

The New Rules of Professional Conduct

By Neil J Wertlieb

The attached articles are a three-part series discussing the comprehensive set of new Rules of Professional Conduct that were approved by the California Supreme Court on May 10, 2018. When these 69 new Rules go into effect on November 1, 2018, they will replace the 46 Rules of Professional Conduct that currently govern the conduct of attorneys in California. These articles focus on those Rules that implement controversial or important changes to the current Rules or impose new obligations in California. Every California attorney should be aware of these changes, as failure to comply with the Rules may result in discipline.

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The Controversial and Disruptive New Rules of Conduct

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The Uncontroversial But Important New Rules of Conduct

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The Entirely New Rules of Conduct

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FRIDAY, MAY 18, 2018

PART I OF III

The controversial and disruptive new rules of conduct

By Neil J Wertlieb

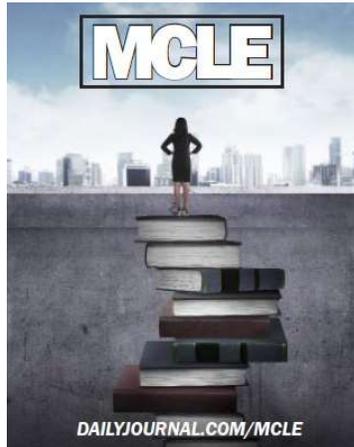
On May 10, the California Supreme Court has approved the first comprehensive rewrite of the attorney Rules of Professional Conduct in nearly three decades. Last year, the State Bar of California submitted 70 proposed new and amended Rules of Professional Conduct to the California Supreme Court. On May 10, the court approved 27 of the proposed rules in the form submitted by the State Bar, approved another 42 of the proposed rules as modified by the court, and denied one proposed rule.

On Nov. 1, these 69 approved rules will replace the 46 Rules of Professional Conduct that currently govern the conduct of all attorneys in California. Several of the new rules implement important changes to the current rules or impose new obligations in California. Every California attorney should be aware of these changes, as failure to comply with the rules may result in discipline, including being disbarred from the practice of law. See new Rule 8.5(a). Failure to comply in a litigation matter may also result in disqualification from a matter.

California is the only state that does not base its rules on the American Bar Association's Model Rules of Professional Conduct. Until the new rules take effect, California remains the only state with its own unique set of rules.

The last comprehensive revision of the California rules became operative in 1989. Since then, numerous changes have influenced the practice of law, including technological advances, multi-jurisdictional practices, and a focus more on the practice of law as a business — all with potential ethical implications.

In 2001 and 2002, the ABA revised its Model Rules, which prompted the State Bar Board of Governors to appoint a Commission for the Revision of the Rules of Professional Conduct to do a comprehensive review of the



California rules. After more than a decade of work, however, in 2014 the California Supreme Court granted the State Bar's request to restart the effort. In January 2015, a second commission was appointed with the goal of submitting proposed rules by March 2017. After soliciting public comment, the commission presented a set of proposed rules to the Board of Trustees (the successor to the Board of Governors), which (with some modification) became the set of rules the Supreme Court approved last week.

One of the most significant (although nonsubstantive) changes is to the numbering scheme of the new rules. The commission determined that the rules should generally conform to the organization and rule numbering of the Model Rules. This change allows for easier comparison and review across various jurisdictions.

Today we begin a three-part series discussing the new rules. In part one, we will consider some of the most controversial rules adopted by the Supreme Court. In parts two and three we will consider some of the less controversial, yet important changes as well as the entirely new rules adopted by the state Supreme Court.

Sexual Relations with Current Client

Current Rule 3-120 effectively

permits a lawyer to engage in "sexual relations" (as defined in the rule) with a client, provided that the lawyer does not: "(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; (2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or (3) Continue representation of a client with whom the [lawyer] has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110 [Failing to Act Competently]."

Most other jurisdictions have adopted a version of Model Rule 1.8(j), which imposes a bright-line standard that generally prohibits all sexual relations between a lawyer and client unless the sexual relationship was consensual and existed at the time the lawyer-client relationship commenced.

New Rule 1.8.10 reflects a major shift from current Rule 3-120, and substantially adopts the bright-line prohibition approach of Model Rule 1.8(j): "A lawyer shall not engage in sexual relations with a current client who is not the lawyer's spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced."

The new prohibition carries forward the exceptions in current Rule 3-120 for spousal and preexisting sexual relationships. Also, under both the current and new rule, when the client is an organization, the person overseeing the representation is considered to be the client. Current Rule 3-120, Discussion; new Rule 1.8.10, Comment [2].

This change attracted much commentary during the public review process and in the press. The commission itself recognized that the change represents a significant departure from California's current rule, and may implicate important privacy concerns. The members of the commission, however, concluded

that the current rule had not worked as intended — evidenced by the fact that in the 25 years since the rule's adoption, there had been virtually no successful disciplinary prosecutions under Rule 3-120.

Prohibited Discrimination, Harassment and Retaliation

New Rule 8.4.1, like current Rule 2-400 (which it replaces), will prohibit unlawful discrimination, harassment and retaliation in connection with the representation of a client, the termination or refusal to accept the representation of any client, and law firm operations. However, new Rule 8.4.1 reflects a fundamental change from current Rule 2-400. New Rule 8.4.1 eliminates the current requirement that there be a final civil determination of such unlawful conduct before a disciplinary investigation can commence or discipline can be imposed.

In addition, new Rule 8.4.1 expands the scope of current Rule 2-400, which only applies to "the management or operation of a law practice," and does not expressly cover retaliation.

The current rule requires a prior adjudication by a tribunal of competent jurisdiction (i.e., not the State Bar Court): "No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction ... shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred." Current Rule 2-400(C).

A majority of the members of the commission believed that the prior adjudication requirement rendered the current rule difficult to enforce. The commission cited to the fact that no discipline appears to have ever been imposed under the current rule. Further, no other rule contains a similar limitation on the original jurisdiction of the State Bar Court.

New Rule 8.4.1 was one of the more controversial proposed rules.

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In fact, the Board of Trustees, on its own initiative, mandated that an alternative version of this rule be sent out for public comment — the only rule as to which the board took such action. In its final vote on the proposal, the board was evenly split 6-to-6, with the State Bar president breaking the tie in favor of the version of the rule proposed by the commission.

Some of the primary concerns raised by the elimination of the prior adjudication requirement include the following: First, State Bar complaints may be filed by aggrieved clients and employees without the usual concern for the negative consequences typically associated with filing complaints in litigation, such as being subject to claims for malicious prosecution or attorney fees. Second, the State Bar Court is not properly experienced or staffed to become the forum of first resort for a victim of discriminatory, harassing or retaliatory conduct committed by a lawyer. And third, the disciplinary process before the State Bar Court does not provide for the same due process protections to lawyers as a tribunal of competent jurisdiction. For example, lawyers are afforded only limited discovery in matters before the State Bar Court. On the other hand, the deficiencies identified in the current rule (with respect to enforceability) led several commission members, as well as members of the public (as reflected in public commentary), to view the current rule as discriminatory in and of itself.

In response to the public concern with respect to the elimination of the prior adjudication requirement, the commission modified the rule to impose a self-reporting obligation on a lawyer who receives notice of disciplinary charges for violating the rule. This modification requires the lawyer to provide a copy of a notice of disciplinary charges pursuant to new Rule 8.4.1 to the California Department of Fair Employment and Housing, the U.S. Department of Justice, Coordination and Review Section, or to the U.S. Equal Employment Opportunity Commission, as applicable. New Rule 8.4.1(e). The purpose of this modification is to provide to the relevant government agencies an opportunity to become involved in the matter so that they may implement and advance the broad legis-



lative policies with which they have been charged. Further, a comment to the new rule clarifies that the rule would not affect the State Bar Court's discretion in abating a disciplinary investigation or proceeding in the event that a parallel administrative or judicial proceedings arises from the same lawyer misconduct allegations (new Rule 8.4.1, Comment [7]), thus giving a tribunal of competent jurisdiction an opportunity to adjudicate the matter before the State Bar Court takes action.

Safekeeping Funds and Property of Clients and Other Persons

Current Rule 4-100 requires that all funds received or held for the benefit of clients by a lawyer or law firm be deposited into a client trust account. Such funds include settlement payments and other funds received from third parties as well as advances for costs and expenses. But while best practices may dictate otherwise, the current rule does not require the lawyer or law firm to deposit into a client trust account advance fee retainers or deposits. Such payments are not currently required to be segregated from the lawyer's or law firm's funds, and may be deposited into a law firm's operating account. By including the word "fees," new Rule 1.15 mandates that advances for legal fees be deposited into a client trust account. Comment [2] to the new rule defines "advances for fees" as "a payment intended by the client as an advance payment for

some or all of the services that the lawyer is expected to perform on the client's behalf."

The permissive nature of current Rule 4-100 has led many lawyers and law firms to simply deposit all such fees into their operating accounts, some due to the operational needs of the type of practice at issue. In fact, lawyers in certain practice areas have not even needed to maintain a trust account due to the nature of their practices. This will change under new Rule 1.15.

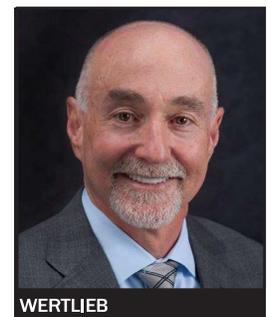
Similar to current Rule 4-100, new Rule 1.15 applies to funds "received or held" by a lawyer or law firm, and requires that the bank account into which funds are deposited be "maintained in the State of California" (subject to a limited exception). New Rule 1.15(a). The addition of a simple four-letter word (i.e., "fees") to the rule may cause material disruption to practitioners in California. First, because new Rule 1.15 is not just prospective (by applying to funds received following the effectiveness of the new rule), but applies to funds "held" by a lawyer or law firm for the benefit of a client, funds received prior to the effectiveness of the new rule and deposited into the firm's operating account would have to be identified, traced and deposited into a trust account. The formulation of new Rule 1.15 means this would essentially be given retroactive effect. Second, because the trust account must be maintained in California, firms based outside of the

state or that otherwise maintain their banking relationships outside of the state will be required to establish new banking relationships within the state.

The requirement to deposit advance fees into a trust account does not apply to a "true retainer," which is defined in new Rule 1.5 as "a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter." Such a fee is earned upon receipt, not as compensation for legal services to be performed, and as such may be deposited directly into a firm's operating account. Similarly, new Rule 1.15 permits a flat fee paid in advance for legal services to be deposited into an operating account, but only if the lawyer discloses to the client in writing that (i) the client has a right to require the flat fee be deposited into a trust account until the fee is earned and (ii) the client is entitled to a refund of any unearned amount of the fee in the event the representation is terminated or the services for which the fee has been paid are not completed; and if the flat fee exceeds \$1,000, the client must consent in writing. New Rule 1.15(b).

In part two of this three-part series, we will consider some less controversial changes that are nevertheless important for all California attorneys to know.

Neil J Wertlieb, through *Wertlieb Law Corp.*, provides expert witness services in litigation and arbitration matters involving attorney ethics and standard of care, as well as corporate transactions, fiduciary duties and corporate governance. He is the current Vice Chair of the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee, and a former Chair of the California State Bar's Committee on Professional Responsibility and Conduct.



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FRIDAY, MAY 25, 2018

PART II OF III

New rules of conduct: the uncontroversial, but important

By Neil J Wertlieb

On May 10, the California Supreme Court adopted the first major overhaul of the Rules of Professional Conduct in three decades. On November 1, these 69 approved rules will replace the 46 Rules of Professional Conduct that currently govern the conduct of all attorneys in California. Several of the new rules implement important changes to the current rules or impose new obligations in California. Every California attorney should be aware of these changes, as failure to comply with the rules may result in discipline, including being disbarred from the practice of law. See new Rule 8.5(a). Failure to comply in a litigation matter may also result in disqualification from a matter.

In part one of this three-part series, we discussed some of the more controversial rules adopted by the court. Today in part two, we will look at some of the less controversial, yet nevertheless important changes that every California lawyer should know. In part three, we will consider certain entirely new rules adopted by the state Supreme Court.

Communication with Clients

Current Rule 3-500 articulates a broad requirement likely intuitive to most practitioners: Lawyers must keep their clients “reasonably informed about significant developments relating to the representation.” But the cur-

rent rule provides little guidance as to precisely what and how much information lawyers must share.

New Rule 1.4 is generally consistent with current Rule 3-500 but it adds clarifying language from the corresponding Model Rule that has been adopted by most other states. This language is intended to enhance public protection by more clearly stating a lawyer’s obligations to clients with regard to communication.

New Rule 1.4 requires that lawyers promptly inform their clients of any decision or circumstance with respect to which disclosure or the client’s informed consent is required by the rules, and advise the client of any relevant limitation on the lawyer’s conduct when the lawyer knows the client expects assistance that may not be permitted under the rules. As a result, lawyers must not only inform clients as to what they will do, they must also advise clients as to what they cannot do.

New Rule 1.4 provides that a lawyer must explain matters to the extent reasonably necessary for clients to make informed decisions regarding the representation, and also requires that a lawyer reasonably consult with the client about the means employed to accomplish the client’s objectives. Combined, these obligations help to ensure that the client understands the information conveyed and empower the

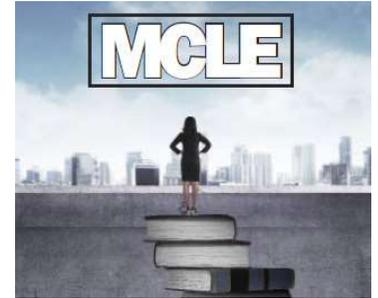
client to be an active participant in the matter.

Conflicts of Interest: Current Clients

Current Rule 3-310 governs conflicts of interest among current clients. The provisions of this current rule are viewed as taking a “checklist” approach to identifying conflicts because they describe discrete situations that might arise in representations that trigger a duty to provide written disclosure to a client or obtain a client’s informed written consent in order to continue the representation. For example, these situations include a representation where a lawyer has a relationship with a party or witness in the case, or where a lawyer has a financial interest in the subject matter of the representation.

New Rule 1.7 replaces the current “checklist” approach with generalized standards that follow the Model Rules approach to current client conflicts. Under this new approach, the inquiry for assessing whether a conflict is present is to simply ask whether there is either direct adversity “to another current client in the same or a separate matter” or “a significant risk that the lawyer’s representation of a current client will be materially limited by the lawyer’s responsibilities to or relationships with another client, a former client, or by the lawyer’s own interests.”

As is the case under current



Rule 3-310, new Rule 1.7 provides that, if such a conflict of interest exists, the lawyer shall not proceed with the conflicted representation without informed written consent from each affected client.

Organization as Client

Both new Rule 1.13 and current Rule 3-600 make clear that, in representing an organization, it is the organization itself — and not its directors, officers, employees or other constituents — that is the client of the lawyer. As an entity, the organization can only act through its authorized officers, employees and other individuals, and such individuals are not the client even though the lawyer may take direction from such persons. New Rule 1.13, however, makes the following substantive changes to current Rule 3-600:

First, current Rule 3-600 permits a lawyer to refer a matter to a higher authority within the organization under certain circumstances, including when the lawyer becomes aware that a constituent of the organization is acting, or intends to act, in a manner that either may be a violation of law imputable to the organization or is likely to result in substantial injury to the organization. (Such an action by the lawyer is often referred to as “re-

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porting up the corporate ladder.”) New Rule 1.13 mandates reporting up in certain circumstances. This mandate is consistent with the ABA Model Rule and the rules of many other states, but it diverges from current Rule 3-600 which permits, but does not require, a lawyer to take such action. (New Rule 1.13 carries forward the requirement in current Rule 3-600 that a lawyer must maintain his or her duty of confidentiality when taking action pursuant to the rule. In particular, it is important to note that, while lawyers may be permitted or obligated to report misconduct up the corporate ladder, they are generally precluded by their duty of confidentiality from “reporting out” such misconduct, e.g., to a regulatory body or prosecutor.)

Second, while the circumstances which trigger reporting up the corporate ladder under current Rule 3-600 are based on the lawyer’s actual knowledge, a lawyer’s duty to report under new Rule 1.13 will be triggered by two separate scienter standards: (1) a subjective standard that would require actual knowledge by the lawyer that a constituent is acting, intends to act, or refuses to act; and (2) an objective standard that asks whether the lawyer knows or reasonably should know that the constituent’s actions would be (a) a violation of either a legal duty to the organization or law reasonably imputable to the organization, and (b) likely to result in substantial injury to the organization.



Third, unlike current Rule 3-600 which permits a lawyer to take corrective action if there is either a violation of law or likely to be substantial injury to the organization, new Rule 1.13 requires that both be present before a lawyer’s duty to report up the corporate ladder is triggered.

Fourth, under new Rule 1.13, a lawyer will be required to notify the highest authority in the organization if the lawyer has been discharged or forced to withdraw as a result of his or her reporting up obligation. No such notification is required by current Rule 3-600.

Candor Toward the Tribunal

Similar to current Rule 5-200, new Rule 3.3 will prohibit a lawyer from knowingly making a false statement of fact or law to a tribunal (or failing to correct such a material statement previously made by the lawyer); or

failing to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquoting to a tribunal the language of a book, statute, decision or other authority; or offering evidence that the lawyer knows to be false.

However, while current Rule 5-200 does not specify the duration of the lawyer’s obligation, new Rule 3.3 expressly provides that the foregoing duties of candor to a tribunal continue to the conclusion of the proceeding. Interestingly, the version of Rule 3.3 proposed last year by the State Bar provided that such duties would continue to “the conclusion of the proceeding *or the representation, whichever comes first.*” There was some dissension among the members of the Commission for the Revision of the

Rules of Professional Conduct with this formulation (which deviates from the corresponding ABA Model Rule), in that it would allow lawyers to circumvent their duties by simply withdrawing from the representation.

The Supreme Court, in approving Rule 3.3, rejected this possibility. As a result, under new Rule 3.3 it is clear that the duty of candor toward a tribunal continues to the conclusion of the proceeding, even if the lawyer’s representation has terminated prior to such time.

In part three, we will consider some of the entirely new rules adopted by the state Supreme Court.

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WERTLIEB

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FRIDAY, JUNE 1, 2018

PART III OF III

New rules: the entirely new rules

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On May 10, the California Supreme Court adopted the first major overhaul of the Rules of Professional Conduct in three decades. On November 1, these 69 approved rules will replace the 46 Rules of Professional Conduct that currently govern the conduct of all attorneys in California. Several of the new rules implement important changes to the current rules or impose new obligations in California. Every California attorney should be aware of these changes, as failure to comply with the rules may result in discipline, including being disbarred from the practice of law. See new Rule 8.5(a). Failure to comply in a litigation matter may also result in disqualification from a matter.

In part one of this three-part series, we discussed some of the more controversial rules adopted by the court. In part two, we considered some of the less controversial, yet nevertheless important changes to the rules. Today in the final installment of this series, we consider some of the entirely new rules adopted by the state Supreme Court.

Imputation of Conflicts of Interest: General Rule

New Rule 1.10 represents an important development for California lawyers. New Rule 1.10 sets forth the noncontroversial concept that, subject to certain limited exceptions, the conflicts of interest of an attorney in a law firm may be imputed to all attorneys in the firm: “While lawyers are associated in a firm, none of

them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [the conflict of interest] rules.”

However, new Rule 1.10 goes further and establishes, for the first time in the rules, an acknowledgment that ethical screens may be effective (in limited circumstances) to cure what would otherwise be an imputed conflict of interest.

Although support exists for the effectiveness of ethical screens in case law, ethical screens are not sanctioned in the current rules. See, e.g., *Kirk v. First American Title Insurance Co.*, 183 Cal. App. 4th 776 (2010). Such cases typically involve disqualification of conflicted counsel. New Rule 1.10 clarifies that the use of ethical screens may mitigate against discipline under the rules (although the circumstances where an ethical screen may be utilized are limited to those specified in the rule). See New Rule 1.10(a).

Duties to Prospective Clients

New Rule 1.18 imposes duties upon lawyers relating to consultations with a prospective client — i.e., a “person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal services or advice from the lawyer in the lawyer’s professional capacity.” New Rule 1.18(a). In particular, lawyers have the obligation to preserve the confidentiality of information acquired during a consultation prior to the establishment of an attorney-client relationship. Even if no attorney-client relationship is

established, under this new rule, a lawyer is prohibited from using or revealing confidential information learned as a result of the consultation.

Although concepts articulated in this new rule are already the law in California and do not establish new standards (see, e.g., California Evidence Code Section 951; Business and Professions Code Section 6068(e)), the commission acknowledged the importance of including these concepts in the rules so as to alert lawyers to this important duty and provide lawyers with guidance through a clearly-articulated disciplinary standard on how to comport themselves during a consultation.

New Rule 1.18 further prohibits a lawyer from representing a client with interests adverse to those of the prospective client in the same or substantially related subject matter, absent informed written consent from the prospective client, if the lawyer has obtained confidential information material to the matter.

The prohibition in this new rule would be imputed to the lawyer’s law firm, such that no lawyer at the firm may knowingly undertake or continue representation in such a matter, unless the lawyer is properly screened from participation in the matter.

Truthfulness in Statements to Others

It has long been recognized in California that attorneys may be disciplined for intentionally deceiving a tribunal or opposing counsel, and that attorneys may be civilly liable to a third party for making false statements of mate-



rial fact on behalf of a client. Further, Section 6106 of the Business and Professions Code provides that attorneys may be disciplined for committing acts involving “moral turpitude, dishonesty or corruption.”

New Rule 4.1 prohibits lawyers, in the course of representing a client, from “knowingly” making a “false statement of material fact or law to a third person,” or failing to disclose to a third person a material fact necessary to avoid assisting in a client’s criminal or fraudulent conduct.

This new rule reflects an important change by expressly including in the rules a disciplinary standard for misrepresentations to third parties where no such disciplinary standard existed. Further, it differs from the legal standard applicable to civil liability for fraudulent representation, because a violation under the new rule does not require proof of reliance or damages.

Dealing with Unrepresented Person

Both the current rules and the new rules contain a version of the No Contact Rule, which prohibits a lawyer from communicating about the subject of a representation with a person represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. See current Rule 2-100; new Rule 4.2. New Rule

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4.3 imposes duties in connection with communications with unrepresented persons.

New Rule 4.3 prohibits a lawyer when communicating on behalf of a client with an unrepresented person from stating or implying that the lawyer is disinterested. If the lawyer knows (or reasonably should know) that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer is obligated to make reasonable efforts to correct that misunderstanding. Further, if the lawyer knows (or reasonably should know) that the interests of the unrepresented person are in conflict with the interests of the client, the lawyer must not give legal advice to that person (although the lawyer may advise the person to seek legal counsel). Rule 4.3(a).

New Rule 4.3 also prohibits a lawyer when communicating on behalf of a client with an unrepresented person from seeking to obtain privileged or other confidential information that the lawyer knows (or reasonably should know) the person is precluded from revealing without violating a duty to someone else or which the lawyer is not entitled to receive. Rule 4.3(b).

As stated in Comment [1] to the rule, this new rule is intended to protect unrepresented persons from being misled in communications with a lawyer who is acting on behalf of a client.

Duties Concerning Inadvertently Transmitted Writings

No rule existed that addressed a lawyer's duties to third persons when presented with inadvertent disclosure of privileged materials.

New Rule 4.4 provides: "Where it is reasonably apparent to a lawyer who receives a writing relating to a lawyer's representation of a client that the writing was inadvertently sent or produced, and the lawyer knows or reasonably should know that the writing is privileged or subject to the work product doctrine, the lawyer shall: (a) refrain from examining the writing any more than is necessary to determine that it is privileged or subject to the work product doctrine, and (b) promptly notify the sender."

While new Rule 4.4 is consistent with California case law (*see, e.g., Rico v. Mitsubishi*, 42 Cal. 4th 807, 817 (2007)), the commission concluded that adopting this new rule would help protect the public and the administration of justice, as well as inform attorneys of their ethical obligations. Consistent with such case law, Comment [1] to the new rule provides the lawyer with the following options when a lawyer determines the rule applies to a transmitted writing: "the lawyer should return the writing to the sender, seek to reach agreement with the sender regarding the disposition of the writing, or seek guidance from a tribunal."

Responsibilities of Managerial & Supervisory Lawyers, of a Subordinate Lawyer and Regarding Nonlawyer Assistants

The only reference to a lawyer's duty to supervise subordinates is contained in a comment to current Rule 3-110 (Failing to Act Competently): "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents." New Rules 5.1, 5.2 and 5.3 de-

tail what that duty to supervise requires.

New Rule 5.1 provides that lawyers who manage law firms, both individually and collectively, "shall make reasonable efforts to assure that all lawyers in the firm comply" with the rules. New Rule 5.1 also requires lawyers who supervise other lawyers, whether or not a member or an employee of the same law firm, to make similar "reasonable efforts to ensure compliance by the lawyer supervised." A lawyer will be vicariously responsible for another lawyer's violation of the rules if "(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

Consistent with case law in California (*see, e.g., Jay v. Mahaffey*, 218 Cal. App. 4th 1522 (2013); *In re Aguilar*, 34 Cal. 4th 386 (2004)), new Rule 5.2 makes it clear that, notwithstanding the vicarious responsibility imposed on a managing or supervising lawyer by new Rule 5.1, a subordinate lawyer has an independent duty to comply with the rules. The comment to the new rule further provides that "[i]f the subordinate lawyer believes that the supervisor's proposed resolution of the question of professional duty would result in

a violation of these rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer."

New Rule 5.3 holds lawyers similarly responsible for non-lawyer employees. Managerial and supervisory lawyers must make reasonable efforts to ensure that the conduct of the nonlawyers they supervise is compatible with the professional obligations of the lawyer.

The above changes and additions to the Rules of Professional Conduct have been approved the California Supreme Court. These rules, as well as the rest of the 69 new rules, will become effective on November 1, at which time all attorneys in California will be subject to the new rules.

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