ETHICS AND ENTERTAINMENT LAW IN CALIFORNIA:

THE ESSENTIALS©

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I. INTRODUCTION

Entertainment law is a highly competitive area of practice, involving attorneys taking on numerous roles and dealing with various players. Many times attorneys may take on roles, duties and activities similar to those of agents or managers (i.e. marketing, advertising, negotiating, networking and deal-making). Attorneys however, are distinguishable from agents and managers in that attorneys must conform their conduct to high ethical standards governed by codes of professional behavior. The California *Rules of Professional Conduct* (the "Rules)[1] apply equally to all attorneys, regardless of the nature of their practice, and despite the unique nature of entertainment law practice, there are no special rules or exceptions for entertainment attorneys.

Attorneys who aggressively represent clients in litigation and/or transactional matters often test the limits of permissible professional conduct. Entertainment attorneys, for example, might test such limits by taking on the joint representation of multiple parties in negotiating deals, or by acting as personal managers and/or agents for their clients, or by accepting as their fee an ownership interest in their client's literary property, any of which may create conflicts of interest.

One of the most notorious cases demonstrating the types of claims and monetary damages an entertainment attorney can face if he or she disregards the codes of professional behavior is *Day v Rosenthal*.[2] The *Day* case depicts one of the most atrocious examples of breach of fiduciary duty by an entertainment attorney. Doris Day brought claims for legal malpractice, breach of fiduciary duty, fraud and abuse of process against her former and long-time attorney-manager, Jerome B. Rosenthal, for the losses she had suffered from his mismanagement of her earnings and assets, much of which apparently ended up in Rosenthal's own pockets. Day eventually won a legal malpractice award of $26 million (upheld on appeal). While the law firm's malpractice insurer paid the bulk of the award, it did not cover the $1 million punitive damage component awarded against Rosenthal, individually. Further, disciplinary proceedings resulted in the State Bar Court unanimously recommending that Rosenthal be disbarred.[3] The *Day* case presents facts instructive of what attorneys, also functioning as an agent and/or manager, should not do and what can happen when they do not follow the rules.

Given the highly competitive nature of the entertainment business, it is not unexpected that many entertainment attorneys may become the subject of one or more complaints before disciplinary authorities and/or the courts, which makes it all the more important that entertainment attorneys (and all attorneys for that matter) work within the rules of professional responsibility, as well as continuing their legal education. Failure to do so could result in various consequences ranging from disqualification and adverse publicity to possible disbarment and lawsuits for civil damages.

II. THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT, IN GENERAL

A. Purpose and Function.

The Rules are intended to regulate professional conduct of members of the State Bar through discipline, and have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to *Business & Professions Code* ("B&P Code) §§ 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession.[4]

These Rules (together with any standards adopted by the Board of Governors pursuant to these Rules) are binding upon all members of the State Bar, and for any willful breach of any

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[1] Unless otherwise indicated references to "Rule __" refer to the Rules.

[2] *See, Day v. Rosenthal* (1985) 170 Cal App 3d 1125.

[3] *Id.*

[4] Rule 1-100(A)

of these Rules, the Board of Governors has the power to discipline members of the State Bar.[5]

Note – While courts have held that no independent cause of action exists for the breach of a disciplinary rule, in contrast, subsequent rulings have established that an attorney's duties to his or her client are conclusively established by the Rules, and the attorney's violation of those Rules may establish the attorney's negligence and breach of fiduciary duties, even in the absence of expert testimony.[6]

B. Geographic Scope of the Rules.

1. As to members of the California State Bar, the Rules govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from the Rules.[7]

2 As to attorneys from other jurisdictions, who are not California State Bar members, the Rules also govern the activities of attorneys while engaged in the performance of attorney functions in this state; but nothing contained in the Rules are deemed to authorize the performance of such functions by such persons in California except as otherwise permitted by law.[8]

a Business & Professions Code § 6125 – This rule provides "No person shall practice law in California unless the person is an active member of the State Bar."

b. *Birbrower v The Superior Court* – A New York law firm, Birbrower, Montalbano, Condon & Frank, P.C. ("Birbrower"), performed work in California relating to the representation of a California corporation, in negotiating the resolution of a dispute with another entity prior to going to arbitration. Subsequently, after a dispute arose between Birbrower and the client over the fee agreement, the client sued for legal malpractice and argued that by practicing law without a license in California and by failing to associate California legal counsel, Birbrower violated section 6125, rendering the fee agreement unenforceable. The trial court agreed and granted limited summary adjudication, and the Court of Appeal affirmed. The Supreme Court also affirmed to the extent that Birbrower's representation in California violated section 6125, and that Birbrower was not entitled to recover fees under the fee agreement for its California services, but reversed to the extent the Court of Appeal did not allow for the recovery of fees attributable to services rendered in New York.[9]

c. Note – In making its analysis of what constitutes the practice of law "*in California*," the Court in *Birbrower* commented that "[m]ere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California.' The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations. Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence . . . is one factor [to be considered] . . . but it is by no means exclusive. For example, one may practice law in the state in violation of section 6125 . . . by advising a California client on California law in connection with a California legal dispute by telephone, fax,

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[5] *Id.*

[6] *Id.*; *also see, Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654 [a breach of a disciplinary rule does not per se create an independent civil cause of action]; and in contrast, *see, Stanley v. Richmond* (1995) 35 Cal.App. 4th 1070, 1086 [the scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct]; *Mirabito v. Liccardo* (1992) 4 Cal.App. 4th 41 [the rules could be used to help prove breach of fiduciary duties]; and *Day, supra*, 170 Cal.App. 3d at 1146-1149 [attorney's duties are conclusively established by the rules, which the court was required to judicially notice].

[7] The State Bar is currently working on proposed rules and/or amendments for comment, relating to multi-jurisdictional practice.

[8] Rule 1-100(D)(1)&(2).

[9] *Birbrower v. The Superior Court* (1998) 17 Cal. 4th 119, 140.

computer, or other modern technological means." Conversely, the Court did "reject the notion that a person *automatically* practices law 'in California' whenever that person practices California law anywhere or 'virtually' enters the state by telephone, fax, e-mail, or satellite," and concluded that "[w]e must decide each case on its individual facts."[10]

d. Further Note – In *Birbrower*, the trial court's granting of limited summary adjudication, did not include Birbrower's cause of action for quantum meruit recovery. Thus, the issue of quantum meruit recovery for the reasonable value of legal services provided, albeit in violation of section 6125, was not addressed by the Supreme Court. In fact, the Court specifically limited its decision by stating that "Birbrower is not entitled to recover fees *under the agreement* for those services."[11]

e. Practice Tip – In view of some of the comments made by the Court in *Birbrower*, out-of-state attorneys, unlicensed in California, should proceed with caution if choosing to represent California residents or corporations in relation to California law and/or California legal disputes, even when there is no physical presence made by the attorney in the state (also see Law Firm Websites below), and strongly consider associating with local California counsel. The failure to do so was one of the major errors noted in *Birbrower*.[12]

III. ADVERTISING AND SOLICITATION

A. Bates v. State Bar of Arizona.[13]

In this case, the U.S. Supreme Court ruled that the State could not restrain attorneys with a "blanket suppression" on advertisement, and that the subject advertisement in a newspaper, was protected, as long as the advertisement was truthful and not misleading. The court reasoned that a complete ban on commercial advertising by attorneys would only serve to perpetuate the market position of established attorneys, and consideration of "entry barrier" problems urged the conclusion that advertising should be allowed so as to aid the new competitor-attorney in penetrating the market. A rule allowing restrained commercial advertising by attorneys facilitates the process of intelligent selection of attorneys, and to assist in making legal services fully available.

B. Rule 1-400 – Advertising and Solicitation.

1. Rule 1-400 contains broad definitions of key terms: "solicitation" and "communication."

a. "Communication" – means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following: (1) Any use of firm name, trade name, etc.; (2) Any stationery, letterhead, business card, sign, brochure, etc.; (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

b. "Solicitation" means any communication: (1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and (2) Which is (a) delivered in person or by telephone, or (b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

c. A "solicitation" should not be made by or on behalf of an attorney or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A "solicitation" to a former or

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[10] *Id*, at 128-129
[11] *Id*, at 140
[12] *Id*, at 126
[13] *Bates v. State Bar of Arizona* (1977) 433 U.S. 350.

present client in the discharge of an attorney's or law firm's professional duties is not prohibited [14]

d. Further, a "solicitation" or "communication" should not:

1) Contain any untrue statement;[15]

2) Present any matter in a manner which is false, deceptive, or which tends to confuse, deceive, or mislead the public;[16]

3) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors.[17]

4) Note - In California, as there is no certified designation of "entertainment law specialist," an attorney should not state or imply that they are specialists in the entertainment field of law in any "solicitation" or "communication."[18]

2. Under Rule 1-400, certain forms of advertising are presumed improper. The Board of Governors of the State Bar has formulated and adopted "Standards." Examples of "communication(s)" presumed improper include those containing: (1) guarantees, warrantees, or predictions; (2) testimonials or endorsements; (3) transmitted at a scene of an accident; (4) a dramatization unless such communication contains a disclaimer which states "this is a dramatization" or words of similar import; (5) which states or implies "no fee without" recovery unless such communication also expressly discloses whether or not the client will be liable for costs, etc

C. B&P Code §§ 6157-6158.3 – Legal Advertising.

1. "Advertise" or "advertisement" means any communication, disseminated by television or radio, by any print medium including, but not limited to, newspapers and billboards, or by means of a mailing directed generally to members of the public and not to a specific person, that solicits employment of legal services provided by a member, and is directed to the general public and is paid for by, or on the behalf of, an attorney.[19] "Electronic medium" means television, radio, or computer networks [20]

2. Prohibited Statements – No advertisement should contain any false, misleading, or deceptive statement or omit to state any fact necessary to make the statements made, in light of circumstances under which they are made, not false, misleading, or deceptive.[21]

3. Prohibited Contents – No advertisement should contain or refer to any of the following: (a) any guarantee or warranty regarding outcome of a legal matter as a result of representation; (b) statements that member can obtain immediate cash or quick settlements; (c) impersonations or spokespersons (with exceptions); (d) statement that a member offers representation on a contingent basis unless the statement also advises whether a client will be held responsible for any costs advanced by the member when no recovery is obtained.[22]

4. Practice Tip - The most effective way for an entertainment attorney (or any attorney for that matter) to promote their legal services is to establish a strong reputation for providing efficient, competent, and superior legal work with the general public, as well as within the professional community.[23] The idea being that satisfied clients will return with more work and will refer new clients. Attorneys trying to develop an entertainment law practice should make their presence known in the arts

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14 Rule 1-400(C).
15 Rule 1-400(D)(1)
16 Rule 1-400(D)(2)
17 Rule 1-400(D)(6)
18 *See*, www.californiaspecialist.org,, for list of designated California "specialist" practice areas.

19 B&P Code § 6157(c)
20 B&P Code § 6157(d).
21 B&P Code § 6157.1.
22 B&P Code § 6157.2.
23 *See*, Kenneth J. Abdo & Jack Sahl, *A Professional Responsibility Primer for Today's Entertainment Lawyer*, 18:3 ENT. AND SPORTS LAWYER, (Fall 2000), at 7

and entertainment community by attending continuing legal education seminars on entertainment law subjects, and attend performances and related events such as award ceremonies and benefits Attorneys can also help develop an entertainment law practice by providing legal services pro bono and volunteering their services to non-profit arts organizations, as well as authoring entertainment law articles.

D. Current Issues.

1. Law Firm Websites – in general, website advertising must comply with the general rules of the relevant state bar rules applicable to advertising In a recent CA State Bar Ethics Opinion – Formal Opinion No 2001-15, the committee held that a website is a "communication" and thus falls under the umbrella of Rule 1-400(A) of the Rules of Professional Conduct. Additionally, it falls under the umbrella of B&P Code §§ 6157 to 6158.3 as an "advertisement." Since a website falls under Rule 1-400 and B&P § 6158, attorneys must be certain that their website does not contain any false, misleading, or deceptive messages

a A website does not constitute a "solicitation" even if it includes electronic mail capabilities allowing for direct communication to and from the attorney. The committee reasoned that e-mail on a website is "a communication that is made available to everyone, but directed to no one in particular." On the other hand, once an attorney responds to an identified person, that response would be a solicitation under rule 1-400(B)(2)(b) only if the person is "known to the sender to be represented by counsel in a matter which is a subject of the communication."

b. Note - Websites might be subject to regulation by other jurisdictions or may be considered the unauthorized practice of law in other jurisdictions.

c For those who do not practice in other jurisdictions, the committee suggests the following language: "1) an explanation of where the attorney is licensed to practice law, 2) a description of where the attorney maintains law offices and actually practices law, 3) an explanation of any limitation on the courts in which the attorney is willing to appear, and 4) a statement that the attorney does not seek to represent anyone based solely on a visit to the attorney's website."

d. Even the above language, may not comply with the rules of some jurisdictions

2. Chat rooms, Radio Call-In Shows, & other electronic media Advertising by Electronic Media – In advertising by electronic media, to comply with B&P §§ 6157.1 and 6157.2, the message as a whole may not be false, misleading, or deceptive, and the message as a whole must be factually substantiated, meaning capable of verification by a credible source (see Duty of Confidentiality, below) [24]

a. Further Note on Chat rooms – California State Bar Formal Opinion No 2004-166: Where an attorney communicated with prospective clients in a mass disaster victims Internet chat room, the committee held that an Attorney's participation in a chat room does constitute a "communication" within the meaning of subdivision (A) of the rule 1-400, but was not a prohibited "solicitation" as defined in rule 1-400(B). However, the committee did hold that the communication was in violation of subdivision (D)(5) of rule 1-400, which bans transmittal of communications that intrude or cause duress, as well as a violation of Standard (3) to rule 1-400, which presumes improper any communication delivered to a prospective client whom the attorney knows may not have the requisite emotional or mental state to make a reasonable judgment about retaining counsel.

IV. ESTABLISHING AN ATTORNEY-CLIENT RELATIONSHIP

A. Introduction.

When an attorney makes the important decision to take on a new client, they are committing themselves to a bundle of duties

[24] B&P § 6158, and generally §§ 6158.2 & 6158.3; *see also*, California State Bar Formal Opinion No 2003-164

owed to that new client, including the duties of confidences, competency and communication

B. Attorney-Client Relationship.

Courts have established that an attorney-client relationship can be created by express or implied agreement, and as a result, attorneys need to be careful about casually offering advice on legal matters

1. Except when created by court appointment, the attorney-client relationship may be found to exist based on the intent and conduct of the parties and the reasonable expectations of the potential client [25]

2. The distinction between express and implied-in-fact contracts "relates only to the manifestation of assent; both types are based upon the expressed or apparent intention of the parties."[26]

3. The "totality of the circumstances" may establish an implied-in-fact contract creating an attorney-client relationship.[27] A number of factors (none of which are dispositive of the issue) may be considered in determining whether an implied-in-fact attorney-client relationship exists, including, but not limited to:

a. whether the attorney volunteered his or her services;[28]

b. whether the attorney previously represented the individual, particularly under circumstances similar to those of the matter in question;[29]

c. whether the individual sought legal advice from the attorney in the matter in question and the attorney provided advice;[30]

d. whether the individual paid fees or other consideration to the attorney in connection with the matter in question;[31]

e. whether the attorney consulted the attorney in confidence;[32]

f. whether the individual reasonably believes that he or she is consulting a attorney in a professional capacity [33]

4. *State of mind is not enough* – Unless *reasonably* induced by representations or conduct of the attorney, the individual's subjective state of mind is not sufficient to create the attorney-client relationship.[34]

5. Note - An attorney can avoid the formation of an attorney-client relationship by express actions or words [35]

C. Attorney Relationship and/or Duties To Non-Client/Third Parties.

There are sometimes limited duties of care owed to non-client/third parties.

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[25] *See, Flatt v Superior Court* (1994) 9 Cal 4th 275, 281, fn 1 [discussing the factual nature of determining whether an attorney-client relationship has been formed]

[26] *See, Responsible Citizens v Superior Court* (1993) 16 Cal App 4th 1717, 1732, quoting 1 Witkin, *Summary of California Law* (9th Ed. 1987), "Contracts," § 11, p. 46

[27] *Del E. Webb Corp v Structural Materials Co.* (1981) 123 Cal.App.3d 593, 611; *see Kane, Kane & Kritzer, Inc v Altagen* (1980) 107 Cal.App 3d 36, 40-42

[28] *See. Miller v Metzinger* (1979) 91 Cal.App 3d 31, 39-40

[29] *IBM Corp v. Levin* (3d 1978) 579 F.2d 271, 281

[30] *See, Beery v State Bar* (1987) 43 Cal 3d 802, 811

[31] *See, Strasbourger Pearson Tulcin Wolff Inc v Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1403; *Fox v Pollack* (1986) 181 Cal.App.3d 954, 959.

[32] *See, In re Marriage Zimmerman* (1993) 16 Cal.App.4th 556

[33] *See, Westinghouse Electric Corp v. Kerr-McGee Corp.* (7th Cir. 1978) 580 F.2d 1311, 1319-1320

[34] *Fox v. Pollack, supra*, 181 Cal.App.3d 954, 959; *see also Moss v Stockdale, Peckham & Werner* (1996) 47 Cal App 4th 494, 504.

[35] *Fox, supra*, 181 Cal.App.3d at 959; *People v Gionis* (1995) 9 Cal.4th 1196 [attorney disclaimed attorney-client relationship in advance of discussion]

1. There is a duty to communicate with third parties who may reasonably believe that an attorney represents their interests, at least to admonish them that they are not so represented (see Duty to Communicate, below),[36] and possibly to advise them to seek independent counsel.[37]

2. Duties of care may flow to client family members[38] and friends.

3. Duties of care may also extend to persons with whom client maintains professional or business relationships.[39]

4. Third-party beneficiaries - The CA Supreme Court has held that an attorney may be held liable for injuries to third-parties, even in the absence of privity, when the "end and aim" of the attorney's representation was to provide a benefit to that third-party.[40] The potential liability of attorneys to third party beneficiaries may even extend in the presence of intervening factors.[41]

a. Balancing Test - "Whether an [attorney] will be held liable to a third person not in privity [with the attorney] is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the [third-party], the foreseeability of harm to him, the degree of certainty that the [third-party] suffered injury, the closeness of the connection between the [attorney's] conduct and the injury, and the policy of preventing future harm."[42]

b. Note - Although an attorney's potential liability to third-party beneficiaries has generally been limited to cases dealing with trust and will drafting, the balancing test has been argued to apply to other circumstances[43], and could potentially be extended by the courts.

D. Duty of Confidentiality/Attorney-Client Privilege.

Even in the absence of an attorney-client relationship, an attorney may owe a duty of confidentiality to individuals who consult the

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[36] *Butler v State Bar* (1986) 42 Cal.3d 323

[37] *See* Kenneth J. Abdo & Jack P. Sahl, *Entertainment Law Ethics*, ALI-ABA Course of Study Materials, (January 2005), at 9, fn. 32, discussing *Croce v. Kurnit* (S.D.N.Y. 1982) 565 F.Supp. 884, aff'd., 737 F. 2d 229 (2nd Cir. 1984). In *Croce*, the widow of the late singer and songwriter, Jim Croce, sued in New York Federal Court claiming unconscionability and breach of fiduciary duty against Croce's publishers, managers and an attorney on the managerial and personal services contracts. At the initial meeting, the attorney was introduced to the Croces as "the lawyer" and reviewed the contract terms. While the attorney was clearly not the Croces' lawyer and the court upheld the contracts, the Court found the attorney liable for all of Croce's legal fees in challenging the contracts. The court held that the attorney had breached a fiduciary duty to the Croces by failing to advise them to seek independent counsel at the outset. This case has inspired the inclusion of an acknowledgment in management contracts that the artist has been advised of the opportunity to seek independent counsel.

[38] *See, Meighan v Shore* (1995) 34 Cal.App.4th 1025 [duty to advise personal injury client's spouse of potential claim for loss of consortium]; limited in *Hall v Superior Court* (2003) 108 Cal.App. 4th 706, 714 [*Meighan* was limited to potential claim for loss of consortium where both spouses were present and sought legal advice from attorney together]

[39] *See, Buehler v. Sbardellati* (1995) 34 Cal.App.4th 1527 [as to client's partnerships]; *Kapelus v State Bar* (1987) 44 Cal.3d 179 [limited partnerships]; *Johnson v Superior Court* (1995) 38 Cal.App.4th 463 [corporations, unincorporated associations]; *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 [investors]

[40] *See, Borissoff v Taylor & Faust* (2004) 33 Cal. 4th 523; *Lucas v Hamm* (1961) 56 Cal. 2d 583 ["in the event of a breach by the attorney, only by giving the beneficiaries a right of action, we should recognize, as a matter of policy, that they are entitled to recover as third-party beneficiaries"]; *Biakanja v Irving* (1958) 49 Cal. 2d 647; *also see, Glanzer v Shepard* (1922) 233 N.Y. 236

[41] *See, Osornio v Weingarten* (2004) 124 Cal.App. 4th 304, 332 ["we conclude here that the absence of an extreme closeness between conduct and injury, by itself, should not trump a finding of an attorney's duty to a nonclient"]

[42] *Lucas, supra*, 56 Cal. 2d at 588; citing *Biakanja, supra*, 49 Cal. 2d at 650.

[43] *See, Goodman v Kennedy* (1976) 18 Cal. 3d 335 [attorney for corporation had no duty to third-party buyers of stock].

attorney in confidence, and the attorney-client privilege may be applicable.[44]

1. For purposes of the attorney-client privilege, *Evidence Code* § 951 defines a "client" to mean: "a person who, directly or through an authorized representative, *consults* an attorney *for the purpose of* retaining the attorney or securing legal service or advice from him in his professional capacity. . ." (Emphasis added).

a. No requirement that the "client" actually retain the attorney or receive legal advice.

b. *Conduct of attorney is critical factor* – if the attorney's conduct, in light of the surrounding circumstances, implies a willingness to be consulted, then the speaker may be found to have a reasonable belief that he is consulting the attorney in the attorney's professional capacity.

c. The communication must actually be confidential for the attorney-client privilege or the duty of confidentiality to apply.

2. Further Note on Radio Call-In Shows/Chatrooms - California State Bar Formal Opinion No. 2003-164: the committee held that the context (particularly its public and non-confidential nature) of a radio call-in show or other similar format is unlikely to support a reasonable belief by the caller that the attorney fielding questions is agreeing implicitly to act as the caller's attorney or to assume any of the duties that flow from an attorney-client relationship.

3. Communications in a Non-Office Setting (i.e. social functions). It is not uncommon for entertainment attorneys (and all attorneys for that matter) to be approached for impromptu legal advice in a social setting or cocktail party type atmosphere. Attorneys should be cautious when such circumstances arise, as it is possible for an attorney-client relationship to be formed (along with all or some of the accompanying duties) in even the most informal of environments.

a. California State Bar Formal Opinion No. 2003-161: a person's communication made to an attorney in a non-office setting may result in the attorney's obligation to preserve confidentiality of the communication (1) if an attorney client relationship is created by the contact; or (2) even if no attorney-client relationship is formed, the attorney's words or actions induce in the speaker a reasonable belief that the speaker is consulting the attorney, in confidence, in his professional capacity to retain the attorney or to obtain legal services or advice.

b. Attorneys must be sensitive and cognizant of the circumstances surrounding any non-office communications that could give rise to misunderstandings, and whether their words or actions could provide a "reasonable" basis for contending that the attorney was being consulted.

c. Practice Tip - To prevent any misunderstandings, attorneys should disclose or demonstrate, at the earliest opportunity, an unwillingness to be consulted or to act as counsel in the matter.[45]

E. Duty of Competence.

One of the most important decisions an attorney makes is the decision to represent a client. Attorneys are generally free to reject a client's offer of employment, but once an attorney agrees to represent a client, California Rules of Professional Conduct, Rule 3-110 requires the attorney to not intentionally, recklessly, or repeatedly fail to perform legal services with competence.[46]

1. For purposes of Rule 3-110, "competence" in any legal service skill shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.[47]

2. If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless

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[44] B&P Code § 6068(e); *Evidence Code* § 950, *et seq*.

[45] *People v. Gionis*, *supra*, 9 Cal.4th at 1211.

[46] Rule 3-110(A).

[47] Rule 3-110(B).

perform such services competently by 1) associating with or, where appropriate, professionally consulting another attorney reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required [48]

3. The duties set forth in Rule 3-110 include the duty to supervise the work of subordinate attorneys and non-attorney/office employees or agents.[49]

F. Duty to Communicate With Client.

Rule 3-500 requires an attorney to keep a client reasonably informed about significant developments relating to the employment or representation and promptly comply with reasonable requests for information [50]

1. An attorney's failure to communicate, and his or her inattention to the needs of a client, is considered proper grounds for discipline [51] The attorney has a duty to communicate significant events to a client, including statutory deadlines, any overtures from opposing counsel relating to possible settlement or other matters, or the attorney's decision to not pursue a particular course of legal action if he deems it fruitless, as absent such communications, the client is deprived of the attorney's professional advice, as well as of the opportunity to consult with another attorney as to the wisdom of such decisions.[52]

2. An attorney's duty to communicate with a client includes a duty to communicate with persons who reasonably believe they are clients, at least to the extent of advising them of the attorney's belief that they are not clients.[53]

3. Note - Even when an attorney declines representation of a party, the attorney normally still owes a duty to communicate any potential deadlines and statutes of limitations.[54]

V. RETAINER AGREEMENTS AND FEE ARRANGEMENTS

A. Introduction.

With some exceptions, discussed below, all fee agreements, whether hourly or contingency, must be in writing. Fee arrangements are negotiated as an arms-length dealing, and unlike some other transactions between attorneys and clients, which are treated the same as those between trustees and beneficiaries, there is no presumption of fraud on the attorney's part involving the "hiring or compensation" transaction.[55]

B. Written Retainer Agreements.

A comprehensive retainer agreement for legal services should unambiguously address the agreed scope of the attorney's representation and payment method. Outlining the agreed scope of representation, including excluded areas of responsibility, is essential as a first step to limiting exposure for areas outside the scope of engagement.[56] However, even when a retention is expressly limited, the attorney may still be obligated to alert the client to legal problems and

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[48] Rule 3-110(C)

[49] *See, Gadda v State Bar* (1990) 50 Cal 3d 344, 353; *Spindell v State Bar* (1975) 13 Cal.3d 253; *also see, Noble supra* 33 Cal.App 3d at 663 [Court held that attorneys (and other hirers of detective agencies) for either a single investigation, or for the protection of property, may be liable for the intentional torts of employees of the private detective agency committed in the course of the employment, including invasion of privacy]

[50] Rule 3-500; *see*, B&P Code § 6068, subd (m).

[51] *See, Aronin v State Bar* (1990) 52 Cal 3d 276, 287-288.

[52] *See, In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47; *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, 451

[53] *Butler, supra,* 42 Cal 3d 323.

[54] *See, Miller v Metzinger* (1979) 91 Cal.App. 3d 31; distinguished in *Flatt, supra,* 9 Cal 4th 275 [attorney had no duty to communicate statute of limitations to party seeking representation, where such advice would be adverse to present client of attorney] (see Conflicts of Interest, below)

[55] *See, Probate Code* § 16004; and *Ramirez v Sturdevant* (1994) 21 Cal.App 4th 904

[56] *See, Nichols v Keller* (1993) 15 Cal App 4th 1672; and *Di Loreto v O'Neill* (1991) 1 Cal App 4th 149

remedies which are reasonably apparent, even though they fall outside the scope of the retention [57]

1. Contingency Fee Agreements – An attorney who contracts to represent a client on a contingency fee basis should, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, to the client [58]

a. The contract must be in writing, and shall include, but is not limited to the following:

1) a statement of the contingency fee rate;

2) how the disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery;

3) to what extent, if any, the client could be required to pay any compensation to the attorney for related matters not covered in the contingency fee contract.[59]

4) Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall thereupon be entitled to collect a reasonable fee [60]

2. "Shopping" Agreements – Oftentimes entertainment attorneys take on the job to market or "shop" creative properties to companies. A separate "shopping" agreement can be drawn, separate from any other legal services the attorney may provide.

a. Because of the speculative nature of shopping talent and creative properties, attorneys often agree to a contingency fee arrangement whereby they receive a fee only after a deal is made. Once an agreement is concluded, the attorney may propose to continue the arrangement for future services, perhaps on a contingency fee based on the client's gross income (such as those often used by managers, and movie, literary, and sports agents).

b. A customary legal contingency fee ranges from 5-10% of the defined gross compensation of the client and rarely exceeds 10%. The exact percentage may depend on the amount of the work undertaken by the attorney and the client's record of commercial success (i.e. a superstar may pay a lower % of gross compensation, while a new talent might pay a higher % to compensate for the higher speculative risk involved) [61]

3. Fee Agreements for Services in Excess of $1,000.00 – In any case not coming within § 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees will exceed one thousand dollars ($1000), the contract for services in the case must be in writing, and a duplicate copy signed by both the attorney and client shall be provided to the client at the time the contract is entered into.[62]

a. The written contract must contain all of the following:

1) Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case;

2) The general nature of the legal services to be provided to the client;

3) The respective responsibilities of the attorney and the client as to the performance of the contract.[63]

b. Failure to comply with any provision of § 6148 renders the agreement voidable at the option of the client, and the

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[57] *See Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal App 4th 930, 940; citing *Nichols, supra*, 15 Cal App 4th at p. 1684

[58] B&P Code § 6147(a)

[59] B&P Code § 6147(a)(1)-(3)

[60] B&P Code § 6147(b).

[61] *See*, Abdo & Sahl, *supra*, at 7.

[62] B&P Code § 6148(a).

[63] B&P Code § 6148(a)(1)-(3)

attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee.[64]

c. Exceptions to § 6148:

(1) If the client is a corporation; (2) An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client; (3) If the client knowingly states in writing, after full disclosure of 6148, that a writing concerning fees is not required; and (4) Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.[65]

4 Rate Changes – Fee agreements should include the ability to change rates, especially in litigation engagements or any other matter that contemplates services to be rendered over a sustained period of time.

a. In practice, the law firm should give written notice in advance of a scheduled rate increase, preferably by letter, but at least through an invoice that clearly shows the increased rates. Otherwise, rate changes will not be permitted absent a modification agreement to which the client consents.[66]

b. When negotiating or renegotiating fee arrangements with an existing client, like negotiating a fee arrangement with a new client, there is no presumption of fraud to the transaction.[67]

c. Note – Although there is authority that no presumption of fraud exists when renegotiating a fee agreement, attorneys should nevertheless exercise prudence when doing so, since there is at that point an existing fiduciary relationship and there may well be circumstances that could arguably later be portrayed as duress. A prudent attorney may suggest that the client seek advice from another attorney regarding the proposed renegotiation of fees.

d. Further Note - the failure to obtain a written fee agreement could be brought out as evidence in a malpractice action, especially where there is a controversy over the scope of the engagement, and can be an effective weapon in the hands of an expert witness.[68] Further, non-compliance could be State Bar sanctionable, especially based on a pattern of violations.[69]

e. Practice Tip – It is a good idea to use written fee agreements in *every* matter for *every* client, even the corporate client (to protect against changes in management, bankruptcy or receivership), even if only a brief confirming letter, covering most important items: fee arrangements, scope of engagement, excluded areas of responsibility, and alternative dispute resolution.

C. Fee Splitting.

1 With Attorneys – An attorney should not divide a fee for legal services with an attorney who is not a partner of, associate of, or shareholder with the attorney unless: (1) the client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and (2) the total fee charged by all attorneys is not increased solely by reason of the

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[64] B&P Code § 6148(b); *see Iverson Yoakum, etc. v. Berwald* (2000) 76 Cal.App.4th 990 [absent a written fee agreement, which "shall clearly state the basis thereof, including the amount, rate, basis for calculation, or other method of determination of the member's fees," an attorney cannot even sue on a promissory note to which the fee receivable was converted].

[65] B&P Code § 6148(d)(1)-(4).

[66] *Severson, Werson et al. v. Bolinger* (1991) 235 Cal.App.3d 1569.

[67] *See, Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 519; *Walton v. Broglio* (1975) 52 Cal.App.3d 400, 404.

[68] *See*, David B. Parker, William K. Mills, and Jayesh Patel, *Expert Grilling*, Los Angeles Lawyer, (Nov. 2001), Vol. 24, No. 8, p. 41 ["As juries are afforded greater authority to decide issues that were once the province of courts, expert opinions become significantly more important."].

[69] *See, In The Matter of Harney* (1996) Cal. LEXIS 2409 (Review Dept. State Bar Court, April 4, 1995) (though violations of these statutes are not disciplinable offenses, the underlying conduct does violate the RPC and can be targeted for discipline).

provision for division of fees and is not unconscionable as that term is defined in Rule 4-200.[70]

a Joint Ventures & Of Counsel – the exemptions for fee splitting without written consent from the client, set forth in Rule 2-200(A), do not create an exemption for one time "joint ventures" between attorneys or "of counsel" attorneys.[71]

b. Quantum Meruit Recovery – A fee-sharing agreement between attorneys not falling within one of the exemptions of Rule 2-200(A), made without written client consent, is unenforceable. However, an attorney would still be allowed to recover in *quantum meruit* for the reasonable value of the legal services provided.[72]

2 With Non-Attorneys – Neither a attorney nor a law firm should directly or indirectly share legal fees with a person who is not a attorney, except that: (1) money may go to a deceased member of a firm's estate or more specified persons; (2) non-attorney employees included in a profit-sharing or other retirement plan; (3) payment may be made to a prescribed registration, referral, or participation fee to a State Bar approved attorney referral service.[73]

D. Referral Fees.

Oftentimes entertainment attorneys rely on referrals for their services from a variety of sources, including previous clients, friends, family, other attorneys, agents, managers, and personnel with entertainment companies.

1. To Attorneys – Sometimes called "Pure Referral Fees" in which one attorney receives a fee or percentage of a contingent fee for doing nothing more than obtaining the signature of a client upon a retainer agreement, while the attorney to whom the case is referred performs the work.[74] Generally, referral fees to attorneys are treated the same as fee splitting under Rule 2-200(A), in that they are allowed as long as: (1) the attorney provided full disclosure and acquired written consent from the client; and (2) the fee does not cause an increase of the total fees and is not unconscionable as that term is defined in Rule 4-200.[75]

2. To Non-Attorneys – Except for a Lawyer Referral Service meeting the State Bar of California's Minimum Standards, as permitted by Rule 1-320(A)(4), an attorney should not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the attorney or the attorney's law firm by a client, or as a reward for having made a recommendation resulting in employment of the attorney or the attorney's law firm by a client.[76]

E. Unconscionable and Illegal Fees.

An attorney is prohibited from entering into an agreement for, charging, or collecting an illegal or unconscionable fee.[77] The concepts of an "illegal" fee and an "unconscionable" fee are fundamentally different. "Illegal" fees are those charged in excess or violation of statutory or case law limitations[78], while "unconscionable" fees are those that are grossly overcharged, and generally involve an element of fraud or overreaching by the attorney.[79]

1. The "unconscionability" of a fee is determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties

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70 Rule 2-200(A)

71 *Chambers v Kay* (2002) 29 Cal 4th 142, 152.

72 *Huskinson & Brown v Wolf* (2004) 32 Cal.4th 453, 464; and see *Chambers v Kay*, *supra*, 29 Cal 4th at 161

73 Rule 1-320(A)(1)- (4)

74 *See, Moran v Harris* (1982) 131 Cal App 3d 913.

75 Rule 2-200(B)

76 Rule 1-320(A)(4) & (B)

77 Rule 4-200(A)

78 *Barnum v. State Bar* (1990) 52 Cal 3d 104 [An attorney took $10,000 in fees in a bankruptcy case without court approval].

79 *Warner v State Bar* (1983) 34 Cal 3d 36, 43.

contemplate that the fee will be affected by later events [80]

2. Some of the factors to be considered in determining the conscionability of a fee include the following; (1) the amount of the fee in proportion to the value of the services performed; (2) the relative sophistication of the attorney and the client; (3) the difficulty of the work involved and the skill requisite to perform such legal service; (4) the amount involved and the results obtained; (5) time limitations imposed by the client or circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the attorney or attorneys performing the services; (8) whether the fee is fixed or contingent.[81]

3. A fee is not unconscionable simply because it is more than other attorneys might have charged for the same work. It must be so exorbitant and disproportionate to the services performed as to shock the conscience of other attorneys of ordinary prudence practicing in the same community [82]

F. Binding Arbitration Clauses In Fee Agreements.

There are two kinds of arbitrations relating to fee disputes: (1) Statutory: mandatory State Bar *fee* arbitration ("MFA"), which is initiated by the client, and non-binding, pursuant to *Business & Professions Code* §§ 6200, et seq; and (2) Contractual: binding arbitration agreements ("CAA"), which can be initiated by either party pursuant to a clause in the fee agreement.

1. Mandatory Fee Arbitration

a. Duty of Attorney – attorney must give client Notice of Right to Arbitrate as to attorney's claims for unpaid fees, in form prescribed by statute.[83]

b. Client's Rights – client has sole right to call for arbitration within 30 days of notice, and if client chooses to do so, it is mandatory for attorney to submit.[84]

c. Non-binding – unless both sides elect to make the MFA binding, it will not be binding, and either side will have the right to proceed in court *de novo,* if dissatisfied with the result.[85]

d. Note – the attorney is not required to defend malpractice claims in this forum, as the MFA is strictly limited to fee claims. However, malpractice claims can be raised defensively by the client, and the scope of the MFA can be expanded to cover such claims by stipulation of the parties.[86]

2. Contractual Arbitration Agreements

a. CAA are ethical and enforceable since they do not involve a prospective limitation on liability (prohibited by Rule 3-400(A), see below), but merely prescribe how disputes will be resolved.[87]

b. Scope - CAA, in contrast to the State Bar MFA, allows for a truly comprehensive resolution of all other issues (including malpractice claims) and is not limited to fee disputes.[88]

c. Advantages - Among the presumed advantages of contractual binding arbitration of attorney-client disputes are: (a) an

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[80] Rule 4-200(B); *Youngblood v Higgins* (1956) 146 Cal App 2d 350, 352

[81] Rule 4-200(B)(1)-(9)

[82] *Champion v Superior Court* (1988) 201 Cal App 3d 777, 782; also see *Aronin v State Bar* (1990) 52 Cal 3d 276 [a fee that is high is not the same as an unconscionable fee]

[83] *See, Business & Professions Code* §§ 6200, et seq.

[84] *Id*

[85] *Id*

[86] *See, Glassman v McNab* (2003) 112 Cal App 4th 1593.

[87] *See*, CA Supreme Court decision, *Aguilar v Lerner* (2004) 32 Cal 4th 974; and California State Bar Ethics Committee Opinion 1989-116.

[88] *See*, Peck & Kichaven, *Enforcing Arbitration of Lawyer-Client Disputes: Some Questions and Even a Few Answers*, California Litigation, 14 (Winter 1998)

expedited proceeding; (b) less expensive (discovery limited or prohibited); (c) confidentiality of proceedings; (d) avoidance of jury risks (prejudice, passion, confusion—both as to liability and damage aspects); and (e) arbitrators can be expected to be more sophisticated, especially retired judges [89]

3 Note - There have been instances where a CAA came into conflict with a client's MFA rights For example, in *Alternative Systems v Carey*, it was held that an arbitration clause that effectively called for an advance waiver of the client's right to *de novo* trial after MFA, was invalid as infringing on the client's MFA rights.[90] Clearly, at least as to the subject of fee disputes, any arbitration clause that operates to preclude a client's MFA rights is unenforceable. However, there is still an open question as to what extent a binding arbitration agreement is enforceable if a client declines MFA, or properly invokes the right to arbitrate under the MFA, but subsequently exercises his statutory right to reject the arbitrator's decision and have a trial *de novo*.[91]

4. Further Note - The Supreme Court in *Aguilar* did conclude that once a client files a malpractice lawsuit against his or her former attorney, the client has effectively waived any MFA rights.[92]

5 Practice Tip – Arbitration clauses should be drafted to be conspicuous, plain and clear, as any ambiguities will be construed against the law firm as the drafter of the fee agreement [93]

In contrast, where the arbitration provision is clear and unambiguous, it will be enforced without allowance for parol evidence as to the intent of the parties [94]

VI. CONFLICTS OF INTEREST

A. Introduction

The conflicts of interest rules are designed to protect and advance two important values in the attorney-client relationship—confidentiality and undivided loyalty.[95] The fast-paced competitive nature of the entertainment industry is conducive to conflicts of interest, as the industry tends to be dominated, at least at the corporate top, by a relatively small number of resilient power brokers and as a result a premium is often commanded by who an attorney knows.[96] Potential clients may approach the more established entertainment law firms based on that firm's strong connections in the industry and representation of "A-list" talent—i e because of what could be construed as the firm's inherent conflicts, not in spite of them Some experts in the entertainment industry believe that such inherent conflicts of interest are not only common, but can be beneficial, such as when an entertainment attorney representing two successful clients can bring them together in a package deal, to produce a blockbuster movie or successful record album.[97] The problems, however, come from balancing and dealing with the potential conflicts of interest that may arise, for example, the risk that an attorney in the above mentioned position may promote his or her more prominent clients in package deals at the expense of the less famous (and less profitable) clients.[98] While some attorneys might argue that separate rules should exist for entertainment lawyers, such is

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89 *Id*

90 *See, Alternative Systems v Carey* (1998) 67 Cal App 4th 1034

91 *See, Aguilar, supra*, 32 Cal 4th 974, 992; although not part of the official ruling of the Court, Justices Chin, Baxter, and Brown, in their concurring opinion noted that under such circumstances a binding arbitration agreement should remain enforceable, as otherwise would "permit a client to evade an arbitration agreement by a simple procedural device," and stated that *Alternative Systems* "cannot survive today's ruling."

92 *Id.*

93 *See, Mayhew v Benninghoff* (1997) 53 Cal.App 4th 1365; *Lawrence v Walzer & Gabrielson* (1989) 207 Cal.App 3d 1501

94 *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102.

95 *See, Flatt, supra,* 9 Cal.4th at 284.

96 *The Ultimate Mogul* TIME, Apr. 19, 1993, at 54 (quoting agent Micheal Ovitz, "Look, this industry created conflicts of interest")

97 Edwin F. McPherson, *Conflicts in the Entertainment Industry? Not!*, 10:4 ENT. & SPORTS LAW (Winter 1993) at 5

98 McPherson, *supra*, at 5

not the case, and when courts have been faced with the argument in the context of writing contracts for the movie industry (or dealing with ethical issues), they have resolved the matter in favor of the rule of law.[99]

B. Concurrent/Simultaneous Representation of Multiple Clients.

The primary value at stake in cases of simultaneous or dual representation is the attorney's duty--and the client's legitimate expectation—*of loyalty*[100]

1. An attorney should not, *without the informed written consent* of each client: (1) accept representation of more than one client in a matter in which the interests of the clients potentially conflict; (2) accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or (3) represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.[101]

a *Metro-Goldwyn-Mayer, Inc v Tracinda Corporation* – The court ruled that a law firm who had been MGM's general counsel should have been per se disqualified from representing former MGM shareholders in an action involving funding of a merger between MGM and another company, when MGM had brought a related action against those same shareholders. The court noted that when the duty of loyalty applies, it requires an automatic disqualification in all but a few instances.[102]

b. *Joel v Grubman* – Billy Joel sued his former New York attorneys claiming $90 million in damages for causes of action including legal malpractice, breach of contract, fraud and breach of fiduciary duty. Among other things, Joel alleged conflicts of interest existed because Mr. Grubman represented the singer while also representing his manager, top executives of his record label, CBS Records (now Sony Music), and the merchandising company which held the franchise for t-shirts and other items. Joel's conflict of interest claims also included an allegation that Grubman paid kick-backs to Joel's manager in order to retain Joel as a client. Grubman claimed that any conflict of interests were fully disclosed to Joel. The matter was settled for an undisclosed amount.[103]

c *Grisham v. Garon-Brooke Assocs., Inc.* – Author John Grisham sued his attorney for breach of fiduciary duty and malpractice, in part, for not advising him of the conflicts of interest in the attorney's simultaneous representation of both Grisham and his agent. Grisham claimed he retained the lawyer on the advice of his agent and that the attorney failed to inform Grisham that he did not have to renew his original agreement with the agent.[104]

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[99] Joseph Z. Fleming, *Ethical Issues: The Designated Hitter As A Moral Hazard and Its Relevance To the Practice of Entertainment, Arts and Sports Law*, ALI-ABA Course of Study Materials, Entertainment, Arts, and Sports Law (January 2005), at 12; discussing *Effects Associates, Inc v Larry Cohen* (9th Cir. 1990) 908 F. 2d 555, 557 [Court rejected the argument described as "moviemakers do lunch, not contracts."]; also see Owen J. Sloan, *Serving Two Masters May Jeopardize Client Interests*, The National Law Journal, (November 25, 1996), at B7, col. 2 ["Practitioners often raise the serious question of whether traditional conflict-of-interest rules are appropriate to the entertainment bar and whether entertainment lawyers should be treated differently than other lawyers for ethical purposes."].

[100] *Flatt, supra,* 9 Cal. 4th at 284.

[101] Rule 3-310(C)(1)-(3); Note, the "official discussion" to the ethics rules generally should be regarded as of equal import to the rule itself, which is evident in the "official discussion" following Rule 3-310, as it extends the application of the rule beyond the individual "member's" relationships to those with whom the member is associated in the law firm, if the relationship is known

[102] *Metro-Goldwyn-Mayer v Tracinda Corp* (1995) 36 Cal.App.4th 1832.

[103] *Joel v Grubman* (1992), Case No. 261-55-92, N.Y. Sup. Ct.

[104] *See* Richard E. Flamm & Joseph B. Anderson, *Conflict of Interest in Entertainment Law Practice, Revisited*, 14 ENT. & SPORTS L.J. 3 (1996);

d. *Bolton v Weil, Gotshal & Manges* – Recently, pop star Michael Bolton has sued Weil, Gotshal & Manges, and partner Robert G Sugarman for $30 million in damages, alleging the law firm was conflicted when it represented him and his music publisher Warner-Chappell Music Ltd and Sony Music Entertainment Inc., in an action brought by the Isley Brothers, who alleged that Bolton's 1991 hit, "Love is a Wonderful Thing" infringed on the copyright of their 1964 song of the same name The underlying case ended in a 1994 verdict awarding the Isley Brothers $5 4 million Bolton alleges that Sugarman, who led the defense, and Weil Gotshal, cooperated in the "secret agenda" of IIG Insurance Co., Warner-Chappell's insurer, which sought to push the matter to a final verdict rather than settle, thereby triggering an indemnification provision in Bolton's contract with Warner-Chappell Bolton claims Sugarman did not discuss the disadvantages of joint representation, and told Bolton the copyright defendants were a "team." The singer also alleges that Sugarman failed to discuss with him the Isley Brothers' offer to settle for around $700,000 [105]

e. *Flaherty v. Filardi* – Plaintiff Flaherty brought motion to disqualify the law firm of Quinn, Emmanuel, Urqhart, Oliver & Hedges, in an action where Flaherty brought suit alleging that defendant Filardi's screenplay for the motion picture "Bringing Down the House" infringed the copyright in her screenplay entitled "Amoral Dilemma" Flaherty named Filardi, as well as Disney in her suit, and brought the motion to disqualify Quinn Emmanuel based on a potential conflict of interest due to their joint representation of Filardi and Disney Flaherty argued that the joint representation was improper given Filardi's potential obligation to indemnify Disney and the appearance of impropriety. The motion to disqualify was denied because of (1) the absence of an actual conflict between Filardi and Disney, (2) Quinn Emmanuel's expectation that no conflict would arise in the future, and (3) both parties had provided informed consent to joint representation.[106]

2. Aggregate Settlements – an attorney who represents two or more clients should not enter into an aggregate settlement of the claims of or against the clients *without the informed written consent of each client*.[107]

3. Note - An example of a common area in which transactional entertainment attorneys face conflict issues regularly, involves production work where firms represent production companies for whom they handle all of the "business affairs" work, including the deal making for the production company with the distributor (i e. distribution agreements, financing agreements, credit issues), and also the agreements with the rights holders, writers, guilds, actors, etc Some of these other parties may also be clients of the firm, and thus give rise to complex conflict issues, which should be taken into consideration by the attorney and/or law firm.

4. Further Note - Some commentators contend that entertainment attorneys should decline simultaneous representation of a personal manager, who is a prior client, and an artist to negotiate their artist-management contract, due to the potential conflicting interests relating to certain contract provisions, such as the duration of the contract [108]

5 Practice Tip – Although not necessarily required by Rule 3-310, even where informed written consents are obtained, a prudent attorney may seek further insulation from future problems by also requiring the

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discussing *Grisham v. Garon-Brooke Assocs Inc.*, Case No. 3:96 CV045-B (N.D. Miss. 1996).

[105] *See*, Anthony Lin, *Singer Sues Weil Gotshal Over Joint Representation*, New York Law Journal, (Dec 2003).

[106] *Flaherty v Filardi* 2004 WL 1488213 [SDNY, July 1, 2004]

[107] Rule 3-310(D)

[108] *See, e g*, John P Saul, *Ethics for Entertainment Lawyers Avoiding Conflicts of Interest*, 12th Annual International Folk Alliance Conference (Feb. 11, 2000) (suggesting lawyers avoid dual representation of managers and artists in negotiating terms of personal management contracts).

parties be advised to consult with independent outside legal counsel

B. Successive Representation and Duties Owed to Former Clients.

Where the potential conflict is one that arises from the *successive* representation of clients with potentially adverse interests, the courts have recognized that the chief fiduciary value jeopardized is that of client *confidentiality*.[109]

1. An attorney should not accept or continue representation of a client without providing written disclosure to the client where: (1) the attorney has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; (2) the attorney knows or should reasonably know that: (a) the attorney previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and (b) the previous relationship would substantially affect the attorney's representation; or (3) the attorney has or had a legal, business, financial, professional, or personal relationship with another person or entity the attorney knows or reasonably should know would be affected substantially by resolution of the matter.[110]

2. An attorney should not, *without the informed written consent*[111] of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.[112]

3. Disqualification - Where a former client seeks to have a previous attorney disqualified from serving as counsel to a successive client in litigation adverse to the interests of the first client, the governing test requires that the client demonstrate a "*substantial relationship*" between the subjects of the antecedent and current representations.[113]

a. The "substantial relationship" test mediates between two interests—the freedom of the subsequent client to counsel of choice, on the one hand, and the interest of the former client in ensuring the permanent confidentiality of matters disclosed to the attorney in the course of the prior representation, on the other.[114]

b. Where the requisite "substantial relationship" between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant by definition, to the second representation) is presumed and disqualification of the attorney's representation of the second client is mandatory, and extends vicariously to the entire firm.[115]

c. The knowledge/conflict of one member of a firm is imputed to all other members of the firm, whether partners, associates or "of counsel."[116]

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[109] *See, Flatt, supra,* 9 Cal 4th at 283.

[110] Rule 3-310(B)(1)-(3).

[111] In *Fargnoli v. Ziffren Brittenham & Branca* (1992), Case No. BC068280, L.A. Sup. Ct., an action was filed by Steve Fargnoli, a former manager for the artist Prince, against the Ziffren law firm alleging a conflict of interest stemming from the Ziffren firm's formerly representing Fargnoli from 1981 to 1986, then later representing Prince during a time when Fargnoli sued the entertainer and his corporations. The suit alleged that the Ziffren firm disclosed to Prince some of Fargnoli's confidential communications protected by the attorney-client privilege. The Ziffren firm had previously helped Prince and Fargnoli settle a dispute during their representation of Prince and at the behest of Fargnoli. In granting the Ziffren law firm summary judgment, the court noted that the parties had entered into a release including conflict of interest claims after the parties settled their dispute.

[112] Rule 3-310(E).

[113] *See, Flatt, supra,* 9 Cal 4th at 283.

[114] *Id.*

[115] *Id.*; citing *Rosenfeld Construction Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 575; *also see, T.C. Theater Corp. v. Warner Brothers Pictures* (1953) 113 F.Supp. 265, 268-269.

[116] *See, SpeeDee Oil Systems, Inc., supra,* 20 Cal 4th 1135.

d Note - Once an attorney leaves his/her former firm, the doctrine of imputation is no longer applicable, as the Courts have recently fashioned a "two variable" rule focusing on (1) the relationship between the nature of the legal problem involved in the former representation and that which is presented in the pending matter; and (2) the relationship between the challenged attorney and the former client with respect to the legal problem involved in the prior matter In practical terms, disqualification will turn on whether the attorney had a "direct relationship" with the former client, in which case the conclusive presumption that the attorney possesses relevant confidential information arises [117]

e Joint Client Exception – when the prior representation involves joint clients, and the subsequent action relates to the same matter, the propriety of disqualification is not dependent upon the "substantial relationship" test, as it will always exist in these situations, rather it generally turns upon the scope of the clients' consent [118]

4. Advance Waivers and Ethical Screens.

a. An advance waiver of potential future conflicts, with full disclosure to, and informed consent by the clients, can protect the attorney or firm from disqualification and allow the continued representation of one of the clients, even if an actual conflict does arise between the two.[119]

b. Ethical walls or screens alone will not generally protect a law firm from a possible breach of its duty of loyalty or vicarious disqualification[120], but when combined with an informed advance waiver, can protect the duty of confidentiality and rebut the presumption of shared information.[121]

D. Payment of Attorney Fees by a Third Party.

1. The duty of undivided loyalty to the client may come into question when a third party (i.e. family member, manager, or agent) is paying for the client's legal services An attorney should not accept compensation for representing a client from one other than the client *unless*:

a. There is *no interference* with the attorney's independence of professional judgment or with the client-attorney relationship;

b. Information relating to the representation of the client is protected and kept *confidential*; and

c. The attorney obtains the client's *informed written consent*.[122]

2. Note – This rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest.[123]

3. Further Note – The question of whether or not Rule 3-310 applies to the situation of when an attorney is representing an indemnitee, or whether such a situation would be treated as an exception to the rule (similar to insurers and insureds), has not been addressed However, it is more likely that the rule would apply, especially in situations where the indemnitor is an existing or possible co-

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[117] *See, Brand v 20th Century Ins Co* (2004) 119 Cal App. 4th 594; *Farris v Fireman's Fund Ins Co* (2004) 119 Cal App 4th 671; following *Jessen v Hartford Casualty Insurance Co* (2003) 111 Cal App. 4th 698

[118] *Zador Corporation v Kwan* (1995) 31 Cal App 4th 1285, 1294.

[119] *See, Zador, supra*, 31 Cal App.4th 1285

[120] *See, Henriksen v. Great American Savings & Loan* (1992) 11 Cal App 4th 109

[121] *Visa U.S.A., Inc v First Data Corporation* (2003) 241 F Supp 2d 1100, 1110.

[122] Rule 3-310(F)(1)-(3).

[123] *See, San Diego Navy Federal Credit Union v Cumis Insurance Society* (1984) 162 Cal App 3d 358, superseded by statute on other grounds as stated in *Derivi Construction & Architecture, Inc. v. Wong* (2004) 118 Cal App. 4th 1268, 1276.

defendant in the action, for obvious conflict reasons.

E. Attorney – Client Business Transactions.

1 An attorney is prohibited from entering into a business transaction[124] with a client, or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, *unless* each of the following requirements has been satisfied[125]:

a The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client;[126]

b. The client is advised in writing that the client may seek the advice of an independent attorney of the client's choice and is given a reasonable opportunity to do so;[127] and

c. The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition [128]

2 Note – Generally, Rule 3-300 is not intended to apply to the fee agreement by which an attorney is retained [129]

3 Further Note – It is not clear if Rule 3-300 has any application to "shopping agreements" Although an attorney is arguably involved in a business transaction with a client if the attorney enters into a "shopping" agreement for a contingent fee from income derived from a record contract, sale of a book, or some similar deal[130], a "shopping agreement" is also normally a fee agreement for legal services, which clearly do not fall under Rule 3-300.

F. Attorney Limiting Liability to Client.

Under Rule 3-400 an attorney shall not (1) contract with a client prospectively limiting the attorney's liability to the client for the attorney's professional malpractice; or (2) settle a claim for the attorney's liability to the client for the attorney's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent attorney of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice [131]

1 Rule 3-400 is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent an attorney from reasonably limiting the scope of the attorney's employment or representation.[132]

2 Threatening a plaintiff with criminal prosecution to obtain an advantage in a civil case, in violation of Rule 3-400, is a sufficient legal basis to state a cause of action for intentional infliction of emotional distress and to seek monetary damages.[133]

G. Risk of Disqualification in Litigation Based On Firm Members Being Witnesses to Underlying Transaction.

There are popular misconceptions that exist relating to an attorney being a possible witness to a client's litigation; such as: (1) that law firms cannot try cases where members of the firm will appear as witnesses; and (2) that trial attorneys cannot appear as witnesses in support of their client's case Due to various exceptions to Rule 5-210, as set forth below, these misconceptions do not actually hold true

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[124] "Business transactions" is an exceedingly broad term, which includes non-legal services contracts, investments, and loans, and just about anything, other than fee agreements.

[125] Rule 3-300

[126] Rule 3-300(A)

[127] Rule 3-300(B)

[128] Rule 3-300(C).

[129] Rule 3-300; "Official Discussion"

[130] *See* Abdo & Sahl, *supra*, at 5.

[131] Rule 3-400(A)(B)

[132] *See, Nichols v Keller*, *supra*, 15 Cal.App. 4th 1672

[133] *Kinnamon v. Staitman & Snyder* (1977) 66 Cal.App 3d 893; overruled on other grounds by *Silberg v Anderson* (1990) 50 Cal. 3d 205

1. An attorney shall not act as an advocate before a jury which will hear testimony from the member *unless*:

a. The testimony relates to an uncontested matter; or

b. The testimony relates to the nature and value of legal services rendered in the case; or

c. The attorney has the informed, written consent of the client.[134]

2. In any event, prior to doing so, it is important for the attorney to carefully consider many questions, such as: Is it necessary and/or wise for the trial attorney to testify? Can the testimony be provided by another member of the firm, or by the client? Can the argument relating to the attorney's testimony be handled by another member of the trial team? Is there a risk to the client's cause if the trial attorney is subjected to cross examination or by the specter of arguing his/her credibility to the jury?

3. Practice Tip – In drafting the written consent/waiver for the client to allow the attorney to testify, the waiver should be carefully drafted in a way that the document can be disclosed in the event it is necessary to do so in order to fend off a motion to disqualify.

VII. ATTORNEYS, AGENTS, AND MANAGERS

A. Introduction.

While an entertainment attorney's primary function (like most attorneys) may be to protect their artist-client's legal interests, entertainment attorneys may, either purposely or inadvertently, find themselves taking on roles often times associated with agents or personal managers, such as advising them on career and business matters, and possibly finding them work. An attorney must be more careful when he or she begins taking on these often overlapping, but more agent and managerial type duties, and be aware of the extra conflicts of interest that may arise[135], as well as the fact that they may risk falling under the purview and possibly breaching the regulations of California's Talent Agencies Act ("The Act").

B. Purpose of the Talent Agencies Act.

The purpose of the Act is to protect artists who are seeking employment or attempting to advance their careers in the California entertainment industry by regulating those "whose primary purpose and function is the securing of employment for artists."[136] As demonstrated in some of the cases discussed below, their has been significant confusion and dispute over various terms of the Act, such as "*primary* purpose" and "*procuring* employment", in relation to its authority over personal managers (and possibly attorneys).

C. Definitions of Roles.

Because the functions of entertainment attorneys often overlap with that of talent agents and personal managers, it is important to be aware of the general functions of agents and managers, as well as the different rules governing them.

1. Talent Agents – The talent agent's primary function is to market the artist's talent to buyers within the entertainment industry and negotiate the particulars of employment, after locating such purchasers.[137]

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[134] Rule 5-210

[135] *See*, Abdo & Sahl, *supra*, at 6 ["For example, the lawyer who also acts as a personal manager should proceed carefully. The potential for conflicts of interest and the artist's frustrations with unrealized career expectations can easily impair the lawyer-client relationship"].

[136] *See*, James M. O'Brien III, *Regulations of Attorneys Under California's Talent Agencies Act: A Tautological Approach To Protecting Artists*, 80 Cal. L. Rev. 471, 493; and Gary E. Devlin, *The Talent Agencies Act: Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California's Entertainment Industry*, 28 Pepp. L. Rev. 381, 388 (2001).

[137] *See*, O'Brien, *supra*, at 478.

a Talent agents in California must be licensed and are regulated by the Act.[138] In addition to state licensing requirements, talent agents are subject to regulations promulgated by the various entertainment unions,[139] which may not only dictate limits on fees, but require form contracts to be used, and that an agent procure a franchise license prior to procuring employment for any members of that union.[140]

b The Act defines "talent agency" as a "person or corporation who engages in the occupation of *procuring*, offering, promising, or attempting to procure employment or engagements for an artist . "[141]

c. Generally an agent cannot receive in excess of 10% of the artist's gross income, a regulation promulgated in conjunction with the various entertainment guilds and unions [142]

2. Personal Managers – The primary function of a personal manager is not as clearly defined as that of a talent agent, but is basically defined as that of advising, counseling, directing and coordinating the artist in the development of the artist's career, which encompasses matters of business and finance, as well as personal significance.[143]

a Unlike talent agents, no California law or entertainment-union regulation expressly governs a personal manager's activities or fees Managers usually receive a large percentage of the gross income of the artist as a commission, in the range of 15 to 25% [144]

b The California Entertainment Commission has interpreted the Talent Agencies Act as prohibiting a personal manager from seeking or procuring employment for a client without a talent-agency license from the Labor Commissioner.[145]

c. The California courts have also held that a personal manager involved in "procuring employment" who is not licensed under the Act, may be subject to sanctions as an unlicensed agent.[146]

d. Common law does impose fiduciary duties of loyalty, good faith, fair and honest dealing on all managers and agents (as well as attorneys) [147]

D. Are Attorneys Governed by The Talent Agencies Act?

1 While the Act does not expressly mention its applicability toward attorneys, under prevailing interpretations, attorneys who actively engage in "procurement of employment" activities for their artist-clients –whether inadvertently or intentionally– are subject to the Act's requirements and penalties.[148] However, this question has yet to be directly addressed by the Labor Commissioner or the courts.[149]

2. Why Should Attorneys Be Exempt From the Act? – The major arguments for an attorney exemption from the Act are: (1) that the Act was never intended to apply to attorneys; (2) that much of the language of the Act (i.e. "procurement" and "primary") are ambiguous in

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[138] *See, Cal. Labor Code* § 1700-1700.47 ["No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefore from the Labor Commissioner (§ 1700.5, subd. (a))"]

[139] Agents for musical talent are also subject to the strictures of the American Federation of Musicians ("AFM"), an international trade union, and are required to be licensed by the AFM.

[140] *See*, Luaine L. Quast, *Musicians, Their Representatives, and the Agreements Between Them*, 1990 Entertainment, Publishing and the Arts Handbook, 191, 191 (John D. Viera & Robert Thorne eds.)

[141] *See Cal. Labor Code* § 1700.4(a)

[142] *See*, Devlin, *supra*, at 384

[143] *See*, O'Brien, *supra*, at 482

[144] *See* Abdo & Sahl, *supra* at 6

[145] *See*, O'Brien, *supra*, at 483

[146] *See, Waisbren v Peppercorn Productions, Inc* (1995) 41 Cal.App.4th 246; and *Wachs v. Curry* (1993) 13 Cal App 4th 616.

[147] *See, Detroit Lions, Inc. v Argovitz* (E.D. Mich 1984) 580 F.Supp 542 [a non-lawyer sports agent violated conflicts of interest standards when negotiating on behalf of a player with a team in which the agent was also part owner]; and *Croce, supra*, 565 F.Supp 884

[148] *See*, O'Brien, *supra*, at 472; and Devlin, *supra*, at 383.

[149] *Id*, at 473-475

nature, and (3) that the California Rules of Professional Conduct already govern and regulate nearly every conceivable activity or impropriety that an attorney may commit, and arguably provide greater protection for artist-clients than the Act does [150]

a To Register or Not To Register – On the one hand, entertainment attorneys who decide to register with the California Labor Commissioner as licensed talent agents may avoid the possibility of the penalties of being found to be working as an unlicensed talent agent, while on the other hand, they expose themselves to the various financial, documentary, and bureaucratic burdens the Act imposes, including having to deposit a $10,000 00 surety bond with the Labor Commissioner to cover potential charges of fraudulent or inappropriate acts by the agent [151]

b. *Pryor v. Franklin* – Comedian/actor Richard Pryor brought an action against his personal representative, David Franklin, for alleged violations of the Act, as Franklin purportedly acted as Pryor's personal manager, attorney, and loan-out corporation officer, and had procured employment for Pryor and conducted his other business affairs. The Labor Commissioner rejected Franklin's contentions that he had not violated the act because his procurement activities were not in a talent agent capacity, and found that Franklin had procured employment for Pryor as an unlicensed agent in violation of the Act., and granted Pryor an award exceeding $3,000,000 [152]

c. *Wachs v Curry* – Comedian/actor Arsenio Hall instituted a Labor Commission proceeding against his former representative, Robert Wachs, seeking to force Wachs, who is also an attorney, personal manager, and owner of a management company, to return all fees and commissions – reportedly totaling almost $8,000,000, for allegedly violating the Act by procuring employment for Hall as an unlicensed agent Wachs in turn challenged the constitutionality of the Act, claiming that the licensing requirements of the Act were unconstitutionally vague. Wach's constitutional challenges failed, and due to his significant procurement activities, the court ruled against him and awarded Hall the remedies of rescission and damages in the sum of $2.1 million [153]

d. *Chinn v. Tobin* – The California Labor Commissioner ruled that an attorney who owned a production company was not procuring employment as an agent for an artist-client when he hired the artist to be in one of his productions The Commissioner held that an attorney having an ownership interest in the employment is functioning as an employer, not as an agent "with third parties" within the meaning of the Act. [154]

3. Note - While none of the above cases directly examined the question of whether attorneys who partake in procurement activities for artist-clients have violated the Act, nevertheless, both the *Pryor* and *Wach* cases suggest that attorneys who do engage in procurement activities must at least be wary of the Act's provisions and penalties [155]

VIII. DEALING WITH THE MEDIA

A. Introduction

In recent years media coverage of legal disputes has become more pervasive and widespread, from the O J. Simpson murder trial to the Michael Jackson child molestation case. It has been noted that "[t]oday media impact is more important than ever before in the history of the jury trial because there is much more widespread and detailed reporting of trials and crime events, especially on television "[156]

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[150] *Id*, at 492-493

[151] *Id*, at 473-474, 489

[152] *Id*, at 474, and *Pryor*, *supra*, Cal. Labor Commissioner Case No. TAC 17 MP 114 (1982)

[153] *See*, Devlin, *supra*, at 395-396; and *Wachs supra*, 13 Cal App.4th 616.

[154] *See*, Abdo & Sahl, *supra*, at 6; and *Chinn*, *supra*, California Labor Commissioner Case No. 17-96 (1997)

[155] *See*, O'Brien, *supra*, at 475.

[156] Reid Hastie, *Reflections in the Magic Mirror of Law Media Effects on Juror Decisions*, 40 S Tex L Rev 903, 903 (1999).

Shows such as *Celebrity Justice* and networks like Court TV ensure that for the foreseeable future, when there is a celebrity involved in a legal dispute, the media will not be far behind. Thus, for all attorneys, but entertainment attorneys in particular, it is more important then ever to be familiar with the professional rules relating to media contact.

B. Rule 5-120 – Trial Publicity

An attorney who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the attorney knows or reasonably should know that it will have a "*substantial likelihood of materially prejudicing an adjudicative proceeding in the matter*."[157]

1. Exceptions to Rule 5-120 – An attorney may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) the information contained in a public record; (3) that an investigation of the matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and (7) some additional exceptions specific to criminal cases [158]

2. Further Exception – An attorney may make a statement that a reasonable attorney would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the attorney or the attorney's client. A statement made pursuant to this exception shall be limited to "*such information as is necessary to mitigate the recent adverse publicity*."[159]

3. Note – Whether an extrajudicial statement violates Rule 5-120 depends on many factors, including: (1) whether the statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the statement presents information the attorney knows is false, deceptive, or the use of which would violate B & P Code § 6068(d); (3) whether the statement violates a lawful "gag" order, protective order, statute, rule of court, or special rule of confidentiality; and (4) the timing of the statement.[160]

a. *Rothman v. Jackson* – While pre-litigation negotiations were proceeding between Rothman, an attorney representing a boy with alleged tort claims against singer, Michael Jackson, a psychological evaluation of the boy was "leaked" by persons unknown. In response, Jackson's attorneys responded to the negative public exposure by making statements to the media, not only denying the charges against Jackson, but making countercharges that Rothman and his clients had knowingly and intentionally made false accusations against Jackson in order to extort money from him. Rothman filed a complaint for conspiracy to interfere with a business relationship, defamation and intentional infliction of emotional distress. Demurrers were eventually sustained, without leave to amend, in the trial court, based solely on the ground of the litigation privilege. The Court of Appeal reversed the trial court, stating that "attorneys who wish to litigate their cases in the press do so at their own risk . . . the litigation privilege should not be extended to 'litigating in the press.'" Also, the Court of Appeal expressly rejected the argument by defense counsel "that celebrities and their lawyers *must* litigate their cases in the press because the public *expects* it" and that "because of such public expectations 'media attention becomes part of the forum of litigation . . .' and to deny celebrity litigants protection for statements made in this 'forum'

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157 *See*, Rule 5-120(A).
158 *See*, Rule 5-120(B).
159 *See*, Rule 5-120(C).

160 *See*, Rule 5-120, "official discussion."

would contravene the policies of the litigation privilege "[161]

b *Mattel, Inc v MCA Records, Inc* – In a lawsuit brought by Mattel against several music companies who produced, marketed and sold a song called "Barbie Girl," for trademark infringement and dilution of the "Barbie" doll name, MCA, one of the defendants, also brought a defamation claim against Mattel for statements Mattel made about MCA while the lawsuit was pending. The District Court dismissed the defamation claim, which was affirmed by the Ninth Circuit. The Court commented, "MCA filed a counterclaim for defamation based on the Mattel representative's use of the words 'bank robber,' 'heist,' 'crime' and 'theft.' But all of these are variants of the invective most often hurled at accused infringers, namely 'piracy.' No one hearing this accusation understands intellectual property owners to be saying that infringers are nautical cutthroats with eyepatches and peg legs who board galleons to plunder cargo. In context all these terms are nonactionable 'rhetorical hyperbole,' [citation omitted] The parties are advised to chill "[162]

c. *Kasky v Nike, Inc.* – An action was brought against Nike seeking monetary and injunctive relief for false advertising and unfair competition, after, in response to adverse publicity, Nike made allegedly false statements to the California consuming public relating to the working conditions of their employees working in their factories. The California Supreme Court held that the statements constituted "commercial speech" deserving less protection than "non-commercial speech," and thus potentially a basis for a false advertising claim. The Court stated "Nike may not 'immunize false or misleading product information from government regulation simply by including references to public issues.'"[163]

4. Note - In sum, attorneys making statements to the media need to remember that the statements must be truthful and not likely to affect the proceedings. Also, that while there is still some room for "rhetorical hyperbole" in litigation, statements to the media are not necessarily protected by the litigation privilege and are made at the attorney's "own risk," and Corporation type clients may be held to a different standard under the First Amendment, if the statement is construed as "commercial speech."

IX. CONCLUSION

In an ever increasingly litigious society more and more clients are willing to file grievances and claims of legal malpractice against their attorneys, some of which may be meritorious, and some of which may not. It has been noted that many clients play the "let's sue the lawyers" card, only after they try the more common solution of "let's not pay the lawyers."[164] Given the competitive and complex nature of the entertainment industry, and many of the inherent conflicts which arise, it is important for entertainment attorneys (and all attorneys for that matter) to stay abreast of changes and developments in the various rules of professional responsibility and be mindful of how any such changes may affect their particular practice.

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[161] *Rothman v Jackson* (1996) 49 Cal App 4th 1134, 1149

[162] *Mattel Inc v MCA Records Inc* (2002) 296 F 3d 894, 908.

[163] *Kasky v Nike, Inc* (2002) 27 Cal. 4th 939, 966

[164] *See*, McPherson, *supra*, at 4.

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A founding partner of **Parker Mills & Patel LLP**, Mr. Parker has been identified as among the leading California experts on legal malpractice in "Who You Gonna Call" in the *California Lawyer*, p. 25 (February 2002), and in the "Lawyers' Lawyers" issue of the Daily Journal's *California Law Business* (November 30, 1998) in the article entitled "The Malpractice Practice."

Mr. Parker was a founding member of, and senior partner at, Lewis, D'Amato, Brisbois & Bisgaard. Mr. Parker graduated Summa Cum Laude and Phi Beta Kappa from the University of California at Los Angeles in 1972, where he also obtained his law degree in 1976, graduating Order of the Coif. In his third year of law school, Mr. Parker served as the Associate Editor of the UCLA Law Review. Mr. Parker is a member of the State Bar of California and is admitted to practice before all of the state courts in California, the States District Courts in California and Hawaii, and the Ninth Circuit Court of Appeals. He has tried dozens of jury and non-jury trials and arbitrations. He has acted as the principal attorney in numerous reported decisions of the California Supreme Court and Courts of Appeal, and has served numerous times as an expert witness and as a consultant in his areas of expertise.

Mr. Parker has authored numerous law review articles and monographs, and has frequently lectured in his areas of expertise, as well as other subjects, for public and private seminars, for law firms, for legal departments, for bar associations, and for other professional and business groups. Mr. Parker is a past member of the Board of Governors of the Association of Business Trial Lawyers, and is a past Chair of the Errors & Omissions Prevention Committee and a former member of the Professional Liability Insurance Committee of the Los Angeles County Bar Association. Currently, Mr. Parker serves as Vice Chair of the LACBA Ethics and Professional Responsibility Committee.

PIERRE B. PINE

A senior associate at **Parker Mills & Patel LLP**, Mr. Pine joined the firm in February 2001. Mr. Pine received his undergraduate degree from Loyola Marymount University in 1995. During his attendance at Loyola, Mr. Pine was academically selected to attend a study-abroad program at Queen's College, Oxford, England.

Mr. Pine graduated in the top of his class from the University of San Diego School of Law in 2000, where he was a merit scholarship recipient for all three years, and received honors for highest class grades in California Civil Procedure and Lawyering Skills (legal research & writing), including Best Brief Award. During his attendance at USD, Mr. Pine also studied International Comparative Constitutional Law at Trinity College, in Dublin, Ireland, under Supreme Court Justice Antonin Scalia.

Mr. Pine is a member of the State Bar of California and is admitted to practice before all of the state courts and States District courts in California. He is also a member of the American Business Trial Lawyer's Association and the Beverly Hills Bar Association (Business, Intellectual Property, and Entertainment Law sections)

LEXSTAT CAL. RULES OF PROF'L CONDUCT 1-100

DEERING'S CALIFORNIA CODES ANNOTATED

*** THIS DOCUMENT REFLECTS ALL CHANGES RECEIVED THROUGH DECEMBER 22, 2003 ***

STATE BAR RULES
RULES OF PROFESSIONAL CONDUCT
CHAPTER 1. Professional Integrity in General

Cal Bar Rules, Prof Conduct R 1-100 (2004)

Review Court Orders which may amend this Rule

Rule 1-100 Rules of Professional Conduct, in General

(A). Purpose and Function.

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

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

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

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

(B). Definitions.

(1) "Law Firm" means:

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

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

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

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

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

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

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

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

(C) Purpose of Discussions

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

(D) Geographic Scope of Rules.

(1) As to members:

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

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

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

(E)

These rules may be cited and referred to as "Rules of Professional Conduct of the State Bar of California "

LEXSTAT CAL BAR RULES, PROF CONDUCT R 1-400

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STATE BAR RULES
RULES OF PROFESSIONAL CONDUCT
CHAPTER 1 Professional Integrity in General

Cal Bar Rules, Prof Conduct R 1-400 (2004)

Review Court Orders which may amend this Rule

Rule 1-400 Advertising and Solicitation

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

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or

(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity

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

(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and

(2) Which is;

(a) delivered in person or by telephone, or

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

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

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

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or

(5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct

(6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification

(E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in *Evidence Code sections 605* and *606*. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

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

BUSINESS AND PROFESSIONS CODE SECTION 6125

6125. No person shall practice law in California unless the person is an active member of the State Bar.

BUSINESS AND PROFESSIONS CODE SECTION 6157-6159.2

6157. As used in this article, the following definitions apply:

(a) "Member" means a member in good standing of the State Bar and includes any agent of the member and any law firm or law corporation doing business in the State of California.

(b) "Lawyer" means a member of the State Bar or a person who is admitted in good standing and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof, and includes any agent of the lawyer or law firm or law corporation doing business in the this state.

(c) "Advertise" or "advertisement" means any communication, disseminated by television or radio, by any print medium including, but not limited to, newspapers and billboards, or by means of a mailing directed generally to members of the public and not to a specific person, that solicits employment of legal services provided by a member, and is directed to the general public and is paid for by, or on the behalf of, an attorney

(d) "Electronic medium" means television, radio, or computer networks.

6157.1. No advertisement shall contain any false, misleading, or deceptive statement or omit to state any fact necessary to make the statements made, in light of circumstances under which they are made, not false, misleading, or deceptive.

6157.2. No advertisement shall contain or refer to any of the following:

(a) Any guarantee or warranty regarding the outcome of a legal matter as a result of representation by the member.

(b) Statements or symbols stating that the member featured in the advertisement can generally obtain immediate cash or quick settlements.

(c) (1) An impersonation of the name, voice, photograph, or electronic image of any person other than the lawyer, directly or implicitly purporting to be that of a lawyer.

(2) An impersonation of the name, voice, photograph, or electronic image of any person, directly or implicitly purporting to be a client of the member featured in the advertisement, or a dramatization of events, unless disclosure of the impersonation or dramatization is made in the advertisement.

(3) A spokesperson, including a celebrity spokesperson, unless there is disclosure of the spokesperson's title

(d) A statement that a member offers representation on a contingent basis unless the statement also advises whether a client

will be held responsible for any costs advanced by the member when no recovery is obtained on behalf of the client. If the client will not be held responsible for costs, no disclosure is required.

6157.3. Any advertisement made on behalf of a member, which is not paid for by the member, shall disclose any business relationship, past or present, between the member and the person paying for the advertisement.

6157.4. Any advertisement that is created or disseminated by a lawyer referral service shall disclose whether the attorneys on the organization's referral list, panel, or system, paid any consideration, other than a proportional share of actual cost, to be included on that list, panel, or system.

6157.5. (a) All advertisements published, distributed, or broadcasted by or on behalf of a member seeking professional employment for the member in providing services relating to immigration or naturalization shall include a statement that he or she is an active member of the State Bar, licensed to practice law in this state. If the advertisement seeks employment for a law firm or law corporation employing more than one attorney, the advertisement shall include a statement that all the services relating to immigration and naturalization provided by the firm or corporation shall be provided by an active member of the State Bar or by a person under the supervision of an active member of the State Bar. This subdivision shall not apply to classified or "yellow pages" listings in a telephone or business directory of three lines or less that state only the name, address, and telephone number of the listed entity.

(b) If the advertisement is in a language other than English, the statement required by subdivision (a) shall be in the same language as the advertisement.

(c) This section shall not apply to members employed by public agencies or by nonprofit entities registered with the Secretary of State.

(d) A violation of this section by a member shall be cause for discipline by the State Bar.

6158. In advertising by electronic media, to comply with Sections 61571.1 and 6157.2, the message as a whole may not be false, misleading, or deceptive, and the message as a whole must be factually substantiated. The message means the effect in combination of the spoken word, sound, background, action, symbols, visual image, or any other technique employed to create the message. Factually substantiated means capable of verification by a credible source.

6158.1. There shall be a rebuttable presumption affecting the

burden of producing evidence that the following messages are false, misleading, or deceptive within the meaning of Section 6158:

(a) A message as to the ultimate result of a specific case or cases presented out of context without adequately providing information as to the facts or law giving rise to the result.

(b) The depiction of an event through methods such as the use of displays of injuries, accident scenes, or portrayals of other injurious events which may or may not be accompanied by sound effects and which may give rise to a claim for compensation.

(c) A message referring to or implying money received by or for a client in a particular case or cases, or to potential monetary recovery for a prospective client. A reference to money or monetary recovery includes, but is not limited to, a specific dollar amount, characterization of a sum of money, monetary symbols, or the implication of wealth.

6158.2. The following information shall be presumed to be in compliance with this article for purposes of advertising by electronic media, provided the message as a whole is not false, misleading, or deceptive:

(a) Name, including name of law firm, names of professional associates, addresses, telephone numbers, and the designation "lawyer," "attorney," "law firm," or the like.

(b) Fields of practice, limitation of practice, or specialization.

(c) Fees for routine legal services, subject to the requirements of subdivision (d) of Section 6157.2 and the Rules of Professional Conduct.

(d) Date and place of birth.

(e) Date and place of admission to the bar of state and federal courts.

(f) Schools attended, with dates of graduation, degrees, and other scholastic distinctions.

(g) Public or quasi-public offices.

(h) Military service.

(i) Legal authorship.

(j) Legal teaching positions.

(k) Memberships, offices, and committee assignments in bar associations.

(l) Memberships and offices in legal fraternities and legal societies.

(m) Technical and professional licenses.

(n) Memberships in scientific, technical, and professional associations and societies.

(o) Foreign language ability of the advertising lawyer or a member of lawyer's firm.

6158.3 In addition to any disclosure required by Section 6157.2, Section 6157.3, and the Rules of Professional Conduct, the following disclosure shall appear in advertising by electronic media. Use of the following disclosure alone may not rebut any presumption created in Section 6158.1. If an advertisement in the electronic media conveys a message portraying a result in a particular case or cases,

the advertisement must state, in either an oral or printed communication, either of the following disclosures: The advertisement must adequately disclose the factual and legal circumstances that justify the result portrayed in the message, including the basis for liability and the nature of injury or damage sustained, or the advertisement must state that the result portrayed in the advertisement was dependent on the facts of that case, and that the results will differ if based on different facts.

BUSINESS AND PROFESSIONS CODE SECTION 6060-6069

6068. It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

(i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

(j) To comply with the requirements of Section 6002.1

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

(l) To keep all agreements made in lieu of disciplinary prosecution with the agency charged with attorney discipline.

(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.

(n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

(o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.

(2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

(3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000).

(4) The bringing of an indictment or information charging a felony against the attorney.

(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

(6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

(8) As used in this subdivision, "against the attorney" includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney's knowledge already been reported by the law firm or corporation.

(9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.

(10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.

LEXSTAT CAL BAR RULES, PROF CONDUCT R 3-110

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STATE BAR RULES
RULES OF PROFESSIONAL CONDUCT
CHAPTER 3 Professional Relationship With Clients

Cal Bar Rules, Prof Conduct R 3-110 (2004)

Review Court Orders which may amend this Rule

Rule 3-110 Failing to Act Competently

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

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

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

LEXSTAT CAL BAR RULES, PROF CONDUCT R 3-500

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STATE BAR RULES
RULES OF PROFESSIONAL CONDUCT
CHAPTER 3. Professional Relationship With Clients

Cal Bar Rules, Prof Conduct R 3-500 (2004)

Review Court Orders which may amend this Rule

Rule 3-500. Communication

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

BUSINESS AND PROFESSIONS CODE SECTION 6146-6149.5

6147. (a) An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following:

(1) A statement of the contingency fee rate that the client and attorney have agreed upon.

(2) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.

(3) A statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee contract. This may include any amounts collected for the plaintiff by the attorney.

(4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client.

(5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.

(b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee.

(c) This section shall not apply to contingency fee contracts for the recovery of workers' compensation benefits.

(d) This section shall become operative on January 1, 2000.

6147.5. (a) Sections 6147 and 6148 shall not apply to contingency fee contracts for the recovery of claims between merchants as defined in Section 2104 of the Commercial Code, arising from the sale or lease of goods or services rendered, or money loaned for use, in the conduct of a business or profession if the merchant contracting for legal services employs 10 or more individuals.

(b) (1) In the instances in which no written contract for legal services exists as permitted by subdivision (a), an attorney shall not contract for or collect a contingency fee in excess of the following limits:

(A) Twenty percent of the first three hundred dollars ($300) collected.

(B) Eighteen percent of the next one thousand seven hundred dollars ($1,700) collected.

(C) Thirteen percent of sums collected in excess of two thousand dollars ($2,000).

(2) However, the following minimum charges may be charged and collected:

(A) Twenty-five dollars ($25) in collections of seventy-five dollars ($75) to one hundred twenty-five dollars ($125).

(B) Thirty-three and one-third percent of collections less than seventy-five dollars ($75).

BUSINESS AND PROFESSIONS CODE SECTION 6146-6149.5

6148. (a) In any case not coming within Section 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars ($1,000), the contract for services in the case shall be in writing. At the time the contract is entered into, the attorney shall provide a duplicate copy of the contract signed by both the attorney and the client, or the client's guardian or representative, to the client or to the client's guardian or representative. The written contract shall contain all of the following:

(1) Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.

(2) The general nature of the legal services to be provided to the client.

(3) The respective responsibilities of the attorney and the client as to the performance of the contract.

(b) All 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. Upon request by the client, the attorney shall provide a bill to the client no later than 10 days following the request unless the attorney has provided a bill to the client within 31 days prior to the request, in which case the attorney may provide a bill to the client no later than 31 days following the date the most recent bill was provided. The client is entitled to make similar requests at intervals of no less than 30 days following the initial request. In providing responses to client requests for billing information, the attorney may use billing data that is currently effective on the date of the request, or, if any fees or costs to that date cannot be accurately determined, they shall be described and estimated

(c) Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee.

(d) This section shall not apply to any of the following:

(1) Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is otherwise impractical.

(2) An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client.

(3) If the client knowingly states in writing, after full disclosure of this section, that a writing concerning fees is not required.

(4) If the client is a corporation.

(e) This section applies prospectively only to fee agreements following its operative date.

(f) This section shall become operative on January 1, 2000.

LEXSTAT CAL BAR RULES, PROF CONDUCT R 2-200

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STATE BAR RULES
RULES OF PROFESSIONAL CONDUCT
CHAPTER 2 Relationship Among Members

Cal Bar Rules, Prof Conduct R 2-200 (2004)

Review Court Orders which may amend this Rule

Rule 2-200 Financial Arrangements Among Lawyers

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

(1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

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

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

STATE BAR RULES
RULES OF PROFESSIONAL CONDUCT
CHAPTER 1. Professional Integrity in General

Cal Bar Rules, Prof Conduct R 1-320 (2004)

Review Court Orders which may amend this Rule

Rule 1-320 Financial Arrangements With Non-Lawyers

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

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

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

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

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

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

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

LEXSTAT CAL BAR RULES, PROF CONDUCT R 4-200

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STATE BAR RULES
RULES OF PROFESSIONAL CONDUCT
CHAPTER 4 Financial Relationship With Clients

Cal Bar Rules, Prof Conduct R 4-200 (2004)

Review Court Orders which may amend this Rule

Rule 4-200 Fees for Legal Services

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

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

(1) The amount of the fee in proportion to the value of the services performed.

(2) The relative sophistication of the member and the client.

(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.

(4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.

(5) The amount involved and the results obtained.

(6) The time limitations imposed by the client or by the circumstances.

(7) The nature and length of the professional relationship with the client.

(8) The experience, reputation, and ability of the member or members performing the services.

(9) Whether the fee is fixed or contingent.

(10) The time and labor required.

(11) The informed consent of the client to the fee.

LEXSTAT CAL BAR RULES, PROF CONDUCT R 3-310

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STATE BAR RULES
RULES OF PROFESSIONAL CONDUCT
CHAPTER 3 Professional Relationship With Clients

Cal Bar Rules, Prof Conduct R 3-310 (2004)

Review Court Orders which may amend this Rule

Rule 3-310 Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LEXSTAT CAL BAR RULES, PROF CONDUCT R 3-300

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STATE BAR RULES
RULES OF PROFESSIONAL CONDUCT
CHAPTER 3 Professional Relationship With Clients

Cal Bar Rules, Prof Conduct R 3-300 (2004)

Review Court Orders which may amend this Rule

Rule 3-300. Avoiding Interests Adverse to a Client

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

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

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

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

LEXSTAT CAL BAR RULES, PROF CONDUCT R 3-400

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STATE BAR RULES
RULES OF PROFESSIONAL CONDUCT
CHAPTER 3 Professional Relationship With Clients

Cal Bar Rules, Prof Conduct R 3-400 (2004)

Review Court Orders which may amend this Rule

Rule 3-400 Limiting Liability to Client

A member shall not:

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

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

STATE BAR RULES
RULES OF PROFESSIONAL CONDUCT
CHAPTER 5 Advocacy and Representation

Cal Bar Rules, Prof Conduct R 5-120 (2005)

Rule 5-120 Trial Publicity

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

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

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(a) the identity, residence, occupation, and family status of the accused;

(b) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(c) the fact, time, and place of arrest; and

(d) the identity of investigating and arresting officers or agencies and the length of the investigation

(C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member

or the member's client A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

HISTORY:
Approved by the Supreme Court September 14, 1995, effective October 1, 1995

NOTES:
Official Comment:

DISCUSSION:
1995-- Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.
Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissable as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate *Business and Professions Code section 6068(d)*; (3) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and (4) the timing of the statement
Paragraph (A) is intended to apply to statements made by or on behalf of the member
Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer--client privilege or of *Business and Professions Code section 6068(e)* regarding the member's duty to maintain client confidence and secrets Related Statutes & Rules:
Duties as an attorney: *B & P C § 6068* Collateral References:
Cal. Forms Pl. & Pr. (Matthew Bender), Ch 72, "Attorney Practice and Ethics" III, Introduction
Rutter, Cal Practice Guide, Professional Responsibility § § 8:298 et seq

Law Review Articles:
Leaks, gags and shields: taking responsibility. *37 Santa Clara LR 943*

LEXSTAT CAL BAR RULES, PROF CONDUCT R 5-210

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STATE BAR RULES
RULES OF PROFESSIONAL CONDUCT
CHAPTER 5. Advocacy and Representation

Cal Bar Rules, Prof Conduct R 5-210 (2004)

Review Court Orders which may amend this Rule

Rule 5-210. Member as Witness

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

(A) The testimony relates to an uncontested matter; or

(B) The testimony relates to the nature and value of legal services rendered in the case; or

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

LABOR CODE
SECTION 1700.5-1700.22

1700.5. No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner. The license shall be posted in a conspicuous place in the office of the licensee. The license number shall be referred to in any advertisement for the purpose of the solicitation of talent for the talent agency.

Licenses issued for talent agencies prior to the effective date of this chapter shall not be invalidated thereby, but renewals of those licenses shall be obtained in the manner prescribed by this chapter.

LABOR CODE
SECTION 1700-1700.4

1700.4. (a) "Talent agency" means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.

(b) "Artists" means actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises.