

PROGRAM MATERIAL

PART 2

PROGRAM OUTLINE

Attorneys' Fees: Practically, Ethically

2012

Presented by: Joel Mark

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December 29, 2011

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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 Principles 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 section 16004 (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. Broglia* 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 Silvertown* 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. Shivenner* 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 & Connors 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 Sickel* 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. *Jeffrey 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. Disorgement:
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 hac 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 an action based upon the attorney-client relationship is enforceable and will entitle 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); *Satisfas 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. Krajewicz* 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)).
- Encryption 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).

SUBSTANCE ABUSE
“Lawyers on the Rocks”

MAD MEN LAW GROUP, LLP
ATTORNEYS ON THE ROCKS
A TRAGEDY IN FIVE ACTS



BY 2012 JEROME H. BERENSON INNS OF COURT TEAM 1
PRESENTED TO BARRISTERS OF VENTURA COUNTY BRIDGING THE GAP 2014

DO YOU NEED TO REPORT YOUR COUNSEL OR COLLEAGUE?

No.

San Diego County Bar Association Ethics Opinion 1992-2: "[T]here is no ethical duty imposed by the California Rules of Professional Conduct upon California attorneys to report the misconduct of other attorneys. This is true regardless of the nature or magnitude of such misconduct. Notwithstanding, the act of reporting such misconduct is absolutely privileged in this state."

The ABA disagreed, and adopted Model Rule 8.3:

Maintaining The Integrity Of The Profession

Rule 8.3 Reporting Professional Misconduct

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
- (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

BUT the ABA Rule was rejected by the California Bar.

Instead, the commission determined to retain the existing RPC 1-120, 1-500(B), and B&P 6090.5.

- **Rule 1-120 Assisting, Soliciting, or Inducing Violations**
A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act
- **Rule 1-500(B)**
(B) A member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules.
- **6090.5. Discipline for acting to prevent reporting of settlement, to obtain withdrawal of disciplinary complaint, or to prevent disciplinary review of record in civil action for misconduct**
 - (a) It is cause for suspension, disbarment, or other discipline for any member, whether as a party or as an attorney for a party, to agree or seek agreement, that:
 - (1) The professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the disciplinary agency.
 - (2) The plaintiff shall withdraw a disciplinary complaint or shall not cooperate with the investigation or prosecution conducted by the disciplinary agency.
 - (3) The record of any civil action for professional misconduct shall be sealed from review by the disciplinary agency.
 - (b) This section applies to all settlements, whether made before or after the commencement of a civil action.

IF YOU HAVE A PROBLEM, DO YOU NEED TO WITHDRAW?

Cal. Rule of Prof. Conduct 3-700(B) ("Mandatory Withdrawal"): A member must withdraw from representing a client if: "(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."

Cal. Rule of Prof. Conduct 3-700(C) ("Permissive Withdrawal"): A member may not withdraw *unless*: "(1) The client . . . (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 (2) "The continued employment is likely to result in a violation of these Rules or the State Bar Act;" or (4) The member's mental or physical condition render it difficult for the member to carry out the employment effectively."

WHAT ELSE SHOULD YOU DO IF YOU HAVE A PROBLEM?

LAWYER ASSISTANCE PROGRAM: The mission of the Lawyer Assistance Program (LAP) is to support recovering attorneys in their rehabilitation and competent practice of the law, enhance public protection, and maintain the integrity of the legal profession. The program aids attorneys struggling with substance abuse, mental health concerns, stress, burnout and other issues impacting their productivity. The LAP supports attorneys in returning to an optimum level of professional practice. **Participation is confidential as mandated by Business and Professions Code § 6234.** No information concerning participation in the program will be released without written consent from the attorney participant.
(<http://www.calbar.ca.gov/Attorneys/MemberServices/LawyerAssistanceProgram.aspx>)

WHAT SHOULD THE FIRM DO WHEN IT SEES A SUBSTANCE ABUSE PROBLEM?

1. Inform the client.

Cal. Rule of Prof. Conduct 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."

2. Reassign the Case to Another Attorney.

Cal. Rule of Prof. Conduct 3-700(B) ("Mandatory Withdrawal"): A member must withdraw from representing a client if: "(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."

California Business and Professions Code § 6068: "It is the duty of an attorney to do all of the following: ... (m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

3. Make Reasonable Accommodations

Alcohol and Drug Rehabilitation Act (ADRA): Labor Code §§1025-1028 Private employers of 25 or more employees are required to make reasonable accommodation not amounting to undue hardship for employees who voluntarily take part in alcohol or drug rehabilitation programs. (§ 1025.) The employer should made reasonable efforts to protect the employee's privacy regarding the programs. (§ 1026.) An employer is not required to hire or continue to employ anyone who, because of alcohol or drugs, cannot perform the job or cannot do so without endangering the health or safety of the employee or others. (§ 1025.)

Americans with Disabilities Act (ADA): 42 USC §§12101-12213

Under the ADA, alcoholism may be a "disability" if it substantially limits and individual's major life activities. Therefore, an employer may not make adverse employment decisions merely because an individual is an alcoholic. (See *Miners v. Cargill Communications, Inc.* (8th Cir. 1997) 113 F3d 820, 823, fn. 5) Absenteeism and tardiness resulting from an employee's alcoholism may be grounds for discharge. "The text of the ADA authorizes discharges for misconduct or inadequate performance

that may be caused by a 'disability' in only one category of cases--alcoholism and illegal drug use: '[An employer] may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.' 42 U.S.C. § 12114(c)(4). In line with this provision, we have applied a distinction between disability-caused conduct and disability itself as a cause for termination only in cases involving illegal drug use or alcoholism." (*Humphrey v. Memorial Hospitals Association* (9th Cir. 2001) 239 F3d 1128, 1140, fn. 18)

An employer may have a duty to provide reasonable accommodation for an employee's addiction to alcohol, including providing leave for the employee to seek treatment or rehabilitation.

WHAT HAPPENS TO THE ATTORNEY WITH A SUBSTANCE ABUSE PROBLEM?

Nothing, if you get help before something bad happens. Otherwise, the discipline is through the Attorney Diversion and Assistance Act

B&P 6230 et seq.. Legislative intent

It is the intent of the Legislature that the State Bar of California seek ways and means to identify and rehabilitate attorneys with impairment due to abuse of drugs or alcohol, or due to mental illness, affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety.

6236. Outreach activities; Education programs

The State Bar shall actively engage in outreach activities to make members, the legal community, and the general public aware of the existence and availability of the Attorney Diversion and Assistance Program. Outreach shall include, but not be limited to, the development and certification of minimum continuing legal education courses relating to the prevention, detection, and treatment of substance abuse, including no-cost and low-cost programs and materials pursuant to subdivision (d) of Section 6070, informing all members of the State Bar of the program's existence and benefits through both direct communication and targeted advertising, working in coordination with the judicial branch to inform the state's judges of the program's existence and availability as a disciplinary option, and working in cooperation with organizations that provide services and support to attorneys with issues related to substance abuse.

6237. Limitation of program

It is the intent of the Legislature that the authorization of an Attorney Diversion and Assistance Program not be construed as limiting or altering the powers of the Supreme Court of this state to disbar or discipline members of the State Bar.

WHAT CAN THE COURT DO WHEN A LAWYER APPEARS DRUNK?

A. Court's Authority To Control Proceedings

1. Contempt/Sanctions

C.C.P. § 128: "(a) Every court shall have the power to do all of the following: (1) To preserve and enforce order in its immediate presence. (2) To enforce order in the proceedings before it . . . (5) To control in furtherance of justice, the conduct of its ministerial officers, and all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto."

C.C.P. § 1209: "(a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: 1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding; 2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding; **3. Misbehavior in office, or other willful neglect or violation of duty by an attorney** . . . 5. Disobedience of any lawful

judgment, order, or process of the court; 8. Any other unlawful interference with the process or proceedings of a court. . . .”

C.C.P. §1211: “(a) When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he or she be punished as therein prescribed.

***Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1595:** “Courts have inherent power, separate from any statutory authority, to control the litigation before them and to adopt any suitable method of practice, even if the method is not specified by statute or by the Rules of Court.” [See also: *Hays v. Superior Court* (1940) 16 Cal.2d 260, 264, *People v. Gonzalez* (2006) 38 Cal.4th 932, 951, and *People v. Shelley* (1984) 156 Cal.App.3d 521, 530]

2. Disqualify/Reassign Counsel

***People v. Jones* (2004) 33 Cal.4th 234, 240:** “Inherent in the question whether a trial court may disqualify a criminal defense attorney over the defendant's objection is the conflict between the defendant's preference to be represented by that attorney and the court's interest in ‘ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.’” (quoting *Wheat v. United States* (1988) 486 U.S. 153, 160. Other citations omitted.)

3. Take Over The Attorney's Practice (if no one else will)

B&P 6190 et seq: Cause of incapacity

6190. The courts of the state shall have the jurisdiction [...] when an attorney [...] has, for any reason, including [...] excessive use of alcohol or drugs, physical or mental illness, or other infirmity [...], become incapable of devoting the time and attention to, and providing the quality of service for, his or her law practice which is necessary to protect the interest of a client if there is an unfinished client matter for which no other active member of the State Bar, with the consent of the client, has agreed to assume responsibility.

6190.34. Findings by court

If the court finds that (a) the facts set forth in Section 6190 have occurred and, (b) that the interests of the client, or of an interested person or entity will be prejudiced if the proceeding provided herein is not maintained, the court shall order the applicant to mail a notice of cessation of law practice pursuant to Section 6180.1 and may make all orders provided for by the provisions of Article 11 (commencing with Section 6180) of Chapter 4 of Division 3. The court shall provide a copy of any order issued pursuant to this article to the Office of the Chief Trial Counsel of the State Bar.

6190.5. Disciplinary investigation may be maintained

The proceeding may be maintained concurrently with a disciplinary investigation or proceeding provided for by this chapter.

RESOURCES

Cal Bar Lawyer Assistance Program:

<http://www.calbar.ca.gov/Attorneys/MemberServices/LawyerAssistanceProgram.aspx>

ABA - A Young Lawyer's Guide to Ethically Confronting Substance Abuse:

<http://apps.americanbar.org/litigation/committees/youngadvocate/email/spring2012/spring2012-0612-young-lawyers-guide-ethically-confronting-substance-abuse.html>

2008 Annual Report of the Lawyer Assistance Program of the State Bar of California:

http://www.calbar.ca.gov/calbar/pdfs/reports/2009_LAP-Annual-Report_2008.pdf

Buckner, C. and Sall, R. "Ethical Considerations of Dealing with an Addicted Attorney on Both Sides of a Case" Orange County Bar Association Online MCLE program, December 5, 2006:

<http://www.legalspan.com/ocbar/catalog.asp?UGUID=D20090923205822312484017&CategoryID=20031218-163149-1357150&ItemID=20071114-664950-104124>

Facing Substance Abuse Head-On: http://www.calbar.ca.gov/calbar/pdfs/sections/lpmt/the-bottom-line_vol-23_no-3_mcle.pdf

Jennett, E. "Addiction and Lawyers: Substance Abuse in the Legal Profession" Associated Content, January 17, 2006:

http://www.associatedcontent.com/article/18193/addiction_and_lawyers_substance_abuse.html?cat=5

McCarthy, N. "Statistics Tell the Story of Stress, Addiction in Lives of Lawyers" California Bar Journal, November 2000, p. 1: <http://www.calbar.ca.gov/calbar/2cbj/00nov/index.htm>

Peck, E. "Lawyers and Substance Abuse" California Bar Journal, September 2005:

http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/September2005&MONTH=September&YEAR=2005&sCatHtmlTitle=MCLE%20Self-Study&sJournalCategory=YES

The Other Bar, informational brochure: <http://www.otherbar.org/OtherBarBrochure.pdf>

Act 3 of this presentation was based upon an actual court hearing in Las Vegas. The video of that hearing is available on YouTube at:

<http://www.youtube.com/watch?v=yV2qtvbIPFE>

<http://www.youtube.com/watch?v=l2cuAA2NOt4&feature=relmfu>

http://www.youtube.com/watch?v=ZF7_VHp95Ps&feature=relmfu

<http://www.youtube.com/watch?v=1q60M4QYGac&feature=relmfu>

(or by searching "drunk lawyer las vegas")