time to speak to us today.

We hope you enjoy today's presentations.

Christina S. Stokholm
2011 Barristers President

Robert S. Krimmer
2011 Barristers Vice President
2012 Barristers President

2011 Board of Directors

Bridging the Gap 2012 is being produced by the 2011 Barristers Board, which was comprised of the following individuals:

Officers:

Christina S. Stokholm, President
Robert S. "Bob" Krimmer, Vice President
Mathew M. Purcell, Secretary
Rennee R. Dehesa, Treasurer
Douglas K. Goldwater, Past-President

Members At-Large:

Tom Adams
Jesse E. Cahill
Rachel Coleman
Amy R. Dilbeck
Matthew LaVere
Brier K. Miron
John Negley
Kathryn Pietrolungo
Jaclyn Smith
Michael Strauss

Tom Adams is a true Southern California native. Born in Orange County and raised in Los Angeles and Santa Barbara, he moved to Ventura County in 2004. Tom earned his law degree from Ventura College of Law with a certificate of concentration in business law, and honors for scholastic achievement. At VCL, he served as vice president and president of the school's branch of the Student Animal Legal Defense Fund's animal law group, and he continues to provide pro-bono legal services to organizations that benefit animals.

Tom has worked in the legal profession for over 8 years, starting off his career as a paralegal in a Los Angeles-based personal injury law firm, where he worked on hundreds of cases for plaintiffs and defendants. He later moved to Ventura, where he worked for Myers, Widders, Gibson, Jones & Schneider, LLP, assisting with complex litigation, homeowners association disputes, construction defect claims, and business disputes.

As an attorney, Tom has built on his experience to develop a boutique-type practice that focuses on the needs of small businesses and consumers, as well as providing litigation support to multiple law firms in Ventura and Los Angeles Counties.

2011 Board of Directors

Tom is a 3-term member of the Barristers, a member of the Jerome H. Berenson Chapter of Inns of Court, and has been on the Board of Directors for the Barristers/YMCA's Take It To The Court annual basketball tournament fundraiser, along with other fundraising committees for local organizations.

Jesse E. Cahill, an AV-rated attorney, is a partner at Ferguson Case Orr Paterson LLP. Mr. Cahill practices estate planning, trust and probate law. Prior to Ferguson Case Orr Paterson LLP, Jesse worked with an Orange County law firm, where he also gained experience in the practice areas of estate litigation and intellectual property.

Jesse received his undergraduate diploma from the University of California, Santa Barbara, where he earned a double major in Philosophy and Law & Society. During college, Jesse spent a summer studying world economics and British foreign policy at Cambridge University in England.

Upon graduating from UCSB, Jesse worked as an associate with a land use planning and development firm. Realizing that he needed a law degree to further his career, he enrolled at the Pepperdine University School of Law in Malibu.

Jesse lives in Camarillo with his wife, Stephanie, an elementary school teacher, and their two children. He enjoys golf, reading and playing the bass guitar. He was Barristers President for 2007.

Rachel Coleman graduated with honors from Ventura College where she obtained her Associate Degree and then received her Juris Doctorate from the Ventura College of Law. During law school, Ms. Coleman participated in the Certified Law Student program through the State Bar, which allowed her to make court appearances and attend depositions under the supervision of a managing attorney. Ms. Coleman also acted as the Student Bar President and the Dean of Delta Theta Phi. Ms. Coleman currently litigates a wide variety of civil matters including personal injury, business disputes involving contracts, employment, and real property with the firm DK Law Group.

Ms. Coleman sits on the board of the Ventura County Barristers and the editorial board of the Ventura County Bar Association magazine, Citations. As a member of the editorial board of Citations, she has published several judicial profiles. She is also a member of the Jerome H. Berenson Chapter of Inns of Court. Ms. Coleman is also an active alumna of the Ventura College of Law. She is also an instructor for the UCSB Extension Paralegal Program.

Ms. Coleman was elected Barristers Secretary for 2012.

2011 Board of Directors

Rennee R. Dehesa is a tenured associate with Nordman Cormany Hair & Compton, focusing in the areas of family law and bankruptcy. Ms. Dehesa attended California Western School of Law and successfully completed law school in two years. She began practicing at the age of 24.

Ms. Dehesa is extremely involved in the community through her membership in and leadership of various organizations including; Mexican American Bar Association, Ventura County Barristers, Camarillo Chamber of Commerce, Ventura County Women's Lawyers, and Inns of Court.

In an effort to improve relationships among lawyers and foster camaraderie in the legal profession, Ms. Dehesa started the Ventura County Barristers Mentorship Program to help match newer attorneys with more experienced attorneys and judges.

As part of her involvement with the local community, Ms. Dehesa volunteers with Casa Pacifica to assist in fundraising and annual events. She has also helped high school students develop trial and advocacy skills as an attorney coach with the High School Mock Trial Program.

Ms. Dehesa is fluent in Spanish and through her practice and involvement with the Mexican American Bar Association, strives to promote equality and access to justice to the Spanish-speaking community.

Nordman Cormany Hair & Compton believes Ms. Dehesa is an outstanding representation of a rising young business and community leader dedicated to making our region a better place to live and work.

Ms. Dehesa was re-elected Barristers Treasurer for 2012.

Amy R. Dilbeck earned her undergrad degree in Public Relations at Pepperdine University and joined the staff at CureSearch National Childhood Cancer Foundation. She was the first childhood cancer survivor hired by the organization, and in this role, she traveled and lectured widely and was featured in multiple national television, radio, print and live appearances, sharing the podium with Lance Armstrong and First Lady Laura Bush.

Amy spent her summers through college working at Hume Lake Christian Camps yelling on bullhorns, carousing with teenagers, and trying to keep the kids from drowning or kissing in the bushes.

She graduated from Pepperdine School of Law in 2009 and practices at Strauss Law Group in downtown Ventura.

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Douglas K. Goldwater, 2011 Barristers Past-President, is a partner with Ferguson Case Orr Paterson LLP. His practice focuses primarily on family law, including both litigation and collaborative cases, specializing in complex custody and financial disputes. He also has extensive experience in business, real property, and intellectual property litigation. Doug is currently President of the Ventura County Family Law Bar Association and President of the Ventura County Collaborative Family Law Professionals. Doug also serves as a board member of the locally based Kids and Families Together non-profit organization.

Doug graduated from the University of California, Berkeley with degrees in Legal Studies and Mass Communications. At Berkeley, Doug was extensively involved with the re-founding of the university's chapter of Theta Chi fraternity. Between his undergraduate studies and law school, Doug took a year off to work at a film production company. In 2001, he enrolled at the University of Southern California Law School, where he was an active member of the Public Interest Law Foundation and Phi Alpha Delta. He was also the Notes Editor of the USC Interdisciplinary Law Journal.

Outside of work, Doug likes to spend time with his wife Rachel and their twins, Clayton and Knox. He also enjoys cycling, playing softball and soccer, and watching movies.

Aris Karakalos practices law at Ferguson Case Orr Paterson LLP. He specializes in civil and criminal appeals and litigation, and has handled a wide array of matters including administrative writs, writs of habeas corpus, family law issues, parole hearings, contract disputes, wrongful termination and immigration.

Aris graduated from the University of Arizona, School of Law in 2005, where he worked on the *Arizona Journal of International and Corporate Law*. During law school, Aris served as a judicial extern for the Honorable Roslyn O. Silver, who sits on the United States District Court for the District of Arizona. Prior to law school, Aris earned dual degrees in Economics and Art History from Grinnell College in Grinnell, Iowa.

Before joining Ferguson Case Orr Paterson LLP, Aris was an associate at Lascher & Lascher specializing in appellate practice. He also has experience practicing in the areas of employment litigation, real estate and immigration.

When not working, Aris enjoys basketball, volleyball, travel, backgammon, camping and anything having to do with the beach. Aris is fluent in Greek and proficient in Italian.

Robert S. Krimmer, 2011 Barristers Vice President, is an associate with Arnold, Bleuel, LaRochelle, Mathews, VanConas & Zirbel LLP. He brings a wealth of life experience to his

2011 Board of Directors

"second career" as an attorney practicing in the specialized fields of water and sanitation. Robert unites his academic background in science, public policy, business and law to serve government agencies, special districts and private organizations with matters regarding water quality and control, sustainable agriculture, wastewater matters and solid waste issues.

He has represented public agencies in matters related to environmental regulation, governance, code development, code enforcement, rate adoption, surface water, ground water, recycled water and water conservation. In addition to his public agency work, Robert works closely with Ventura County's agriculture community to achieve sustainable agricultural in the face of ever-mounting regulatory demands.

In 1975, Robert received his bachelor's degree in environmental studies from Colorado College in Colorado Springs. He worked for two years as an environmental planner on EPA-funded projects focused on water, zoning and land use, which inspired him to pursue a career in environmental law.

While attending the joint JD/MBA program at the University of California, Hastings College of Law, Robert was offered a scholarship to attend the prestigious American Conservatory Theatre ("ACT"). Robert took a leave of absence from his law/business studies to accept the scholarship offer, a decision that led to a successful 20-year career as a lead television performer on numerous top-rated series.

Throughout his entertainment career, Robert remained interested in both legal and environmental issues. This unwavering interest compelled him to pursue a second career as a practicing attorney. Robert attended Ventura College of Law's night program for working professionals, from which he graduated valedictorian. While in law school, Robert interned with the California Court of Appeal (2nd District, Division 6) and the Ventura County Counsel's office. He supported his family during law school by working at Arnold LaRochelle Mathews VanConas & Zirbel LLP as a nationally certified paralegal.

Robert is a member of the Ventura County Bar Association and is the 2012 President of the Barristers Section. Robert is also on the board of managers of the Ventura YMCA and helped launch a 3-on-3 basketball tournament whose proceeds provide scholarships for disadvantaged families in the area.

A longtime Ojai resident, Robert enjoys spending time with his wife and two children. He likes to compete in triathlons and for years participated in marathons.

Brier K. Miron earned a bachelor of science in civil engineering from California State University, Sacramento. Prior to attending law school, Ms. Miron practiced briefly as a civil engineer. She received her Juris Doctorate from Southwestern Law School. During law

school, Ms. Miron was an associate editor of Southwestern Law Review and her article was selected for publication in Southwestern Law Review.

Currently, Ms. Miron is an associate at Straussner Sherman where she practices workers' compensation law and disability retirements for public safety members in Los Angeles County and Ventura County. Ms. Miron is admitted to practice before the California Superior Courts and U.S. District Court, Central District of California. She is a member of the Los Angeles County Bar Association and Ventura County Bar Association.

During her free time, Ms. Miron enjoys running, reading, travelling, and community service. Ms. Miron has volunteered for Relay for Life, Salvation Army, Habitat for Humanity, and Adopt a Highway.

Mathew M. Purcell, 2011 Barristers Secretary, is a partner at the Camarillo Family Law firm of Wolpert Niedens & Purcell. His practice focuses solely on Family Law matters, encompassing Collaborative Family Law, Family Law litigation, and Family Law Mediation. He is the current Treasurer for the VCBA Family Law section and serves as the Secretary for the VCBA Barristers. In the past year, Matt, with the help of his fellow Barristers, organized a Self Help Night at the Salvation Army Women's Transitional Living Center.

Matt graduated Cum Laude from Central Washington University with a B.A. in Law and Justice, minor in Political Science. He was selected as the Valedictory Speaker for his graduating class, was the Law and Justice Department Student Intern of the Year for his service in the Kittitas County Self Help Center, as well as being named a finalist for the Law and Justice Department Student of the Year. Matt earned his law degree from the Ventura College of Law where he earned a Family Law Certificate of Concentration. While in law school Matt served as a mediator in Small Claims Court via the Ventura Center for Dispute Resolution. In his final year of law school he clerked for the Ventura County Family Law department through the Family Law Internship Program.

Matt was elected to serve as 2012 Barristers Vice President.

John Negley is a long time resident of Ventura. His practice focuses on the area of Family Law and related issues. John will take the time necessary to understand your particular issue and zealously pursue your interests in court. John prides himself on the highest quality of customer service and accessibility. He is a member of the American Bar Association, the Ventura County Bar Association, the Family Law Section of the Ventura County Bar Association, and the Jerome H. Berenson Inns of Court. He obtained his J.D. from Southern California Institute of Law, graduating valedictorian of his class.

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Kathryn Pietrolungo, is an associate at Anderson Kill Wood & Bender, P.C., one of the nation's leading law firms specializing in insurance policy enforcement. Her practices focuses on civil litigation, primarily in the area of insurance recovery law. Ms. Pietrolungo also provides counsel to families and individuals who are considering establishing a conservatorship, a form of legal guardianship for a person deemed legally incompetent. Ms. Pietrolungo is the 2011-2012 Chair of the California Young Lawyers Association, a board member of Ventura County Bar Association and the Ventura County Barristers, and the Secretary of the J.H.B. Inn of Court. Ms. Pietrolungo also writes a monthly column entitled "Barristers' Corner" for *Citations,* the magazine of the Ventura County Bar Association. She served as Barristers President in 2008.

Jaclyn Smith is an Assistant County Counsel for the County of Ventura. She has represented Ventura County in both litigation and appellate matters and advises several County departments. Jaclyn graduated from U.C. Davis School of Law in 2010 and from Lafayette College in 2007. While in law school, Jaclyn served as a board member for the UC Davis Moot Court program. She was recognized as a top oral advocate at several moot court competitions. She also participated in the King Hall Legal Aid Foundation and was nominated for a King Hall Service Award for her work in juvenile delinquency court.

Christina S. Stokholm, 2011 Barristers President, is a senior associate with the Law Offices of Mark Pachowicz, APLC. She practices primarily in the areas of criminal defense, business law, and civil litigation.

Christina has served on the Board of Directors of the Barristers since 2007, and on the VCBA board since 2010. In 2011, the Board of Governors of the State Bar of California appointed Christina to the Legal Services Trust Fund Commission, which administers and distributes the IOLTA funds, and other monies, to qualified legal services programs throughout the state.

Outside of her law-related activities, Christina enjoys participating in events that allow her to interact with, and support, local youth. She is the current board chair for the Make-A-Wish Foundation of the Tri-Counties; she is a coach for the Thousand Oaks High School mock trial team; and, as former competitive gymnast, she dedicates many of her weekends to judging gymnastics competitions throughout Southern California.

Michael Strauss was born and raised in Ventura, California. He attended Ventura High School, and then received an undergraduate degree in history from UC Berkeley. Michael went to law school at Wake Forest University.

2011 Board of Directors

Michael has focused his practice on plaintiffs' employment law. He regularly handles wage and hour cases, such as cases for unpaid overtime. Michael appears regularly in Labor Commissioner conferences and hearings. He has extensive knowledge of the intricacies of the California Labor Code.

Michael runs the day-to-day operations of Palay Law Firm. Additionally, he litigates their bigger cases, including wage-and-hour class actions.

Michael was president of the Barristers of the Ventura County Bar Association in 2009. He sat on the board of Barristers through 2011 and currently sits on the board of the Ventura County Bar Association's Lawyer Referral and Information Service. He is set to join the board of the Ventura County Bar Association in 2012.

Michael has been named a "Rising Star" by Super Lawyers Magazine for 2011 in the area of plaintiff's employment litigation. He served as Barristers President for 2009.

Prior to becoming a lawyer, Michael taught physical education at an elementary school in Ventura. He spends every spare minute with his family and dogs. He enjoys surfing, playing soccer, and building websites.

2012 Board of Directors

The following attorneys were recently elected to the 2012 Barristers Board of Directors:

PRESIDENT**:**	**Robert S. Krimmer** (Arnold Bleuel LaRochelle Mathews & Zirbel LLP)
VICE PRESDIDENT:	**Mathew M. Purcell** (Wolpert Niedens & Purcell)
SECRETARY:	**Rachel Coleman** (DK Law Group)
TREASURER:	**Renne R. Dehesa** (Nordman Cormany Hair & Compton)
PAST-PRESIDENT:	**Christina S. Stokholm** (Law Offices of Mark Pachowicz, APLC)

MEMBERS AT-LARGE:

Tom Adams, Attorney at Law

Amy R. Dilbeck (Strauss Law Group)

Katherine T. Hause (Law Office of Ben A. Schuck III)

Joshua Hopstone (Ferguson Case Orr Paterson LLP)

Chris Kunke (Nordman Cormany Hair & Compton)

Brier K. Miron (Straussner & Sherman)

Melanie J. Murphy (Engle Carobini Covner & Coats)

Kathryn Pietrolungo (Anderson Kill Wood Bender)

Jon Schwalbach (Ferguson Case Orr Paterson LLP)

Jaclyn Smith (Ventura County Counsel)

Judicial Perspective

THE SPEAKERS

Moderator: Joseph L. Strohman

Joe Strohman is a partner at the Ventura firm of Ferguson Case Orr Paterson, LLP. His practice focuses on civil litigation, including real property litigation, business litigation, easement litigation and mechanic's lien law. He is past President of the Ventura County Bar Association (2011) and has served three terms on its Board of Directors. For more than 25 years, he has also been the Race Director of the annual Law Day 5K Run, which raises money for the VCBA's non-profit legal fund.

Joe graduated from the University of Notre Dame in 1982 with a business finance degree. While at Notre Dame, Joe competed on the track and cross-country teams for four years and lettered for three. Joe earned his law degree from Pepperdine University in 1982. After law school, Joe studied in Salzburg, Austria as part of the McGeorge School of Law International Program and later worked for a barrister in London, England under the same program. In 1983, Joe joined the newly-formed Case, Orr & Cunningham as its first associate.

Hon. Vincent J. O'Neill is the current Presiding Judge of the Ventura County Superior Court, as well as Supervising Judge of the Civil Division. He has served on the municipal and superior courts of Ventura County since 1992, and is a former Presiding Judge of the Appellate Division. In addition to his administrative duties, Judge O'Neill currently conducts all pre-trial settlement conferences in civil cases. Past assignments have included civil and criminal trials, as well as temporary judicial duties at the Court of Appeal in Los Angeles and Riverside Superior Court.

Judge O'Neill earned his bachelor's degree at Loyola Marymount University and his law degree from the UCLA School of Law. He began his legal career in the Criminal Division of the Los Angeles office of the California Attorney General. He spent 13 years in the Ventura County District Attorney's office, including eight years as Chief Deputy District Attorney.

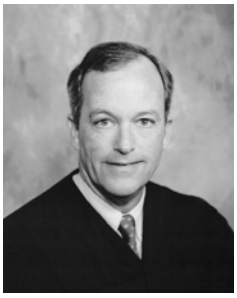
Judge O'Neill has taught numerous statewide judicial education courses and is an adjunct professor at the Santa Barbara and Ventura Colleges of Law. He has been active in many professional and community activities, and is the author of O'Neill's California Confessions Law.

The Barristers give special thanks to Judge O'Neill because of his wonderful support for our group. Not only has Judge O'Neill shared his time with us by personally participating in many of our events (you should see his Honor throw darts and shoot hoops), but his leadership as Presiding Judge this past year has been an example that encourages all of us to practice law in a manner befitting our community - that is, with integrity and respect for others.

Hon. Kevin G. DeNoce was appointed to the bench in August 2007. He currently presides over criminal trials and sits on the bench of the Appellate Division. From 2003 to 2007, Judge DeNoce was a sole practitioner in the Law Offices of Kevin G. DeNoce in Ventura. From 1996 to 2003, he was a partner in the Law Offices of Andrade & DeNoce, LLP. Judge DeNoce's primary areas of practice included criminal defense, DUI defense, criminal appellate practice, personal injury, and administrative proceedings before the Department of Motor Vehicles. From 1987 to 1996, Judge DeNoce served as a prosecuting attorney with the Ventura County District Attorney's Office, where he was the supervising attorney for the Appellate Division from 1992 to 1996 and a Senior Deputy District Attorney from 1994 to 1996.

Judge DeNoce is a past president of both the Ventura County District Attorney's Association and the Criminal Justice Attorney's Association of Ventura County. He is a recipient of the Outstanding Prosecutor of the Year Award from the Ventura County District Attorney's Office, and a recipient of the Ventura County Criminal Defense Bar Association's Joyce Yoshioka Award recognizing outstanding contributions to the criminal justice system.

Judge DeNoce earned his Bachelor of Arts degree from the University of Colorado at Boulder and his Juris Doctorate degree from Pepperdine University School of Law.



Hon. John R. Smiley has served on the Ventura County bench for over 25 years. He is a former Superior Court Presiding Judge and former Municipal Court Presiding Judge. He is the current Supervising Judge of the Family Law Division, and has served in that capacity for over 13 years.

Prior to his appointment to the bench, Judge Smiley was a partner in the firm of Lucking, Bertelsen, Bysshe, Kuttler & Smiley in Ventura, where he practiced family, real estate, probate and business law for 13 years.

In 2000, Judge Smiley was named Trial Judge of the Year by the Ventura County Trial Lawyers Association. In 2006, he was presented with the Distinguished Jurist Award by the Southern California Chapter of the American Academy of Matrimonial Lawyers. This award recognizes outstanding contributions by a judicial officer in actively improving the practice of family law.

Judge Smiley is a graduate of Princeton University and Southwestern University School of Law. He has taught at the Ventura College of Law since 1986 and is a past instructor at the National Judicial College in Nevada.

Eliminating Bias in Jury Selection

Practical Information for Making Effective Batson/Wheeler Motions

THE SPEAKER

Michael C. McMahon is a Chief Deputy with the Ventura County Public Defender's Office. He is dual-certified by the California Board of Legal Specialization as a specialist in both Criminal and Appellate Law. He is a member of the Bar of the U.S. Supreme Court, a past president of the California Public Defenders Association and chairman of its Amicus Committee. Mr. McMahon serves on the Planning Committee of the annual CACJ-CPDA Capital Case Defense Seminar and has 33 years' experience in capital case defense. He has a degree from the University of California in Dynamics of International Development and a Juris Doctorate from Hastings College.

Access to Justice

Serving Clients Lost in the Process

THE SPEAKER

Michael D. Sudman, Esq.

Please go to next page for additional information about the speaker and his presentation.

THE LAW OFFICE
OF
MICHAEL D. SUDMAN

November 15, 2011

ACCESS TO JUSTICE- Serving clients lost in the process

Speaker: Michael D. Sudman, Esq.

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Speaker Profile: A solo-practitioner in the areas of Family Law and Bankruptcy. Michael practices in Ventura, Santa Barbara, San Luis Obispo, and Los Angeles counties. Michael's family practice is focused on assisting parents in high conflict custody and visitation matters. Although the practice does assist with all Family Law matters. He began assisting these same clients with bankruptcy as needed. In 2008, Michael identified a segment of the client market he believed to be underserved by the legal community. This segment is clients who do not qualify for Pro-bono assistance but cannot afford to engage traditionally billing law firms. Started as a marketing concept, Michael began to offer his clients unique payment programs based on the client's ability to afford to pay. He still believes when you offer a service which adds value to the lives of your clients they will live up to their promises to you. Since beginning the "payment plan" program just more than 4 years ago, Michael has assisted more than 350 clients. Most telling that his program is successful is that almost 95% of the clients meet their payments as promised.

Topic Contents: Sole practice marketing ideas; How to make a difference in the "legal" life of clients and build your practice in the process; Focusing on niche market segments you have a genuine interest to serve. Managing client expectations; Counsel v. Litigation in family law matters

Avoiding Pitfalls in Government Claims

THE SPEAKERS

Alberto Boada is the current Litigation Supervisor for Ventura County Counsel, as well as Agency Counsel for Fox Canyon Groundwater Management Agency. He has a broad litigation background in real estate, land rights, administrative, construction, and public agency law, including extensive trial and appellate work. Prior to joining County Counsel, Mr. Boada was in private practice where he represented various cities, redevelopment agencies, and other public agencies. He also served as corporate counsel for Southern California Edison Company. Mr. Boada is a graduate of UCLA and earned his law degree from SMU Law School.

Jaclyn Smith is an Assistant County Counsel for the County of Ventura. She has represented Ventura County in both litigation and appellate matters and advises several County departments. Jaclyn graduated from U.C. Davis School of Law in 2010 and from Lafayette College in 2007. While in law school, Jaclyn served as a board member for the UC Davis Moot Court program. She was recognized as a top oral advocate at several moot court competitions. She also participated in the King Hall Legal Aid Foundation and was nominated for a King Hall Service Award for her work in juvenile delinquency court.

THE GOVERNMENT CLAIMS ACT: AN INTRODUCTION

I. Overview

The Government Claims Act requires a plaintiff to timely file a claim for money or damages with the public entity prior to the filing of a lawsuit. The failure to do so bars the plaintiff from bringing suit. The claims presentation requirement applies to all forms of monetary demands, regardless of the theory of the action. Claims filing requirements do not apply to requests for declaratory or injunctive relief, unless the primary relief sought is money or damages.

The claims presentation requirement affords prompt notice to public entities, and permits early investigation and evaluation of the claim and informed fiscal planning in light of prospective liabilities. Its purpose is not to prevent surprise but rather is to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation. Accordingly, the Claims Act must be satisfied even in the face of the public entity's actual knowledge of the circumstances surrounding the claim.

The Claims Act applies to claims against every public entity in the State and their employees. This includes every city and county, and every special district (e.g. school district, public hospital, public transportation agency, etc.).

II. Timelines

Claims for personal injury or personal property damage must be presented not later than six months after the accrual of the cause of action. Claims relating to any other cause of action must be filed within one year of accrual. The date of accrual for purposes of the claim presentation requirement is the same date on which the cause of action would accrue under the statute of limitations in an action against a private party.

If a claimant did not know the reason for filing the claim at the time of injury (for example, in a case of medical malpractice), the six-month time period begins at the point when the claimant became aware, or should have become aware, of the reason. A claimant's minority or incapacity does not extend the time limit for presentation of a claim against a governmental entity.

A public entity may be estopped from asserting the limitations of the Claims Act where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act. Estoppel requires a showing of: (1) a misrepresentation, act or omission that causes an injured party to refrain from filing a claim; and (2) reasonable reliance on the part of the claimant.

The public entity has only 45 days within which to either accept or reject the claim. If it fails to act within the 45–day period, the claim is deemed rejected by operation of law. The public entity is required to give written notice of its rejection or of its inaction. Failure to do so waives any defense based on untimeliness unless the claim contained no address to which notice could be sent. If proper notice of rejection is given, suit must be commenced within 6 months after mailing of the notice of rejection. The 6–month period runs from the date the notice is deposited in the mail. There is no five-day extension of the limitations period for mailed notices of

rejection. The 6–month period consists of 6 calendar months or 182 days, whichever is longer. If the 6 months ends on a weekend or holiday, it is extended to the next business day.

The 6-month statute of limitations cannot be extended by provisions outside the Claims Act. Although minors are generally entitled to longer statutes of limitations, they are bound by the 6–month limit in actions against public entities. If a plaintiff is incarcerated during the limitations period, suit must be filed suit within six months of release.

If no notice or improper notice of rejection is given, a claimant has 2 years from the accrual of the cause of action within which to sue.

III. Preparing the Claim

The claim must be signed and include: (1) the name and address of the claimant; (2) the address to which notices to the claimant are to be sent; (3) the date, place and other circumstances of the occurrence or transaction giving rise to the claim; (4) a general description of the indebtedness, injury, or loss; (5) the name or names of the public employee or employees causing the injury, or loss, if known; and (6) the amount claimed if less than $10,000, including the estimated amount of any future loss, and the basis of computation of the amount claimed. If the claim exceeds $10,000, it must indicate whether it would be a limited civil case, i.e., $25,000 or less.

The claim must include the material facts supporting the alleged wrongdoing. It need not, however, specify each particular act or omission later proven to have caused the injury. Nor does the Claims Act require a claim to specifically identify a particular legal theory of liability. If a claimant relies on more than one theory of recovery, however, each must be fairly reflected in the claim. Whether a cause of action is "fairly reflected" in a claim is generally subject to a rule of liberal interpretation.

IV. Presenting the Claim

A claimant presents a claim by either delivering it to the clerk, secretary, or auditor of the public entity, or by mailing the claim to these three individuals or to the governing body of the public entity.

If the public entity deems the claim defective or incomplete, it may notify the claimant within 20 days. The public entity's failure to give notice that the claim is deficient results in a waiver of any defense as to the sufficiency of the claim based on a defect or omission. On the other hand, documents or correspondence submitted to a public entity that contain no threat of litigation do not constitute a claim and do not trigger a duty to respond on the part of the public entity.

A claim may be amended at any time before the expiration of the period for presenting claims or before action is taken on it by the public entity, whichever is later. The amendment must relate to the same transaction or occurrence which gave rise to the original claim. The amendment will be considered a part of the original claim.

V. Substantial Compliance

If a claim is deficient in some way, but substantially complies with all of the statutory requirements, the doctrine of "substantial compliance" may in some cases be applied. A claim that discloses sufficient information to enable the public entity to make an adequate investigation

and settle the claim without the expense of litigation, may be deemed substantial, i.e., adequate, compliance with the Claims Act. On the other hand, the doctrine of substantial compliance cannot cure the total omission of an essential element from the claim, or remedy a failure to comply meaningfully with the Claims Act. In other words, there must be some compliance with all of the requirements of the Claims Act before the substantial compliance doctrine will be invoked.

VI. Late Claims

If a claim that is required to be presented not later than six months after the accrual of the cause of action is not presented within that time, a written application may be made to the public entity for leave to present that claim. The application must be submitted within a reasonable time not to exceed one year after the accrual of the cause of action and must state the reason for the delay. If an application for leave to present a late claim is denied, the claimant may petition the superior court within six months after denial.

The Claims Act provides four bases for allowing presentation of a late claim: (1) the claim was filed late due to mistake, inadvertence, surprise or excusable neglect and the public entity will not be prejudiced; (2) the claimant was a minor during the entire six-month period; (3) the claimant was under a physical or mental incapacity; and (4) the claimant passed away during the claims presentation period. Relief on grounds of mistake, inadvertence, surprise or excusable neglect is available only on a showing that the claimant's failure to timely present a claim was reasonable when tested by an objective standard. Reasonableness is determined on a case-by-case basis, and even a short delay may be considered unreasonable.

VII. Filing Suit on a Claim

After the public entity has acted upon or is deemed to have rejected the claim, the claimant may bring a lawsuit against the public entity. The complaint must allege facts demonstrating either that a claim was timely presented or that compliance with the Claims Act is excused. Otherwise, the complaint is subject to a general demurrer for failure to state facts sufficient to constitute a cause of action.

A plaintiff suing a public entity is limited to the matters set forth in the claim. A complaint is vulnerable to a demurrer if it alleges a factual basis for recovery which is not fairly reflected in the written claim. Adding factual allegations or legal theories is not fatal, so long as the complaint is not based on an entirely different set of facts. If the claim would alert the public entity to the basis or bases for liability alleged in a subsequent lawsuit, the suit may proceed. On the other hand, a complaint that reflects a complete shift in allegations from those described in the claim will be barred.

SELECTED PROVISIONS OF GOVERNMENT CLAIMS ACT

§ 901. Date of accrual of cause of action

For the purpose of computing the time limits prescribed by Sections 911.2, 911.4, 912, and 945.6, the date of the accrual of a cause of action to which a claim relates is the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable thereto if there were no requirement that a claim be presented to and be acted upon by the public entity before an action could be commenced thereon. However, the date upon which a cause of action for equitable indemnity or partial equitable indemnity accrues shall be the date upon which a defendant is served with the complaint giving rise to the defendant's claim for equitable indemnity or partial equitable indemnity against the public entity.

§ 905. Claims for money or damages against local public entities; exceptions

There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) all claims for money or damages against local public entities except any of the following:

(a) Claims under the Revenue and Taxation Code or other statute prescribing procedures for the refund, rebate, exemption, cancellation, amendment, modification, or adjustment of any tax, assessment, fee, or charge or any portion thereof, or of any penalties, costs, or charges related thereto.

(b) Claims in connection with which the filing of a notice of lien, statement of claim, or stop notice is required under any law relating to liens of mechanics, laborers, or materialmen.

(c) Claims by public employees for fees, salaries, wages, mileage, or other expenses and allowances.

(d) Claims for which the workers' compensation authorized by Division 4 (commencing with Section 3200) of the Labor Code is the exclusive remedy.

(e) Applications or claims for any form of public assistance under the Welfare and Institutions Code or other provisions of law relating to public assistance programs, and claims for goods, services, provisions, or other assistance rendered for or on behalf of any recipient of any form of public assistance.

(f) Applications or claims for money or benefits under any public retirement or pension system.

(g) Claims for principal or interest upon any bonds, notes, warrants, or other evidences of indebtedness.

(h) Claims that relate to a special assessment constituting a specific lien against the property assessed and that are payable from the proceeds of the assessment, by offset of a claim for damages against it or by delivery of any warrant or bonds representing it.

(i) Claims by the state or by a state department or agency or by another local public entity or by a judicial branch entity.

(j) Claims arising under any provision of the Unemployment Insurance Code, including, but not limited to, claims for money or benefits, or for refunds or credits of employer or worker contributions, penalties, or interest, or for refunds to workers of deductions from wages in excess of the amount prescribed.

(k) Claims for the recovery of penalties or forfeitures made pursuant to Article 1 (commencing with Section 1720) of Chapter 1 of Part 7 of Division 2 of the Labor Code.

(l) Claims governed by the Pedestrian Mall Law of 1960 (Part 1 (commencing with Section 11000) of Division 13 of the Streets and Highways Code).

(m) Claims made pursuant to Section 340.1 of the Code of Civil Procedure for the recovery of damages suffered as a result of childhood sexual abuse. This subdivision shall apply only to claims arising out of conduct occurring on or after January 1, 2009.

(n) Claims made pursuant to Section 701.820 of the Code of Civil Procedure for the recovery of money pursuant to Section 26680.

§ 905.1. Inverse condemnation; claim unnecessary to maintain action; procedure if claim filed

No claim is required to be filed to maintain an action against a public entity for taking of, or damage to, private property pursuant to Section 19 of Article I of the California Constitution.

However, the board shall, in accordance with the provisions of this part, process any claim which is filed against a public entity for the taking of, or damage to, private property pursuant to Section 19 of Article I of the California Constitution.

§ 906. Amount allowed on the claim; interest; agreement to vary terms; settle or compromise claim

(a) As used in this section, "amount allowed on the claim" means the amount allowed by the public entity on a claim allowed in whole or in part or the amount offered by the public entity to settle or compromise a claim.

(b) Except as provided in subdivision (c):

(1) No interest is payable on the amount allowed on the claim if payment of the claim is subject to approval of an appropriation by the Legislature; but, if an appropriation is made for the payment of a claim described in this paragraph, interest on the amount appropriated for the payment of the claim commences to accrue 30 days after the effective date of the law by which the appropriation is enacted.

(2) Interest on the amount allowed on the claim, other than a claim described in paragraph (1), commences to accrue 30 days after the claimant accepts in writing the amount allowed on the claim in settlement of the entire claim.

(3) Interest on the amount allowed on the claim accrues at the rate provided for judgments until paid.

(c) The public entity and the claimant may agree in writing to vary the terms prescribed by subdivision (b), including but not limited to, any one or more of the following:

(1) An agreement that no interest will be payable on the amount allowed on the claim.

(2) An agreement that interest on the amount allowed on the claim will commence to accrue at a time other than the time specified in paragraph (1) or (2) of subdivision (b).

(3) An agreement that interest on the amount allowed on the claim will accrue at a different rate than is specified in paragraph (3) of subdivision (b).

(d) The public entity may allow a claim in whole or in part, or may offer to settle or compromise a claim, upon the condition that the claimant agree in writing to a provision that varies the terms prescribed in subdivision (b). The acceptance by the claimant in writing of the amount allowed on the claim in settlement of the entire claim subject to such condition creates a written agreement that satisfies the requirements of subdivision (c).

(e) Nothing in this section limits the rights of a claimant to interest on a judgment obtained against a public entity.

§ 910. Contents of claim

A claim shall be presented by the claimant or by a person acting on his or her behalf and shall show all of the following:

(a) The name and post office address of the claimant.

(b) The post office address to which the person presenting the claim desires notices to be sent.

(c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted.

(d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim.

(e) The name or names of the public employee or employees causing the injury, damage, or loss, if known.

(f) The amount claimed if it totals less than ten thousand dollars ($10,000) as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed. If the amount claimed exceeds ten thousand dollars ($10,000), no dollar amount shall be included in the claim. However, it shall indicate whether the claim would be a limited civil case.

§ 910.2. Signature

The claim shall be signed by the claimant or by some person on his behalf. Claims against local public entities for supplies, materials, equipment or services need not be signed by the claimant or on his behalf if presented on a billhead or invoice regularly used in the conduct of the business of the claimant.

§ 910.4. Forms

The board shall provide forms specifying the information to be contained in claims against the state or a judicial branch entity. The person presenting a claim shall use the form in order that his or her claim is deemed in conformity with Sections 910 and 910.2. A claim may be returned to the person if it was not presented using the form. Any claim returned to a person may be resubmitted using the appropriate form.

§ 910.6. Amendment of claim; failure or refusal to amend

(a) A claim may be amended at any time before the expiration of the period designated in Section 911.2 or before final action thereon is taken by the board, whichever is later, if the claim as amended relates to the same transaction or occurrence which gave rise to the original claim. The amendment shall be considered a part of the original claim for all purposes.

(b) A failure or refusal to amend a claim, whether or not notice of insufficiency is given under Section 910.8, shall not constitute a defense to any action brought upon the cause of action for which the claim was presented if the court finds that the claim as presented complied substantially with Sections 910 and 910.2 or a form provided under Section 910.4.

§ 910.8. Notice of insufficiency of claim

If, in the opinion of the board or the person designated by it, a claim as presented fails to comply substantially with the requirements of Sections 910 and 910.2, or with the requirements of a form provided under Section 910.4 if a claim is presented pursuant thereto, the board or the person may, at any time within 20 days after the claim is presented, give written notice of its insufficiency, stating with particularity the defects or omissions therein. The notice shall be given in the manner prescribed by Section 915.4. The board may not take action on the claim for a period of 15 days after the notice is given.

§ 911. Failure to give notice of insufficiency; waiver of defenses based on defect or omission

Any defense as to the sufficiency of the claim based upon a defect or omission in the claim as presented is waived by failure to give notice of insufficiency with respect to the defect or omission as provided in Section 910.8, except that no notice need be given and no waiver shall result when the claim as presented fails to state either an address to which the person presenting the claim desires notices to be sent or an address of the claimant.

§ 911.2. Time of presentation of claims; limitation

(a) A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) not later than one year after the accrual of the cause of action.

(b) For purposes of determining whether a claim was commenced within the period provided by law, the date the claim was presented to the California Victim Compensation and Government Claims Board is one of the following:

(1) The date the claim is submitted with a twenty-five dollar ($25) filing fee.

(2) If a fee waiver is granted, the date the claim was submitted with the affidavit requesting the fee waiver.

(3) If a fee waiver is denied, the date the claim was submitted with the affidavit requesting the fee waiver, provided the filing fee is paid to the board within 10 calendar days of the mailing of the notice of the denial of the fee waiver.

§ 911.3. Claim presented without application; notice of return without action; form

(a) When a claim that is required by Section 911.2 to be presented not later than six months after accrual of the cause of action is presented after such time without the application provided in Section 911.4, the board or other person designated by it may, at any time within 45 days after the claim is presented, give written notice to the person presenting the claim that the claim was not filed timely and that it is being returned without further action. The notice shall be in substantially the following form:

"The claim you presented to the (insert title of board or officer) on (indicate date) is being returned because it was not presented within six months after the event or occurrence as required by law. See Sections 901 and 911.2 of the Government Code. Because the claim was not presented within the time allowed by law, no action was taken on the claim.

Your only recourse at this time is to apply without delay to (name of public entity) for leave to present a late claim. See Sections 911.4 to 912.2, inclusive, and Section 946.6 of the Government Code. Under some circumstances, leave to present a late claim will be granted. See Section 911.6 of the Government Code.

You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

(b) Any defense as to the time limit for presenting a claim described in subdivision (a) is waived by failure to give the notice set forth in subdivision (a) within 45 days after the claim is presented, except that no notice need be given and no waiver shall result when the claim as presented fails to state either an address to which the person presenting the claim desires notices to be sent or an address of the claimant.

§ 911.4. Application to present late claim; one year limitation; computation of limitation period; tolling

(a) When a claim that is required by Section 911.2 to be presented not later than six months after the accrual of the cause of action is not presented within that time, a written application may be made to the public entity for leave to present that claim.

(b) The application shall be presented to the public entity as provided in Article 2 (commencing with Section 915) within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim. The proposed claim shall be attached to the application.

(c) In computing the one-year period under subdivision (b), the following shall apply:

(1) The time during which the person who sustained the alleged injury, damage, or loss as a minor shall be counted, but the time during which he or she is mentally incapacitated and does not have a guardian or conservator of his or her person shall not be counted.

(2) The time shall not be counted during which the person is detained or adjudged to be a dependent child of the juvenile court under the Arnold-Kennick Juvenile Court Law (Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code), if both of the following conditions exist:

(A) The person is in the custody and control of an agency of the public entity to which a claim is to be presented.

(B) The public entity or its agency having custody and control of the minor is required by statute or other law to make a report of injury, abuse, or neglect to either the juvenile court or the minor's attorney, and that entity or its agency fails to make this report within the time required by the statute or other enactment, with this time period to commence on the date on which the public entity or its

agency becomes aware of the injury, neglect, or abuse. In circumstances where the public entity or its agency makes a late report, the claim period shall be tolled for the period of the delay caused by the failure to make a timely report.

(3) The time shall not be counted during which a minor is adjudged to be a dependent child of the juvenile court under the Arnold-Kennick Juvenile Court Law (Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code), if the minor is without a guardian ad litem or conservator for purposes of filing civil actions.

§ 911.6. Grant or denial of application by board

(a) The board shall grant or deny the application within 45 days after it is presented to the board. The claimant and the board may extend the period within which the board is required to act on the application by written agreement made before the expiration of the period.

(b) The board shall grant the application where one or more of the following is applicable:

(1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect and the public entity was not prejudiced in its defense of the claim by the failure to present the claim within the time specified in Section 911.2.

(2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim.

(3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of such disability failed to present a claim during such time.

(4) The person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim.

(c) If the board fails or refuses to act on an application within the time prescribed by this section, the application shall be deemed to have been denied on the 45th day or, if the period within which the board is required to act is extended by agreement pursuant to this section, the last day of the period specified in the agreement.

§ 911.8. Notice of board's action

(a) Written notice of the board's action upon the application shall be given in the manner prescribed by Section 915.4.

(b) If the application is denied, the notice shall include a warning in substantially the following form:

"WARNING

"If you wish to file a court action on this matter, you must first petition the appropriate court for an order relieving you from the provisions of Government Code Section 945.4 (claims presentation requirement). See Government Code Section 946.6. Such petition must be filed with the court within six (6) months from the date your application for leave to present a late claim was denied.

"You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

§ 912.2. Claim deemed presented to board upon day leave to present claim granted

If an application for leave to present a claim is granted by the board pursuant to Section 911.6, the claim shall be deemed to have been presented to the board upon the day that leave to present the claim is granted.

§ 912.4. Time for action by board; extension of time by agreement; failure or refusal to act within time prescribed

(a) The board shall act on a claim in the manner provided in Section 912.6, 912.7, or 912.8 within 45 days after the claim has been presented. If a claim is amended, the board shall act on the amended claim within 45 days after the amended claim is presented.

(b) The claimant and the board may extend the period within which the board is required to act on the claim by written agreement made either:

(1) Before the expiration of the period.

(2) After the expiration of the period if an action based on the claim has not been commenced and is not yet barred by the period of limitations provided in Section 945.6.

(c) If the board fails or refuses to act on a claim within the time prescribed by this section, the claim shall be deemed to have been rejected by the board on the last day of the period within which the board was required to act upon the claim. If the period within which the board is required to act is extended by agreement pursuant to this section, the last day of the period within which the board is required to act shall be the last day of the period specified in the agreement.

§ 912.6. Action by board on claim against local public entity

(a) In the case of a claim against a local public entity, the board may act on a claim in one of the following ways:

(1) If the board finds the claim is not a proper charge against the public entity, it shall reject the claim.

(2) If the board finds the claim is a proper charge against the public entity and is for an amount justly due, it shall allow the claim.

(3) If the board finds the claim is a proper charge against the public entity but is for an amount greater than is justly due, it shall either reject the claim or allow it in the amount justly due and reject it as to the balance.

(4) If legal liability of the public entity or the amount justly due is disputed, the board may reject the claim or may compromise the claim.

(b) In the case of a claim against a local public entity, if the board allows the claim in whole or in part or compromises the claim, it may require the claimant, if the claimant accepts the amount allowed or offered to settle the claim, to accept it in settlement of the entire claim.

(c) Subject to subdivision (b), the local public entity shall pay the amount allowed on the claim or in compromise of the claim in the same manner as if the claimant had obtained a final judgment against the local public entity for that amount, but the claim may be paid in not exceeding 10 equal annual installments as provided in Section 970.6 only if the claimant agrees in writing to that method of payment and in such case no court order authorizing installment payments is required. If an agreement for payment of the claim in installments is made, the local public entity, in its discretion, may prepay any one or more installments or any part of an installment.

§ 913. Notice of rejection of claim

(a) Written notice of the action taken under Section 912.5,912.6, 912.7, or 912.8 or the inaction that is deemed rejection under Section 912.4 shall be given in the manner prescribed by Section 915.4. The notice may be in substantially the following form:

"Notice is hereby given that the claim that you presented to the (insert title of board or officer) on (indicate date) was (indicate whether rejected, allowed, allowed in the amount of $___ and rejected as to the balance, rejected by operation of law, or other appropriate language, whichever is applicable) on (indicate date of action or rejection by operation of law)."

(b) If the claim is rejected, in whole or in part, the notice required by subdivision (a) shall include a warning in substantially the following form:

"WARNING

"Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. See Government Code Section 945.6.

"You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

§ 913.2. Re-examination of rejected claim

The board may, in its discretion, within the time prescribed by Section 945.6 for commencing an action on the claim, re-examine a previously rejected claim in order to consider a settlement of the claim.

§ 915. Presentation to local public entity or to state; means of presentation

(a) A claim, any amendment thereto, or an application to the public entity for leave to present a late claim shall be presented to a local public entity by either of the following means:

(1) Delivering it to the clerk, secretary or auditor thereof.

(2) Mailing it to the clerk, secretary, auditor, or to the governing body at its principal office.

(b) Except as provided in subdivisions (c) and (d), a claim, any amendment thereto, or an application for leave to file a late claim shall be presented to the state by either of the following means:

(1) Delivering it to an office of the Victim Compensation and Government Claims Board.

(2) Mailing it to the Victim Compensation and Government Claims Board at its principal office.

(c) A claim, any amendment thereto, or an application for leave to file a late claim shall be presented to a judicial branch entity in accordance with the following means:

(1) Delivering or mailing it to the court executive officer, if against a superior court or a judge, court executive officer, or trial court employee, as defined in Section 811.9, of that court.

(2) Delivering or mailing it to the clerk/administrator of the court of appeals, if against a court of appeals or a judge of that court.

(3) Delivering or mailing it to the Clerk of the Supreme Court, if against the Supreme Court or a judge of that court.

(4) Delivering or mailing it to the Secretariat of the Judicial Council, if against the Judicial Council or the Administrative Office of the Courts.

(d) A claim, any amendment thereto, or an application for leave to file a late claim shall be presented to the Trustees of the California State University by delivering or mailing it to the Office of Risk Management at the Office of the Chancellor of the California State University.

(e) A claim, amendment or application shall be deemed to have been presented in compliance with this section even though it is not delivered or mailed as provided in this section if, within the time prescribed for presentation thereof, any of the following apply:

(1) It is actually received by the clerk, secretary, auditor or board of the local public entity.

(2) It is actually received at an office of the Victim Compensation and Government Claims Board.

(3) If against the California State University, it is actually received by the Trustees of the California State University.

(4) If against a judicial branch entity or judge, it is actually received by the court executive officer, court clerk/administrator, court clerk, or secretariat of the judicial branch entity.

(f) A claim, amendment or application shall be deemed to have been presented in compliance with this section to a public agency as defined in Section 53050 if it is delivered or mailed within the time prescribed for presentation thereof in conformity with the information contained in the statement in the Roster of Public Agencies pertaining to that public agency which is on file at the time the claim, amendment or application is delivered or mailed. As used in this subdivision, "statement in the Roster of Public Agencies" means the statement or amended statement in the Roster of Public Agencies in the office of the Secretary of State or in the office of the county clerk of any county in which the statement or amended statement is on file.

§ 915.2. Mailing manner; time of presentation and receipt; proof of mailing

If a claim, amendment to a claim, or application to a public entity for leave to present a late claim is presented or sent by mail under this chapter, or if any notice under this chapter is given by mail, the claim, amendment, application, or notice shall be mailed in the manner prescribed in this section. The claim, amendment, application or notice shall be deposited in the United States post office, a mailbox, sub-post office, substation, mail chute, or other similar facility regularly maintained by the government of the United States, in a sealed envelope, properly addressed, with postage paid. The claim, amendment, application, or notice shall be deemed to have been presented and received at the time of the deposit. Any period of notice and any duty to respond after receipt of service of a claim, amendment, application, or notice is extended five days upon service by mail, if the place of address is within the State of California, 10 days if the place of address is within the United States, and 20 days if the place of address is outside the United States. Proof of mailing may be made in the manner prescribed by Section 1013a of the Code of Civil Procedure.

§ 915.4. Manner of giving notice of insufficiency of claim, board's action upon application, or rejection of claim

(a) The notices provided for in Sections 910.8, 911.8, and 913 shall be given by either of the following methods:

(1) Personally delivering the notice to the person presenting the claim or making the application.

(2) Mailing the notice to the address, if any, stated in the claim or application as the address to which the person presenting the claim or making the application desires notices to be sent or, if no such address is stated in the claim or application, by mailing the notice to the address, if any, of the claimant as stated in the claim or application.

(b) No notice need be given where the claim or application fails to state either an address to which the person presenting the claim or making the application desires notices to be sent or an address of the claimant.

§ 930.2. Agreement of governing body of local public entity establishing claims procedure

The governing body of a local public entity may include in any written agreement to which the entity, its governing body, or any board or employee thereof in an official capacity is a party, provisions governing the presentation, by or on behalf of any party thereto, of any or all claims arising out of or related to the agreement and the consideration and payment of such claims. The written agreement may incorporate by reference claim provisions set forth in a specifically identified ordinance or resolution theretofore adopted by the governing body.

§ 930.4. Application for leave to present claim not presented within required time

A claims procedure established by agreement made pursuant to Section 930 or Section 930.2 exclusively governs the claims to which it relates, except that if the procedure so prescribed requires a claim to be presented within a period of less than one year after the accrual of the cause of action and such claim is not presented within the required time, an application may be made to the public entity for leave to present such claim. Subdivision (b) of Section 911.4, Sections 911.6 to 912.2, inclusive, and Section 946.6 are applicable to all such claims, and the time specified in the agreement shall be deemed the "time specified in Section 911.2" within the meaning of Sections 911.6 and 946.6.

§ 930.6. Presentation of claim as prerequisite to suit

A claims procedure established by agreement made pursuant to Section 930 or Section 930.2 may include a requirement that a claim be presented and acted upon as a prerequisite to suit thereon. If such requirement is included, any action brought against the public entity on the claim shall be subject to the provisions of Section 945.6 and Section 946.

§ 935. Procedure established by charter, ordinance or regulation of local public entity; requirements

(a) Claims against a local public entity for money or damages which are excepted by Section 905 from Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part, and which are not governed by any other statutes or regulations expressly relating thereto, shall be governed by the procedure prescribed in any charter, ordinance or regulation adopted by the local public entity.

(b) The procedure so prescribed may include a requirement that a claim be presented and acted upon as a prerequisite to suit thereon. If such requirement is included, any action brought against the public entity on the claim shall be subject to the provisions of Section 945.6 and Section 946.

(c) The procedure so prescribed may not require a shorter time for presentation of any claim than the time provided in Section 911.2.

(d) The procedure so prescribed may not provide a longer time for the board to take action upon any claim than the time provided in Section 912.4.

(e) When a claim required by the procedure to be presented within a period of less than one year after the accrual of the cause of action is not presented within the required time, an application may be made to the public entity for leave to present such claim. Subdivision (b) of Section 911.4, Sections 911.6 to 912.2, inclusive, and Sections 946.4 and 946.6 are applicable to all such claims, and the time specified in the charter, ordinance or regulation shall be deemed the "time specified in Section 911.2" within the meaning of Sections 911.6 and 946.6.

§ 945.3. Person charged with criminal offense; prohibition from bringing civil action for money or damages while charges pending; tolling of statute of limitations

No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending before a superior court.

Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a superior court.

For the purposes of this section, charges pending before a superior court do not include appeals or criminal proceedings diverted pursuant to Chapter 2.5 (commencing with Section 1000), Chapter 2.6 (commencing with Section 1000.6), Chapter 2.7 (commencing with Section 1001), Chapter 2.8 (commencing with Section 1001.20), or Chapter 2.9 (commencing with Section 1001.50) of Title 6 of Part 2 of the Penal Code.

Nothing in this section shall prohibit the filing of a claim with the board of a public entity, and this section shall not extend the time within which a claim is required to be presented pursuant to Section 911.2.

§ 945.4. Necessity of written claim acted upon by board or deemed to have been rejected

Except as provided in Sections 946.4 and 946.6, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division.

§ 945.6. Limitation practices on claims required to be presented in accordance with chapters 1 and 2 of part 3; persons imprisoned in state prisons

(a) Except as provided in Sections 946.4 and 946.6 and subject to subdivision (b), any suit brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division must be commenced:

(1) If written notice is given in accordance with Section 913, not later than six months after the date such notice is personally delivered or deposited in the mail.

(2) If written notice is not given in accordance with Section 913, within two years from the accrual of the cause of action. If the period within which the public entity is required to act is extended pursuant to subdivision (b) of Section 912.4, the period of such extension is not part of the time limited for the commencement of the action under this paragraph.

(b) When a person is unable to commence a suit on a cause of action described in subdivision (a) within the time prescribed in that subdivision because he has been sentenced to imprisonment in a state prison, the time limit for the commencement of such suit is extended to six months after the date that the civil right to commence such action is restored to such person, except that the time shall not be extended if the public entity establishes that the plaintiff failed to make a reasonable effort to commence the suit, or to obtain a restoration of his civil right to do so, before the expiration of the time prescribed in subdivision (a).

(c) A person sentenced to imprisonment in a state prison may not commence a suit on a cause of action described in subdivision (a) unless he presented a claim in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division.

§ 945.8. Limitation of actions on claims not required to be presented in accordance with chapters 1 and 2 of part 3

Except where a different statute of limitations is specifically applicable to the public entity, and except as provided in Sections 930.6 and 935, any action against a public entity upon a cause of action for which a claim is not required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division must be commenced within the time prescribed by the statute of limitations that would be applicable if the action were brought against a defendant other than a public entity.

§ 946.6. Denial of application for leave to present claim; relief from provisions of section 945.4; place of filing petition

(a) If an application for leave to present a claim is denied or deemed to be denied pursuant to Section 911.6, a petition may be made to the court for an order relieving the petitioner from Section 945.4. The proper court for filing the petition is a superior court that would be a proper court for the trial of an action on the cause of action to which the claim relates. If the petition is filed in a court which is not a proper court for the determination of the matter, the court, on motion of any party, shall transfer the proceeding to a proper court. If an action on the cause of action to which the claim relates would be a limited civil case, a proceeding pursuant to this section is a limited civil case.

(b) The petition shall show each of the following:

(1) That application was made to the board under Section 911.4 and was denied or deemed denied.

(2) The reason for failure to present the claim within the time limit specified in Section 911.2.

(3) The information required by Section 910.

The petition shall be filed within six months after the application to the board is denied or deemed to be denied pursuant to Section 911.6.

(c) The court shall relieve the petitioner from the requirements ofSection 945.4 if the court finds that the application to the board under Section 911.4 was made within a reasonable time not to exceed that specified in subdivision (b) of Section 911.4 and was denied or deemed denied pursuant to Section 911.6 and that one or more of the following is applicable:

(1) The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements ofSection 945.4.

(2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim.

(3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of that disability failed to present a claim during that time.

(4) The person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim.

(d) A copy of the petition and a written notice of the time and place of hearing shall be served before the hearing as prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure on (1) the clerk or secretary or board of the local public entity, if the respondent is a local public entity, or (2) the Attorney General, if the respondent is the state. If the petition involves a claim arising out of alleged actions or inactions of the Department of Transportation, service of the petition and notice of the hearing shall be made on the Attorney General or the Director of Transportation. Service on the Attorney General may be accomplished at any of the Attorney General's offices in Los Angeles, Sacramento, San Diego, or San Francisco. Service on the Director of Transportation may be accomplished only at the Department of Transportation's headquarters office in Sacramento. If the petition involves a claim arising out of alleged actions or inactions of a judicial branch entity, service of the petition and notice of the hearing shall be made in accordance with the following:

(1) If the petition involves a claim arising out of alleged actions or inactions of a superior court or a judge, court executive officer, or trial court employee, as defined in Section 811.9, of the court, service shall be made on the court executive officer.

(2) If the petition involves a claim arising out of alleged actions or inactions of a court of appeals or a judge thereof, service shall be made on the Clerk/Administrator of the court of appeals.

(3) If the petition involves a claim arising out of alleged actions or inactions of the Supreme Court or a judge thereof, service shall be made on the Clerk of the Supreme Court.

(4) If the petition involves a claim arising out of alleged actions or inactions of the Judicial Council or the Administrative Office of the Courts, service shall be made on the secretariat of the Judicial Council.

(e) The court shall make an independent determination upon the petition. The determination shall be made upon the basis of the petition, any affidavits in support of or in opposition to the petition, and any additional evidence received at the hearing on the petition.

(f) If the court makes an order relieving the petitioner from Section 945.4, suit on the cause of action to which the claim relates shall be filed with the court within 30 days thereafter.

§ 950. Necessity for presentation of claim against public employee

Except as otherwise provided in this chapter, a claim need not be presented as a prerequisite to the maintenance of an action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee.

§ 950.2. Grounds for barring cause of action

Except as provided in Section 950.4, a cause of action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee is barred if an action against the employing public entity for such injury is barred under Part 3 (commencing with Section 900) of this division or under Chapter 2 (commencing with Section 945) of Part 4 of this division. This section is applicable even though the public entity is immune from liability for the injury.

§ 950.4. Exception to bar of cause of action

A cause of action against a public employee or former public employee is not barred by Section 950.2 if the plaintiff pleads and proves that he did no.t know or have reason to know, within the period for the presentation of a claim to the employing public entity as a condition to maintaining an action for such injury against the employing public entity, as that period is prescribed by Section 911.2 or by such other claims procedure as may be applicable, that the injury was caused by an act or omission of the public entity or by an act or omission of an employee of the public entity in the scope of his employment as a public employee.

§ 950.6. Necessity of written claim rejected, or deemed to have been rejected, by public entity; limitations

When a written claim for money or damages for injury has been presented to the employing public entity:

(a) A cause of action for such injury may not be maintained against the public employee or former public employee whose act or omission caused such injury until the claim has been rejected, or has been deemed to have been rejected, in whole or in part by the public entity.

(b) A suit against the public employee or former public employee for such injury must be commenced within the time prescribed by Section 945.6 for bringing an action against the public entity.

(c) When a person is unable to commence the suit within the time prescribed in subdivision (b) because he has been sentenced to imprisonment in a state prison, the time limited for the commencement of such suit is extended to six months after the date that the civil right to commence such action is restored to such person, except that the time shall not be extended if the public employee or former public employee establishes that the plaintiff failed to make a reasonable effort to commence the suit, or to obtain a restoration of his civil right to do so, before the expiration of the time prescribed in subdivision (b).

Ethical Rules for the California Practitioner

An Overview

THE SPEAKER

Joel Mark, Esq.

Please go to next page for additional information about the speaker and his presentation.

JOEL MARK

Professional Experience:

NORDMAN CORMANY HAIR & COMPTON LLP, 2000 to present.

1000 Town Center Drive, Sixth Floor
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RUSS, AUGUST, KABAT & KENT, Los Angeles, California, 1998 to 2000.

PLOTKIN, MARUTANI & KYRIACOU, Los Angeles, California, 1993 to 1998.

BAKER & McKENZIE, Los Angeles, California (formerly Macdonald, Halsted & Laybourne), 1973 to 1993.

Litigation Experience:

Mr. Mark has concentrated in trial practice and complex business litigation, including class action matters. With over thirty-eight years of experience, Mr. Mark has handled a wide range of business litigation matters including trademark, trade secret and competitive business practice cases, shareholder dissolution and valuation actions, director and officer liability matters, real estate disputes, general contract and business disputes, banking litigation, and insurance coverage disputes. Mr. Mark has handled over one hundred securities and broker/dealer cases and has represented over eighty attorneys and accountants in malpractice and malicious prosecution cases. Mr. Mark has had in excess of fifty trials to verdict or other contested dispositive judgment, including numerous jury trials. Mr. Mark has handled numerous major arbitration

matters before arbitration forums such as the American Arbitration Association and the International Chamber of Commerce Court of Arbitration. Mr. Mark serves as a commercial and securities arbitrator for the American Arbitration Association (Panel Chair Training 1993; Panel Training and Certification 1999) and the Ventura County Superior Court panel of arbitrators, and formerly served on the panel of the National Association of Securities Dealers. Mr. Mark is a Senior Partner with Nordman Cormany Hair & Compton LLP, served as Chair of the Firm's Litigation Group from 2002 through 2011, and currently serves as the Firm's Managing Partner.

Mr. Mark also has lectured on and has served as an expert witness concerning legal ethics and litigation practice and procedure and attorneys' fees issues. As a member of the California State Bar Committee on Mandatory Fee Arbitration (Member 1993-1997, 2002-2008; Chair 1997 and 2008; Presiding Arbitrator 2009-), Mr. Mark wrote the lesson plan for and moderated over twenty arbitrator training sessions and has presented numerous Section Education Institute, State Bar, CEB and other provider programs regarding attorneys' fees, ethics issues and litigation skills. Mr. Mark was the lead editor for the 1997 edition of the State Bar Form Attorneys' Fee Agreements publication, and participated in the update of the document in 2004, 2005 and 2010. Mr. Mark also has served on the State Bar Committee on Professional Responsibility and Conduct (2000-2002). In 2010, Mr. Mark was appointed by the State Bar Office of Chief Trial Counsel to serve as a Special Deputy Trial Counsel in State Bar disciplinary matters.

Appellate Cases:

McConnell v. Merrill Lynch, 21 Cal.3d 365 and 33 Cal.3d 816; Merrill Lynch v. Livingston, 566 F.2d 1119; AIG v. AIB (9th Cir. 1991) 926 F.2d 829; Oprian v. Goldrich/Kest, 220 Cal.App.3d 337; Thomason v. Bateman, Eichler, 199 Cal.App.3d 1100 (decertified for publication); Forman v. Knapp Press, 173 Cal.App.3d 200; Acosta v. Kerrigan, 2005 WL 271625 (not certified for publication); Acosta v. Kerrigan, 150 Cal.App.4th 1124; Agrizap v. Woodstream, 520 F.3d 1337.

Admissions:

State Bar of California, December 1972; United States Supreme Court; Ninth Circuit Court of Appeals; Federal Circuit Court of Appeals; United States District Courts, California, all Districts; State Bar of Colorado, August 1994 (currently inactive).

Organizations:

Los Angeles Association of Business Trial Lawyers (Charter Member; ABTL Report Editorial Board); Volunteer Referee, California State Bar Court (1984-1989); Member, California State Bar Standing Committee on Mandatory Fee Arbitration (1993-1997 and 2002-2008; Chair 1997 and 2008, Vice Chair 1996, 2005-2007; Presiding Arbitrator 2009-); California State Bar Committee on Professional Responsibility

and Conduct (2000-2002); State Bar of California Special Deputy Trial Counsel for disciplinary matters (2010-); Los Angeles County Bar Association Dispute Resolution Services Fee Arbitration Executive Committee (1996-2003; Chair 1999-2001); Member, Panel of Arbitrators, American Arbitration Association (1984-); American Bar Association (Litigation, Dispute Resolution, Insurance and Commercial Sections [1976-2006]); Los Angeles County Bar Association (Litigation, Alternate Dispute Resolution and Business Law Sections); Federal Bar Association (Los Angeles Chapter Board of Directors, 1992-2001); Santa Monica Bar Association (Mandatory Fee Arbitration Panel and Trainer, 1998-2001); Ventura County Bar Association (Board of Directors, 2006 - ; Secretary-Treasurer 2011; Business Litigation Section 2004-), Mandatory Fee Arbitration Panelist, Committee Member and Trainer (2000-), Judicial Evaluation Committee (2009-); Ventura County Trial Lawyers Association (Secretary/Treasurer 2005, Vice President 2006, President and recipient of the CAOC Local Chapter President of the Year 2007); Jerome H. Berenson Inns of Court (Master, 2005 -); Association of Professional Responsibility Lawyers (2008 -).

Education:

University of California Hastings College of the Law (J.D., 1972)
University of California at Berkeley (A.B., 1969)

Personal:

Born, April 21, 1947; Married (Leslie); Two children (Jessica, Joanna); American Youth Soccer Organization (National Board of Directors, 1998 – 2004; National Secretary, 1998; National Vice President, 1999; National President, 2000 – 2004; Chair of AYSO Audit Committee, 2006 - ; AYSO Hall of Fame Inductee at National Soccer Hall of Fame, Oneonta, New York, 2008).

ETHICAL RULES FOR THE CALIFORNIA PRACTITIONER

AN OVERVIEW

ETHICAL RULES FOR THE CALIFORNIA PRACTITIONER

AN OVERVIEW

The practice of law involves the zealous and competent representation of our clients' interests. However, the overriding concern in the course of representing our clients is our ethical obligations to the courts, to the public and to the profession, in addition to our ethical obligations to our clients.

The purpose of this outline is to discuss the various ethical concerns that must be kept in mind by all practitioners, including new practitioners. It is not intended as an exhaustive treatise on each of the issues raised. Rather, it is intended as a checklist for further consideration and research so that the ethical issues facing the attorney become aspirational goals rather than traps for the unwary.

I. Ethics Objectives, Rules Sources and Resources

A. Purpose of Ethics Rules:
   1. Guidance and professionalism.
   2. Discipline.
   3. Disbarment and other sanctions.
   4. Disqualification.
   5. Standard of care. *Mirabito v. Liccardo* 4 Cal. App. 4th 41 (1992).
   6. Fiduciary duties. *David Welch Co. v. Erskine & Tully* 203 Cal. App. 3d 884 (1988).
   7. Fee collection.
   8. But, ethics rules violations do not create a separate cause of action based upon breach alone.

B. Sources and Resources:
   1. The primary source of ethical materials relating to attorneys' fees in California is the California Rules of Professional Conduct ("Rules") and the State Bar Act (Business and Professions Code [B&P] sections 6000 through 6238).
   2. A secondary source of such materials is the State Bar and local bar association ethics opinions. The State Bar ethics opinions, issued by the Committee on Professional Responsibility and Conduct ("COPRAC"), are available on the California State Bar website (www.calbar.ca.gov) and are searchable. They are, however, non-binding. Additionally, the State Bar offers an ethics hotline (1-800-

2ETHICS), which strives to respond to ethics questions raised by California attorneys within four hours or less.

3. The State Bar Committee on Mandatory Fee Arbitration periodically offers "Arbitrator Advisories" (also available on the State Bar website) that cover a variety of ethical and other issues relating to attorneys' fees.
4. The Committee on Mandatory Fee Arbitration also offers on the website form fee agreements. These cover almost every attorney fee clause and situation and are very user friendly.
5. The ABA Model Rules and Model Code are not applicable to California attorneys, are sometimes inconsistent with the Rules, and should be looked to by the courts for only secondary guidance. California State Bar Formal Opinion No. 1983-71 (1983).

C. 2012 Caveat: The California Rules of Professional Conduct have been the subject of extensive revisions over the past few years. The majority of the new rules have been conditionally approved by the State Bar Board of Governors and presently are out for public comment. If adopted, the new Rules all will have different numbers and many may be amended, added or deleted.

II. Ethical Obligations to Clients

A. Creation of an Attorney-Client Relationship: An attorney-client relationship is a matter of contract, and will be created in the manner any contract may be created. However, the test is the reasonable expectations of the client. Thus, where circumstances would lead a reasonable potential client to conclude that the relationship had been formed, the attorney will be liable for all duties arising out of such a relationship even where the attorney's subject intention was not to represent the client. See, COPRAC Formal Opinion 2003-161.

B. Declining an Attorney-Client Relationship: Because the standard for the formation of an attorney-client relationship is the reasonable expectation of the client, all decisions to decline such a relationship should be documented between the attorney and the prospective client. And, where there is a potential statute of limitations issue, failure to advise the client of that possibility may be grounds for a malpractice action even where the representation is declined. *Miller v. Metzinger* 91 Cal. App.

3d 31 (1979) [failure to make referral until after running of statute of limitations].

C. The Initial Agreement:
   1. Probate Code section 16004(B).
      a. At the start, the relationship generally is considered at arm's length. *Setzer v. Robinson* 57 Cal. 2d 213 (1962) [based on Civil Code § 2235]; *Baron v. Mare* 47 Cal. App. 3d 304 (1975).
      b. As a result, the attorney has no obligation to advise the prospective client about the proposed fee agreement and, because the attorney therefore is not on both sides of the transaction, the presumption of undue influence under section16004 (and its predecessor Civil Code § 2235) does not apply to fee agreements. *Ramirez v. Sturdevant* 21 Cal. App. 4th 904 (1994); *Setzer v. Robinson* 57 Cal. 2d 213 (1962).
      c. Modification of fee agreement, however, is a new agreement between a fiduciary and principal and does require compliance with and will be subject to scrutiny under Rule 3-300.

D. Termination of the Relationship: Termination of the relationship is governed by Rule 3-700. Where the relationship involves a matter before a tribunal, permission of the tribunal is required and will be given only where the requirements for withdrawal are present, and where withdrawal will not unreasonably prejudice the client or interfere with the administration of justice.

E. Obligations Imposed by the State Bar Act:
   1. Preservation of client confidences and secrets (B&P section 6068(e)).
   2. Keeping clients informed of all significant developments in connection with the representation (B&P section 6068(m) and (n).
   3. Duty to communicate offers of settlement (B&P section 6103.5).
   4. Requirements of fee agreements (B&P sections 6146-6149).

F. Obligations Imposed by the Rules:
   1. Maintaining client confidences (Rule 3-100).
   2. Competency (Rule 3-110).

3. Refrain from sexual relations with clients and from using the relationship to coerce sexual relations (Rule 3-120).
4. Avoiding interests adverse to a client (Rule3-300 [fiduciary obligations to clients]).
5. Avoiding representation of adverse interests (Rule 3-310 [duty of loyalty; dual representation] – See First Supplemental Outline).
6. Disclosure of relationship with another party's lawyer (Rule 3-320).
7. Impermissible limitations on liability to a client (Rule 3-400).
8. Disclosure of the lack of professional liability insurance (Rule 3-410).
9. Communications with a client and informing a client of significant developments connected with the representation (Rule 3-500).
10. Communication of settlement offers (Rule 3-510).
11. Obligations specific to representation of an organization of a client (Rule 3-600)
12. Obligations upon termination of employment (Rule 3-700).
13. Obligations regarding trust funds and trust accounting (Rule 4-100).
14. Prohibition against purchasing client property at court-supervised sale (Rule 4-300).
15. Prohibition against accepting gifts from clients (Rule 4-400).
16. Prohibition against testifying before a jury without the client's consent (Rule 5-210).

G. Other Obligations
1. Duty to advise a client about remedies outside the scope of the representation.
2. Duty to refer to a specialist regarding matters relevant to the representation outside the attorney's expertise.

III. Ethical Issues Relating to Attorneys' Fees: See Second Supplemental Outline

IV. Duties to Third Parties

A. Generally, because of the high ethical obligations attorneys have to zealously represent the interests of their clients, they have no

duties to third parties arising out of their representation of their clients.

B. Litigation Privilege (Civil Code section 47(b); but, the attorney can be liable for statements made outside of the litigation process and not reasonably related to obtaining the lawful objectives of the litigation process.

C. However, where it is reasonably foreseeable that a third party is relying upon a misrepresentation, the attorney can become liable to a third party who relies to their detriment, where the attorney acts as an escrow holder for the benefit of a third party or for the failure to properly distribute settlement funds to a third party [split of authority]

D. Liability to Partners: Generally, an attorney will be liable to a partner for his or her conduct of partnership business, absent formation of the partnership as an LLP

E. Liability to Other Attorneys: There is no liability to or fiduciary duty owed to an associated attorney (*Beck v. Wecht* 28 Cal. 4th 289 (2002)); however, where one associated attorney is only passively negligent, that attorney may seek indemnity from the active negligent attorney (*Musser v. Provencher* 28 Cal. 4th 274 (2002)).

F. Liability to Opposing Parties and Counsel:
   1. Improper communication with represented party; grounds for disqualification.
   2. Inadvertent receipt of privileged materials; duty to advise and return.

V. Duties to the Courts and to the Administration of Justice

A. Obligations Imposed by the State Bar Act:
   1. Duty of licensure (B&P sections 6060-6067)
   2. Duty to support the Constitution and laws (B&P section 6068(a)).
   3. Duty to maintain respect for the courts (B&P section 6068(b)).
   4. Duty to maintain actions only as appear just (B&P section 6068(c)).
   5. Duty to maintain causes only consistent with the truth and to never seek to mislead a judicial officer by an

artifice or false statement of fact or law (B&P section 6068(d)).

6. Duty not to advance facts prejudicial to the honor or reputation of a party or witness unless required by the interests of justice (B&P section 6068(f)).
7. Duty not to pursue a cause from any corrupt motive of passion or interest (B&P section 6068(g)).
8. Duty never to reject the cause of the defenseless (B&P section 6068(h)).
9. Duty to comply with disciplinary investigations, proceedings and conditions (B&P sections 6068(i), (k), (l) and (o).
10. Mandatory continuing education (B&P section 6070).
11. Duty to provide or support provision of pro bono services (B&P section 6073)
12. Duty to comply with the Rules (B&P section 6077).
13. Prohibition of conditioning employment upon agreement not to file disciplinary charges (B&P section 6090.5).
14. Prohibitions regarding acts involving moral turpitude (B&P sections 6100-6103).
15. Duty not to misrepresent authority (B&P section 6104).
16. Prohibitions on unlawful solicitation of business (B&P sections 6150-6156).
17. Restrictions on attorney advertising (B&P sections 6157-6159.53).
18. Duty to participate in mandatory fee arbitration (B&P sections 6200-6206).

B. Obligations Imposed by the Rules:

1. Improper objectives of employment (Rule 3-200).
2. Prohibition on advising violation of the (Rule 3-210).
3. Prohibition against threatening criminal, administrative or disciplinary charges to obtain advantage in a civil dispute (Rule 5-100).
4. Prohibition against government attorney instituting criminal charges unless supported by probable cause (Rule 5-110).
5. Prohibition against extrajudicial statements expected to be disseminated by public communication if there is a substantial likelihood of materially prejudicing an adjudicative proceeding (Rule 5-120).
6. Requirement to maintain causes by such means only as are consistent with the truth (Rule 5-200(A)).

7. Prohibition against seeking to mislead a judicial officer of jury by as artifice or false statement of fact or law (Rule 5-200(B)).
8. Prohibition against intentionally misquoting a book, statute or decision (Rule 5-200(C)).
9. Prohibition against citing an invalid or overruled decision or statute (Rule 5-200(D)).
10. Prohibition against asserting personal knowledge of a fact at issue except when testifying as a witness (Rule 5-200(E)).
11. Prohibition against suppression of evidence (Rule 5-220).
12. Prohibited contacts with court officials (Rule 5-300).
13. Prohibitions regarding contacts with witnesses (Rule 5-310).
14. Obligations and prohibitions regarding contact with jurors (Rule 5-320).

C. Other Obligations to the Courts
1. Prohibition against filing false pleadings or documents.
2. Prohibition against willful disobedience of lawful court orders.
3. Prohibition against noncompliance with support judgment or order.
4. Prohibition against disrespect to the court (free speech vs. inappropriate criticism; improper courtroom attire).
5. Duty to remain and participate in court proceedings.

VI. Ethical Issues Relating to Client Development and Attorney Advertising: See Third Supplemental Outline.

FIRST

SUPPLEMENTAL

OUTLINE

CONFLICTS OF INTEREST

A SHORT COURSE

William H. Hair, Esq. and Joel Mark, Esq.

Nordman Cormany Hair & Compton LLC
June 22, 2006

1. Introduction
   a. Nature of the problem
   b. The temptations
   c. Ways it can be manifested – civil suit, disqualification, discipline
   d. The possible penalties

2. Where to find the resoucrces
   a. Business and Professions Code
   b. Rules of Professional Conduct
   c. Court Decisions
   d. Leading resources and references
   e. State Bar Resources
      i. "Gray Book"
      ii. Sample Fee Agreements

3. The Governing Rules of Professional Conduct

4. "Rules of Thumb" for identifying the problem
   a. Duty of undivided loyalty
   b. Duty to inform client
   c. Duty to maintain client confidences
   d. Duty to practice competently

5. "Quick Rules" for Conflict Spotting and Resolution

6. Mechanisms for Identifying Potential Conflicts

7. Recent Developments, Updates, Questions

8. Attached references

BILL'S AND ~~MIKE~~ JOEL'S "QUICK RULES"

FOR CONFLICT SPOTTING AND RESOLUTION

1. Specifically indentify the potential client, and make sure that in accepting the engagement it is clear to all who you consider to be the client.

   a. This may or may not be the person paying the bills. Rule 3-310(F).

   b. Organizations. Rule 3-600.

   c. Governmental entities.

   d. Multiple clients and adverse interests. Rule 3-310.

2. Identify the fields of potential conflicts.

   a. Potential persons in conflict include:
      - Your current clients and those of all of the lawyers in your office, including co-counsel, partners, associates and of-counsel.
      - Former clients.
      - Relatives, business associates and other persons in special relationships.
      - Relationship with other party's lawyer. Rule 3-320.
      - Conflicts created by staff, such as paralegals, secretaries, etc.
      - Economic Competitors.

   b. Potential kinds of non-financial conflicts include:
      - Trial counsel as witness. Rule 5-210.
      - Sexual relations with client. Rule 3-120.
      - Consultants, including other attorneys.

   c. Potential kinds of financial conflicts include:
      - Publication rights. Rule 3-300.
      - Business dealings with clients. Rule 3-310(B)(3).
      - Business transactions with clients. Rule 3-300.
      - Acquiring ownership in a client in connection with legal services provided to the client. Rule 3-300; ABA Formal Ethics Opinion 00-418 (2000).
      - Gifts from a client. Rule 4-400.
      - Loans and advances to client. Rule 3-400.
      - Fee dispute with client – Mandatory Fee Arbitration.

3. If there is a potential conflict, address it as soon as possible.

a. Do you initial conflicts check before getting any confidential material or information from the potential client.

b. The consequences of not doing so.

c. If engagement is declined, do it in writing and confirm that nothing confidential was conveyed.

d. When you learn more information about who is involved, check again.

e. The "First in Time" or "Hot Potato" Rule.

4. Determine the measure of disclosure and consent necessary; when in doubt disclose and obtain consent anyway.

a. The Rules of Professional Conduct have four levels of notification/consent to the client when there is a conflict or potential conflict.
   - Conflict is unwaivable; e.g., Rule 3-120(B) or *per se* violation of duty of loyalty.
   - Informed written consent from client; e.g., Rule 3-310(C)-(F).
   - Disclosure to client without written consent also being required; e.g., Rule 3-310(B)(1)-(4).
   - Notice to client without written disclosure or consent being required; e.g., Rule 3-320.

b. Consider whether the struggle to avoid the potential conflict is really worth the effort and risk of the potential consequences.

c. Is it a waivable conflict? If in doubt, don't take it.

d. If waivable, is mere written disclosure enough? If in doubt, also obtain written consent.

e. Level of detail of disclosure? If you can think of a possible consequence of the conflict, disclose it.

5. Beware of "Beauty Contests." California Bar Journal, October 2003, p. 10 "Beauty Contests can Turn Ugly."

6. Provide in your engagement letter, if possible, how to resolve potential future conflicts and that fees to date of discovery will remain due.

CONFLICTS OF INTEREST
By William H. Hair
NOVEMBER 20, 2003

The basic rules relating to conflicts of interest are found in the Rules of Professional Conduct *(Rules)* and the State Bar Act in the Business and Professions Code.

Rule 1-100 specifically provides that the Rules are not exclusive - we are bound by, *inter alia,* the State Bar Act and the appellate decisions of the courts. This Rule provides that, although not binding, opinions of ethics committees in California should be consulted for guidance on proper conduct and that ethics opinions and rules and standards of other jurisdictions may also be considered.

COMMUNICATING WITH REPRESENTED PARTY

Rule 2-100 is the basic prohibition of communications with persons who are known to be represented, but provides that the attorney can advise such a person if the attorney is independently consulted by the represented client and the attorney is not in a conflict position by virtue of an existing relationship.

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DEALS WITH CLIENTS

The first specific rule regarding conflicts is Rule 3-300 concerning avoiding interests adverse to a client. This rule prohibits an attorney from entering into a business transaction with a client or knowingly acquiring an "ownership, possessory, security or other pecuniary interest adverse to a client" unless three conditions have been satisfied:

1. The deal and its terms "are fair and reasonable and are fully disclosed and transmitted in writing to the client;" and

2. The client is advised in writing that the client may seek the advice of independent counsel of choice and is given a reasonable chance to do so; and

3. The client thereafter consents in writing to the terms of the deal.

This rule does apply to security interests for past or future fees and costs.

RULE 3-310 AVOIDING ADVERSE INTERESTS

The real "guts" of the conflict of interest rule is Rule 3-310 - which no matter how familiar you may be with this rule, I believe it is prudent, anytime a conflict issue arises, that this rule be re-read and perhaps even diagramed to fit the particular case that you are dealing with. This is something that I do whenever the question arises, even in the obvious cases of possible conflicts.

Rule 3-310 has six subsections with a number of sub-parts to each subsection. In short, it is a complex rule which can have a number of unpleasant results if it is ignored or mistakenly applied.

Sub A defines the terms used, "disclosure", "informed written consent", and "written". These are the only definitions or these terms in the Rules and it is my belief that they are applicable whenever used in the Rules.

Sub B prohibits an attorney from accepting or continuing the representation of a client without giving written disclosure to the client in four separate situations:

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

(2) The attorney "knows or reasonably should know that:

(a) he or she "previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and (b) the previous relationship would substantially affect the member's representation;" or

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

(4) The attorney "has or had a legal, business, financial, professional interest in the subject matter of the representation." Note that this sub-part has dropped the "personal" interest that is used in the first three sub-parts. I believe, in

an abundance of caution, that an attorney that finds that he or she has a personal interest in the subject matter of the representation aside from the personal/professional desire to do the best job for the client, that the attorney had better make the required disclosure.

It is apparent from a careful reading of subsection B, that there are a number of potential "land mines" for the unwary. The term "same matter" is not defined by the rule and it has been my experience that this term can be the subject of a lot of debate when one of the described situations arises, particularly after a case has been undertaken. The term "reasonably should know" is an obvious potential pitfall when second guessers enter the picture after a case has been ended, or you have been relieved from the representation. Last, but not least, you must bear in mind that the disclosure requirements continue for later discovered relationships.

Sub C deals with the situations where "informed written consent" is required. It has three sub-parts which on reading seem deceptively simple, but in the application to real life situations can be extremely complex. Rule 3-310 (C) provides:

> A member shall not, with out the informed written consent of each client:
>
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
>
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients

actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

The term "matter" is again a potential land mine for the unwary. In applying this rule, I have found it very helpful to get out the yellow pad and diagram the facts to make sure of the ground that I am on.

Sub D deals with the situation where an attorney is representing two or more clients and requires that any aggregate settlement have the "informed written consent of each client."

Sub E provides that an attorney may not accept employment adverse to a client or former client without the "informed written consent" of the client or former client where by reason of the representation of the client or former client, the attorney has obtained confidential information material to the employment.

Sub F provides the conditions under which an attorney may accept compensation from someone other than the client. The conditions are, (1) there is no interference with the attorney's independence or professional judgment or with the attorney/client relationship; (2) information relating to the representation is protected as required by B&P § 6068(e); and the attorney gets the client's informed written consent, provided that no written disclosure or consent is required if, (a) non-disclosure is otherwise authorized by law, or (b) the attorney is giving services

on behalf of any public agency which provides legal services to other public agencies or the public.

ORGANIZATIONS

Rule 3-600 covers the basic rules concerning representing an organization, whether a governmental agency, corporation, club or partnership. This rule has recently been under intense scrutiny recently because of its implications under the "whistle blower" scandals, but has survived in its present form so far. The rule provides that an attorney representing "an organization" "shall conform" the representation "to the concept that the client is the organization itself, acting through its highest" officer, etc. It goes on to provide that if the attorney knows that an agent, actual or apparent of the organization intends or is acting in a violation of the law that reasonably can be imputed to the organization, the attorney shall not violate the duty of protecting confidences per B&P § 6068(e), but can "take such actions as appear to the member to be in the best interest of the organization." The rule gives 2 examples of the type of action that may be taken, including urging reconsideration or referring the matter to the highest internal authority of the organization. If this doesn't work, then the attorney's only "out" is to resign as permitted by Rule 3-700.

The rule obligates the attorney; to inform the organizations employees, directors, officers, shareholders, or other constituents that the organization is the client.

Last, but not least, this rule provides that an attorney may represent any officers, constituents, etc. of the organization, subject to the provisions of Rule 3-310 and that when consent is required, that it be given by someone other than the individual being represented.

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to the transfer 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.

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

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

CHAPTER 3. PROFESSIONAL RELATIONSHIP WITH CLIENTS

Rule 3-110. Failing to Act Competently

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

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

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

Discussion:

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

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

Rule 3-120. Sexual Relations With Client

(A) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

(B) A member shall not:

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

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

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

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

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

Discussion:

Rule 3-120 is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all client matters, a member is advised to keep clients' interests paramount in the course of the member's representation.

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

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

Rule 3-200. Prohibited Objectives of Employment

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

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

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

Rule 3-210. Advising the Violation of Law

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

Discussion:

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

Rule 3-300. Avoiding Interests Adverse to a Client

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

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

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

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

Discussion:

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

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

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

Rule 3-310. Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

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

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

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

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

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

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

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

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

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

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

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

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

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

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

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

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law; or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion:

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

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

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

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

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

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

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

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

In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

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

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

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

Rule 3-320. Relationship With Other Party's Lawyer

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

Discussion:

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

Rule 3-400. Limiting Liability to Client

A member shall not:

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

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

Discussion:

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

Rule 3-500. Communication

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

Discussion:

Rule 3-500 is not intended to change a member's duties to his or her clients. It is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be disciplined for failing to communicate

insignificant or irrelevant information. (See Bus. & Prof. Code, §6068, subd. (m).)

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

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

Rule 3-510. Communication of Settlement Offer

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

(1) All terms and conditions of any offer made to the client in a criminal matter; and

(2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

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

Discussion:

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

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

Rule 3-600. Organization as Client

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

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

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

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

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

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

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

Discussion:

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

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

Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149

Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.

Rule 3-700. Termination of Employment

(A) In General.

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

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal.

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

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

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

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

(C) Permissive Withdrawal.

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

(1) The client

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

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

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

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

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

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

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

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

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

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

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

(D) Papers, Property, and Fees.

A member whose employment has terminated shall:

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

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

Discussion:

Subparagraph (A)(2) provides that "a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients." What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.

Paragraph (D) makes clear the member's duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member "promptly" return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).

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

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Ethics Issues Finding Way Into Courts

Most of the significant decisions which have shaped the law of lawyer disqualification have come since 1990

by Stanley W. Lamport

California lawyers are practicing in an era of increasing ethical awareness and scrutiny. Whether this trend has resulted from the State Bar's expanded disciplinary mandate, or lawyer MCLE requirements, or as a response to the public's perception of the legal profession, there is little question that ethical issues are taking an increasingly prominent role in evaluating lawyer conduct.

It is therefore not surprising that these issues are finding their way into the courts. In 1995 alone, the courts of appeal published over a dozen cases involving lawyer ethical questions in contexts ranging from lawyer disqualification to malpractice to enforceability of lawyer agreements. Indeed, most of the significant reported decisions which have shaped the law of lawyer disqualification have been decided since 1990.

In deciding these cases, courts not only affect the rights of the parties before them, but the legal profession as a whole, in some cases profoundly. Under rule 1-100(A) of the California Rules of Professional Conduct, a lawyer's ethical conduct is governed by opinions of California courts as well as by the Rules of Professional Conduct themselves. Given the volume of issues which confront the courts and the impact that court decisions have on the profession, it is important to understand the principles underlying ethical questions involved in these cases.

Lawyer conflicts of interest are the mostly commonly recurring ethical issue in the courts, underlying most disqualification motions and an increasing number of disputes over lawyer fees. In many legal malpractice cases, the dispute centers around whether a conflict of interest resulted in a deficient performance.

Yet as frequently as the issue arises, there is very little authority defining conflict of interest. To be sure, there are many anecdotal and situational definitions, but no unifying definition. The Rules of Professional Conduct address a number of situations that involve conflicts of interest, the most

prominent being Rule 3-310, which address conflicts of interest in the representation of clients. In most cases, a lawyer is not precluded from accepting a representation that is subject to the rule if there is adequate written disclosure and, in some cases, written consent.

While Rule 3-310 identifies situations in which written disclosure and written consent are required, the rule does not include a conflict of interest definition. This makes it difficult for both lawyers and courts to apply Rule 3-310. The following discussion is intended to get behind Rule 3-310 and address the fundamental policies, underlying issues and conflicts of interest in general.

A conflict of interest is a situation that interferes with a lawyer's ability to fulfill his or her basic duties to a client, because duties exist which a lawyer owes to another or because the lawyer has interests which are extraneous to the representation.

There are two types of conflicts of interest. Potential conflicts arise when the lawyer's ability to fulfill the basic duties is not impaired, but under the circumstances, such a situation could arise during the representation.

Actual conflicts arise when the lawyer's ability to fulfill the basic duties is strained or impaired.

Conflict of interest situations

There are four basic duties that may be violated in conflict of interest situations: (1) the fiduciary duty of undivided loyalty to a client, (2) the duty to inform a client, (3) the duty to maintain client confidences and secrets, and (4) the duty to represent a client competently.

All conflict of interest situations involve conflicting loyalties either between the lawyer's interests and a client's interests or between the interests of two or more clients. In situations where there are conflicting interests between the clients, there can be a tension between the duty to maintain confidential information of one client and the duty to inform the other client. These problems can impair a lawyer's ability to represent a client competently.

The conflicts rules in Rule 3-310 are designed to address situations which inherently strain a lawyer's ability to fulfill these basic duties. It is important to understand the scope of the basic duties and to keep them in mind when analyzing whether a lawyer has a potential or actual conflict. When in doubt, an analysis of the basic duties involved in conflict situations can help determine where a conflict may lie. It can also help determine what disclosures are needed to obtain a client's informed consent.

Duty of undivided loyalty

"Perhaps the most fundamental quality of the attorney-client relationship is the absolute and complete fidelity owed by the attorney to his or her client." (State Bar Formal Opn. 1984-83). "Few precepts are more firmly entrenched than that the fiduciary relationship between attorney and client is of the very highest character." (*Yarn v. Superior Court* (1979) 90 Cal.App.3d 669, 675.)

In the conflicts of interest context, a lawyer's duty of undivided loyalty encompasses three concepts. First, a lawyer has a duty to represent a client's interests, rather than the interests of another. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 289; *Anderson v. Eason* (1930) 211 Cal. 113, 116.) Second, a lawyer must exercise independent judgment on a client's behalf, which means a lawyer must

represent the interests of a client without being influenced by the interests of the lawyer or others that are extraneous to the lawyer-client relationship. (*Anderson v. Eason, supra,* 211 Cal. at 116; State Bar Formal Opn. 1995-141.)

The third concept is a duty to preserve the client's trust and security in the lawyer-client relationship. (*Flatt v. Superior Court, supra* at 282.) The duty precludes a lawyer from assuming a role that is antagonistic to a client, based on the proposition that when a client engages a lawyer in a given matter, the client is entitled to feel that he or she has the undivided loyalty of the lawyer as his or her advocate or champion until the matter is over. (*Flatt v. Superior Court, supra,* at 286.) The confidence and trust which a client reposes in the lawyer is essential to the effective functioning of the fiduciary relationship and one of the foundations of the professional relationship. (*Id* at 282.)

Duty to inform a client

A lawyer has a duty to inform a client of significant developments related to the representation or employment and to promptly respond to reasonable requests for information. This duty is embodied in Business & Professions Code §6068(m) and rule 3-500 of the California Rules of Professional Conduct. The obligation is part of a broader duty of honesty and candor that a lawyer owes a client.

Duty to maintain confidences

B&P Code §6068(e) states that it is a lawyer's duty "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Section 6068(e) encompasses a duty to preserve the confidentiality of information related to client representation.

The confidentiality duty in §6068(e) is broader than the lawyer-client privilege. *(Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621, n.5; State Bar Formal Opn. 1993-133.)

"This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge." (ABA Code of Prof. Resp., E.C. 4-4, cited in *Goldstein v. Lees, supra.)* State Bar ethics opinions have defined the duty as encompassing not only privileged communications, but any information related to the representation of a client, from any source, which a client does not want disclosed or the disclosure of which is likely to be embarrassing or detrimental to the client. (See State Bar Formal Opn. Nos. 1976-37, 1980-52, 1981-58, 1986-87 and 1993-133 and LACBA Formal Opn. Nos. 386 (1980), 436 (1985), and 456 (1990).)

While courts and ethics opinions have recognized some exceptions to the duty of confidentiality, it is still extremely broad. Furthermore, it is a duty that survives the conclusion of the lawyer-client relationship. A lawyer is forever precluded from either disclosing a client's confidential information or using that information against a client's wishes.

Duty to practice competently

The duty to practice competently is found in rule 3-110 of the California Rules of Professional Conduct, which states that a lawyer "shall not intentionally, recklessly or repeatedly fail to perform legal services with competence." Rule 3-110(B) states "competence in any legal service" means "to apply the (1) diligence, (2) learning and skill, and mental, emotional and physical ability reasonably necessary for the performance of such service."

Keeping the four basic duties in mind can help demystify many of the conflict of interest claims a court will confront. Ultimately competent representation is a reflection of a lawyer's ability to fulfill these duties.

In a disqualification motion context, it can assist a court in determining whether there is a conflict that requires a lawyer's removal from the case or whether there was adequate disclosure and consent to the conflict.

In malpractice cases, the duty analysis can assist in evaluating the proximate cause between the conflict and the injury alleged and help clarify instructions to the jury on these issues. Duty analysis should result in greater consistency in deciding these issues.

Stanley W. Lamport of Cox, Castle & Nicholson LLP in Los Angeles is past chair of the State Bar's Standing Committee on Professional Responsibility and Conduct.

JOURNAL

METHODS FOR IDENTIFYING AND AVOIDING CONFLICTS OF INTEREST

COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT

STATE BAR OF CALIFORNIA
ANNUAL MEETING
October 11, 2002
Monterey

I. INTRODUCTION

A. Purpose and Scope of This Session

B. Description of Materials

II. CONFLICTS OF INTEREST: INTRODUCTION

A. WHY LAWYERS SHOULD BE CONCERNED ABOUT CONFLICTS OF INTEREST

1. Purpose of Conflicts Rules: To protect clients, foster respect and confidence in the legal profession and to ensure the lawyer maintains key fiduciary duties to client.

2. Fiduciary Duties That Regularly Come into Play in Conflicts Situations
   a. Competent representation
   b. Full disclosure of all significant facts and developments
   c. Maintenance of client confidence and secrets
   d. Undivided loyalty

3. Consequences of Violating Conflicts Rules
   a. Discipline
   b. Disqualification
   c. Civil Liability
   d. Other consequences

4. Sources of Guidance on Ethical Duties:
   a. California Rules of Professional Conduct
   b. State Bar Act
   c. ABA Model Rules
   d. Ethics opinions: State Bar; Local Bar Association; ABA

B. RELEVANT CALIFORNIA RULES OF PROFESSIONAL CONDUCT

1. Rule 3-300 [Business Transactions Between Lawyer and Client]
2. Rule 3-310 [Avoiding Representation of Adverse Interests Between and Among Clients]

III. JOINT CLIENTS IN THE SAME MATTER

A. When a lawyer represents multiple clients in the same matter, special issues can arise.

B. An example of joint representation in ***litigation context*** would be:

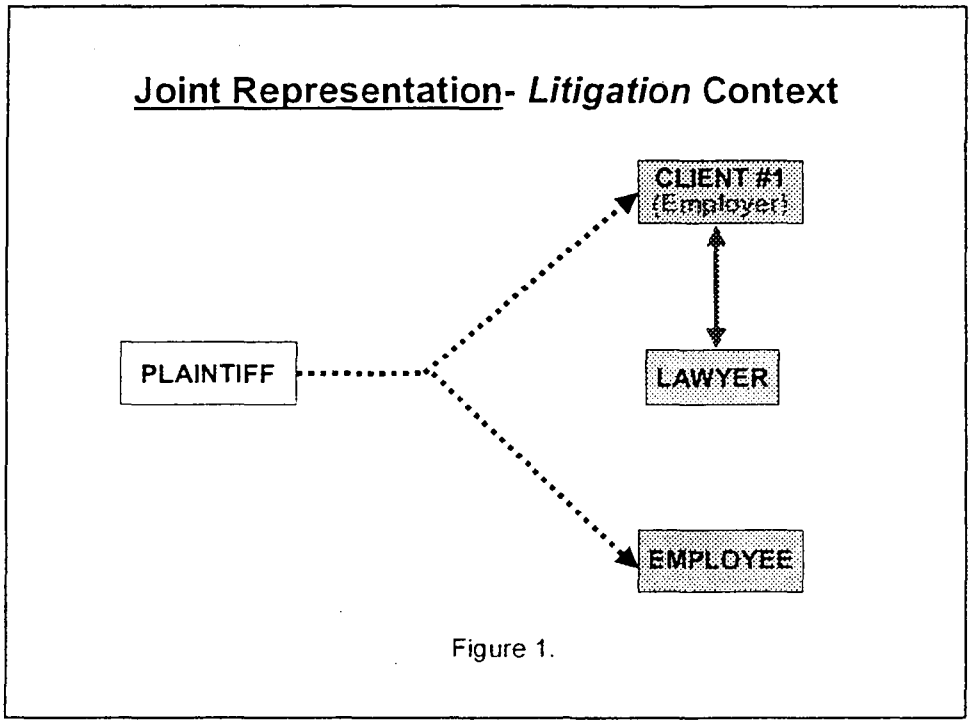

Figure 1.

C. Specific examples:

1. Employer and employee;
2. Employer and prospective employee;
3. Corporation and corporate officers, board members;
4. Partnership and general and limited partners.
5. Note that we have not included co-defendants in a criminal case. The potential for conflicts here is greater than in civil matters (e.g., one co-defendant testifying against another to cut a deal). This presents special issues beyond the scope of this program.

5. "a preexisting relationship with one client that would adversely affect the lawyer's independent judgment on behalf of the other client;"
6. "conflicting demands by the clients for the original file once the representation has ended." **State Bar Formal Ethics Opn. 1999-153.**

G. Applicable rules.

1. Rule 3-310(C)(1): potential conflicts
2. Rule 3-310(C)(2): actual conflicts
3. Joint-client exception to attorney-client privilege. Evid. Code § 962.

IV. REPRESENTING ONE CLIENT AGAINST A PRESENT OR FORMER CLIENT

A. BRIEF OVERVIEW & INTRODUCTION

1. Current Client. You cannot represent a client in a matter adverse to against another current client, even if the matters in which you are representing those clients are different and unrelated. Flatt v. Superior Court, 9 Cal.4th 275 (1994).

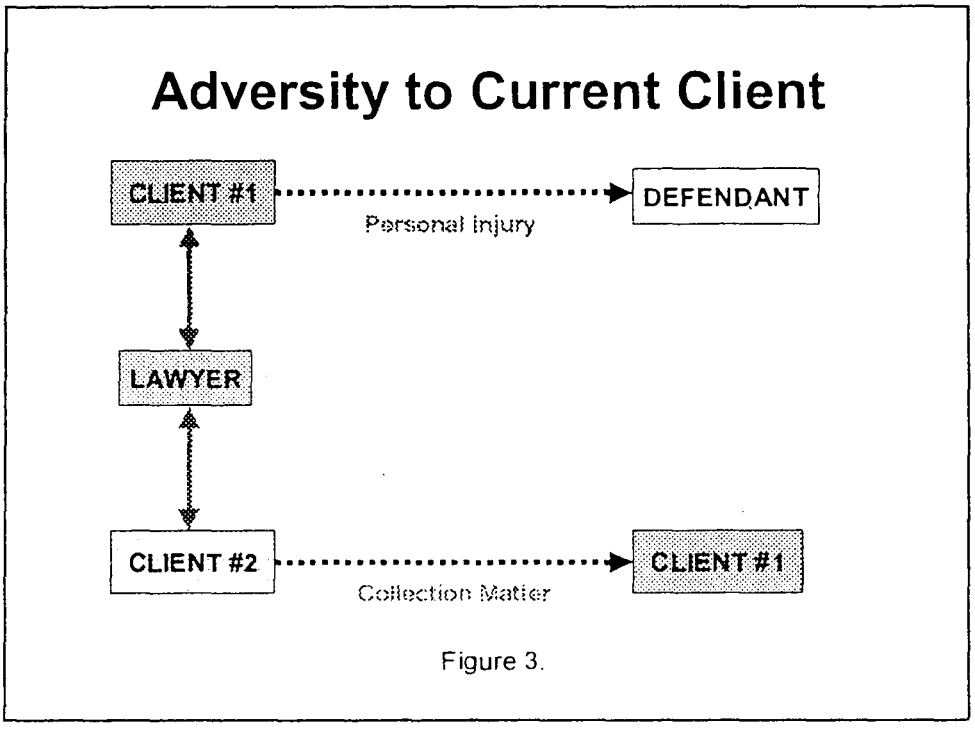

Figure 3.

a. Even if Lawyer has not learned any confidential information of Client #1 from the Client #1 vs. Defendant matter that is material to the Client #2 vs. Client #1 matter, Lawyer is precluded from representing Client #2 because of the duty of loyalty a lawyer owes each client.

b. The **"hot potato" rule** prevents a lawyer from dropping a client to take on a new matter. Truck Ins. Exchange, 6 Cal.App.4th 1050, 1059, 8 Cal.Rptr.2d 228, 233 (1992).

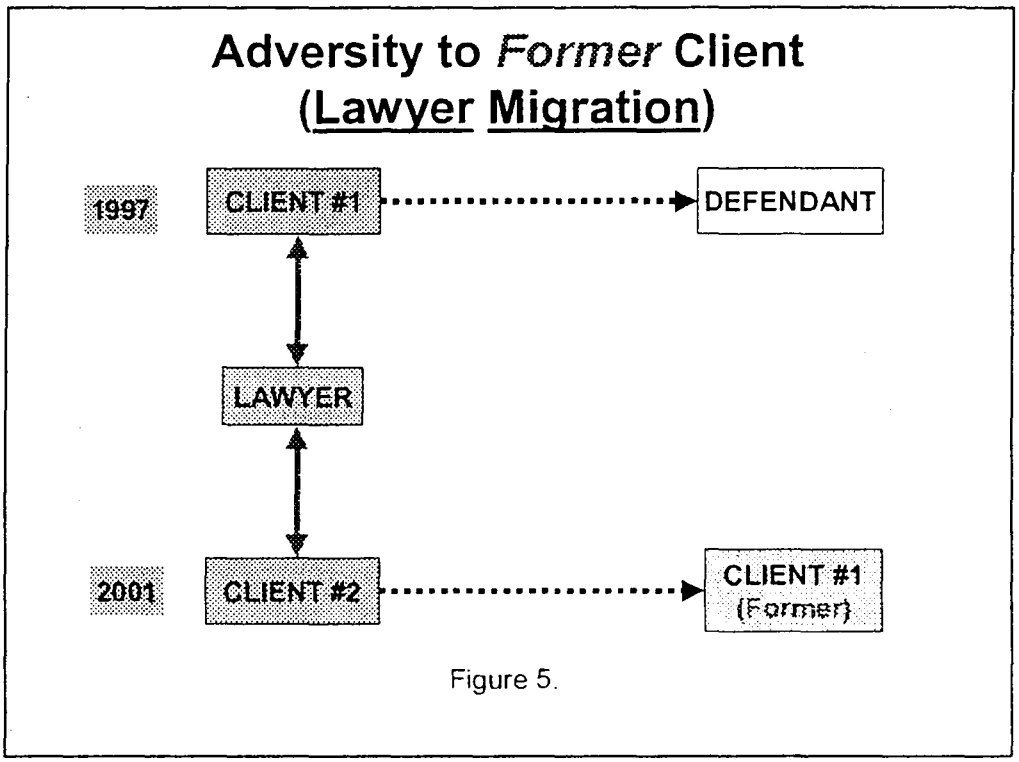

Figure 5.

b. Lawyer Migration. A client has become a former client because the lawyer has migrated from one firm to another. Figure 5.

c. Substantial Relationship Test. If Client #1 claims that Lawyer has confidential information materials to the Client #2 v. Client #1 matter, how does Client #1 prove this without having to disclose precisely what Client #1 does not want disclosed or used: the client's confidential information. The answer lies in the substantial relationship test that California has judicially adopted. Once the former client proves the former and present matter are substantially related (facts, law & lawyer's involvement), lawyer is conclusively presumed to have obtained confidential information because the client cannot prove what the lawyer knows or does not know. H.F. Ahmanson & Co. v. Salomon Bros., 229 Cal.App.3d 1445 (1991).

V. LAWYER'S INTERESTS AND RELATIONSHIPS

A. INTRODUCTION -- OVERVIEW OF LAWYER-CLIENT CONFLICTS.

1. Non-Financial Interests. Examples include:
   a. Trial counsel as witness. **Cal. Rule 5-210.**
   b. Sexual relations with client. **Cal. Rule 3-120.**
2. Financial Interests. Examples include:
   a. Publication rights. **Cal. Rule 3-300.**
   b. Business dealings with others. **Cal. Rule 3-310(B)(3).**
   c. Business transactions with clients. **Cal. Rule 3-300.**
   d. Acquiring ownership in a client in connection with the legal services provided to that client. **Cal. Rule 3-300;** ABA Formal Ethics Opin. 00-418 (2000)..
   e. Gifts from a client. **Cal. Rule 4-400.**
   f. Loans and Advances to Client. **Cal. Rule 4-210.**
   g. Limiting malpractice liability. **Cal. Rule 3-400.**
   h. Fee Dispute with client. *See Cal. Bus & Prof. Code §§ 6200 et seq.*, concerning mandatory arbitration of fee disputes between client and lawyer.

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Risky Business. . .Representing Multiple Interests

by Richard A. Zitrin

A San Francisco Attorney represents the driver-husband and passenger-wife in a simple auto accident. Now the couple is divorcing, and it's not amicable. A small Los Angeles law firm has represented an International Union and several of its Southern California locals for years; now there's a dispute between the International and one of the locals that may lead to litigation. A Riverside lawyer negotiates a contract for the sale of a business between two of his biggest clients; a year later they're accusing each other of negotiating in bad faith.

By the time these lawyers—composites based on real cases—sought help out of their conflict of interest dilemmas, it was too late.

Indeed, where a lawyer's loyalty to a particular client is any way impaired by that attorney's other loyalties or interests, withdrawal—and the loss of a valued client—may be the least that can happen. At worst is the possibility a malpractice lawsuit or even potential discipline under rule 3-310 of the California Rules of Professional Conduct.

Recognizing the Problem

The everyday practice of most firms, large and small, is replete with potential conflicts of interest. Careful practitioners must learn to spot these situations and anticipate potential problems before they occur. I advise lawyers who consult me to follow these rules:

First, think not of conflicts of interest, but of *potential* conflicts. Look at any representation situation from the point of view that there is—or could be—a conflict of interest, rather than from the perspective that there's not.

Second, think beyond "conflicts;" think in terms of *"impaired loyalty."* This phrase, taken from rule 1.7 of the American Bar Association Model Rules of Professional Conduct, suggests the lawyer ask not "do I have a conflict of interest?" or even "do I have a potential conflict?" The question becomes, "Is there *any* way—through my representation or *anything else*—in which my loyalty to Client may be impaired?"

Third, remember that, although in perhaps 99 to 100 cases a conflict will never ripen, it is impossible to predict with certainty *which* case is the 100th. The only way to protect the interests of all clients—and the law firm itself—is if preventive measures are undertaken at the inception of representation, and in *all* 100 cases.

Solving the Problem

There are many situations in which multiple clients not only can but should have the same lawyer. See rule 3-310 of the California Rules of Professional Conduct,

Discussion. But situations where the lawyer's ability to represent a client is impaired should trigger a full explanation to the client(s). A disclosure of divided loyalties will rarely, if ever, be meaningful if it merely recites the existence of the problem. At a minimum, the lawyer must also advise the client of "the actual and reasonably foreseeable adverse consequences. (Rule 3-310(A)(1), California Rules of Professional Conduct.) But for the best protection of both the clients and the law firm, I advise lawyers to take a more complete approach:

1. memorialize all communications, not just the clients' consents;
2. specifically address what happens to attorney-client confidences in the multiple representation situation;
3. spell out specific ramifications of multiple representation in an if/then format; and
4. specifically address the ground rules of what will happen in the event a conflict arises, including withdrawal.

One point—too often overlooked—which should always be a part of any disclosure is how client confidentiality will be treated. Clients have come to expect that lawyers will strictly protect every confidence, and they will still expect it, even if they are co-plaintiffs in a personal injury case, or both sides in a contact negotiations, or the parties to an "uncontested" dissolution. But allowing such parties to tell their mutual lawyer anything which can be held in confidence vis-à-vis the other party inevitably asks for trouble. It is almost impossible to maintain, for example, "his" secrets as against "her," and "hers" as against "him," with the parties feeling mistrust, knowing that the lawyer may know something they don't. This may doom efforts to cooperate before they've begun. The best solution is to agree—in advance—that, among multiple clients, there shall be no confidences. Should the client insist on blurting out a "confidence," however, the lawyer may be required to withdraw.

Explaining the multiple representation from an "if this happens, then here's what happens next" point of view may make the ramifications clearer to the client. The if/then approach is also valuable in explaining confidences, and in delineating when the lawyer must withdraw from representation.

One final point: Client consent can't cure conflicts in every—or even most—situations. The lawyer should adopt the standards suggested by rule 1.7 of the American Bar Association Model Rules of Professional Conduct: Agree to conflict waivers only where the clients' consents, viewed objectively, are reasonable, and make certain no consent is obtained where the lawyer is unable to make full disclosure.

These suggestions for preventive, anticipatory communications are neither new, nor particularly sophisticated, nor difficult to carry out. But the dangers of ignoring such communications can be severe. The rewards are ample: clients who are more efficiently served with quality legal help, and lawyers who are free to serve the needs of all their clients without fear of the consequences.

Richard A Zitrin is a San Francisco sole practitioner and an Adjunct Professor of Law at the University of San Francisco School of Law. His principle practice is advising of attorneys on issues of legal ethics and malpractice avoidance. He is a member of the State Bar of California's Committee on Professional Responsibility and Conduct, and other state, local and ABA committees on legal ethics and legal services issues.

(Article taken from Vol. 1, No.1; Winter 1992-93 *Ethics Hotliner*)

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WRITER'S E-MAIL ADDRESS
lcastro@nchc.com

October 16, 2003

Mr.

Mrs.

Re: Marriage of _____

Dear Mr. and Mrs.:

Mrs. has requested that this law firm represent her in a dissolution of marriage action to Mr.. However, we have advised Mrs. that we cannot represent her due to the fact that we have previously represented both you and Mrs. unless you each acknowledge and waive this conflict of interest in writing.

Please read this letter carefully and do not execute it unless you believe you fully understand it and are agreeable to its terms. Additionally, you may discuss this agreement with independent counsel of your own choosing.

First, as you know, this law firm has represented both of you in the preparation of the Family Trust dated March 5, 1996. During this representation, information of a confidential nature regarding your financial condition or other matters may have been revealed by either of you to a member of this firm which places one of you at an advantage over the other in a dissolution of marriage action. While we are not aware of any such specific information having been revealed to any member of this firm, we cannot state with certainty that such information was not revealed by one of you to a member of this firm at some time in the past.

Second, you each may have individual rights, liabilities and interests as spouses regarding support, community property, separate property, property division, taxes, alimony, and a number of other issues arising out of your marriage to one another

and/or its dissolution. By agreeing to have this firm represent Mrs. in the dissolution of your marriage to each other, each of you acknowledge and understand that this firm will be representing Mrs. and not Mr. with regard to any of these potential rights, liabilities and interests. Rather, Mr. , should he choose to retain legal counsel, will be required to retain separate counsel of his own choosing to look out for his individual interests in respect to all such rights, liabilities and interests.

Third, because this firm would be representing Mrs. only we will likely be speaking with her about confidential matters. Thus, by agreeing to have us represent Mrs. and not Mr. in a dissolution of marriage action, you each acknowledge and understand that all such communications between this office and Mrs. will be privileged and protected from disclosure to Mr.

If you are both agreeable to a future attorney-client relationship between this firm and Mrs. in a dissolution of marriage action adverse to Mr., please execute and date where indicated below. Please return one executed copy of this letter to my attention. The second copy should be retained in your files. If you have any questions or doubts about the matters discussed in this letter, feel free to call us or to consult with another attorney.

By executing this letter below, you each: (1) acknowledge that we have disclosed our past representation of the other party in another matter; and (2) consent to our representation of Mrs. in a dissolution of marriage action to Mr.

I apologize for the formality of this letter, but the law requires this sort of formality and experience teaches us that it is better to be clear about the terms of the engagement at the outset.

Very truly yours,

NORDMAN, CORMANY, HAIR & COMPTON

William H. Hair

LMC:lmc
H:\wdocs\09401\002\ltr\10163824.WPD

I HAVE READ THIS LETTER AND I AGREE TO BE BOUND BY ITS TERMS. I HAVE BEEN INFORMED OF AND WAIVE ANY CONFLICT OF INTEREST ARISING FROM THE FIRM'S REPRESENTATION OF MYSELF AND MR. IN MATTERS RELATING TO THE CREATION OF OUR FAMILY TRUST. I UNDERSTAND THAT I HAVE THE RIGHT TO HAVE THIS AGREEMENT REVIEWED BY INDEPENDENT COUNSEL.

Date: _____ _____

Mrs.

I HAVE READ THIS LETTER AND I AGREE TO BE BOUND BY ITS TERMS. I HAVE BEEN INFORMED OF AND WAIVE ANY CONFLICT OF INTEREST ARISING FROM THE FIRM'S REPRESENTATION OF MYSELF AND MRS. IN MATTERS RELATING TO THE CREATION OF OUR FAMILY TRUST. I CONSENT TO THE FIRM'S REPRESENTATION OF MRS. IN A DISSOLUTION OF MARRIAGE ACTION TO ME. I UNDERSTAND THAT I HAVE THE RIGHT TO HAVE THIS AGREEMENT REVIEWED BY INDEPENDENT COUNSEL.

Date: _____ _____

Mr.

SECOND

SUPPLEMENTAL

OUTLINE

PROGRAM OUTLINE

Attorneys' Fees: Practically, Ethically

2012

Presented by: Joel Mark

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* Nordman Cormany Hair & Compton LLP is a State Bar of California approved MCLE provider. This seminar has been approved for 1.0 hours of ethics MCLE.

Joel Mark

Mr. Mark has concentrated in trial practice and complex business litigation and, with thirty-nine years of experience, has handled a wide range of business litigation matters including trademark, trade secret and competitive business practice cases, shareholder dissolution and valuation actions, director and officer liability matters, real estate disputes, general contract and business disputes, banking litigation, and insurance coverage disputes. Mr. Mark additionally has handled over one hundred securities and broker/dealer cases and has represented over eighty attorneys and accountants in malpractice and malicious prosecution cases. Mr. Mark serves as a commercial and securities arbitrator for the American Arbitration Association (Chair Training 1993; Panel Certification 1999), the National Association of Securities Dealers (Chair Training 2002), and for the Los Angeles and Ventura County Superior Courts. Mr. Mark is a senior partner of Nordman Cormany Hair & Compton LLP and currently serves as Chair of the Firm's Litigation Group.

Mr. Mark also has lectured extensively on and served as an expert witness concerning attorneys' fees, legal ethics and litigation practice and procedure. As Chair of the California State Bar Committee on Mandatory Fee Arbitration (Member 1993-1997 and 2002-2008, Chair 1997 and 2008; Presiding Arbitrator, 2009 -2012) and as Chair of the Los Angeles DRS Attorney-Client Mediation and Arbitration Executive Committee (1997-2001), Mr. Mark wrote the lesson plan for and has participated in over thirty arbitrator training sessions and has presented numerous Section Education Institute Programs regarding attorneys' fees and practice ethics issues. Mr. Mark was the lead editor for the 1997 edition of the State Bar Form Attorneys' Fee Agreements publication, and participated in the 2006 revision of the publication. Mr. Mark also served on the California State Bar Committee on Professional Responsibility and Conduct (2000-2002). He also currently continues to participate in the Ventura County fee arbitration program.

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I. Introduction: This presentation is for California attorneys. It covers many of the practical and ethical considerations involved in contracting for, charging for, billing and accounting for, collecting, and resolving disputes regarding attorneys' fees. The presentation is of legal information only. It is not intended to create an attorney-client relationship between the presenter and any attendee. It may not be relied upon in lieu of independent research and verification. Nordman Cormany Hair & Compton LLP is a State Bar of California approved MCLE provider.

II. Ethics Objectives, Rules Sources and Resources

A. Purpose of Ethics Rules:
1. Guidance and professionalism.
2. Discipline.
3. Disbarment and other sanctions.
4. Disqualification.
5. Standard of care. *Mirabito v. Liccardo* 4 Cal. App. 4th 41 (1992).
6. Fiduciary duties. *David Welch Co. v. Erskine & Tully* 203 Cal. App. 3d 884 (1988).
7. Fee collection.
8. But, ethics rules violations do not create a separate cause of action based upon breach alone.

B. Sources and Resources:

1. The primary source of ethical materials relating to attorneys' fees in California is the California Rules of Professional Conduct ("Rules") and the State Bar Act.
2. A secondary source of such materials is the State Bar and local bar association ethics opinions. The State Bar ethics opinions, issued by the Committee on Professional Responsibility and Conduct ("COPRAC"), are available on the California State Bar website (www.calbar.ca.gov) and are searchable. They are, however, non-binding. Additionally, the State Bar offers an ethics hotline (1-800-2ETHICS), which strives to respond to ethics questions raised by California attorneys within four hours or less.
3. The State Bar Committee on Mandatory Fee Arbitration periodically offers "Arbitrator Advisories" (also available on the State Bar website) that cover a variety of ethical and other issues relating to attorneys' fees.
4. The Committee on Mandatory Fee Arbitration also offers on the website form fee agreements. These cover almost every attorney fee clause and situation and are very user friendly.
5. The ABA Model Rules and Model Code are not applicable to California attorneys, are sometimes inconsistent with the Rules, and should be looked to by the courts for only secondary guidance. California State Bar Formal Opinion No. 1983-71 (1983).

C. 2012 Caveat: The California Rules of Professional Conduct have been the subject of extensive revisions over the past few years. The majority of the new rules have been conditionally approved by the State Bar Board of Governors and presently are out for public comment. If adopted, the new Rules all will have different numbers and many may differ substantially from the Rules referred to in this Program Outline.

III. The General Ethical Principals Governing Attorneys' Fees

A. The Initial Agreement:

1. Probate Code section 16004(B).
   a. At the start, the relationship generally is considered at arm's length. *Setzer v. Robinson* 57 Cal. 2d 213 (1962) [based on Civil Code § 2235]; *Baron v. Mare* 47 Cal. App. 3d 304 (1975).
   b. As a result, the attorney has no obligation to advise the prospective client about the proposed fee agreement and, because the attorney therefore is not on both sides of the

transaction, the presumption of undue influence under section16004 (and its predecessor Civil Code § 2235) does not apply to fee agreements. *Ramirez v. Sturdevant* 21 Cal. App. 4th 904 (1994); *Setzer v. Robinson* 57 Cal. 2d 213 (1962).

2. Rule 3-300.
   a. Because the initial fee agreement usually is an arm's length agreement, Rule 3-300 is not applicable to typical fee agreements.
   b. This may be true even if the fee agreement is reached after the attorney-client relationship is formed. *Walton v. Broglio* 52 Cal. App. 3d 400 (1975).
   c. Rule 3-300 will be applicable to the initial fee agreement and any subsequent modification where "the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client" or where "the member wishes to obtain an interest in the client's property in order to secure the amount of the member's past due or future fees."

B. Rule 4-200:
   1. All fee agreements are subject to scrutiny in accordance with Rule 4-200 – An attorney may not charge an "unconscionable" fee.
   2. The unconscionability standard of Rule 4-200 is a "shock the conscience" standard. *Tarver v. State Bar* 37 Cal. 3d 122, 134 (1984); *Champion v. Superior Court (Boccardo)* 201 Cal. App. 3d 777 (1988); *Bushman v. State Bar* 11 Cal. 3d 558 (1974); *Herrscher v. State Bar* 4 Cal. 2d 399 (1935), *Goldstone v. State Bar* 214 Cal. 490 (1931).
   3. The factors that may result in a fee being unconscionable are enumerated in Rule 4-200; *see also*, *Serrano v. Priest* 20 Cal. 3d 25 (1977).
   4. The unconscionability determination is made based upon the facts and factors that exist at the time the contract is entered into, not whether it is unconscionable in light of subsequent events. *American Software, Inc. v. Ali* 46 Cal. App. 4th 1386 (1996); *Brobeck, Phleger & Harrison v. Telex Corp.* 602 F. 2d 866 (9th Cir. 1979).
   5. Charging fees in addition to statutory limitations is unconscionable. *In re Ronald Silverton* 36 Cal. 4th 81 (2005); *Matter of Croft* 3 Cal. State Bar Ct. Rptr. 838 (1998); *Matter of Shalant* 4 Cal. State Bar Ct. Rptr. 829 (2005); *Matter of Harney* 3 Cal. State Bar Ct. Rptr. 266 (1995).

6. Charging a fee subject to court approval without such approval is unconscionable. *Matter of Phillips* 4 Cal. State Bar Ct. Rptr. 322 (2001); *Matter of Bailey* 4 Cal. State Bar Ct. Rptr. 220 (2001); *Matter of Riley* 3 Cal. State Bar Ct. Rptr. 91 (1994); *Matter of Brimberry* 3 Cal. State Bar Ct. Rptr. 390 (1995); *Coviello v. State Bar* 41 Cal. 2d 273 (1953).
7. Successor counsel charging a full contingency fee in addition to the reasonable fee of former counsel is unconscionable. *Matter of Van Sickle* 4 Cal. State Bar Ct. Rptr. 980 (2006).
8. Charging a fee "wholly disproportionate to the services rendered" is unconscionable. *Recht v. State Bar* 218 Cal. 352 (1933).
9. Failure to be able to substantiate the fees charged can be unconscionable. *Warner v. State Bar* 34 Cal. 3d 36 (1983); *Bushman v. State Bar* 11 Cal. 3d 558 (1974).
10. Charging a "minimum fee" if a client discharges the attorney constitutes a penalty for exercising the client's right to change counsel and can be unconscionable. *Matter of Scarpa & Brown* 2 Cal. State Bar Ct. Rptr. 635 (1993).
11. Charging an unconscionable fee may be grounds for disbarment and/or a finding of moral turpitude. *Blair v. State Bar* 49 Cal. 3d 762 (1989). Attempting to charge an unconscionable fee also may result in discipline. *Dixon v. State Bar* 39 Cal. 3d 335 (1985). However, merely charging a fee in excess of a "reasonable fee" will not subject the attorney to discipline, as determination of the reasonableness of fees are left to the courts. *Herrscher v. State Bar* 4 Cal. 2d 399.
12. Taking a fee without performing services also is dishonest and can result in discipline (*Hulland v. State Bar* 8 Cal. 3d 440 (1972)), and the fee must be repaid (*In re Fountain* 74 Cal. App. 3d 715 (1977)).
13. Charging an unconscionable fee also may be the basis for a malpractice action. *Schultz v. Harney* 27 Cal. App. 4th 1611 (1994).
14. Fees charged in excess of statutory limitations (MICRA, workers' compensation cases, etc.) also may subject the attorney to discipline.

C. Payments by Third Parties:
1. Acceptance of payment from someone other than the client is not permitted unless (a) it does not impair the attorney's independent professional judgment or interfere with the attorney-client relationship, (b) it does not compromise attorney-client confidentiality, and (c) it is with the informed written consent of the client. Rule 3-310(F).

2. Practice Tip: It is advisable also to have the payor acknowledge in writing that he or she is not entitled to influence the conduct of the matter and not entitled to receive or view confidential communications between the attorney and the client.
3. The payor also is entitled to invoke mandatory fee arbitration against the attorney. *Wager v. Mirzayance* 67 Cal. App. 4th 1187 (1998).

D. Payment by Credit Card:
1. Accepting payment by credit card is ethically permissible provided systems are in place to prevent commingling, permit adjustments and preserve confidentiality; and, any processing fees must either be paid by the attorney or fully disclosed. ABA Comm. On Ethics and Prof. Responsibility Formal Opinion 00-419 (2000).
2. Payment of legal fees by credit it ethically permissible where the fees are earned and provided that the attorney's merchant account is not connected to the attorney's trust account. STATE BAR Formal Opinion 2007-172.
3. Advance fees may be paid by credit card, but must immediately be transferred to the attorney's trust account. STATE BAR Formal Opinion 2007-172.
4. Advances for costs cannot be paid by credit card, as Rule 4-100 requires that such advances be deposited in the attorney's trust account. STATE BAR Formal Opinion 2007-172
5. Descriptions on credit card charge slips may not reveal any information subject to attorney-client confidentiality. STATE BAR Formal Opinion 2007-172.

E. Payment by the Fruits of a Crime: It is a federal criminal offense to knowingly engage in monetary transactions in property constituting, or derived from, the proceeds of certain criminal offenses, including knowingly accepting money or property stolen in connection with such offenses as a fee for legal services. (18 U.S.C. § 1957.)

F. Principles of Interpretation of Fee Agreements:
1. Fee agreements are evaluated based upon conditions and matters reasonably foreseeable at the time they are made, will be strictly construed against the attorney, and must be "fair, reasonable and fully explained to the client" ["explained" apparently means: fully stated and understandable]. *Alderman v. Hamilton* 205 Cal. App. 3d 1033 (1988).
2. Although considered an "arms-length" transaction, any lack of specificity in the fee agreement's language will be construed

against the attorney. *In re County of Orange* 241 B.R. 212 (1999); *Norman v. Berney* 235 Cal. App. 2d 424 (1965).

3. The attorney has a professional responsibility to ensure that the fee agreement is neither unreasonable nor written in a manner that may discourage the client from asserting any rights that he or she may have against the attorney. Los Angeles County Bar Association Professional Responsibility and Ethics Committee Ethics Opinion No. 489; *see also, Ojeda v. Sharp Cabrillo Hospital* 8 Cal. App. 4th 1 (1992).
4. The attorney may not limit liability to client. Rule 3-400.

G. Scope of Services.

1. A clear limitation in the scope of services will protect the attorney from subsequent malpractice actions regarding any services outside of the agreed scope. But, limitations upon the scope of services cannot be so extensive that they constitute an attempt to avoid liability for actions normally within the standard of care for the particular service being performed. *Nichols v. Keller* 15 Cal. App. 4th 1672 (1993); *Janik v. Rudy, Axelrod & Zieff* 119 Cal. App. 4th 930 (2004).
2. The attorney will not be compensated for services rendered in excess of a specific contractual scope of services, unless the client is aware of and consents to such services. *Reynolds v. Sorosis* 133 Cal. 625 (1901); *Baldie v. Bank of America* 97 Cal. App. 2d 71 (1950). Where there are changed circumstances, and awareness of client, the attorney may recover the reasonable value of services performed in excess of the contractual scope of services. *Compare, McKee v. Lynch* 40 Cal. App. 2d 216 (1940); and *Brooks v. Van Winkle* 161 Cal. App. 2d 734 (1958).

IV. The Statutory Requirements of an Enforceable Fee Agreement

A. General Statutory Requirements:

1. Agreements to charge attorneys' fees must comply with Business & Professions Code sections 6146 [where a contingent fee in a medical malpractice case is charged], 6147 [where a contingent fee in any other case is charged], 6147.5 [in cases involving the recovery of claims between merchants], and 6148 [regarding other matters].
2. *See, Waters v Bourhis* 40 Cal. 3d 424 (1985) [rules re mixed MICRA and non-MICRA claims – attorneys beware of burden of proof and conflict of interest issues].
3. Statutory requirements and limitations are applicable to other cases including probate fees (Probate Code sections 10810 and

10811), guardianship and conservatorship fees (Probate Code section 2640 and 2645), workers' compensation fees (Labor Code section 4903), fees for services as athletic agent (Business & Professions Code sections 18895, et. seq.), bankruptcy fees, "*Cumis*" counsel fees (Civil Code section 2860), and Social Security benefit matters (42 U. S. C. section 406).

4. Where a fee agreement is negotiated in Spanish, Chinese, Tagalog, Vietnamese or Korean, orally or in writing, the attorney must deliver to the client a translation of the contract before it is executed. Civil Code section 1632(b)(6).

B. Contingent Fee Contracts:

1. Section 6147 requires that a written contract be signed by the client and that it set forth the contingency rate, how costs and disbursements will be applied (*i.e.*, will the contingent fee be calculated on the net recovery or gross recovery), a statement whether the client will be responsible for any related services (*i.e.*, appeal, tax implications, etc.), and a statement that the fees are not set by law and are negotiable.
2. In *Franklin v. Appel* 8 Cal. App. 4th 875 (1992), the Court of Appeal found that section 6147 applies only to litigation matters and not to other contingency arrangements, and to that limited extent disagreed with *Alderman v. Hamilton* 205 Cal. App. 3d 1033 (1988). The Court rejected the former client's attempt to void the fee agreement based on its lack of the statement required by section 6147 that the fee amount is not set by law. It appears, however, that this result was overturned by the Legislature when it amended section 6147(a) to change "plaintiff" to "client" [but note that in doing so the legislature erroneously left in one use of "plaintiff."]. *See also, Arnall v. Superior Court (Liker)* (Second District Court of Appeal, November 22, 2010) [Section 6147 held to apply to all contingent fee contracts, including those in transactional matters, and to mixed fee arrangements such as hourly plus success bonus].
3. Subsequent modifications of the contingent fee agreement also must comply with section 6147. *Fergus v. Songer* 150 Cal. App. 4th 552 (2007); *Stroud v. Tunzi* 160 Cal. App. 4th 377 (2008).
4. Any provision preventing settlement, or requiring the attorney's approval for the settlement, is invalid. *Calvert v. Stoner* 33 Cal. 2d 97 (1948); *Lemmer v. Charney* 195 Cal. App. 4th 99 (2011).
5. Although widely approved in most all other situations, with limited exceptions contingent fee contracts are inappropriate in dissolution of marriage matters. *Theisen v. Keough* 115 Cal. App. 353 (1931) [void as promotive of divorce]; *but see* STATE BAR Formal Opinion No. 1983-72 [contingent fee contract

permissible in property aspects of dissolution provided that the agreement does not discourage or provide impediment to potential reconciliation of spouses during pendency of action]. A contingent fee is permissible for the representation of a respondent in a dissolution action. *Krieger v. Bulpitt* 40 Cal. 2d 97 (1953).

6. Contingent fee arrangement in action to recover child support is improper. *Kyne v. Kyne* 60 Cal. App. 2d 326 (1941). However, the attorney still may recover the reasonable value of the services. *Leonard v. Alexander* 50 Cal. App. 2d 385 (1942).
7. Contingent fee arrangement in criminal representation considered unethical. *See, United States ex rel. Simon v. Murphy* 349 F. Supp. 818 (E.D. Pa. 1972).
8. Amount of the contingent percentage is not subject to a maximum where based upon genuine contingency. *Estate of Guerin* 194 Cal. App. 2d 566 (1961).
9. However, percentages in excess of 50% can be found to be unconscionable. *Swanson v. Hempstead* 64 Cal. App. 2d 681 (1944). In cases where the contingency is slight or the amount of work involved is small, even contingencies less than 50% can be found to be unconscionable. *Blattman v. Gadd* 112 Cal. App. 76 (1931); *Denton v. Smith* 101 Cal. App. 2d 841 (1951).
10. Whether a contingent fee contract is unconscionable is judged at the time the contract is made. *Setzer v. Robinson* 57 Cal. 2d 213 (1962).
11. Sophistication of the client is a factor in judging unconscionability of a contingent fee agreement. *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.*, 187 Cal. App. 4th 1405 (2010).
12. Reversion to hourly fee upon discharge is suspect and may be found to be unconscionable (i.e., because removal of the risk of no recovery may render the fee not truly contingent). And, in one Alaska case where the contract provided that if the attorney is discharged the attorney will be entitled to recover the hourly rate, the arrangement was found to be unconscionable and a violation of Model Rule 1.2 (improper control of client's settlement decision). *Compton v. Kittleson* 171 P.3d 172 (2007).
13. "Front loading" of contingent fee in structured settlement must comply with Rules 4-200 and 3-300. *See* STATE BAR Formal Opinion No. 1995-135.

C. Other Fee Arrangements:

1. Section 6148 requires that a written contract be signed by the client and that it set forth the basis for compensation (including the hourly rates, statutory fees or flat fees and other standard

rates, fees and charges), the scope of services (general nature of the services and any limitation on the services to be provided), and a statement as to the respective responsibilities of both the attorney and the client in the performance of the agreement. A signed duplicate original must be provided to the client.

2. A statement regarding presence of malpractice insurance coverage is no longer a requirement, but newly adopted Rule 3-410(C) requires a disclosure of the absence of coverage in all matters where it is reasonably foreseeable that the representation will exceed four hours of the attorney's time.
3. Practice Tip: The better practice is to send the contract to the client before signature by the attorney, have the client return two signed copies, and then send a fully executed contract back to the client.
4. The requirements of these statutes otherwise may not be waived except with the informed written consent of the client.
5. While Section 6148 does exempt several types of fee agreements (*i.e.*, where total expense is less than $1,000, in cases of emergency, if the client is a corporation, etc.), the better practice is to have a written fee agreement for all engagements.
6. Unless required to be in writing, an oral fee agreement is permissible and will be enforced according to its terms. *Harvey v. Ballagh* 38 Cal. App. 2d 348 (1940); *Thomas v. Casaudoumecq* 205 Cal. App. 2d 549 (1962). NB: The attorney doubtless will bear the burden of proof regarding the terms of such a contract in the event that such terms later are contested by the client.
7. Practice Tip: Get it in writing!

D. Failure to Comply with Statutory Requirements:
   1. Where there is an express written contract complying with the appropriate statute, the attorney is entitled to recover the full fee agreed to in the contract and is not limited to *quantum meruit* recovery. *Berk v. Twentynine Palms Ranchos, Inc.* 201 Cal. App. 2d 625 (1962); *see also, Carlson, Collins, Gordon & Bold v. Banducci* 257 Cal. App. 2d 212 (1967).
   2. Failure to comply with the provision of the appropriate statutes will render the fee agreement "voidable" at the option of the client, and the attorney's fee will be limited to a "reasonable fee" (*quantum meruit*) only.
   3. Failure to provide billing statements in compliance with section 6148(b) also will give the client the option of voiding the fee agreement and limiting the attorney to reasonable value of services.
   4. Even a promissory note signed by the client is voidable, where there is no complying written fee agreement and the note itself

does not satisfy section 6148. *Iverson, Yoakum, et al v. Berwald* 76 Cal. App. 4th 999 (2000) [attorney's claim was held barred by two-year statute of limitations for *quantum meruit*, since written promissory note was voidable by client].

5. Exceeding other statutory limitations will result in a finding that the fee is "illegal" and/or "unconscionable." *Matter of Phillips* 4 Cal. State Bar Ct. Rptr. 315 (2001).

E. Calculating a "Reasonable Fee":

1. The attorney bears the burden of proving that the fee is reasonable. *Clark v. Millsap* 197 Cal. 795 (1926); *Priester v. Citizens Nat'l Bank* 131 Cal. App. 2d 314 (1955).
2. Although expert testimony is admissible on the question of the reasonable value of attorneys' fees (*Kurland v. Simmons* 126 Cal. App. 2d 79 (1954); *Kanner v. Globe Bottling Co.* 273 Cal. App. 2d 559 (1969)), the reasonable amount of attorneys' fees are entirely within the discretion of the trial court and may be determined without expert testimony (*City of Los Angeles v. Los Angeles-Inyo Farms* 134 Cal. App. 268 (1933)), contrary to expert testimony (*Melnyk v. Robledo* 64 Cal. App. 3d 618 (1976); *Vella v. Hudgins* 151 Cal. App. 3d 515 (1984)), without evidence of time records (*Weber v. Langholz* 39 Cal. App. 4th 1578 (1995)), or without any testimony or evidence at all (*Hedden v. Valdeck* 9 Cal. 2d 631 (1937)).
3. However, the trial court must either explain how it reached its decision regarding the proper amount of fees awardable, or evidence upon which such a calculation can be made must be present in the record. *Gorman v. Tassajara Dev. Corp.* 178 Cal. App. 4th 44 (2009).
4. The attorney need not submit time records and may prove the reasonable value of the fee by reconstructing bills and testifying about the estimated hours expended on the matter. *Mardirossian & Associates, Inc. v. Ersoff* 153 Cal. App. 4th 257 (2007).
5. Factors upon which a reasonable fee may be determined (*see* MFA Arbitrator Advisory 98-03):
    a. Reasonable fee factors include the nature of the litigation, the difficulty of the litigation, the amount in controversy, the skill employed in handling the matter, the attention given to the matter, the success or failure of the attorney's efforts, the education of the attorney, the age of the attorney, the experience of the attorney in the subject matter of the litigation, the necessity for such experience and skill, the time consumed, the prevailing reasonable rate in the county in which the services are performed,

the professional standing and reputation of the attorney, the amounts awarded previously in the litigation, the contingent nature of the fee, whether the matter has precluded the attorney from acceptance of other employment and extraordinary time limitations imposed by the matter. See, Rule 4-200(B); *Berry v. Chaplin* 74 Cal. App. 2d 652 (1946); *Melnyk v. Robledo* 64 Cal. App. 3d 618 (1976); *Mandel v. Lackner* 92 Cal. App. 3d 747 (1979); *Dietrich v. Dietrich* 41 Cal. 2d 497 (1953); *Sharon v. Sharon* 75 Cal. 1 (1888); *Glendora Comm. Redev. Agency v. Demeter* 155 Cal. App. 3d 465 (1994); *Bruckman v. Parliament Escrow Corp.* 190 Cal. App. 3d 1051 (1987); *Stokus v. Marsh* 217 Cal. App. 3d 647 (1990).

b. The profit margin the attorney may make on associates and/or contract attorneys is not a relevant factor. *Shaffer v. Superior Court* 33 Cal. App. 4th 993 (1995); *Margolin v. Regional Planning Comm. of Los Angeles* 134 Cal. App. 3d 999 (1982). However, use of contract lawyers usually must be disclosed to the client. STATE BAR Formal Opinion No. 2004-165.

c. Billing for the time of paralegals and other professionals necessary to accomplish the representation is appropriate. *Missouri v. Jenkins* 491 U. S. 274 (1989); *Guinn v. Dotson* 23 Cal. App. 4th 262 (1994); *Sundance v. Municipal Court* 192 Cal. App. 3d 268 (1987).

d. Although time records are not required, the specificity and adequacy of an attorney's time records can be a factor reflecting upon the reasonable value of the attorney's services. *Martino v. Denevi* 182 Cal. App. 3d 553 (1986); *Margolin v. Regional Planning Comm. of Los Angeles* 134 Cal. App. 3d 999 (1982).

e. The charges must be appropriate. Violations may include failure to pursue a less costly option, services unrelated to obtaining the desired outcome, multiple attorneys where unnecessary, unnecessary court appearances or appearances made necessary by untoward attorney conduct, excessive research and excessive and/or unsupervised associate and paralegal activity.

F. Fee Agreement Forms: The California State Bar Committee on Mandatory Fee Arbitration offers comprehensive suggested forms of fee agreements and special terms for a nominal cost. These were revised in 2006. Other providers, such as the California Continuing Education of the Bar, offer instructive form fee agreements as well.

V. Retainers, Alternative Billing Arrangements and Related Ethical Issues

A. True Retainers and Trust Accounting Issues:

1. Availability retainers, paid in exchange for a contractual commitment to be available for legal services when requested, are earned when paid and are not refundable, and therefore cannot be deposited into the client trust account. Rule 3-700(D)(2). The arrangement must be clearly an availability retainer to be enforced as such. *Baranowski v. State Bar* 24 Cal. 3d 153 (1979).

2. Retainers against future services placed in trust account are not earned until the services are performed and must be retained in trust. *Securities and Exchange Commission v. Interlink Data Network of Los Angeles, Inc.* 77 F. 3d 1201 (9th Cir. 1996); Rule 4-100(A); *Katz v. Worker's Como. Appeals Bd.* 30 Cal. 3d 353 (1981); *T & R Foods v. Rose* 47 Cal. App. 4th Supp. 1 (1996) [Los Angeles Superior Court Appellate Division]; *but see, Baranowski v. State Bar* 24 Cal. 3d 153 (1979) [expressly leaving open whether "advance fees" must be deposited into the trust account].

3. Whether a so-called "retainer" is a true retainer or an advance payment of future fees will be determined by the facts and circumstances of the entire agreement, and not by the characterization that the attorney may give the payment in the fee agreement. *Matthew v. State Bar* 49 Cal. 3d 784 (1989); *see also, Federal Savings & Loan v. Angell, Holmes & Lea* 838 F.2d 395 (9th Cir. 1988); *In re: Matter of Lais* 3 Cal. State Bar Ct. Rptr. 907 (1998) [discipline against attorney charging a "non-refundable" retainer for the first 10 hours of work, finding this was an advance payment and not a true retainer]; *see also, Dixon v. State Bar* 39 Cal. 3d 335 (1985); Arbitrator Advisory 01-02.

4. Even if the payment is a true retainer, it will be subject to "unconscionability" scrutiny under Rule 4-200. *In re: Scapa & Brown* 2 Cal. State Bar Ct. Rptr. 635 (1993) [discipline against attorney charging "minimum fee" upon discharge].

B. Alternative Billing Arrangements:

1. Modified hourly billing
   a. Blended rates
   b. Caps
   c. Budgets
   d. "Firm" Estimates
   e. Hourly rate plus contingency
   f. Discounts and volume rates

g. Unbundled fees (task specific services)

2. Contingent-based fees
   a. Cost-plus arrangements
   b. Incentive billing (success fees and bonuses)
   c. Value billing
3. Flat fee arrangements
   a. Fixed fee arrangements
   b. "Per diem" fee
   c. Task-based flat fees
   d. Unit fee (minimum charge)
   e. "Loaned" attorney
4. "Exploratory" or "diagnostic" fees
5. The "DuPont" model
6. All alternative arrangements must be clearly understood and agreed to by the client, any limitation on the scope of services required by such alternative arrangements must be clearly spelled out in writing and agreed to by the client, and such alternative arrangements are subject to "unconscionability" scrutiny under Rule 4-200.
7. Minimum fee schedules set by state or local bar associations are illegal under the Sherman Antitrust Act. *Goldfarb v. Virginia State Bar* 421 U.S. 773 (1975).

C. "Unbundling" or "Limited Scope Representations:"
   1. "Unbundling" or "Limited Scope Representations" are specifically approved for Family Law matters. California Rules of Court, Rule 5.70.
   2. They also are appropriate in other areas, such as document production. Los Angeles County Bar Association Professional Responsibility and Ethics Opinion 483 (1985).
   3. They must be with the informed written consent of the client (Los Angeles County Bar Association Professional Responsibility and Ethics Opinion 502; Business & Professions Code section 6147 and 6148), and reasonable under the circumstances (Rule 3-400).
   4. In some states, the "ghostwriter" must be identified to the court.
   5. The practitioner who gives "coaching" advice must be careful not to go so far as to assist in the unauthorized practice of law by the client. Rule 1-300.
   6. The duties of competence (Rule 3-110), confidentiality (Business & Professions Code section 6068(e)), and avoiding adverse interests (Rule 3-310), and the duty to advise on related issues (*Nichols v. Keller* 15 Cal. App. 4th 1672 (1993)), all apply to Limited Scope Representations.

7. Practice Tip: Intake interview checklists that can be used during intake of Limited Scope Representation clients are available on the California State Bar website at www.calbar.ca.gov in the risk management materials section.

D. Charging for Non-Legal Services: An attorney may perform and charge for services that otherwise might be performed by laymen, provided that the attorney complies with applicable attorney ethical rules with respect to all the services, both legal and non-legal, including confidentiality, loyalty and rules respecting attorney advertising. *Layton v. State Bar* 50 Cal. 3d 889 (1990); STATE BAR Formal Opinion No. 1999-154.

E. Stock or Other Client Assets for Services:

1. Because taking stock or other client assets in barter for services is considered a form of doing business with a client, compliance with Rule 3-300, including i) the informed written consent of the client, ii) that the transaction is "fair and reasonable" to the client, iii) that the client is advised to seek independent counsel before entering into the alternative billing arrangement, iv) that the client has the reasonable opportunity to consult independent counsel, and v) that the transaction is explained in writing to the client in a manner that the client should reasonably understand, is required. *Passante v. McWilliam* 53 Cal. App. 4th 1240 (1997).
2. The attorney retains the burden of proving that the transaction was fair and reasonable even where the client consents in writing and has the opportunity to consult independent counsel. *See, e.g., Mayhew v. Benninghoff* 53 Cal. App. 4th 1365 (1997), *Bradner v. Vasquez* 43 Cal. 2d 147 (1954); Probate Code section 16004(C).
3. The value of the stock, or the foreseeable potential future value of the stock, must not be such that the fee is rendered "unconscionable" within the meaning of Rule 4-200, measured at the time the transaction is entered into.

F. Assignment of Literary Rights: An agreement to take assignment of literary rights must comply with Rule 3-300, and in criminal cases may subject attorney to claims of conflict of interest (providing ineffective counsel). *Maxwell v. Superior Court* 30 Cal. 3d 606 (1982); *People v. Corona* 80 Cal. App. 3d 684 (1978).

G. Syndication of Recovery: No California case has ruled on the propriety of syndicating the recovery. Practical and ethical concerns include whether the syndication is an investment contract, whether the

arrangement is an assignment (impermissible in a personal injury matter), whether conflicts of interest arise between nominal plaintiff and syndicate investor, and whether the arrangement constitutes soliciting clients and fomenting litigation. For a general discussion, see *Killian v. Millard* 228 Cal. App. 3d 1601 (1991).

VI. Payment and Advancements for Client Costs

A. Permissible Advances:
   1. An attorney may not directly or indirectly pay a current or prospective client's personal or business expenses. Rule 4-210(A).
   2. An attorney may lend money to a client upon the client's written promise to repay the loan. Rule 4-200(A)(3).
   3. An attorney may advance costs for litigation with repayment contingent upon the outcome of the matter. Rule 4-200(A)(3).

B. Requirements for Reimbursement:
   1. Absent an advance agreement giving the attorney permission to incur all reasonable costs within the attorney's discretion, the attorney will be entitled to recover the direct costs of suit from the client (*Cooley v. Miller & Lux* 156 Cal. 510 (1909); *Tasker v. Cochrane* 94 Cal. App. 361 (1928)), but no other costs or expenses.
   2. Specific approval of all other costs is required before the client is obligated to reimburse the attorney, including travel expenses, extraordinary expenses, additional counsel or assistance, etc. *See*, 1 Witkin California Procedure, "Attorneys" section 190 (4th ed. 1996).

C. Compliance with Business & Professions Code: In contingent fee cases, how the costs may affect the net recovery to the client also must be explained. Business & Professions Code section 6147.

D. No Profit Element: An attorney must bill the costs as incurred and may not add a profit element on such costs unless clearly disclosed and agreed to in writing.

E. Trust Accounting: If the client advances funds to pay future costs, they must be kept in the client trust account. Rule 4-100(A).

F. Advances Absent Client Approval: The attorney ethically may advance or pay for costs directly related to the matter that the client may refuse to pay even though they might not be repaid and even if such repayment is not contingent on the outcome of the action. Los Angeles

County Bar Association Professional Responsibility and Ethics Committee Ethics Opinion No. 495 (1999).

VII. Liens on Client Assets and Recoveries and Related Ethical Issues

A. Liens:

1. Liens on a cause of action or recovery are permissible (*Isrin v. Superior Court* 63 Cal. 2d 153 (1965)), but must be in writing (*Cetenko v. United California Bank* 30 Cal. 3d 528 (1982)) or based upon facts supporting lien by implication (*County of Los Angeles v. Construction Laborers Trust, etc.* 137 Cal. App. 4th 410 (2006).
2. Contract seeking to obtain a lien for attorneys' fees on the recovery in the matter that is the subject to the representation (a contingent fee) does not require compliance with Rule 3-300. *Plummer v. Day/Eisenberg LLP* 184 Cal. App. 4th 38 (2010); *see also, Matter of Silverton* 4 Cal. State Bar Ct. Rptr. 252 (2001).
3. Contract seeking to obtain a lien for attorneys' fees from any other source does require compliance with Rule 3-300. *Fletcher v. Davis* 33 Cal. 4th 61 (2004); *Hawk v. State Bar* 45 Cal. 3d 589 (1988) [predecessor Rules].
4. Even where consented to in writing with advice of independent counsel, the arrangement also must be "fair and reasonable to the client." Rule 3-300.
5. A contract for a percentage of the recovery, by itself, will not create a lien on the recovery; but, a contract for a percentage of the "fund" recovered will. *Skelly v. Richman* 10 Cal. App. 3d 844 (1970); *Gelfand, Greer, Popko & Miller v. Shivener* 30 Cal. App. 3d 364 (1973).
6. However, a constructive trust may be implied where the parties contemplate that the attorney's recovery will come from the success of the client's cause of action. *Jones v. Martin* 41 Cal. 2d 23 (1953).
7. No lien may be created or enforced absent a contractual relationship between the attorney and the client against whom the lien is asserted. *Carroll v. Interstate Brands Corp.* 99 Cal. App. 4th 1168 (2002) [lien asserted by counsel brought in by primary counsel may not assert a lien absent contract with client].
8. The lien is valid upon the execution of the initial agreement. *Saltarelli & Steponovich v. Douglas* 40 Cal. App. 4th 1 (1995).
9. The lien will survive discharge (*Weiss v. Marcus* 51 Cal. App. 3d 590 (1975)) or proper mandatory or voluntary withdrawal (*Pearlmutter v. Alexander* 97 Cal. App. 3d Supp. 16 (1979)). The

lien will not survive where the attorney withdraws without cause. *Hansel v. Cohen* 155 Cal. App. 3d 563 (1984).

10. Statutory liens also have been recognized in a number of cases. *E.g.,* Labor Code section 4903(a) [workers' compensation]; *Los Angeles v. Knapp* 7 Cal. 2d 168 (1936) [condemnation]; Family Code section 272 [family law]; Probate Code section 10830 [probate].
11. Lien may not attach to child support award. *Hoover-Reynolds v. Superior Court* 50 Cal. App. 4th 1273 (1996).
12. Client's files or papers may never be the subject of a lien. *Weiss v. Marcus* 51 Cal. App. 3d 590 (1975); *Academy of California Optometrists, Inc. v. Superior Court* 51 Cal. App. 3d 999 (1975).

B. Enforcement:

1. Where the lien is appropriate (*i.e.*, complying with the foregoing requirements), it will be enforced by the courts.
   a. A court may not approve a settlement which may operate to defeat a prior counsel's valid lien. *Epstein v. Abrams* 57 Cal. App. 4th 1159 (1997).
   b. Such a lien will survive a bankruptcy discharge. *Saltarelli & Steponovich v. Douglas* 40 Cal. App. 4th 1 (1995).
   c. A valid lien is entitled to priority over any offset to which the judgment debtor may be entitled. *Brienza v. Tepper* 35 Cal. App. 4th 1839 (1995).
   d. The lien may be entitled to priority over other secured judgment creditors where the lien is as to the proceeds of a tort recovery and the creditor's security does not specifically extend to the tort recovery. *Waltrip v. Kimberlin* 165 Cal. App. 4th 517 (2008).
   e. The lien may be entitled to priority over liens of medical providers in personal injury actions. *Gilman v. Dalby* 176 Cal. App. 4th 606 (2009).
2. A notice of lien may be filed in the underlying action (*Hansen v. Jacobsen* 186 Cal. App. 3d 350 (1986)), but is not required to sustain the lien (*Id.*; *see Bluxome Street Associates v. Woods* 206 Cal. App. 3d 1149 (1988)).
3. One decision has questioned the propriety of filing the lien in the underlying action, because it might hinder settlement. *Carroll v. Interstate Brands Corp.* 99 Cal. App. 4th 1168 (2002). On the other hand, another decision held that where a notice is filed by a discharged attorney, new counsel and insurer with notice of the lien may be liable for interference with prospective economic advantage where the insurer pays full settlement

amount to new counsel and client in exchange for a full release. *Levin v. Gulf Ins. Group* 69 Cal. App. 4th 1282 (1999).

4. The lien must be enforced in a separate action by the attorney against the client, not in the action in which the lien is created. *Hansen v. Jacobsen* 186 Cal. App. 3d 350 (1986); *Bandy v. Mt. Diablo Unified Sch. Dist.* 56 Cal. App. 3d 230 (1976); *Carroll v. Interstate Brands Corp.* 99 Cal. App. 4th 1168 (2002) [trial court in underlying action lacks jurisdiction to determine validity of lien or even to order it expunged]; *Brown v. Superior Court (Cyclon Corp.)* 116 Cal. App. 4th 320 (2004) [attorney's lien cannot be filed in underlying action even in face of junior judgment lien creditor, although it may be abuse of discretion to honor junior lien before separate action establishes attorney's lien].
5. There are some exceptions: *Spires v. American Bus Lines* 158 Cal. App. 3d 211 (1984) [former attorney permitted to intervene in settlement conference to assert lien on client's recovery in settlement of case when client is represented by successor counsel]; *Curtis v. Estate of Fagan* 82 Cal. App. 4th 270 [lien involving compromise of minor's claim may be determined in underlying action]; *Law Offices of Stanley J. Bell v. Shine, Browne & Diamond* 36 Cal. App. 4th 1011 (1995) [a determination made as to fees in the underlying action as to which no objection is made will be final and binding on the parties].
6. The separate enforcement action may name as defendants anyone – the client, successor counsel (*Levin v. Gulf Ins. Group* 69 Cal. App. 4th 1282 (1999)) and/or an insurer (*Siciliano v. Fireman's Fund Ins. Co.* 62 Cal. App. 3d 745 (1976)) – who refuses to pay the first attorney or makes a payment directly to the client in knowing disregard of the attorney's lien.
7. Where the lien action names the client as a defendant, notice of client's right to arbitrate under Business and Professions Code section 6102 is required.
8. Where co-counsel or successor counsel forges the name of other counsel and negotiates the settlement check without honoring other counsel's lien, co-counsel or successor counsel may be sued for conversion and interference with prospective economic advantage. *Plummer v. Day/Eisenberg, LLP* 2010 Daily Journal D.A.R. 6131 (4th District, April 26, 2010).

C. Other Issues:
1. Holding settlement proceeds in trust account as means of enforcing lien is not unethical (*In re: Feldsott* 3 Cal. State Bar Ct. Rptr. 754 (1997)); but, refusal to pay over settlement

proceeds without proper justification is subject to discipline *(In re: Kaplan* 2 Cal. State Bar Ct. Rptr. 509 (1992)).

2. An attorney does not violate Rule 4-100 by refusing to turn over settlement funds or endorse a settlement check where to do so would extinguish the attorney's charging lien. However, in such cases, the attorney must make a reasonable determination of the amount to which he or she is entitled and, if the client does not agree, promptly seek a resolution of the fee dispute through arbitration or judicial determination as may be appropriate. State Bar Formal Opinion 2009-177.
3. Successor counsel has an obligation to advise former counsel who has a valid lien of the fact of and the amount of a contingency fee recovery despite the client's instructions not to do so. But, the attorney may not disclose any other confidential information. State Bar Formal Opinion 2008-175.
4. Valid liens usually will be given priority over later claims (*Pangborn Plumbing Corp. v. Carruthers & Skiffington* 97 Cal. App. 4th 1039 (2002); *see,* 1 Witkin, *California Procedure*, "Attorneys" § 198 (*4th ed.* 1996)), including tax liens on recovery (*see, Bree v. Beall* 114 Cal. App. 3d 650 (1981)).
5. However, the attorney's lien is subordinate to an adverse party's right to offset a judgment obtained in the same action based upon the same transaction. *Pou Chen Corporation v. MTS Products* 2010 Daily Journal D.A.R. 4577 (2d District, March 4, 2010).
6. Lien may be defeated by equitable considerations. *Del Conte Masonry v. Lewis* 16 Cal. App. 3d 678 (1971).
7. Where a lien or security interest in client property to secure payment of fees is found to be unenforceable under Rule 3-300 or on some other basis, the attorney only loses the security but may maintain a claim against the client for the full amount of the fee. *Shopoff & Cavallo LLP v. Hyon* 167 Cal. App. 4th 1489 (2008).
8. A law firm employee who leaves firm has no lien on recovery on cases he handled while employed by the firm. *Trimble v. Steinfeldt* 178 Cal. App. 3d 646 (1986).

VIII. Fee Splitting and Referral Fees

A. Referral From One Attorney to Another:

1. Referral fees are governed by Rule 2-200 and require the informed written consent of the client after full disclosure and no increase in the overall fee to the client. *Chambers v. Kay* 29 Cal. 4th 142 (2002); *Scolinos v. Kolts* 37 Cal. App. 4th 635 (1995).

2. Compliance with Rule 2-200 is non-delegable and is required even where the referred attorney promises to obtain the informed written consent of the client for the referring attorney. *Margolin v. Shemaria* 85 Cal. App. 4th 891 (2000).
3. Provided that Rule 2-200 is satisfied, agreements between attorneys regarding sharing or splitting fees are permissible and will be enforced according to their terms (*Bunn v. Lucas, Pino & Lucas* 172 Cal. App. 2d 450 (1959); *Dunne & Gaston v. Keltner* 50 Cal. App. 3d 560 (1975)), even where the referring attorney's compensation is simply a forwarding or referral fee and the referring attorney performs no additional services on the matter (*Moran v. Harris* 131 Cal. App. 3d 913 (1982)).
4. Although the client must consent in writing, it is not required that the agreement between the two attorneys be in writing and/or be signed by both attorneys; and, the client's consent may come at any time before the division is made, including after the services are fully performed. *Mink v. Maccabee* 121 Cal. App. 4th 835 (2004); *Cohen v. Brown* 173 Cal. App. 4th 302 (2009). Caution: Rule revisions currently under consideration, if adopted, would require the written consent of the client to be made at the outset of the association.
5. A referral fee will be prohibited where there is no Rule 2-200 compliance. *Campagna v. City of Sanger* 42 Cal. App. 4th 533 (1996) [also holding that a subsequently negotiated referral fee must be disclosed to the client and, if not, the referral fee reverts to the client].

B. Fee Splitting Between Co-Counsel:
1. All agreements to split fees are subject to Rule 2-200 and cannot be enforced unless the arrangement complies with the Rule or fits within one of its recognized exceptions. *Chambers v. Kay* 29 Cal. 4th 142 (2002).
2. Failure to comply with Rule 2-200 will render the fee-splitting agreement unenforceable, including the denial of *quantum meruit* recovery measured by the apportionment of the contingent fee. *Id.*
3. A non-complying attorney may still recover the reasonable value of the services provided that it is justifiable on some reasonable basis other than by the agreed percentage of the recovery. *Huskinson & Brown v. Wolf* 32 Cal. 4th 113 (2004).
4. In a case where the client has not consented to the fee-splitting agreement in accordance with Rule 2-200, *quantum meruit* recovery may be had only against co-counsel and not against the client. *Strong v. Beydoun* 166 Cal. App. 4th 1398 (2008). On the other hand, where the client has consented to the fee-splitting

agreement but the client later fires one of the attorneys, unless that agreement provides otherwise, *quantum meruit* recovery may be had against the client only. *Olsen v. Harbison* 191 Cal. App. 4th 325 (2010).

5. In class actions, the fee-splitting agreement must also be disclosed to and approved by the court. *Mark v. Spencer* 166 Cal. App. 4th 219 (2008); CRC Rule 3.769.
6. Rule 2-200 does not apply to agreements by lawyers leaving or dissolving a partnership. *Anderson, McPharlin & Conners v. Yee* 135 Cal.App.4th 129 (2005).

C. Potential Liability Issues:
1. There may be a potential exposure for liability to the client for "negligent referral." *Miller v. Metzinger* 91 Cal. App. 3d 31 (1979) [failure to make referral until after running of statute of limitations].
2. Under certain circumstances, a cause of action for indemnity against malpractice claims may be stated by the non-negligent attorney against the negligent attorney. *Musser v. Provencher* 28 Cal. 4th 274 (2002).
3. No cause of action lies in favor of the referring attorney against the negligent attorney for loss of the expected share of the fee. *Beck v. Wecht* 28 Cal. 4th 289 (2002).

D. Fee Splitting with a Non-Attorney:
1. Rule 1-320 prohibits splitting legal fees with any non-lawyer, and prohibits compensation or gifts to a non-lawyer in exchange for a referral of business.
2. Contract to divide fees with non-attorney is unenforceable as an illegal contract. *McIntosh v. Mills* 121 Cal. App. 4th 333 (2004) [consulting fee in class action as percentage of attorney's fee held unenforceable]; *see also, Cain v. Burns* 131 Cal. App. 2d 439 (1955). Possible exception may be with respect to statutory fees. Los Angeles County Bar Association Professional Responsibility and Ethics Opinion 515 (2006).
3. *See also, Hyon v. Selten* 152 Cal. App. 4th 463 (2007) [contract with unregistered referral agency to provide counsel in exchange for a percentage of the recovery is unenforceable, but *quantum meruit* recovery is available as to any non-legal services provided].
4. Sharing profits with non-attorney employees by a profit-sharing plan or retirement plan is not prohibited, provided the plan does not circumvent the Rules.
5. An arrangement whereby an attorney refers clients to an outside provider, such as an insurance agent, in exchange for a

fee and/or the expectation of referrals in return is not prohibited, provided that Rules 3-300 and 3-310(B) are complied with. *See* State Bar Formal Opinion 1995-140; *see also*, Los Angeles County Bar Association Professional Responsibility and Ethics Committee Ethics Opinion No. 477 (1994) [referral to medical facility in which attorney owns an interest]. *But see*, Insurance Code section 1724 [prohibiting licensed broker from paying or receiving commission for referral].

6. Payment of money to spouse of deceased partner does not violate Rule 1-320. *Estate of Linnick* 171 Cal. App. 3d 752 (1985).

IX. Modifying a Fee Agreement

A. Permissible Conduct:

1. A fee agreement can be modified as can any other contract, even after the commencement of the attorney-client relationship. *Walton v. Broglio* 52 Cal. App. 3d 400 (1975); *Ramirez v. Sturdevant* 21 Cal. App. 4th 904 (1994); *Vella v. Hudgins* 151 Cal. App. 3d 515 (1984).

2. There are exceptions: *Severson & Werson v. Bolinger* 235 Cal. App. 3d 1569 (1991) [attorney cannot change rates without notice to client even if fee agreement is for "regular hourly rates"; attorney has a professional responsibility to make sure clients understand the firm's billing procedures and rates]; *Grossman v. State Bar* 34 Cal. 3d 73 (1983) [attorney suspended for taking compensation in excess of fixed-fee arrangement without client's informed written consent]; *Priester v. Citizens Natl. Bank* 131 Cal. App. 2d 314 (1955) [where contract is made during the existence of the attorney-client relationship, the burden is on the attorney to establish that the transaction is fair and reasonable and no advantage was taken].

B. Notification to the Client: Any significant changes in the economics of the relationship must also be brought to the attention of the client. Rule 3-500. ["A member shall keep a client reasonably informed about significant developments . . . , including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed."]

C. Fairness, Disclosure and Consent:

1. Subsequent modifications also will be scrutinized for fairness, and care must be taken in dealing with any potential conflicts of interest such modifications may create. *Baron v. Mare* 47 Cal. App. 3d 304 (1975); *Ramirez v. Sturdevant* 21 Cal. App. 4th 904 (1994) [modification as part of settlement creating adversity

between attorney and client will be scrutinized for fairness by trial court].

2. STATE BAR Formal Opinion No. 1989-116 concludes that, where the fee modification is made with an *existing* client, fiduciary duties would "require that the attorney fully disclose the terms and consequences . . . and that the client knowingly consent to it."

3. Modifications when a client is in a vulnerable or emotional state may be considered overreaching and constitute moral turpitude. *Matter of Conner* 5 Cal. State Bar Rptr. 93; *In the Matter of Brockway* 4 Cal. State Bar Rptr. 944.

D. Unilateral Changes Prohibited: An attorney is not permitted unilaterally to change the terms of the agreement or fix the fee and withdraw such amount from trust funds unless the attorney has the informed written consent of the client after full disclosure of the facts and the transaction is fair and reasonable. *Trafton v. Youngblood* 69 Cal. 2d 17 (1968); *Matter of Conner* 5 Cal. State Bar Ct. Rptr. 93 (2008); *Matter of Van Sickle* 4 Cal. State Bar Ct. Rptr. 980 (2006; *Matter of Wells* 4 Cal. State Bar Ct. Rptr. 896 (2005); *Matter of Scarpa & Brown* 2 Cal. State Bar Ct. Rptr. 635 (1993).

E. Compliance with Rule 3-300: A subsequent modification whereby the attorney obtains an additional advantage over the client, such as a note secured by a deed of trust, must also comply with Rule 3-300. *Hawk v. State Bar* 45 Cal. 3d 589 (1988); *Ritter v. State Bar* 40 Cal. 3d 595 (1985) [former Rule 5-101].

X. Suspect Billing Practices and Other Sins

A. Specificity: Business & Professions Code section 6148(b) requires that "[a]ll bills rendered by an attorney to a client shall clearly state the basis thereof. Bills for the fee portion of the bill shall include the amount, rate, basis for calculation, or other method of determination of the attorney's fees and costs. Bills for the cost and expense portion of the bill shall clearly identify the costs and expenses incurred and the amount of the costs and expenses." Section 6148(b) also applies to billings for costs.

B. Block Billing and Minimum Charges: Block billing of hourly charges or expenses (*i.e.*, failure to show attorney, rate and time expended for each task performed), and minimum and fixed rate charges unless provided in the agreement, are prohibited. *Nightingale v. Hyundai Motor America* 31 Cal. App. 4th 99 (1994); *In re Tom Carter Enterprises Inc.*, 55 B. R. 548 (C.D. Cal. 1985); *see* A.B.A. Formal Opinion 93-379.

However, in both *Nightengale* and *In re Tom Carter Enterprises, Inc.* the court permitted the attorney to supply the required detail afterward by declaration. *See, also, Christian Research Institute v. Alnor* 165 Cal. App. 4th 1315 (2008) [block billing "not objectionable per se" but subject to "close scrutiny"]; *Bell v. Vista Unified School District* 82 Cal. App. 4th 672 (2001) [trial court has discretion to simply "cast aside" block billed time entries]; *but see, Welch v. Metropolitan Life Ins. Co.* 480 F. 3d 942 (2007) [across the board reduction due to block billing improper where not all time was block billed].

C. Bill Padding: Impermissible. *See*, MFA Arbitrator Advisory 03-01. May result in discipline. *In re Berg* 3 Cal. State Bar Ct. Rptr. 725 (1997); *see also, Charnay v. Colbert* 145 Cal. App. 4th 170 (2006); *Bird, Marella, Boxer & Wolpert v. Superior Court* 106 Cal. App. 4th 419 (2003).

D. Timing of Statements: There is no requirement regarding the timing of billing statements. However, an attorney must render billing statements within 10 days after a client's request and the client is entitled to make such a request every 30 days. Business & Professions Code section 6148(b).

E. Interest on Account Balances:
   1. Interest may be charged. State Bar Formal Opinion 1980-53.
   2. Problems to avoid are written agreement requirement, usury, timing, and compounding.
   3. There is a split of authority whether attorneys are subject to federal truth-in-lending laws. *Compare Dogherty v. Hoollihan Neils & Boland Ltd.* 531 F. Supp. 717 (D. Minn. 1982) [laws held applicable to attorneys] *with Bonfiglio v. Nugent* 986 F. 2d 1391 (11th Cir. 1993) *and Reithman v. Berry* 287 F. 3d 274 (3d Cir. 2002) [attorney held not a creditor under federal truth-in-lending statutes]; *see also* MFA Arbitrator Advisory 01-01.
   4. Interest charge abuses also will be subject to "unconscionability" scrutiny under Rule 4-200. *See also, Crane v. Stansbury* 173 Cal. 631 (1916).
   5. Practice Tip: Is it worth the hassle, and who is going to pay it anyway?

F. Travel Time: Travel time must be agreed to by the client and cannot be charged where the attorney is working on other matters during the same time. State Bar Formal Opinion No. 1996-147.

G. Billing for Costs:
   1. Unless otherwise disclosed and agreed in writing, costs (including routine costs and costs of outside service providers)

must be billed at actual cost, without profit enhancement. A.B.A. Formal Opinion 93-379.

2. Computerized research is properly recoverable. *Trustees of Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.* 460 F. 3d 1253 (9th Cir. 2006).

H. Recycled/Plagiarized Work Product: An attorney who has agreed to bill for his or her time may not charge a premium for "recycled" work product. A.B.A. Formal Opinion 93-379 [so-called "value billing" impermissible unless disclosed. Absent full disclosure and consent, it is impermissible to add hours to a client's bill when revising pre-existing forms or pleadings prepared by the attorney previously. Orange County Bar Association Formal Opinion 99-001 (1999). In a recent Iowa case, an attorney was suspended for having made a fee application for legal work he plagiarized directly from text book.

I. Unilateral Increases: An attorney may not charge a bonus or increase the fee at a later date even if extraordinary results are obtained. *Trafton v. Youngblood* 69 Cal. 2d 17 (1968); *Goldberg v. Santa Clara* 21 Cal. App. 3d 857 (1971); *Arter & Hadden LLP v. Meronk (In re Meronk)* 2001 U. S. App. LEXIS 26263 (9th Cir. Cal., Dec. 6, 2001).

J. Billing Audits: Law firms subjected to billing audits have no standing to assert a claim for negligence against the auditor, but may sue for defamation. *Glenn K. Jackson v. Roe* 273 F. 3d 1192 (9th Cir. Cal. 2001).

XI. Ethical Breaches and Other Disgorging Concepts

A. Ethical Breaches:

1. Attorney may not collect for services rendered in violation of the Rules of Professional Conduct, including when there is a conflict of interest, a breach of fiduciary duty, and/or a violation of the State Bar Act. *Jeffry v. Pounds* 67 Cal. App. 3d 6 (1977); *Pringle v. La Chapelle* 73 Cal. App. 4th 1000 (1999); *Anderson v. Eaton* 211 Cal. 113 (1931); *Goldstein v. Lees* 46 Cal. App. 3d 614 (1975); *A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli* 113 Cal. App. 4th 1072 (2003) (1st App. Dist. 3002). *Compare David Welch Co. v. Erskine & Tully* 203 Cal. App. 3d 884 (1988) *with Tri-Growth Centre City v. Sildorf, Burdman, Duignan & Eisenberg* 216 Cal. App. 3d 1139 (1989) and *Goldstein v. Lees* 46 Cal. App. 3d 614 (1975).

2. However, breach must be serious and willful to justify disgorgement (as opposed to limiting the attorney to the

reasonable value of services). *Pringle v. La Chapelle* 73 Cal. App. 4th 1000 (1999).

3. Taking an interest adverse to client to secure payment of fees in violation of Rule 3-300 renders the security interest voidable, but does not render the fee agreement voidable. *Shopoff & Cavallo LLP v. Hyon* 167 Cal. App. 4th 1486 (2009).
4. Failure to appeal disqualification in first action is collateral estoppel on issue of ethical breach in subsequent fee dispute. *A.I. Credit Corp. v. Aguillar & Sebastinelli* 113 Cal. App. 4th 1072 (2003).
5. That spouse of attorney may be in a business transaction with the client does not create a conflict of interest for the attorney that would be a bar to the collection of the attorney's fees. *Fergus v. Songer* 150 Cal. App. 4th 552 (2007).

B. Other Conflicts: Conflicts of interest may arise in non-litigation settings such as where two clients are economic competitors. *Compare, Maritrans v. Pepper, Hamilton & Sheetz* 602 A. 2d 1277 (Pa. 1992) [economic competitors can be conflicting] with *Curtis v. Radio Representatives, Inc.* 696 F. Supp. 729 (D.D.C. 1988) [no conflict where adversity is solely economic competition].

C. Ethical "Screening" to Avoid a Conflict: There is a rebuttable presumption whether the migrating attorney has sufficient confidential information to justify disqualification. *Adams v. Aerojet-General* 86 Cal. App. 4th 1324 (2001); *Goldberg v. Warner-Chappell Music* 125 Cal. App. 4th 752 (2005) Where the migrating attorney is found to be tainted with confidential information, an ethical screen is permissible but the burden is on the law firm to prove that it is an effective one and notice must be provided to the affected former client. *Kirk v. First American Title Ins. Co.* 183 Cal. App. 4th 775 (2010). An ethical screen was approved in a federal district court action involving a California law firm. *Visa U.S.A., Inc. v. First Data Corp.* 241 F. Supp. 2d 1100 (N.D. Cal. 2003).

D. Timing of Ethical Breach: In cases where the misconduct arises after the representation has begun, the attorney generally will be entitled to recover the reasonable value of the services up to the date the misconduct first occurred, but will be barred from recovery on account of any services performed after the misconduct occurred. *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* 52 Cal. App. 4th 1 (1997).

E. Disgorgement:
1. Fees received after a conflict of interest arises may be subject to disgorgement. *David Welch Co. v. Erskine & Tulley* 203 Cal.

App. 3d 884 (1988); *see also Priester v. Citizens Natl. Bank* 131 Cal. App. 2d 314 (1955).

2. "Serious" misconduct will warrant a denial of all fees and disgorgement. *Pringle v. LaChapelle* 73 Cal. App. 4th 1000 (1999).
3. Recovery for the reasonable value of the services for a less "serious" ethical breach may be appropriate. *Newmire v. Ford* 22 Cal. App. 712 (1913) [per *dictum*: upon finding a contract unconscionable, "in which event only reasonable damages could be recovered"]; *Rosenberg v. Lawrence* 10 Cal. 2d 590 (1938) [*quantum meruit* permitted where express contract unenforceable due to unethical split of fee with non-lawyer]; *Calvert v. Stoner* 33 Cal. 2d 97 (1948) [*quantum meruit* permitted where express contract unenforceable due to unenforceable requirement that client not settle without attorney's consent]. Additionally, the one recent reported decision where disgorgement was ordered (*Giannini, Chin & Valinotti v. Superior Court*, 36 Cal. App. 4th 600 (1995)) subsequently was ordered depublished by the Supreme Court.
4. In several jurisdictions, an attorney attempting to exact an unconscionable fee will be denied all recovery on the theory that loss of all fees will serve as a deterrent to future conduct. *White v. McBride* 937 S.W.2d 796 (Tenn. 1996); *Rice v. Perl* 320 N.W.2d 407 (Minn. 1982); *In re: Estate of Lee* 214 Minn. 448 (1943); *White v. Roundtree Transport, Inc.* 386 So.2d 1287 (Fla. 1980); *see also Maritrans v. Pepper, Hamilton & Sheetz* 602 A.2d 1277 (Pa. 1992).
5. Other jurisdictions have permitted the recovery of a reasonable fee despite the breach. *New York N. H. and H. R. Co. v. Iannotti* 567 F.2d 166 (2d Cir. 1977); *Chicago & West Town Railways v. Friedman* 230 F.2d 364 (7th Cir. 1956); *In re: Eastern Sugar Antitrust Litigation* 697 F. 2d 524 (3d Cir. 1982).

F. Assignment of Claim for Disgorgement: A claim for disgorgement of attorneys' fees based upon alleged fraud in rendering unnecessary attorneys' fees is not assignable. *Jackson v. Rogers & Wells* 210 Cal. App. 3d 336 (1989) [on the theory that it is a form of malpractice, which claims are not assignable].

G. Admission in California (in good standing) as Prerequisite to Fees:
1. The attorney must be admitted in California to recover fees. *Birbrower, Montalbano, Condon & Frank v. Superior Court* 17 Cal. 4th 119 (1998). *Compare In re Carlos* 227 B.R. 535 (9th Cir. 1998) [attorney not admitted in California denied attorneys' fees where local federal rules required California admission for

District Court admission] *with In re Poole* 222 F.3d 618 (9th Cir. 2000) [fees incurred in bankruptcy action recoverable despite lack of Arizona admission where Arizona admission not required for admission to District Court]. *See also, Cowen v. Calabrese* 230 Cal. App. 2d 870 (1964) [attorney not licensed in California rendering "advice" to California client but not counsel of record in bankruptcy matter entitled to recover reasonable value of services rendered]; *Shapiro v. Paradise Valley Unified School Dist. No. 69* 374 F3d 857 (9th Cir. 2004) [attorneys' fees disallowed for services rendered prior to California attorney's *pro hac vice* admission in Arizona].

2. Following the Supreme Court's ruling in *Birbrower*, the Legislature created a statutory exception permitting out-of-state attorneys to participate in arbitration proceedings in California. Code of Civil Procedure section 1282.4. Additionally, a recent Supreme Court task force has recommended making further exceptions to the absolute rule enunciated in *Birbrower*.
3. Otherwise, admission to practice is a pre-requisite to charging for legal services. *Matter of Wells* 4 Cal. State Bar Ct. Rptr. 896 (2005).
4. Failure of a non-profit law corporation under Corporations Code section 13401(b) and Business & Professions Code section 6213 to register with State Bar defeats claim for attorneys' fees. *Frye v. Tenderloin Housing Clinic, Inc.* 120 Cal. App. 4th 1208 (2004).
5. The right to attorneys' fees in federal court is governed by federal law and procedure; an unadmitted attorney still may recover attorneys' fees if he or she could have been admitted *pro haec vice* had he or she applied. *Winterrowd v. American General Annuity Ins. Co.* 556 F. 3d 815 (9th Cir. 2009).

XII. Attorneys Fees Upon Being Discharged

A. Effect of Termination: Upon termination, the attorney shall "[p]romptly refund any part of a fee paid in advance that has not been earned." Rule 3-700(D)(2).

B. Client Files:

1. Upon termination, the attorney also shall immediately return to the client all the client papers and property, including all correspondence, pleadings, deposition transcripts, exhibits, physical evidence and expert reports, whether or not the client has paid for such items. Rule 3-700(D)(1); *Rose v. State Bar* 49 Cal. 3d 646 (1989).

2. The attorney must return all client files and papers to the client even if the client has not paid the outstanding fees. *Kallen v. Delug* 157 Cal. App. 3d 940 (1984); *Weiss v. Marcus*, 51 Cal. App. 3d 590 (1975). Client's files or papers may never be the subject of a lien. *Academy of California Optometrists, Inc. v. Superior Court* 51 Cal. App. 3d 999 (1975). An attorney may be disciplined for failing to turn client files over to successor counsel. *Finch v. State Bar* 28 Cal. 3d 659 (1981).
3. It is an open question with conflicting authority whether previously uncommunicated work product must be turned over to the client upon termination of the relationship. *See, Metro-Goldwyn-Mayer, Inc. v. Superior Court (Tracinda Corp.)* 25 Cal. App. 4th 242 (1994); *Rose v. State Bar* 49 Cal. 3d 646 (1989). However, Code of Civil Procedure, section 2018.080, enacted in 2004, provides that there is no work product privilege as between an attorney and former client if the work product is relevant to an issue of breach by the attorney of a duty to the client arising out of the attorney-client relationship.
4. Practice Tip: Many ethics opinions have recommended "as a matter of professional ethics and courtesy" that such work product should be turned over to the client – after all, the client has paid for it.
5. Electronic file materials also must be turned over promptly to the client. An attorney is not required to create such items in electronic form if they do not already exist, and may turn over electronic file materials in their existing format and is not required to convert them into any other format. Upon turning over electronic files, an attorney must take reasonable steps to strip from the files any metadata reflecting confidential information belonging to any other client. State Bar Formal Opinion 2007-174.
6. Timing and methods for destruction of client files:
    a. Absent the written consent of the client, client files should not be destroyed where there is any reasonably foreseeable prejudice to the client that may arise from destruction. Although Los Angeles County Bar Association Professional Responsibility and Ethics Committee Ethics Opinion No. 475 recommends that client materials be retained for five years after the file is closed, Opinion 1996-1 (1996) of the Legal Ethics Committee of the Bar Association of San Francisco concludes that no fixed time may provide a safe harbor where it remains foreseeable that destruction of the materials may prejudice the client. Recently California State Bar Formal Opinion No. 2001-157 concluded that

there is no fixed time safe harbor and adopted the position of the BASF Opinion.

b. Additionally, statutory dictates regarding file retention must be observed. *See, e.g.,* Probate Code section 710 [estate planning documents].

c. The three strikes law has made it "foreseeable" that the client may be prejudiced by the destruction of a criminal case file at any time. *See,* Los Angeles County Bar Association Professional Responsibility and Ethics Committee Ethics Opinion No. 420. In California State Bar Formal Opinion No. 2001-157, COPRAC suggested that, absent the informed consent to destruction, retention of files in criminal matters for as long as the client lives may be required.

d. Practice tip: Always obtain advance written consent regarding file destruction, preferably in the engagement letter at the outset of the representation.

e. File destruction also must comply with the attorney's duty under Business & Professions Code section 6068(e) to at every peril preserve the secrets of his or her client. This extends beyond matters covered by the attorney-client privilege. *Goldstein v. Lees* 46 Cal. App. 3d 614 (1975). Accordingly, destruction of the entire file must be by some method (such as incineration, shredding, pulping, etc.) that ensures that confidentiality is maintained.

C. Rights of Withdrawn and Successor Counsel to Attorneys' Fees:

1. A fired attorney, or an attorney withdrawing with good cause, is entitled to a lien on the client's ultimate recovery. *Fracasse v. Brent* 6 Cal. 3d 784 (1972); *Pearlmutter v. Alexander* 97 Cal. App. 3d Supp. 16 (1979); *Estate of Falco* 188 Cal. App. 3d 1004 (1987).

2. Incapacity is sufficient cause warranting *quantum meruit* recovery. *Cazares v. Saenz* 208 Cal. App. 3d 279 (1989). Death of the attorney will entitle the estate to recover the reasonable value of the services up to the time of death, but only upon the occurrence of the contingency (*i.e.*, the recovery). *Estate of Linnick* 171 Cal. App. 3d 752 (1985).

3. An attorney who abandons the client, or withdraws because he or she has lost faith in the merits of the case, is not entitled to a lien on the recovery. *Hensel v. Cohen* 155 Cal. App. 3d 563 (1984); *Finch v. State Bar,* 28 Cal. 3d 659 (1981). Pretextual withdrawal is an abandonment for purposes of entitlement to fees. *Rus, Miliband & Smith v. Conkle & Olesten* 113 Cal.App.4th 656 (2003) [withdrawal based upon client requests

for information that attorney claimed were hostile considered abandonment].

4. Where successive attorneys each claim *quantum meruit* rights in the client's ultimate recovery, the reasonable value of the services will be prorated among the attorneys and the total of all the claims may not exceed the contingent fee amount agreed to by the client. *Cazares v. Saenz* 208 Cal. App. 3d 279 (1989). The factors that will affect the proration are the same as those above regarding the calculation of a reasonable fee, and will be based not just upon a mechanical ratio of hours expended by each counsel but also upon the value each counsel provides to the case. *Id.*
5. It is not unethical for a discharged attorney to refuse to execute a settlement draft made jointly to the client, successor counsel and the attorney where the attorney does so in a good faith effort to protect his lien on the recovery and promptly seeks judicial review of the issue. *In re Feldsott* 3 Cal. State Bar Ct. Rptr. 754 (1997).
6. In dissolution actions, the discharged attorney may bring fee motion in dissolution proceeding to fix fee. *In re Marriage of Borson* 37 Cal. App. 3d 362 (1974). If no motion is made before the filing of the substitution of attorney form, then the matter must be resolved in separate action. *In re Marriage of Read* 97 Cal. App. 4th 476 (2002).
7. In cases involving minors' compromises, the trial court in the primary action has jurisdiction to apportion attorneys' fees between the minor's current counsel and successor counsel. *Padilla v. McClellan* 93 Cal. App. 4th 1100 (2001).

D. Claims Against Successor Counsel: Where the successor counsel had induced the client to discharge the attorney, a cause of action for tortious interference with contractual relations may lie. *Herron v. State Farm Mut. Ins. Co.* 56 Cal. 2d 202 (1961); *Skelly v. Richman* 10 Cal. App. 3d 844 (1970); *Levin v. Gulf Ins. Group*, 69 Cal. App. 4th 1282 (1999). Query: What effect will *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* 11 Cal. 4th 376 (1995), have on such claims? On the other hand, a claim for negligent interference is not recognized. *Davis v. Nadrich* 174 Cal. App. 4th 1 (2009).

E. Fees on Dissolution of Law Firm: Different rules apply where a law partnership may have dissolved.
   1. Each partner who continues to work on the prior firm's matters is not considered successor counsel. Absent a partnership agreement to the contrary, each former partner must account to his or her prior partners for the profits of the matters he or she

may conclude after the dissolution. *Jewel v. Boxer* 156 Cal. App. 3d 171 (1984); *Fox v. Abrams* 163 Cal. App. 3d 610 (1985). *But see, Champion v. Superior Court (Boccardo)* 201 Cal. App. 3d 777. The subsequent division of fees between former partners is no a split of fees and Rule 2-200 compliance is not required. *Anderson, McPharlin & Connors v. Yee* 121 Cal. App. 4th 832 (2004).

2. Practice Tip: *Always* have a written partnership agreement that covers financial issues upon withdrawal or dissolution.

XIII. Ethical Considerations Related to Collecting Attorneys' Fees

A. Article 13 of the State Bar Act:

1. Business and Professions Code section 6200 *et seq.* provides that all attorney-client fee disputes must be submitted to Mandatory Fee Arbitration at the option of the client.
   a. 90%+ of all mandatory fee arbitrations are administered by a local bar program; the rest are administered by the State Bar Mandatory Fee Arbitration Program.
   b. Arbitration is mandatory for the attorney if requested by the client. Notice of the client's right to arbitrate is required prior to any action by the attorney to collect attorneys' fees, and must be given on the approved form.
   c. A client's request for Article 13 arbitration stays all pending legal actions, including mediation and arbitration before any private provider or tribunal. *Alternative Systems, Inc. v. Carey* 67 Cal. App. 4th 1034 (1998).
   d. But see, *Loeb & Loeb v. Beverly Glen Music* 166 Cal. App. 3d 1110 (1985) [application for writ of attachment not subject to stay].
   e. Notice of client's right to arbitrate under Article 13 cannot be given in advance but must be given to the client after the dispute arises. *Huang v. Cheng* 66 Cal. App. 4th 1230 (1998).
   f. In rare circumstances, trial court has discretion to conclude that the failure to give notice is deemed waived. *Law Offices of Dixon R. Howell v. Valley* 129 Cal. App. 4th 1076 (2005). *See also, Richards, Watson & Gershon v. King* 39 Cal. App. 4th 1176 (1995).
2. An Article 13 arbitration may be requested by anyone obligated to pay for or guarantee the payment of the attorney's services; and, notice must go to the third party payor before suit may be brought. *Wager v. Mirzayance* 67 Cal. App. 4th 1187 (1998).

3. Article 13 applicable even where claim is assigned for collection. Business & Professions Code section 6201(b).
4. Cases involving insurers and *Cumis* counsel may not be covered by Article 13 (*National Union Fire Insurance Co. of Pittsburgh v. Stites* 235 Cal. App. 3d 1718 (1991)); and, where the insurer alleges fraud and malpractice, Civil Code section 2860(c) also may be inapplicable (*Fireman's Fund Ins. Companies v. Younesi* 48 Cal. App. 4th 451 (1996)).
5. A provision in the fee agreement requiring the client to submit a future dispute to an Article 13 arbitration is enforceable, but an agreement to make such an Article 13 arbitration binding is not enforceable unless it is made after the fee dispute arises. Business & Professions Code sections 6200(c) and 6204.
6. Where the arbitration is non-binding, either party may request a trial de novo within 30 days following the conclusion of the arbitration. Business & Professions Code section 6204.
7. Where there is a binding agreement for private arbitration between the attorney and client, the trial de novo must be before the agreed-upon private arbitration provider and not in a court unless private arbitration is waived by both parties. *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* 45 Cal. 4th 557 (2009).
8. No jurisdiction under Article 13 to decide dispute over malpractice damages or where the fee or cost has been determined pursuant to statute or court order. Business & Professions Code section 6200(b).
9. Malpractice may be considered, but only if and to the extent that it affects the value of the services. Business & Professions Code section 6203(a).
10. Where a probate court may determine that certain fees are chargeable to the estate while others were for the personal benefit of the estate's representative, there is jurisdiction under Article 13 to adjudicate the dispute over the fees deemed to have been incurred for the personal benefit of the estate's representative. *Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore* 162 Cal.App.4th 1331 (2008).
11. No jurisdiction under Article 13 to decide question of whether or not an attorney-client relationship exists. *Glassman v. McNab* 112 Cal. App. 4th 1593 (2004).
12. A non-binding Article 13 arbitration award will become final and binding if neither side requests a trial *de novo* within 30 days after the award is rendered. Business & Professions Code section 6204.

13. Attorneys' fees incurred in the prosecution or defense of an Article 13 arbitration may not be recovered as a cost notwithstanding any provision in the fee agreement to the contrary (except fees incurred in an action to confirm, correct or vacate the award). Business & Professions Code section 6203(c).
14. Waiver:
    a. The client may waive the right to an Article 13 arbitration either by the failure to timely request it after notice or by filing an action seeking affirmative relief. Business & Professions Code section 6201.
    b. Raising a malpractice claim in a private arbitration also waives the right to an Article 13 arbitration. *Fagelbaum & Heller v. Smylie* 174 Cal. App. 4th 1351 (2009).
    c. If client waives, then contract clause providing for arbitration before private ADR provider may be enforced. *Aguilar v. Lerner* 32 Cal. 4th 974 (2004).
15. Failure to pay an award requiring a refund to a client may result in the attorney involuntarily being placed on temporary inactive status, as well as other fees and penalties. Business & Professions Code section 6203.
16. Article 13 arbitration is not *res judicata* of alleged offending conduct of attorney in subsequent malpractice action, but will preclude portion of client's claim based upon fees found in arbitration to be owing to attorney. *Liska v. The Arns Law Firm* 117 Cal. App. 4th 275 (2004).
17. Failure timely to request trial de novo after arbitration is jurisdictional defect. *Maynard v. Brandon* 36 Cal. 4th 364 (2005).
18. If no fee action is pending, the request for trial de novo must be made by filing a new action; filing the request in the underlying action out of which the fee dispute arose is insufficient. *Loeb v. Record* 162 Cal. App. 4th 421 (2008).
19. Where a trial de novo is requested timely but then dismissed, the Article 13 award then will become final and binding on the parties. *Perez v. Grajales* 169 Cal. App. 4th 580 (2008).

B. Statute of Limitations Issues:
1. The statute of limitations on an action by an attorney to recover fees or by a client seeking a refund is four years for breach of written contract [CCP section 337(1)], four years if an open book account can be established [CCP section 337(2)] or two years if the contract was oral or if the written contract is voided by the client [CCP section 339].
2. But see *Levin v. Graham & James* 37 Cal. App. 4th 798 (1995) [holding in a malpractice case that CCP section 340.6 applied to

all causes of action, including one to recover "unconscionable fees for professional services].

3. The State Bar Committee on Mandatory Fee Arbitration has concluded that, notwithstanding *Levin v. Graham & James*, the contract statutes of limitations and not the malpractice statute of limitations are applicable to fee arbitration actions.

C. Non-Article 13 Arbitration Provisions:

1. Except as may be pre-empted by Article 13, arbitration provisions in fee agreements are ethically permissible (State Bar Formal Opinion No. 1989-116), but enforcement can turn upon specific facts. *See Powers v. Dickson, Carlson & Campillo* 54 Cal. App. 4th 1102 (1997) [provision enforceable where clear and understood by the client]; *Lawrence v. Walzer & Gabrielson* 207 Cal. App. 3d 1501 (1989) [provision not enforced where client's assent was not knowing and voluntary]; *Mayhew v. Benninghoff* 53 Cal. App. 4th 1365 (1997) [provision not enforced where tainted with overreaching].
2. No specific formal requirements, such as 10-point red printing or an express waiver of the right to a jury trial, are required. *Powers v. Dickson, Carlson & Campillo* 54 Cal. App. 4th 1102 (1997).
3. Where the filing fee is unreasonably high, the arbitration provision may be unconscionable and unenforceable. *Parada v. Superior Court* 176 Cal. App. 4th 1554 (2009).

D. Mediation Provisions: The ethical considerations surrounding mandatory mediation provisions in fee agreements are in debate. There has been a COPRAC request for a formal ethics opinion, but no formal ethics opinion has been issued.

E. Actions and Other Methods to Recover Attorneys' Fees:

1. Subject to the requirements of Article 13, it is ethically permissible for an attorney to bring an action against a client to recover attorneys' fees under any appropriate theory, including a claim on an express contract (*Hardy v. San Fernando Valley C. of C.* 99 Cal. App. 2d 572 (1950)), for common counts (*Ferro v. Citizens Nat. Trust & Sav. Bank* 44 Cal. 2d 401 (1955)), for the reasonable value of the services (*Spires v. American Bus Lines* 158 Cal. App. 3d 211 (1984)), or under statute (*e.g.*, Probate Code §§ 2632(d), 2640(c), 2642, 8547(c), 10810, 10811; Labor Code § 4906; etc.).
2. Bringing a fee action while still performing services for the client is a violation of the attorney's duty of undivided loyalty.

See Los Angeles County Bar Association Professional Responsibility and Ethics Committee Ethics Opinion Nos. 476 (1994), 407 (1982), 362 (1976), and 212 (1953). A fee dispute alone, however, will not require withdrawal, at least until suit may be filed. Los Angeles County bar Association Professional Responsibility and Ethics Committee Ethics Opinion No. 512. *Also see, e.g., Santa Clara County Counsel Attys. Assn. v. Woodside* 7 Cal. 4th 525 (1994) [permitting government counsel to sue employer for labor violations].

3. It is ethically permissible to include a Civil Code section 1542 waiver in a settlement agreement for a fee dispute provided that the client is informed that they should seek independent counsel and all facts that might constitute a malpractice claim must also be disclosed. STATE BAR Formal Opinion 2009-178

F. Additional Ethical Issues Regarding Alternative Methods for Obtaining or Securing Payment of Fees:

1. It is improper to use a confession of judgment to collect attorneys' fees. *Hulland v. State Bar* 8 Cal. 3d 440 (1972).
2. An attorney may never refuse to sign a substitution of attorney as a means of securing payment of a fee. *Kallen v. Delug* 157 Cal. App. 3d 940 (1984).
3. It is improper for an attorney to have the client execute a substitution of attorney form at the commencement of the action with the object of using it at a later date in the event that the client fails to pay. Los Angeles County Bar Association Professional Responsibility and Ethics Committee Ethics Opinion No. 371 (1977).
4. It not only is impermissible, but it is a misdemeanor to willfully delay a client's matter for the attorney's personal gain, including to coerce the payment of fees. Business & Professions Code section 6128(b); State Bar Formal Opinion No. 1968-16; Los Angeles County Bar Association Professional Responsibility and Ethics Committee Ethics Opinion No. 356 (1976).
5. It is impermissible to use threats to coerce payment of attorneys' fees, including offering to drop criminal charges against a client's husband if she paid the client's fee (*Bluestein v. State Bar* 13 Cal. 3d 162 (1974)), threatening to notify the INS (*Lindenbaum v. State Bar* 26 Cal. 2d 565 (1945)), and intentionally withholding funds not legitimately in dispute to coerce payment (*McGrath v. State Bar* 21 Cal. 2d 737 (1943)). Such conduct also may constitute extortion. Penal Code section 518.
6. A provision in an engagement letter that purports to shorten the time within which the client may claim that the fees are

improper, or which purports to require the client to object to any charges within a shortened period of time after receipt of the billing statements is improper and unenforceable as against public policy. *Charnay v. Cobert* 145 Cal. App. 4th 170 (2006).

7. The attorney also may not do anything in the pursuit of recovery of attorneys' fees that will violate the attorney's duties under Business & Professions Code section 6068(e). *See* Los Angeles County Bar Association Professional Responsibility and Ethics Committee Ethics Opinion No. 452 (1988) [concluding that it is ethical for an attorney to file a claim for fees in bankruptcy proceeding of former client but that it is unethical for the attorney to supply the trustee with information about the former client or his potential assets that may be subject to Business & Professions Code section 6068(e)].
8. Conversely, the client may not assert the attorney-client privilege to defeat the attorney's action for fees. *Carlson, Collins, Gordon & Bold v. Banducci* 257 Cal. App. 2d 212 (1967); *see also* Code of Civil Procedure section 2018.030 [work product privilege].
9. Suits to recover attorneys' fees also may be subject to statutory restrictions on consumer debt collection. Business & Professions Code section 6077.5.
10. Withdrawal of fee from client trust account without permission is a misappropriation of client funds. *Marquette v. State Bar* 44 Cal. 3d 253 (1988).
11. A lawyer may refer a potential client to a broker for a real property loan to pay for attorney's fees and costs so long as the lawyer does not provide legal representation or receive compensation with regard to the referral or the resulting loan or escrow transactions, and has no undisclosed business or personal relationship with the broker. California State Bar Formal Opinion No. 2002-159 (2002).

G. Suits by the Client:
1. While a criminal defendant cannot sue a criminal attorney for malpractice without proof of actual innocence, such proof is not a prerequisite to the client suing the criminal attorney for breach of the fee agreement. *Bird, Marella, Boxer & Wolpert v. Superior Court (Reiner)* 106 Cal. App. 4th 419 (2003).
2. Absent a written contract providing for the recovery of attorneys' fees, a client may not recover attorneys' fees expended in a successful action against an attorney's attempt to recover and retain an inappropriate fee. *Schneider v. Friedman, Collard, Poswall & Virga* 232 Cal. App. 3d 1276 (1991).

3. Failure to seek attorneys' fees in binding arbitration bars subsequent suit to recover fees. *Corona v. Amherst Partners* 107 Cal. App. 4th 701 (2003).
4. Where the client's request for refund of attorneys' fees is based upon the attorney's alleged malpractice, Code of Civil Procedure section 340.6 is the applicable statute of limitations. *Colello v. Yagman* Unpublished Opinion [not citable] (2d. District, August 17, 2009).

H. Settling Fee Disputes: It is ethically permissible to include a Civil Code section 1542 waiver of malpractice claims in a settlement of a fee dispute. If the attorney has not withdrawn from the representation, however, the attorney must advise the client of the right to seek independent counsel and give reasonable opportunity to do so, advise the client that the attorney is not representing or advising the client as to the fee dispute or the malpractice claim and fully disclose to the client the terms limiting the lawyer's liability to the client in writing (unless the client already is represented by independent counsel in connection with the settlement). STATE BAR Formal Opinion No. 2009-178.

XIV. Attorneys' Fees Under Civil Code Section 1717 and Other Statutes

A. Contractual Requirements:
1. Attorneys' fees under Civil Code section 1717 must be provided for in the contract in dispute and the fees to be awarded are the reasonable value of the services (*see above* re calculating "reasonable value").
2. Assertion of right to attorneys' fees under contract creates estoppel to deny other party's right to recover fees. *International Billing Servs., Inc. v. Emigh* 84 Cal. App. 4th 1175 (2000). *See also, Profit Concepts Management, Inc. v. Griffith* 162 Cal.App.4th 950 (2008); *but see, Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* 162 Cal.App.4th 858 (2008).
3. But, fees are not recoverable by the party asserting a contractual right to attorneys' fees, even if that party prevails in the action, in absence of actual contractual provision for same. *M. Perez Co. v. Base Camp Condominiums* 111 Cal. App. 4th 456 (2003).
4. Where a contract is asserted successfully as a defense to a tort claim, the prevailing party is not entitled to attorneys' fees unless the contractual provision is broadly drawn and expressly provides for an award of fees for defensive use as well as for an

action "on the contract." *Gil v. Mansano* 121 Cal. App. 4th 739 (2004).

5. Third party beneficiary also may collect. *Loduca v. Poplyzos* 153 Cal. App. 4th 334 (2007).

B. Amount:

1. *PLCM Group, Inc. v. Drexler* 22 Cal. 4th 1084 (2000) [fee award based upon the hours expended at the rate prevailing in the community is within the trial court's discretion; the "lodestar" also may be enhanced given the nature and circumstances of the case; review is on a "manifest abuse of discretion" standard]; *Hayward v. Ventura Volvo* 108 Cal. App. 4th 509 (2003) [statutory award under "lemon law" not subject to limitation].
2. However, the lodestar may be increased only where extraordinary circumstances exist that are not already considered or accounted for in calculating the lodestar. *Perdue v. Kenny A.* 2010 Daily Journal D.A.R. 5895 (U.S. Supreme Court, April 21, 2010); *see also, Gisbrecht v. Barnhart* 535 U.S. 789 (2002).
3. Public entities are entitled to recover based upon the lodestar calculation for private litigants and it is improper to reduce the lodestar based upon the cost of the employee attorney to the public entity. *Rogel v. Lynwood Redevelopment Agency* 194 Cal. App. 4th 1319 (2011).
4. Contingent fee also can be recovered. *Fairchild v. Park* 90 Cal. App. 4th 919 (2001). *But see, Andre v. City of West Sacramento* 92 Cal. App. 4th 532 (2001) [contingent fee in reverse condemnation action not recoverable].
5. Where the prevailing party has agreed to a contingent fee, recovery of attorneys' fees is not limited to the amount of the contingent fee. *Vella v. Hudgins* 151 Cal. App. 3d 515 (1984).
6. The award may be reduced to the extent that fees were unnecessarily incurred. *Enpalm, LLC v. Teitler Family Trust* 162 Cal. App. 4th 770 (2008).
7. Recovery is limited only to fees incurred for claims upon which the prevailing party was successful. *Reynolds Metals co. v. Alperson* 25 Cal. 3d 124 (1979).
8. The financial condition of an unsuccessful litigant may be considered when setting the amount of attorneys fees assessed against the litigant pursuant to contract or statute. *Garcia v. Santana* 174 Cal. App. 4th 646 (2009).

C. Fees Must Actually be Incurred and Paid: *Bramalea Cal., Inc. v. Reliable Interiors, Inc.* 119 Cal. App. 4th 468 (2004) [fees paid by

insurer not recoverable by insured; collateral source rule inapplicable to breach of contract action].

D. Self-representation by the Attorney:

1. Attorneys representing themselves may not recover for their own time in an action to recover their own attorneys' fees. *Trope v. Katz* 11 Cal. 4th 274 (1995) [*pro se* services are not fees "incurred" within meaning of Civil Code section 1717]; *see also, Kay v. Ehrler* 499 U.S. 432 (1991); *Witte v. Kaufman* 141 Cal. App. 4th 1201 (2006); *Muaselian v. Adams* 45 Cal. 4th 512 (2009) [same result for fee request under CCP § 128.7]; *Richards v. Sequoia Ins. Co.* 195 Cal. App. 4th 431 (2011); *Carpenter & Zuckerman v. Cohen* 195 Cal. App. 4th 373 (2011) [firm's use of associates to represent it in litigation does not entitle the firm to recover attorneys' fees for the associates' time].
2. A *pro se* attorney may recover the reasonable attorneys' fees incurred for legal services of other attorneys who, although not counsel of record, assist in the prosecution of the action. *Mix v. Tumanjan Dev. Corp.* 102 Cal. App. 4th 1318 (2002).
3. An attorney using his own law firm to represent him in a matter involving his personal rather than the firm's interests may recover the reasonable value of the services. *Gilbert v. Master Washer and Stamping Co.* 87 Cal. App. 4th 212 (2001); *but see, Carpenter & Zuckerman v. Cohen* 195 Cal. App. 4th 373 [law firm is not entitled to recover fees where it "hires" its own associate to handle an appeal].
4. An engagement letter that provides that the attorney may recover for the value of the time spent by attorneys within the firm to prosecute or defend and action based upon the attorney-client relationship is enforceable and will entitled the self-represented attorney to recover the reasonable value of the attorney's or the firm's services on the matter. *Lockton v. O'Rourke* 2010 Daily Journal D.A.R. 7378 (4th District, May 20, 2010).

E. In-house Counsel: Litigants using in-house counsel may recover for the reasonable value of the services of such counsel measured by the time expended and the prevailing reasonable rate within the community, and are not limited by what the entity actually spent on in-house counsel's salary. *PLCM Group, Inc. v. Drexler* 22 Cal. 4th 1084 (2000); *Garfield Bank v. Folb* 25 Cal. App. 4th 1804 (1994) [overruled on other grounds in *Trope v. Katz*, 11 Cal. 4th 274 (1995)]; *City of Santa Rosa v. Patel* 191 Cal. App. 4th 65 (2010) [governmental entity employee counsel].

F. Co-counsel: Dismissed co-counsel may recover fees incurred in representing each other in an action for fees against the former joint client. *Farmers Insurance Exchange v. Law Offices of Conrado Joe Sayas, Jr., Esq.* 250 F.3d 1234 (D.C. Cal. 2001).

G. Pro Bono Counsel: Pro bono counsel may recover attorneys' fees as sanctions. *Do v. Nguyen* 109 Cal. App. 4th 1210 (2003).

H. Interim Awards: Normally, attorneys' fees are not awardable until the outcome of the entire proceeding. *Bell v. Farmer's Ins. Exch.* 87 Cal. App. 4th 805 (2001). There may be some rare situations, however, where they are recoverable during the litigation. These include statutory provisions (*see*, Family Code section 2032(a)(1)) and contract provisions that provide for interim awards (*see, Acosta v. Kerrigan* 150 Cal. App. 4th 1124 (2007) [per contract awarding fees to party who prevails on motion to compel arbitration]; *Profit Concepts Management, Inc. v. Griffith* 162 Cal. App. 4th 950 (2008) [after dismissal for lack of personal jurisdiction]; *Turner v. Schultz* 175 Cal. App. 4th 974 (2009) [prevailing party on action for injunction to prevent arbitration]; *PNEC Corp. v. Meyer* 190 Cal. App. 4th 66 [after dismissal for forum non conveniens].

I. Settlement or Dismissal:

1. Generally, no fee is recoverable where the case is settled or dismissed before trial. Civil Code § 1717(b)(2); *Marina Glencoe v. New Sentimental Film AG* 168 Cal. App. 4th 874 (2008); *Satisas v. Goodin* 17 Cal. 4th 599 (1998) [but, attorneys' fees may be recovered, if otherwise appropriate, under Civil Code sections 1032(b) and 1033.5(a)(10)].
2. Dismissal prior to trial may make a party a "prevailing party" depending upon relief obtained from settlement and trial court's discretion. *Silver v. Boatwright Home Inspection, Inc.* 97 Cal. App. 4th 443 (2002); *see also, Wilkerson v. Sullivan* 99 Cal.App.4th 443 (2002) [fees recoverable to "prevailing party" even though plaintiff voluntarily dismissed appeal] and *Martin v. Szeto* 94 Cal. App. 4th 687 (2001) [dismissal of slander case brought in bad faith may entitle defendant to attorneys fees under Code of Civil Procedure section 1021.7]; *Parrott v. Mooring Townhomes Assn.* 112 Cal.App.4th 873 (2003).
3. *But see, Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources* 121 S. Ct. 1835 (2001) [settlement must result in some "alteration of legal relationship of the parties" for a party to be the prevailing party, and an entirely private settlement would not meet that standard].

4. A fee negotiated as part of a settlement must be fair and reasonable in light of all factors, including whether it accurately reflects the value of the work performed. *Robbins v. Alibrandi* 127 Cal. App. 4th 438 (2005).

J. After Settlement or Dismissal: Attorneys fees may be recovered after case resolved by Code of Civil Procedure section 998 offer. *Ritzenthaler v. Fireside Thrift Co.* 93 Cal. App. 4th 986 (2001).

K. Failure to Request in Arbitration: The failure to request attorneys' fees in a binding arbitration will preclude making such a request in the action to enforce the award. *Corona v. Amherst Partners* 107 Cal. App. 4th 701 (2003).

L. Indemnity for Attorneys' Fees: An attorney who is sued by a corporation for malpractice may not claim attorneys' fees incurred in defending the action under the indemnity provisions of Corporations Code section 317. *Channel Lumber Co. v. Porter Simon* 78 Cal. App. 4th 1222 (2000).

M. Attorneys' Fees Allowable by Statute:
1. Attorneys' fees also are recoverable where authorized by "statute" or "law," including local ordinances. *City of Santa Paula v. Narula* 114 Cal. App. 4th 485 (2003).
2. Attorneys' fees recoverable under private attorney general theory under "catalyst theory" pursuant to Code of Civil Procedure section 1021.5 *Graham v. DaimlerChrysler Corp.* 34 Cal. 4th 553 (2004).
3. Attorneys' fees under Section 1021.5 require pre-litigation settlement efforts in "catalyst" cases, but not in "non-catalyst" cases. *Vasquez v. State* 45 Cal. 4th 243 (2008).
4. Attorneys' fees recoverable under Corporations Code sections 8337 and 15634 in action regarding production of corporate records. *Moran v. Oso Valley Greenbelt Assn.* 117 Cal. App. 4th 1029 (2004); *Berti v. Santa Barbara Beach Properties* 145 Cal. App. 4th 70 (2006).
5. Post arbitration fees are recoverable under Code of Civil Procedure section 1293.2. *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Woodman Inv. Group* 129 Cal. App. 4th 508 (2005).
6. Code of Civil Procedure section 1021.9 provides for attorneys' fees in any action to recover damages to personal or real property resulting from trespass on lands either under cultivation or intended or used for raising livestock.

7. Right to attorneys' fees under 42 U.S.C. section 1988 belong to client and not attorney and may not be assigned contractually. *Pony v. County of Los Angeles* 433 F.3d 1138 (9th Cir. 2006).
8. Some statutory provisions are not reciprocal, such as in elder abuse cases. *Wood v. Santa Monica Escrow Company* 151 Cal. App. 4th 1186 (2007).
9. In FEHA action, the trial court has discretion under Code of Civil Procedure section 1033 to deny fees to prevailing party where the action could have been brought as a limited civil action but was not. *Chavez v. City of Los Angeles* 47 Cal. 4th 970 (2010).

N. Interpleader Actions: No fees based upon interest accrual in interpleader action. *Canal Ins. Co. v. Tackett* 117 Cal. App. 4th 239 (2004).

O. Discovery: Limited discovery into the value of the attorneys' fees claimed under Code of Civil Procedure section 1021.5 [claims for attorneys' fees in cases resulting in public benefit] is permissible. *SOS Santa Monica Mountains v. Superior Court* 84 Cal. App. 4th 235 (2000).

P. Who is Entitled to Collect:
1. Absent an agreement to the contrary, attorneys' fees usually are awarded to the client, not the attorney, and it is up to the client to pay the attorney the amount of fees they contractually had agreed upon. *Stevens v. Stevens* 215 Cal. 316 (1932).
2. In cases where the right to attorneys fees belongs to the client, the attorney may not bring a motion for fees after he or she has been discharged. *Read v. Read (Freid & Goldsman)*, 97 Cal. App. 4th 476 (2002).
3. Client may assign right to fees to attorney (*see, Venegas v. Mitchell* 495 U. S. 82 (1990)); but, the agreement must comply with Rule 3-300, and cannot constitute a right in attorney to object to settlement (*see*, STATE BAR Formal Opinion No. 1989-114). And, client may also waive attorneys' fees in a settlement despite prior assignment to counsel. *Pony v. County of Los Angeles* 433 F. 3d 1138 (9th Cir. 2006).
4. Pursuant to certain statutes, attorneys' fees are awarded directly to the attorney, not the party. *United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equipment, Inc.* 89 F.3d 574 (1996) [*qui tam* actions]; *Flannery v. Prentice* 26 Cal. 4th 572 (2001) [Gov't Code § 12965(G)]; *Folsom v. Butte County Assn. of Government* 32 Cal. 3d 668 (1982) [private attorney general theory pursuant to C.C.P. § 1021.5]. However, recovery is permitted only to the extent that the attorney's services provide

a public benefit, as opposed to a purely private interest. *Hammond v. Agran* 99 Cal. App. 4th 115 (2002).

5. Attorney may intervene in client's action to recover fees due to attorney. *Lindelli v. Town of Anselmo* 139 Cal. App. 4th 1499 (2006).

6. In such a case where the attorney not the client is entitled to the award, or where in a civil rights action the client assigns his or her right to the fee award to the attorney, an ethical issue can arise where the defendant may make a lump sum settlement offer conditioned upon a waiver of the attorneys' fee claim and in an amount insufficient to cover the attorney's claim for fees. Questions also arise whether the attorney must inform his or her client of the settlement offer and of the advantages and disadvantages of accepting it, whether the attorney is ethically required to waive his or her claim to compensation, and whether, in the event that the attorney and the client cannot come to an agreement, the attorney who does not consent to a waiver of his or her fee claim may have to petition the court for leave to withdraw. Also, a case pending in the United States District Court in Los Angeles is hearing a challenge to this practice. Thus, at present, there is no clear guideline.

Q. Requirement of Admission to Practice: Attorneys' fees may not be recovered where the attorney is not properly admitted to practice. *Bobby A. v. San Bruno Park School District* 165 F.3d 1273 (9th Cir. 1998). *But see, Olson v. Cohen* 106 Cal. App. 4th 1209 (2003) [failure of prevailing party's attorney to be properly registered with State Bar as law corporation not fatal to fee claim]; *Winterrowd v. American Gen. Annuity Ins. Co.* 556 F.3d 815 (9th Cir. 2009) [recovery permitted for fees charged by out-of-state attorney assisting admitted attorney].

R. Conditions Precedent:

1. Failure to follow contractual obligation to seek mediation before filing action supports denial of attorneys' fees under Civil Code section 1717. *Leamon v. Krajkiewcz* 107 Cal. App. 4th 424 (2003); *Frei v. Davey* 124 Cal. App. 4th 1506 (2004).

2. Failure to request attorneys' fees in arbitration bars claim for fees in subsequent enforcement action. *Corona v. Amherst Partners* 107 Cal. App. 4th 701 (2004).

S. Tax Issues: Attorneys' fees pursuant to a contingent fee agreement are taxable to the plaintiff as gross income. *Commissioner v. Banks* (Jan. 24, 2005, No. 03-892) 73 USLW 4117, 2005 Daily Journal D. A. R. 845; *Commissioner v. Banaitis* (Jan. 24, 2005, No. 03-907) 73 USLW 4117, 2005 Daily Journal D. A. R. 845.

THIRD

SUPPLEMENTAL

OUTLINE

ETHICAL CONSIDERATIONS SURROUNDING

CLIENT DEVELOPMENT AND ATTORNEY ADVERTISING

I. Your Client Development Strategy – The Basics: Soliciting new business, while once considered unprofessional, now is part of the business of the practice of law. In fact, it can be a way of demonstrating an attorney's professionalism even before the representation begins, provided that the attorney conducts these efforts with:

- Professionalism
- Honesty
- Full Disclosure
- Reputation for Ethical Behavior
- Trust
- Accurate and Truthful (See, *Shapero v. Kentucky St. Bar Assn.* 486 U.S. 466, 472-473)
- No Pressure Sales or Telemarketing (COPRAC Formal Opinion 1988-105; *Ohralik v. Ohio St. Bar Assn.* 436 U.S. 447,464 (1978)).
- All attorney communications are subject to regulation including advertisements, letterheads, office signs, printed and electronic communication, firm names, domain names, websites, etc.

II. Key Issues in Developing Your Marketing Dialogue: The following considerations should be kept in mind regarding all efforts at business development:

- Accuracy
- No Guarantees
- No creation of false impression of relationship with government or other referral source (Rule 1-600).
- No advertising "certified" without State Bar certification; words such as "practice concentrated on" or "specializing in" are permissible if true.
- "SuperLawyers" has been found to be permissible in Iowa and in Virginia and by the Philadelphia Bar Association, and now in New Jersey (overruling an earlier finding that it is not a true peer review rating).
- Practice tip: Such phrases may increase standard of care in subsequent malpractice action.
- No use of governmental title of office in a misleading manner (COPRAC Formal Opinion No. 2004-167).

Communications with Represented Parties:

- Rule 2-100.
- Practice Tip: Where the successor counsel had induced the client to discharge the attorney, a cause of action for tortious interference with contractual relations may lie (*Herron v. State Farm Mut. Ins. Co.*, 56 Cal. 2d 202 (1961); *Skelly v. Richman*, 10 Cal. App. 3d 844 (1970); *Levin v. Gulf Ins. Group*, 69 Cal. App. 4th 1282 (1999)).

Other ethical considerations:

- Random distribution of cards and brochures is permissible provided it is done in compliance with Rule 1-400 (Los Angeles County Opinion No. 419).
- Targeted letters are permissible if in compliance with Rule 1-400 (COPRAC Formal Opinion 1988-105).
- "Sympathy" letters violate Rule 1-400 (Orange County Opinion No. 93-001).
- Participating in an Internet chat room of mass disaster victims may not be a "solicitation" per se, but may violate Rule 1-400(D)(5) where participants may not have the requisite emotional or mental state to make reasonable judgment about retaining counsel (COPRAC Formal Opinion No. 2004-166).
- Conduct of agents and employees is governed by same ethical considerations (Business and Professions Code section 6157(b)).
- "Capping" is prohibited (COPRAC Formal Opinion 1995-144; see, *Hutchins v. Mun. Ct.* 61 Cal. App. 3d 77, 90 (1976)).
- An attorney may contact victims of a multiple tort for legitimate investigative purposes on behalf of an existing client, and may accept representation of the contacted victims if asked, but may not directly solicit business from such victims (*Rose v. State Bar*, 49 Cal. 3d 464 (1989)).
- Such conduct without an existing client, however, is prohibited (*Kitsis v. State Bar* 23 Cal.3d 857 (1979)).

III. Leveraging Existing Relationships – Referral From One Attorney to Another:

- Referral fees are governed by Rule 2-200 and require the informed written consent of the client after full disclosure and no increase in the overall fee to the client (*Scolinos v. Kolts*, 37 Cal. App. 4th 635 (1995)).
- Compliance with Rule 2-200 is required even where the referred attorney promises to obtain the informed written consent of the client for the referring attorney (*Margolin v. Shemaria*, 85 Cal. App. 4th 891 (2000)).
- Provided that Rule 2-200 is satisfied, agreements between attorneys regarding sharing or splitting fees are permissible and will be enforced according to their terms (*Bunn v. Lucas, Pino & Lucas*, 172 Cal. App. 2d 450 (1959); *Dunne & Gaston v. Keltner*, 50 Cal. App. 3d 560 (1975)), even where the referring attorney's compensation is simply a forwarding or referral fee and the referring attorney preforms no additional services on the matter (*Moran v. Harris*, 131 Cal. App. 3d 913 (1982)).Fee Splitting Between Co-Counsel:
- All agreements to split fees are subject to Rule 2-200 and cannot be enforced unless the arrangement complies with the Rule or fits within one of its recognized exceptions (*Chambers v. Kay*, 29 Cal. 4th 142 (2002)).
- Second counsel may be entitled to recover the reasonable value of services against co-counsel on *quantum meruit* basis (*Huskinson v. Brown & Wolf* 32 Cal.4th 453 (2004)).

Fee Splitting with a Non-Attorney:

- Rule 1-320 prohibits splitting legal fees with any non-lawyer, and prohibits compensation or gifts to a non-lawyer in exchange for a referral of business.
- Contract to divide fees with non-attorney is unenforceable as an illegal contract. McIntosh v. Mills 121 Cal. App. 4th 333 (2004) [consulting fee in class action as percentage of attorney's fee held unenforceable]; see also, Cain v. Burns 131 Cal. App. 2d 439 (1955). Possible exception may be with respect to statutory fees. Los Angeles County Bar Association Professional Responsibility and Ethics Opinion 515 (2006).
- See also, Hyon v. Selten 152 Cal. App. 4th 463 (2007) [contract with unregistered referral agency to provide counsel in exchange for a percentage of the recovery is unenforceable, but quantum meruit recovery is available].
- Sharing profits with non-attorney employees by a profit-sharing plan or retirement plan is not prohibited, provided the plan does not circumvent the Rules *(See, In the Matter of Nelson*, 1 Cal. State Bar Ct. Rptr. 178 (1990)).
- An arrangement whereby an attorney refers clients to an outside provider, such as an insurance agent, in exchange for a fee and/or the expectation of referrals in return is not prohibited, provided that Rules 3-300 and 3-310(B) are complied with (*See* COPRAC Opinion 1995-140; *see also*, Los Angeles County Bar Association Opinion 477 (1994) [referral to medical facility in which attorney owns an interest]).
- But see, Insurance Code section 1724 (insurance broker prohibited from sharing fee with or paying any consideration for referral by attorney).

Rule 1-310 prohibits practicing with a non-licensed person:

- Attorney may ethically provide legal and non-legal services (such as investment advisory services) from the same office; but, all advertisements must comply with Rule 1-400 (COPRAC Formal Opinion 1999-154).
- Any split of compensation from a non-legal professional to an attorney must comply with Rules 3-310(B)(4) and 3-300 (*Id.*).

Payments by Third Parties:

- Acceptance of payment from someone other than the client is not permitted unless (a) it does not impair the attorney's independent professional judgment or interfere with the attorney-client relationship, (b) it does not compromise attorney-client confidentiality, and (c) it is with the informed written consent of the client (Rule 3-310(F)). •

Practice Tip: Have third-party payor agree to terms and to Rule 3-310(F) limitations.

IV. Getting Involved in Organizations – Don't forget the pitfalls:

- It is impermissible to donate legal services to charity for subsequent auction (San Diego Opinion No. 1974-19).
- Cannot permit a church to advertise attorney is available to draft wills (San Diego Opinion 1975-14).
- Both of these opinions were issued before the Bates case and the adoption of Rule 1-400. Presumably, such conduct would now be considered permissible provided that the advertisements of the attorney's services do comply with Rule 1-400.

- And, COPRAC Formal Opinion 1982-65 concludes that donation of services for auction is permissible, the attorney must be mindful of all of the professional standards and ethical considerations that may be applicable to such auctioning and providing of legal services to a not for profit organization.

V. Get Yourself Published – Ethically

Plagiarism

Regular newspaper column on law-related topics by "attorney" requires compliance with Rule 1-400 (San Diego Opinion 1976-2).

Publication on the Internet:

- Internet advertising and law firm websites are subject to Rule 1-400, and may create disciplinary issues in other states.
- Maintaining a firm website is an advertisement, but will not constitute solicitation, even where the website provides the ability to e-mail firm members (COPRAC Formal Opinion 2001-155).
- However, interactive communication in response to internet inquiries may be considered solicitations that must be in compliance with Rule 1-400 (see also, Utah Ethics Opinion 97-10; Michigan Ethics Opinion RI-276).
- Domain name is subject to regulation (Ariz. State Bar Opinion 2001-05). Use of names such as "best lawyer.com" or ".org" when not a non-profit organization prohibited.
- Pictures and depictions on website must be accurate or state that it is a depiction (such as general photos of "clients" who are merely firm personnel posing).
- Use disclaimer on website to reduce possibility of creating expectation in website visitor that an attorney-client relationship has been created by website visit or communication or that he or she may safely communicate confidential information to law firm (COPRAC Formal Opinion 2005-168).
- Depiction of website must be maintained for two years.

Other Electronic Communication

- Mass e-mails subject to regulation as advertisement or solicitation.
- Participation in Internet "chat rooms" is not prohibited; but, where communications are to victims of mass torts, such communication may violate Rule 1-400(D)(5), which prohibits transmittal of communications that intrude or cause duress, and Standard (3) of Rule 1-400, which presumes improper any communication delivered to a prospective client whom the attorney know may not have the requisite emotional or mental state to make a reasonable judgment about retaining counsel (COPRAC Formal Opinion No. 2004-166); some other states have opined that solicitation of clients through Internet "chat rooms" is prohibited.
- Listserv participation is ethical, although care must be taken to avoid the possibility of improper ex parte communication with a judicial officer known to be a participant (Los Angeles County Formal Opinion 514)..

- Electronic communication is ethically proper, including facsimile, cell phone and other electronic means (Los Angeles County Formal Opinion 514) and remains privileged (Evidence Code section 952; 18 USC section 2517(4)).
- Encription is "recommended" but not required (Orange County Formal Opinion 97-002; ABA Formal Opinion 99-413); and, interception of electronic communications is a violation of the Electronic Communications Privacy Act (*U. S. v. Councilman* (1st Cir. 2005) 418 F. 3d 67).
- Social media communications have been the subject of increased scrutiny.

VI. Give Speeches, But Watch Out for the Traps for the Unwary:

- Legal information vs. legal advice or representation
- Radio Call in shows
- Accuracy and no promises
- Do not bridge confidences by identification of client used as example
- An attorney may employ a lay spokesperson (such as a "medical liaison") to give presentations to a group of potential clients (such as a group of physicians); but, the liaison's statements are subject to Rule 1-400 and the liaison may not state or imply that the physician will receive any fee, referral or other consideration in exchange for recommending patients to the attorney (COPRAC Opinion 1995-143).

Press Conferences:

- Attorneys may participate in press conferences and cooperate with reporters publishing news stories about their practices without engaging in a regulated "communication" or "solicitation" (*Jacoby v. State Bar*, 19 Cal.3d 359 (1977)).
- Press conferences about pending matters must comply with Rule 5-120, regulating speech that may have a substantial likelihood of materially prejudicing an adjudicative proceeding in a matter.
- Litigation privilege may not apply *(Rothman v. Jackson*, 49 Cal. App. 4th 1134 (1996)).

It is permissible to lecture at a college provided that only general advice and no personal advice is given and the advertisements for the lecture refer only to the name, topic and experience of the attorney on the topic (San Diego Opinion No. 1974-16).

VII. Implement Seminars, But be Sure to Avoid Those Traps Also:

- Disclaimer re lack of legal advice
- Sending unsolicited invitations to seminars or bulletins about legal issues is not improper where they contain no direct solicitation and where they comply with Rule 1-400 (Los Angeles County Opinion No. 494; see, *Belli v. State Bar* 10 Cal.3d 824,833 (1974)).

Newsletters are permissible.

Practice Tip: Care should be taken in all newsletters and in connection with all seminars that the recipient or the audience may not assume the or rely on the existence of any attorney-client relationship or maintain any expectation of confidentiality in connection with the communication or seminar unless and until a formal attorney-client relationship is agreed to by the attorney and by the client and confirmed in writing (COPRAC Formal Opinion No. 2005-168).

VIII. Ethical Considerations Regarding Attorney Advertising

Propriety:

- Attorney advertising is permissible as protected speech (*Bates v. State Bar*, 433 U.S. 350 (1977 Ariz.); Edenfield v. Fane 507 U.S. 761 (1993 Fla.) [accountants]).
- However, attorney advertising is subject to state regulation (*Goldman v. State Bar*, 20 Cal. 3d 130 (1977)).
- Statutory regulation of attorney advertising is governed by Business and Professions Code sections 6157 through 6159.2.
- Other statutes may also apply (such as Business and Professions Code section 17200, et seq., Federal Telephone Consumers Protection Act, CAN-SPAM Act of 2003, etc.).

Significant considerations:

- An "advertisement" is any communication, written, electronic, television or radio, that solicits employment and is directed to the general public.
- No advertisement may contain false, misleading or deceptive material or omit to state any fact necessary to make the statements made not false, misleading or deceptive.
- No advertisement may guarantee a particular outcome.
- No advertisement may contain statements or symbols stating or implying (such as "$ $ $") that the member can generally obtain cash or quick settlements.
- No advertisement may contain an impersonation of the attorney or a celebrity spokesperson for the attorney unless the identity of the spokesperson is disclosed.
- Advertisements for contingent fee arrangements must state the extent to which the client may be responsible for costs.
- Advertisements not paid for by the member shall disclose the relationship of the attorney to the payor.
- Advertisements provided through attorney referral services shall disclose the consideration or proportional cost paid by the member for the referral service.
- Advertisements for immigration services shall state that the attorney is a member of the bar, and clearly state what services will be performed by the attorney and what services will be performed by the support staff under the attorney's supervision.
- Advertisements containing portrayals of outcomes of cases must be supported by and contain supporting documentation.

- Copies of all advertisements must be retained for two years and attorney must supply verification of all factual claims to State Bar upon request.

Statutory violations are subject to special enforcement proceedings under Business and Professions Code section 6158.4. Such special proceedings are in addition to all other appropriate disciplinary proceedings that may be applicable.

All advertising by California attorneys is subject to Rule 1-400: • A "communication" means any message or offer concerning the availability of the member for professional employment to any former, present or prospective client.

- Communications include any use of the a firm name, trade name, or fictitious name, stationery or letterhead, card, sign or brochure, any advertisement and any unsolicited correspondence by the member to any person or entity.
- A "solicitation" is a "communication" where the significant motive is pecuniary gain and,
- Which is delivered in person or by telephone or directed by any means to a person known to the sender to be represented by counsel in the matter which is the subject of the solicitation.

Prohibit Acts: A solicitation or communication shall not:

- Contain any untrue statement.
- Contain any matter or present or arrange any matter in a manner or format that is false, deceptive, or which tends to confuse, deceive or mislead the public.
- Omit to state any fact necessary to make the statements made not misleading.
- Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation.
- Be transmitted in an intrusive matter or involve coercion, duress, intimidation, threats, or vexatious or harassing conduct.
- Indicate that the sender is a "certified specialist" unless the sender holds such certification.

Additionally, the State Bar Board of Governors has adopted standards setting forth conduct which presumptively violates Rule 4-100. These include communications which:

- Guarantee, warrant or predict success regarding the results of the representation.
- Contain testimonials without proper disclaimers.
- Are delivered to persons known to be in such physical, emotional or mental state that they can be expected not to be able to exercise reasonable judgment as to the retention of counsel.
- Are delivered at the scene of an accident or en route any care facility.
- Do not contain in 12 point type on the first page and on the envelope the words "Advertisement" or "Newsletter" or words of similar import (except for professional announcements).

- States or implies that any member in private practice has some relationship to any governmental agency or public or non-profit legal services organization.
- Misrepresents a relationship with another lawyer that does not in fact exist.
- Misrepresents an "of counsel" relationship that does not in fact exist.
- Uses a firm name that is materially different from any such other name or designation used by the same member at the same time in the same community.
- Falsely states or implies a relationship with a certified lawyer referral service.
- Falsely states or implies a certified specialization.
- Fails to identify the member's name making the communication or on whose behalf it is made.
- Contains a dramatization without disclaimer.
- States or implies "no fee without recovery" unless such communication also discloses whether or not the client will be liable for costs.
- Falsely states or implies a language proficiency or fails to state the employment title of the person proficient in the language.
- Advertises a particular cost for a particular service but the attorney charges a higher cost within 90 days thereafter (normal advertising media) or within one year thereafter ("yellow pages" or similar directory advertisement).

Other considerations:

- All communications and solicitations must be retained by the attorney for two years, including all written and electronic media advertisements.
- Advertising that is misleading will subject the attorney to discipline even where the communication is not actually "false." *Leoni v. State Bar*, 39 Cal. 3d 609 (1985).
- An attorney is not excused from the consequences of improper solicitation or advertisement by obtaining a written waiver of the solicitation from the client at the time the parties enter into a retainer agreement. COPRAC Formal Opinion 1988-105.
- It is permissible to send letter to income property owners advertising eviction services where in compliance with Rule 1-400 (BASF Opinion No. 1979-1).
- "Human interest" stories on local newspapers are permissible provided there is no solicitation by the attorney, the press is not compensated, and it is in compliance with Rule 1-400 with respect to any testimonials, etc. (San Diego Opinion No. 1975-3).
- No attorney may limit liability to client by contract or as part of communication or solicitation (Rule 3-400).

Law firm advertising is not protected speech under the Anti-SLAPP statutes (Code of Civil Procedure sections 425.16 and 425.17). *Simpson Strong-Tie Co., Inc. v. Gore* 49 Cal. 4th 12 (2010).

Addiction: It's Really a Brain Disease!

THE SPEAKER

William Shilley

From 1981 to 2009, Bill Shilley was Department Chair of the Addictive Disorders Studies Program at Oxnard College and a full time senior professor. Now retired from full time teaching, he is an auxiliary professor teaching the Overview course and the Pharmacology course each semester. Over a period of thirty years he has developed and taught twenty-four courses for the Addictive Disorders Studies Program. Prior to his appointment to a full time professorship in 1989, he worked for ten years in the Ventura County department of Alcohol Programs where he worked as a Treatment Specialist in the county DUI program. For three years he was senior counselor for the East and West county counseling centers; for five years he was Community Services Coordinator in charge of alcohol/drug prevention programs; for five years he was patient advocate for DUI clients, and was acting Administrator for the last year and a half of his time with the Department.

Mr. Shilley has been an officer in the California Association for Al/Drug Educators since 1985. This is an association which establishes new Addictive Disorders Studies Programs in community colleges and universities and maintains quality control over those programs as an on-going process. He is currently a consultant to CCARTA (Center for Criminality and Addiction Research, Training, and Application) at UCSD, School of Medicine, Department of Psychiatry, and is on the national committee for the Institutional Review Board for Phoenix House treatment centers. In 1995, under the auspices of C.A.A.D.E. and as its president, he established the C.A.T.C. (California Addiction Treatment Counselor) credential which now numbers 1700 certified counselors. Since January of 2003, he has been Ombudsman for Aegis Medical System's 6,000 clients at 28 methadone treatment centers in the state of California. In 1999, he introduced a new certificate program for those wishing to provide alcohol/drug treatment for those involved in the Criminal Justice System.