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TRIAL LAWYERS
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PRACTICING LAW DEFENSIVELY©

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INTRODUCTION

Lawyers are under siege. Unless individual lawyers exercise vigilance, diligence, and rely on healthy paranoia to keep pace with the growth of creative ways their clients and others seek to expand the scope of lawyers' duties and potential for liability, they will become insurers of the work they perform.

Lawyers are often ill-prepared to protect themselves from would-be plaintiffs, with often very predictable prospective claims. So, if lawyers can predict that clients will sue, shouldn't they just as easily protect themselves from potential liability from those same clients? That question is answered affirmatively in this article and we seek, by providing a direct and, hopefully, simple analysis, to demonstrate that practicing law defensively, which is based in common sense and a practical approach to clients and cases, can be achieved by every lawyer.

We examine the California *Rules of Professional Conduct* ("RPC") and legal decisions which define the "Standard of Practice" as finite boundaries or "zones" within which lawyers can practice in relative safety and with the confidence that they can avoid predictable and obvious obstacles. However, understanding the interplay between the laws governing conduct and ethics and the practical aspects of real-world decisions confronting attorneys is critical. Applying the standards to daily practice requires a disciplined and organized approach.

In law firm practice, it is obviously critical for lawyers to rely on professional colleagues and various resources within their firms. However, those colleagues and resources are not always immediately available and do not by themselves provide a framework by which lawyers can adequately perform malpractice prevention analysis. That requires at its foundation a measure of self-reliance.

To the extent that lawyers rely on their own experience and resources in order to conduct the required analysis, the essential techniques they should employ are akin to "defensive driving." Practicing defensively involves (a) introspection, (b) forethought, (c) vigilance, (d) discipline, and (e) organization. Additionally, successful self-reliant analysis requires "professional detachment," because the source of many judgmental lapses stems from identifying too much with the client, and in the corporate setting, with the corporate officers and directors with whom the attorney interacts. Too often, the attorney seeks to become involved in ways that transcend the Attorney-Client relationship: e.g., (a) becoming a principal or participant in client transactions, or (b) becoming the client, by joining the Board of Directors. But by the safeguards outlined below, the lawyer can, as much as possible, create a solid platform for achieving acceptable levels of risk management and negligence avoidance.

The Basics of Avoiding and Managing Risk

Lawyering is fraught with hazards – opportunities for negligence both great and small are ever present, and even when engagements are properly executed, clients may look to lawyers to take responsibility for disappointing outcomes. Thus, the practicing lawyer must take care to insulate him or herself from unnecessary and unwarranted complaints. It is essential to remember that clients and lawyers often have different expectations and perspectives concerning matters, and being aware of a client's perspective may help reduce the possibility of dissatisfaction later on. Risk is best managed or avoided by following three simple rules: **Disclose, Discuss** and **Document**.

Avoiding the Accidental Client

In this age of instant messaging and the omnipresent Blackberry, people often seek quick and free legal advice. Though a lawyer cannot conceivably treat all social and professional interactions as possible new matters, it is important to realize that confidential information can be disclosed even in seemingly innocuous environments, and establishing the correct moment to solidify the Attorney-Client relationship can be tricky. Though the law is not a field in which "the customer is always right," lawyers would be well advised to recognize the fact that prospective clients may feel they have established a relationship well before the lawyer does. Even in social or casual settings, individuals may feel that information they impart will be considered confidential.[1] Although lawyers may not have a legal obligation to preserve the confidences of every person they meet or of every conversation in which they engage, it is always prudent to gauge prospective "clients," and inquire about their intentions before receiving confidential information from the prospective client or saying anything that might be construed as advice.[2]

From the very first communication, whether phone, email, or casual conversation, lawyers must determine how serious the potential client seems, if and when any confidential information has been disclosed, and whether the time has come to reasonably begin protecting themselves.[3]

Prospective Clients

Before a formal relationship is established with any new or potential client (one not previously represented by the lawyer), there are several very important factors to consider. As stated above, this is the best time to determine basic issues relevant to malpractice prevention, such as conflicts of interest and time constraints (e.g., statutes of limitations), to be discussed in greater depth below.

Client Intake: The decision whether to take on a particular client must hinge on the answer to several basic inquiries: (a) conflicts, (b) qualifications, (c) comfort levels, and (d) the prospects for a successful outcome. In all cases, where reasonably practicable,[4] before engaging in any communication that might be considered "confidential," perform a conflicts check[5] on the parties, attorneys, and known witnesses in the case.

Conflicts of interest do not simply include the adverse interests of past or present clients or the firm itself, consideration should be given to certain other relevant relationships (landlord, tenant, or business partner, for example) and client or firm institutional issues (Does the firm represent or have a business relationship? What about subsidiaries?). Consider the type or complexity of the matter, including the qualifications required of the lawyer

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[1] In Opinion 2003-161 the State Bar's Standing Committee on Professional Responsibility and Conduct ("COPRAC") answered the question "Under what circumstances may a communication in a non-office setting by a person seeking legal services or advice from an attorney be entitled to protection as confidential client information when the attorney accepts no engagement, expresses no agreement as to confidentiality, and assumes no responsibility over any matter?" This opinion serves as a useful guide from which to avoid unintended professional responsibilities of an "accidental" lawyer. See also, COPRAC Opinion 2003-164 which answers the question "May an attorney-client relationship be formed with an attorney who answers specific legal questions posed by persons with whom the attorney has not previously established an attorney client relationship on a radio call-in show or other similar format?"

[2] Under California law, the fiduciary relationship between an attorney and a client "extends to preliminary consultations by a prospective client with a view to retention of the lawyer, although actual employment does not result." *People ex rel Department of Corporations* v. *Speedee Oil Change Systems, Inc.*, (1999) 20 Cal. 4th 1135.) Moreover, an attorney is deemed to represent a client (at least for conflict of interest purposes) when she "knowingly obtains material confidential information from the client and renders legal advice or services as a result." *Id.* at p. 1148. In *Streit* v. *Covington & Crowe,* 82 Cal. App. 4th 441, 446 (2000), an attorney retained by counsel of record to make a "special appearance" was determined to have an Attorney-Client relationship with an client, despite never having had contact with the actual client.

[3] If a conflict later arises and the potential or putative "client" later asserts that confidential information was disclosed, it is likely that the lawyer, even if he is lucky enough to remember the contact, will be disqualified.

[4] There are instances in which lawyers must make a value judgment, asking themselves if it is more important to collect potentially confidential information and risk disqualification, or failing to act lose the client? The wiser path is to slow down and complete expeditious conflict check and avoidance procedures.

[5] Though taking many forms, conflicts checks should, at minimum, assure that the prospective client's opponents are not current or former clients.

to best represent the client, and the qualifications or attributes of the lawyer's firm; not every matter is well suited to every lawyer, and undertaking an engagement for which a lawyer is unqualified or lacks the time to approach diligently will benefit no one.

At this threshold moment careful consideration also should be given to several practical "comfort tests" relating to the prospective client, such as their ability to pay (consider a credit or some other sort of background check), their willingness and ability to cooperate and assist, the reasonableness of their expectations,[6] and their track record (with past relationships with lawyers, similar matters, etc.).[7] Finally, think carefully about the prospects for success before agreeing to represent the client. It should go without saying that a lawyer should avoid matters where the lawyer determines in advance he cannot achieve the client's stated objective(s).

Confidentiality: Regardless of whether or not an engagement ultimately materializes, all preliminary consultations involving the exchange of confidential information are and remain privileged. It is for this reason that determining the moment at which such information has been disclosed is so vital; the lawyer has a duty to preserve even a prospective client's confidences **indefinitely**. *Wutchumna Water Co.* v *Bailey,* 216 Cal. 564, 573 (1932).

Additionally, the lawyer, upon receiving confidential information from a prospective client, then has a duty to avoid later adverse representation substantially related to the preliminary consultation, as proscribed by RPC 3-310(E), even if the lawyer does not ultimately represent the potential client.[8] There are special problems in the context of "beauty contests" (i.e., interviewing with a potential client with full knowledge that other lawyers or firms are also interviewing, thus removing any guarantee of retention). In these cases, every effort should be made to avoid receiving any confidential information, and at a minimum, all information received from and provided to the prospective client should be memorialized in a writing. Maintaining accurate records of prospective client contact, including the client's confidences and retaining records, aids future conflicts checks and helps reduce the possibility that problems with conflicts of interest might develop in the future.

Declinations: There is always the prospect, that a relationship will not materialize between a lawyer and prospective client, whether by the attorney's choice or the client's decision to engage other counsel. Representation should be declined when the lawyer lacks competence,[9] or where the client is potentially "difficult." However, that does not mean that the communications which have occurred can be forgotten. Where representation does not materialize, regardless of the reason,, it is important to memorialize the event in writing, e.g., by e-mail or letter, and that receipt be confirmed (consider certified mail or receipt confirmed e-mail) making clear that retention is declined,[10] especially where there have been personal meetings with the prospective client, repeated contacts or receipt of materials.

Declination communications *must* (a) be sent promptly, (b) establish the fact that the attorney (or client) is declining the engagement, (c) where appropriate advise the prospective client to seek other counsel immediately to avoid any prejudice to the prospective client's rights. In addition, the communications should include (a) the dates the lawyer was consulted, (b) the subject matter of the consultation, (c) confirmation of the fact, timing and substance of prior communications, (d) disclosure of the statute of limitations or other deadlines (*see, Flatt v. Superior Court*, 9 Cal. 4th 275 (1994); *Miller* v. *Metzinger*, 91 Cal. App. 3d 31 (1979)), (e) disclosure of reasons for declination [but balance candor against language which tends to dissuade the prospective client from pursuing claims or rights], and (f) memorializing referrals to other counsel, if any were given to the client. Equivocal statements may leave the prospective client with an expectation that an attorney-client relationship was formed. *See* COPRAC Opinion 2003-161.

Consistent with the message and out of courtesy, all materials received should be recorded and returned if the engagement is declined. Cf. RPC Rule 3-700(D)(1), requires that the lawyer promptly release to client all client

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[6] Be wary of the "Come Hell or High Water" client, the one who is argumentative in the face of advice, especially in the initial communications, and be especially careful about clients whose expectations involve subjective considerations, such as vengeance or honor, particularly where the ostensible objective (e.g., money judgment) will not necessarily lead to the desired outcome.

[7] Many lawyers avoid completely any client who has had more than one prior lawyer on the same matter. It is often difficult to obtain accurate information, but more than one prior lawyer reflects negatively on one or more of the practical "comfort tests," discussed above.

[8] Even the briefest of confidential exchanges in the course of an interview which does not lead to the attorney's hiring can preclude the firm from presenting an adverse party in any matter where the confidential information is material. *People ex. Rel. Department of Corp.* v. *Speedee Oil Change Systems, Inc.,* 20 Cal. 4th at 1135.

[9] RPC 3-110(B) defines competence as the application of diligence, learning and skill, and the mental, emotional, and physical ability reasonably necessary for the performance of the legal services.

[10] "The attorney's duty to communicate with a client includes the duty to communicate to persons who reasonably believe they are clients to the attorney's knowledge at least to the extent of advising them that they are not clients." *Butler* v. *State Bar,* 42 Cal. 3d 323, 329 (1986).

papers and property at the request of a former client. In addition, remember that information exchanged prior to declination is covered by attorney client privilege and duty of confidentiality, but information divulged after declination is not so protected. *People* v. *Gionis* 9 Cal.4th 1196, 1211 (1995).

Lawyers should take personal responsibility for becoming aware of whether a file is opened,[11] and assuring that records of the contact with the prospective client are preserved. As the discussion to RPC 3-110 indicates, the duty to act competently includes duty to supervise the work of subordinate attorney and non-attorney employees or agents. *See* cases cited therein.

Legally, with respect to the duties to preserve confidences and advise as to impending deadlines or avoiding conflicts, it makes no difference whether it is the client's decision not to hire the lawyer or the lawyer's in declining the engagement. From a practical standpoint, once the client retains other counsel prior to the expiration of any deadlines, such counsel would necessarily assume the duties relating to the client relationship. *Steketee* v. *Lintz, Williams & Rothberg*, 38 Cal. 3d. 46 (1985).

Formalized Client Relationships

Protections and Concerns: Once the decision has been made for the lawyer and client to enter into a formal relationship, it is even more important to ensure that all proper steps are taken to insulate the lawyer against claims of negligence. For every type of engagement, there are safety precautions and common pitfalls to employ and avoid, respectively.

The following holistic approach to the Attorney-Client relationship seeks to cover not only topics for risk-management, but also outline the proper steps to take in order to minimize the risks of future malpractice claims. Our purpose is to address both the basic outline of engagements, the universal steps for formalizing, maintaining, and terminating engagements, and the possible obstacles to a smooth engagement, from the perspective of removing those obstacles. There are no guarantees that an engagement will proceed without complications, irrespective of what precautions a lawyer takes, but with the right framework, the roadblocks that do appear can be either dealt with quickly and efficiently, or for those that cannot, redirected to alternative dispute resolution, a less costly and time intensive alternative to a jury trial. Remember too, this is the last time that the attorney can deal with the client at arm's length.

Fee Agreements, Roadmaps for Engagements: The fee agreement is quite possibly the single most important piece of documentation in the entire Attorney-Client relationship. If constructed carefully and properly, written fee agreements are risk management devices that can prevent drawn-out fee disputes and divert any future disagreements into alternative dispute resolution. Written fee agreements are required in most instances and governed by the California *Business & Professions Code* ("B&P") sections 6147 (contingency agreements) and 6148 (non-contingency agreements).[12]

Through a written fee agreement, lawyers can reasonably cover a wide array of topics relating to the engagement in such a way as to both outline the manner in which the engagement will be conducted and defend against common anticipated claims.

From defining the scope of the engagement, to billing rates and frequency, to arbitration clauses and termination provisions, the fee agreement provides the lawyer an opportunity to articulate the critical terms of the Attorney-Client relationship, as well as set the barometer for measuring and meeting client expectations.[13] In addition, beyond this vital piece of documentation, there are other ways to reasonably keep the client informed of important information, in compliance with a lawyer's duty under RPC 3-500. Ongoing client communications in the form of phone conversations, letters and e-mail are necessary when conflicts arise, and appropriate to keep the client informed, about the progress of the engagement, as well as potentially creating a "paper" trail in case of disagreement between lawyer and client by documenting the substance or timing of their communications.

[11] Opening a file (whether a case file or merely adding the contact to an address book) on each prospective client, ultimately is the most reliable method for preserving the information collected concerning a prospective client and assuring that it is maintained in a readily accessible and search location so it is available for future conflict checks.

[12] Prior to 1997, there was conflicting case law as to whether B&P § 6147 governed all forms of contingency engagements or only representation of plaintiffs in personal injury actions. *Compare, Franklin* v. *Appel*, 8 Cal. App. 4th 875 (1992), with *Alderman* v. *Hamilton*, 205 Cal. App. 3d 1033 (1988).) In January 1, 1997, B&P § 6147 was clarified to apply to "clients," not just "plaintiffs." However, B&P § 6147.5 codified an exception for contingency agreements in actions involving "merchants." In addition, B&P § 6148(d) provides exceptions to the general requirement for fee agreements in cases involving (a) corporate clients, (b) emergencies to protect client or where otherwise impractical, (c) small engagements (less than $1,000), or (d) where client waives right to written fee agreement in writing.

[13] While not "fire-proof", it is recommended that fee agreements contain both an integration clause and a provision requiring modifications be in a signed writing.

Identifying the Client: The client should be identified in the fee agreement (which is a confidential document under Business & Professions Code § 6149 and thus should not be shared with non-clients) and relevant relationships with non-clients, who might be paying or guaranteeing the fee, should be documented in a separate three way agreement (preferred), concerning their financial responsibility and their status as non-clients compliant with RPC 3-310(F). Where multiple clients are involved, particularly if principals of organization clients, the agreement must be clear and consistent from identification of the clients at the outset to the signature lines. Whether joint and several responsibility for fees or some other arrangement, it must be clearly spelled out. See discussion below.

Defining the Scope of the Attorney-Client Engagement:

Defining included activity. Defining the scope of the engagement is probably the single most important purpose of a fee agreement, and reason enough to have a written agreement covering every engagement regardless of the statutory requirement, and to avoid "mission creep" by amending the fee agreement or setting up a new matter with a separate fee agreement, and avoiding undue use of a client "general" billing file.

Defining excluded activity. No less important, the agreement should specify excluded subjects or activities that are or may be involved. Where other counsel are known to have such responsibilities, the agreement should so indicate. Where an area is excluded due to lack of expertise, the agreement should admonish the client to engage experts who can advise on such matters.

Regardless of the terms of the agreement, lawyers must still be wary of issues arising outside the stated boundaries of the engagements. *Nichols* v. *Keller*, 15 Cal. App. 4th 1672 (1993) (discussed below); *Di Loreto* v. *O'Neill,* 1 Cal. App. 4th 149 (1991). Issues spotted after the fee agreement is executed should be brought to the client's attention in writing. This protects the client and permits a knowing decision on both sides as to whether the engagement is to be expanded to include the new issue. It also further documents the limits on the firm's responsibilities, just as with a prospective client. B&P § 6147(a)(3).

California case law and ethics opinions are generally supportive of allowing lawyers to limit the scope of their engagements so long as the client consents after adequate disclosure. *See for example, Marriage of Egedi,* 88 Cal. App. 4th 17 (2001); *Blevin* v. *Mayfield,* 189 Cal. App. 2d 649 (1961); *Buehler v. Sbardellati,* 34 Cal. App. 4th 1527 (1995); and, Los Angeles County Bar Association ("LACBA") Ethics Opinions 483 and 502. Yet attempts at limiting the scope of an engagement are not free from risk. *See In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498 [2002 WL 31907316 (Cal. Bar Ct.) at p. 13] ("[T]here is no 'limited' appearance of counsel in immigration proceedings."); *Janik* v. *Rudy, Exelrod & Zieff,* 119 Cal. App. 4th 930 (2004) (An attorney's obligations may extend beyond a document purporting to limit scope to include the duty to assert claims arising out of the same facts that the client would reasonably expect to be asserted to accomplish the objectives of the representation.); and *Nichols* v. *Keller,* supra (worker's compensation attorney could limit scope to exclude negligence claims only after adequate disclosure).

Moreover, certain ethical duties are unaffected by attempts to limit the scope of the representation. Those include (a) duty of loyalty, (b) duty of confidentiality, and (c) duty of competency (Rule 3-110).

Assure the Proper Client Executes the Fee Agreement: As obvious as it may sound, it is critical to assure the client is expressly identified, and the terms for payment clearly delineated. There must be compliance with Rule 3-310(F), which requires adequate disclosure and written consent for a lawyer to accept payment from a third party on a client's account. Moreover, the same Rule mandates that the client's confidentiality be maintained (the fee agreement is a confidential document under Business & Professions Code § 6149 and thus should not be shared with non-clients) or by separate three way agreement (preferred), concerning their financial responsibility and their status as non-clients.

Serious problems could arise when a third party has assumed responsibility for payment of an attorney's fees but the real client is not identified or fails to give informed consent to the arrangement. If the proper individual or representative does not sign the fee agreement, the actual client may not be bound by the fee agreement. For example, where an agent signs a contract as an agent where the principal is identified, the principal is personally liable, but not the agent. *Lippert* v. *Bailey,* Cal. App. 2d 376, 382 (1966); *Filippo Industries, Inc.* v. *Sun Insurance Co. of N.Y.,* 74 Cal. App. 4th 1429, 1442 (1999). But if an agent signs his or her own name and does not disclose the principal, the agent may be liable but not the principal. *See*, *Otis Elevator Co. v. Berry* (1938) 28 Cal. App. 2d 430, 432. So, it is critical to assure that the client, whether an individual or business entity, is properly and carefully identified, especially where the term "client(s)" is defined in contracts, in recitals to pleading or in signature blocks.

Advance Waivers: Increasingly, lawyers use of a form of advance waiver of conflicts of interest in an attempt to permit future representation of a party adverse to the current client. They are used to avoid (a) disciplinary consequences of failing to comply with RPC 3-310 (Avoiding the Representation of Adverse Interests), (b) being disqualified from a later representation of the party whose representation creates the conflict, (c) to minimize malpractice exposure. Some Courts have held that a properly worded advance waiver will be sufficient to bar later disqualification because the client has consented in advance to the adverse representation. *See Zador* v. *Kwan,* 31 Cal. App. 4th 1285 (1995); *Visa U.S.A., Inc.* v. *First Data Corporation*, 241 F. Supp.2d 1100, 1106-1107 (N.D., Cal. 2003); See also, Los Angeles County Bar Association ("LACBA") Ethics Opinion 471. However, Courts have also declined to accept such waivers where an actual conflict of interest jeopardizes public trust in the scrupulous administration of justice and in the integrity of the bar. *In Re A.C.,* 80 Cal. App. 4th 994, 1002 (2000). Any advance waiver that purports to allow an attorney to use confidential information against a former client will undoubtedly not pass muster.

The lawyer's focus should be on whether the written disclosure contains sufficient information about the relevant circumstances of a conflict that has not yet arisen, and adequately discloses the reasonably foreseeable adverse consequences to the client of giving the waiver. Broad, generic waivers will not be effective as the client's consent would not be "informed." Even if the waiver avoids the lawyer's disqualification, the client may still contend in a later malpractice action that the waiver did not properly inform the client of the probable adverse consequences. Thus, advance waivers should not be viewed as a means of insulating against malpractice liability.

Defining Financial Arrangements: The financial terms of the attorney-client relationship should be specified in the written fee agreement so that the payment terms are clear, payment requirements obvious, and dispute resolution readily available, in accordance with applicable law to assure enforceability.

Fees: Fee agreements must be fair, reasonable and fully explained to the client. *Alderman* v. *Hamilton*, 205 Cal. App. 3d 1033, 1037 (1988); *Bird, Marella, Boxer & Wolpert* v. *Superior Court,* 106 Cal. App. 4th 419, 430-431 (2003). Rule 4-200 prohibits an unconscionable fee; the rule applies not only to the fee agreement itself, but also later actions when fees are charged or collected. Advisory 98-03 issued by State Bar Mandatory Fee Arbitration Committee; see also, *Severson & Werson v. Bolinger*, 235 Cal. App. 3d 1569, 1572 (1991). Hourly fee rates for various categories of personnel should be expressly stated, along with the timing, and notice required for periodic rate increases (i.e., every January 1 or on 30 days prior written notice).

Costs: The agreement should be clear about how costs are incurred and are to be paid (for example if costs are to be charged at attorney's costs or at a higher rate), and if the firm is taking on any obligation to advance costs (especially in the contingency context). ABA Formal Opinion 00-420 provides that an amount billed to client for a contract lawyer may include surcharge if billed as legal fees, but if billed as expense or cost, absent contrary agreement, a client may only be charged costs directly associated with services, including expenses incurred to obtain and provide benefit of contract lawyer's services.

Billing frequency: The timing of bills and expectation for payment are the most obvious item included in a fee retainer, besides the amount of the fee being charged. Frequent billing serves several important loss prevention functions. First, it keeps billing partners informed of the work being performed on a given matter by others in the firm, especially associates for whom there is supervisory responsibility. Second, regular (*i.e.,* monthly) billing also keeps the client informed concerning the details of the handling of the matter, thus minimizing rude surprises that result from a build up in fees and costs over a period of months. Third, regular billing better enables lawyers and clients alike to track budgets/estimates, where applicable. Fourth, frequent billing also reinforces the firm's position with respect to the issue of waiver in later fee disputes where the fee agreement imposes a timing requirement for client objections to the firm's invoices. If the client has a problem with specific billing entries, it is always better to deal with the issue sooner rather than later. If the client does not object, frequent billing thus improves (but does not guarantee) the firm's position in subsequent fee dispute, especially where the objection seems contrived. The client's silence is also key to Account Stated claims in subsequent collection action. In addition, monthly billing helps the law firm in those instances where the fee agreement calls for interest charges to be added when timely payments are not made; the law firm is not in the business of making interest free loans. Whether the firm ultimately charges interest or insists on the client paying interest charges can be determined at the time of billing (or even later), but if the right is not established in the contract, the lawyer is left only with a contested claim to prejudgment interest in a collection action. The existence of a right to collect interest may also provide small leverage in resolving fee disputes (e.g., law firm may offer to waive interest in exchange for prompt payment of the

balance due). If interest is to be charged, it must be done concurrently and reflected in the invoice. Efforts to retroactively charge interest are not likely to be successful. Interest charges are not subject to usury laws in California[14] but must not be unconscionable under Rule 4-200.[15] Otherwise, there is no ethical prohibition on charging interest on past due reimbursement for costs[16] or past due fees.[17]

Fee agreements should also reserve the right to change rates, especially in litigation engagements or any other matter that contemplates services to be rendered over a sustained period of time. In practice, the law firm should give written notice in advance of a scheduled rate increase, preferably by letter, but at the very 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. *Severson, Werson, et al.* v. *Bolinger*, 235 Cal. App. 3d 1569 (1991); s*ee also*, RPC Rule 4-200(B)(11) (client's informed consent to the fees is one factor in determining unconscionability).

Retainer Deposits: The written fee agreement should specify precisely what a retainer payment represents and how it is to be applied. The agreement should be clear as to whether retainers are "front end" (applied as the matter is billed until exhausted) or "evergreen" (replenished as and when billed) or "back end" (security for non-payment of fees at the conclusion of the engagement). Whichever form of retainer is agreed upon, the law firm must be vigilant to enforce the agreement, especially in the case of "evergreen" retainers. In general, unless it has been agreed upon as an earned fee that assures the attorney's availability and later fees are not charged against it, becoming then a "true retainer" [*Baranowski* v. *State Bar,* 24 Cal. 3d 153 (1979)], a retainer should be deposited into the attorney's trust account[18] where it remains until it is earned, in accordance with the terms of the fee agreement. Retainers deposited into the trust account should not be accessed *except with the client's authorization*, either in advance through the written fee agreement or as funds are proposed to be withdrawn. *Most* v. *State Bar,* 67 Cal. 2d 589 (1967); *Trafton* v. *Youngblood,* 69 Cal. 2d 17 (1968) (in which attorney improperly used monies placed in escrow in order to pay off mechanic's liens for his own attorney's fees).

Estimates: Although giving estimates should be avoided, especially at the outset of an engagement, if an estimate is given, it should be made in writing with full statement of limitations, both those inherent to any estimate in such matters and those specific or unique to the particular matter for which the lawyer is engaged. Additionally, consider incorporating a statement in the fee agreement that no estimate has been requested or given and that any future estimates will be in writing. If an estimate has been given and later events make clear that the estimate is no longer realistic, the attorney should notify the client in writing, explaining the circumstances and advising that the former estimate can no longer be relied upon.

Using Forms: The overuse of form fee agreements (and forms generally) should be closely monitored. Increasingly, forms are used in response to economic pressures stemming from popular law practice business models which involve increased delegation to non-attorneys. "One Size Fits All" fee agreements bear risks, because they will likely omit critical terms, fail to consider specific specialized factors or circumstances, or include irrelevant or inappropriate information. Using forms based on previously used documents even from highly respected sources should be approached warily and tailored to the current engagement.

Conflicts disclosures/waivers are the least susceptible to the use of forms as the very purpose of such documents is to identify the precise and peculiar circumstances that must be brought to the client's attention to ensure "informed" consent.

The risks of working without a Written Agreement: Without a written fee agreement, the lawyer is open to a plethora of possible disadvantages, should there ever be a disagreement between lawyer and client. The primary sanction for failure to obtain a written fee agreement is that the lawyer will be limited to a recovery of quantum meruit (the reasonable value of services rendered, rather than the "agreed upon value," or the actual fees charged or incurred) and the lawyer cannot enforce any contract terms which exist between lawyer and client. *Iverson, Yoakum, Papiano & Hatch* v. *Berwald*, 76 Cal. App. 4th 990 (1999), teaches that 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' [citing B&P § 6148]," an attorney cannot even sue on promissory note to which the fee receivable was converted. The attorney is limited to quantum meruit and subject to a two year statute of

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[14] Interest charges on unpaid professional fees do not represent an extension of credit. *Southwest Concrete v. Gosh* (1990) 51 Cal. 3d 701, 708; *O'Connor v. Televideo* (1990) 218 Cal. App. 3d 709, 717.

[15] Interest rates of 10% (legal rate of interest) to 12% are common and enforceable.

[16] LACBA Ethics Opinion 499.

[17] COPRAC Opinion 1980-53,

[18] In California, attorneys have the right to deposit the retainer in the firm's operating account, but the better practice is to use the client trust account.

limitations under *California Code of Civil Procedure* section 339.

In addition, the failure to obtain a written fee agreement could be introduced as evidence in a malpractice action, especially where a controversy exists over the scope of the engagement—and can be an effective weapon in the hands of an expert witness. In addition, failure to have a written agreement could be State Bar sanctionable, especially based on a pattern of violations. *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).

Finally, based on *Iverson, supra,* a common count (e.g., account stated) is precluded by a violation of the B&P requirement of written fee agreements. An account stated is considered a form of written contract that later arises when a client acquiesces in response to a lawyer's invoice. However, according to the Second District, such an account stated does not satisfy the writing requirement.

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 and alternative dispute resolution. Also, be aware that lawyers must also provide a duplicate, fully executed copy of fee agreement to the client, pursuant to B&P § 6149.[19]

Alternative Dispute Resolution: Keeping in mind the unfortunate but inevitable fact that clients may decide to sue if they are dissatisfied with the outcome of their matter, preparing in advance can save the lawyer significant time, effort, and money in the long run. While there is no way to prevent clients from filing lawsuits, lawyers can introduce ADR provisions which will establish how complaints will be handled when and if they arise.

Arbitration falls in two primary categories: (1) State Bar mandated *fee* arbitration, in which the client (but not the lawyer) can unilaterally call for non-binding arbitration of a fee dispute; and (2) contractually binding arbitration, which can address any and all other disputes and allows for a truly comprehensive resolution of these issues. *See*, Peck & Kichaven, "Enforcing Arbitration of Lawyer-Client Disputes: Some Questions and Even a Few Answers," *California Litigation* 14 (Winter 1998).[20]

These clauses are ethical and enforceable because they do not involve a prospective limitation of liability (prohibited by RPC Rule 3-400(A)), but merely determine how such disputes will be resolved (COPRAC Opinion 1989-116).

Care should be taken care when drafting arbitration clauses to be certain that they are broad enough to cover all types of complaints, and specific enough to encompass complaints other than those based on fee disputes. Recent case law suggests that the failure to do this could result in action dismissal or the inability to uphold the arbitration clause. *Law Office of Dixon R. Howell v. Valley*, 129 Cal. App. 4th 1076 (2005); *Finseth v. Pohl*, Cal. Rptr. 3d, 2005 WL 74119, Cal. App. 4th Dist (2005).

Binding Arbitration Provisions: Binding arbitration has gained popularity among lawyers in lawyer-client disputes because of the many benefits of choosing arbitration over litigation. Among the presumed advantages to members of the Bar are: (a) an expedited proceeding, (b) reduced cost (discovery limited or prohibited), (c) confidentiality of proceedings, (d) avoidance of jury risks: prejudice, passion, confusion—both as to liability and damage (including punitive damages) aspects, and (e) expected increase in sophistication of arbitrators, especially retired jurists.

The construction of the clause itself is immensely important to the viability and enforceability of the terms therein, and, as with the fee agreement as a whole, attention to detail and clarity will greatly improve the chances that disputes will be dealt with efficiently. Arbitration clauses should be drafted to be conspicuous, plain and clear. Any ambiguities will be construed against the law firm as the drafter of the fee agreement. *See, Lawrence* v. *Walzer & Gabrielson, supra*; *Mayhew* v. *Benninghoff, supra*. However, where the arbitration provision is clear and unambiguous, it will be enforced without allowance for parol evidence as to the intent of the parties. *See, Powers* v. *Dickson, Carlson & Campillo, supra*.

It is highly recommended that this provision be set forth in a separate section of the fee agreement with an appropriate title calculated to provoke the client's attention. Some commentators suggest an entirely separate dispute

[19] Remember: fee agreements are confidential and privileged. B&P § 6149. Consider translation into the client's native language where client's fluency in reading and understanding English is in doubt. *See* CAL.CIV.CODE § 1632 (relating to agreements negotiated in Spanish).

[20] Leading cases include: *Alternative Systems Inc.* v. *Carey,* 67 Cal. App. 4th 1034 (1998); *Huang* v. *Cheng,* 66 Cal. App. 4th 1230 (1998); *Powers* v. *Dickson, Carlson & Campillo*, 54 Cal. App. 4th 1102 (1997); *Mayhew* v. *Benninghoff*, 53 Cal. App. 4th 1365 (1997); *Lawrence* v. *Walzer & Gabrielson*, 207 Cal. App. 3d 1501 (1989).

resolution agreement, and while the ten point, bold red print required for arbitration clauses in medical services contracts pursuant to *Code of Civil Procedure* section 1295 is not applicable to lawyer-client fee agreements (*Powers* v. *Dickson*, *Carlson & Campillo, supra*), it might still be advisable as a means of highlighting the importance of the clause. *See*, Peck & Kichaven, "Enforcing Arbitration of Lawyer-Client Disputes: Some Questions and Even a Few Answers," *supra* at 19.

In addition to making the clause amply visible, be as specific as possible. The arbitration clause must make clear that arbitration extends to all claims based upon or arising out of the fee agreement and the performance or failure to perform services, including claims of acts, errors or omissions on the part of the firm. Some commentators urge reference to potential causes of action (negligence, fraud, breach of fiduciary duty, breach of contract), but it is not required that the arbitration clause use the word "malpractice" or comparable phrases. *Powers v. Dickson, Carlson & Campillo supra*.[21]

The written fee agreement should urge or at least remind the client of their right to consult other counsel before agreeing to the contract, though this is not required. *See, Powers* v. *Dickson, Carlson & Campillo, supra*. Allow the client a reasonable period of time to review and sign the agreement, rather than signing them up on the same day as the agreement is presented. There should be a paper trail as to the delay between sending and signing, indicating this was for the benefit of the client's careful review before signing. Consider a specific designation as to who the arbitrator would be and how chosen. The American Arbitration Association has a special panel of arbitrators to handle such claims. *See* Richard Chernick & Ellen Peck, "ADR Clauses in Fee and Retainer Agreements," Winter 1994-95 *Lawyers' Letter* 18.

In each instance in which a new matter is taken on for an existing client, there should be a new fee agreement with a new arbitration clause. A former agreement that was intended for a different engagement may not be extended to compel arbitration of a later engagement, especially if it does not truly involve legal services. *See, Mayhew* v. *Benninghoff, supra*.

Where an attorney wants to *modify* an existing fee agreement with an ongoing client[22], COPRAC has taken the view that "ethical considerations aside from any legal considerations require that the attorney fully disclose the terms and consequences of the provision and that the client knowingly consent to it. … [C]ompliance with the provisions set forth in California *Code of Civil Procedure* § 1295 . . . would satisfy the ethical concerns present when an arbitration provision is negotiated with an existing client." *Cal. Compendium on Prof. Responsibility*, pt. IIA, State Bar Formal Opinion No. 1989-116, p. 4. This includes advising (preferably *requiring*) the client to consult independent counsel before agreeing to modification of the existing contract. *See also*, Peck & Kichaven, "Enforcing Arbitration of Lawyer-Client Disputes: Some Questions and Even a Few Answers", *supra* at 14-16.

Since the arbitration clause is meant to direct any disputes into the realm of arbitration rather than litigation, be clear about the extent to which the clause controls the manner in which any and all disputes which may arise will be handled. The clause should also make clear that the right to compel arbitration extends to individual present and former members of the firm. Most importantly, make sure arbitration is described as "final and binding." In fact, it is advisable that the provision make clear to the client that an agreement for binding arbitration involves a waiver of the constitutional right to a jury trial. Toward this end, some firms find it useful to require this particular disclosure to be initialed by the client. However, neither step is necessary to the enforceability of the agreement. *See, Powers v. Dickson, Carlson & Campillo, supra*.

Mandatory Fee Arbitration: B&P § 6200, et seq., Mandatory Fee Arbitration Act ("MFAA") governs arbitration of fee disputes between attorney and client, and does not cover malpractice or other claims. Under the MFAA, the client (but not the attorney) can *unilaterally* compel for *non-binding* arbitration of a fee dispute. The term "mandatory" refers to the attorney's duty to participate at the client's behest. MFAA arbitration is voluntary for a client and mandatory for an attorney if commenced by a client and non-binding, absent a later agreement between attorney and client. B&P § 6204(a);

[21] In *Powers*, the Court upheld the following wording in the context of a malpractice claim: "If any dispute **arises out of, or related to, a claimed breach of this agreement, the professional services rendered** by [attorney], or Clients' failure to pay fees for professional services and other expenses specified, or **any other disagreement of any nature, type or description regardless of the facts or the legal theories which may be involved**, such dispute shall be resolved by arbitration before the American Arbitration Association." (Emphasis added.) Contrast the arbitration clause in *Lawrence* v. *Walzer & Gabrielson*, supra, which was held not to extend to malpractice claims: "In the event of a dispute between us regarding fees, costs or any other aspect of our attorney-client relationship, the dispute shall be resolved by binding arbitration." This was held to relate to the financial aspects of the relationship only.

[22] It is an unresolved issue whether modifications of an existing fee agreement requires compliance with Rule 3-300. See COPRAC 2009 Ethics Alert which recommends compliance.

Powers v. *Dickson, Carlson & Campillo,* 54 Cal. App. 4th 1102 (1997) (a law firm had a bifurcated arbitration provision which deferred to State Bar arbitration as to fee disputes, but required malpractice claims to be resolved in binding AAA arbitration); *see also, Glassman* v. *McNab* (2003) 112 Cal. App. 4th 1593 (a post-dispute stipulation for binding arbitration, by which the arbitrator was to and did determine the existence of an attorney-client relationship, was determined to be valid). Lawyers (but not clients) can be forced into such arbitration. However, a binding arbitration clause that extends to fee disputes can be enforced where the client waives Mandatory Fee Arbitration by filing a malpractice suit,[23] or by failing to timely elect such arbitration in response to the attorney's notice. *Ervin, Cohen & Jessup, LLP v. Kassel*, 147 Cal. App. 4th 821 (2007).

The California Supreme Court upheld fee arbitration clauses which mandate binding arbitration as the sole avenue for challenging an otherwise nonbinding Mandatory Fee Arbitration award. *Schatz* v. *Allen Matkins Leck Gamble & Mallory LLP,* 45 Cal. 4th 557, 565 (2009). It is recommended that the arbitration clause expressly recognize the client's Mandatory Fee Arbitration rights to make clear that there is no intent to impair those rights, only limit post-arbitration de novo review via binding arbitration, not litigation.

Special ADR Concerns: The lawyer has a duty to notify the client of his or her right to arbitrate, but the timing of this notification has proved itself worthy of special attention. In *Huang* v. *Chen, supra*, the 4th District Court of Appeal held that an attorney who sends out the notice contemporaneous with an invoice or otherwise prior to the existence of an actual fee dispute does so prematurely and exposes his or her subsequent collection action to dismissal. However, on the opposite end of the time frame, it is permissible to send the notice contemporaneous with a filed complaint. The key is to send the notice of right to arbitrate *only* once a dispute had arisen, never before.

There are certainly times in which the climate between lawyer and client can become immensely unpleasant, so that going directly to arbitration may not lead to a productive resolution. Mediation is a potentially useful way of forcing the parties to cool off and consult a neutral third party. A possible alternative to arbitration, mediation could be required as a precondition to arbitration or trial.[24]

Finally, when dealing with fee disputes, consider the role of collection actions as a means of receiving payment. Generally, a lawyer who represents him or herself in a collection action cannot recover prevailing party attorney's fees (applying the same rule as for non-attorney pro per litigants, who are also ineligible to receive attorney's fees in their awards under *Civil Code* section 1717). *Trope* v. *Katz,* 11 Cal. 4th 274 (1995). "[T]he rule enunciated in *Trope* is limited to its facts: lawyers representing themselves in cases involving contractual fees under *Civil Code* section 1717 are not entitled to such fees because of the resulting disparate treatment between lawyer and nonlawyer litigants." *Jacobs* v. *Ropers, Majeski, Kohn & Bentley,* Cal. Rptr. 3d 2004 WL 837913 (Cal. App. 6 Dist., 2004). However, if phrased broadly enough, a contractual attorney fee provision may support an award of attorney fees to the prevailing party in an action found on both contract and tort based upon *Code of Civil Procedure* section 1021. *See Lockton* v. *O'Rourke,* 184 Cal. App. 4th 1051 (2010). Thus, it is recommended that the fee agreement expressly authorize recovery of such fees for self-representation.

In addition, in the unreported case of *Gilman* v. *Babich*, Cal. Rptr. 3d, 2006 WL 1989886 (Cal. App. 3 Dist. 2006), the Court ruled that an attorney employed by the same firm as the defendant attorney could reasonably represent the defendant in his individual capacity and the firm could recover prevailing party attorney's fees if successful in the collection action. Because the attorney acting for the defendant was similar to the use of an in-house counsel, the fees he incurred were no different than those which would have been incurred by an independent counsel, the court found.

Client Communications

Clients expect to be fully informed about the progress of their matters. The failure to do so is a major source of client dissatisfaction and malpractice claims. Though obvious, written communications best protects the lawyer and the client.

The practice of written communications is calculated to better communicate with the client, and serves to stimulate a more thoughtful approach by counsel, allow the client a

[23] *Aguilar* v. *Lerner, supra,* (client appealed a contractual arbitration award in favor of attorney on client's malpractice action and attorney's fee claim and the court affirmed the award, even though a fee dispute was introduced, stating the client had waived his MFAA rights by way of bringing a legal malpractice claim instead of accessing his MFAA rights until it proved more convenient).

[24] Note the National Association of Realtors standard form Residential Purchase Agreement and Joint Escrow Instructions, conditions recovery of attorney fees at the conclusion of any litigation on an attempt to mediate before litigation is commenced. *See Frei* v. *Davey,* 124 Cal. App. 4th 1506 (2004).

greater opportunity to absorb the information, fulfills the general admonition in the RPC Rule 3-500 ("A member shall keep a client reasonably informed about significant developments…and promptly reply to reasonable requests for information."), makes a record for defensive purposes, and enhances the lawyer-client relationship, which, in turn, promotes prompt payment and the prospects of future business.

However, if the prospect of memorializing all of such communications in writing seems daunting, comfort can be taken in the fact that those written communications need not always be contained in formal correspondence. Alternative methods of making a protective record include maintaining file memoranda,[25] e-mails,[26] detailed bills with a cover letter, and sending along copies of significant or interesting documents with cover letter.[27]

Material events and circumstances that warrant written reports to the client are those that bear (particularly negatively) on the client's objectives. They include losses in court, deposition testimony or witness interviews resulting in harmful or credibility impaired testimony, unfavorable expert reports settlement offers/demands,[28] and the client's rejection of lawyer's advice or other major instances of disagreement.[29] Memorializing important decisions in which the client has concurred (i.e., incurring substantial expense, as in hiring an expert, particularly where the client has accepted financial responsibility, or if outside vendors are expected to look only to the client for payment, must also be documented with the vendor) is also an essential step for ensuring that confusion and dissatisfaction will not arise later.

A growing trend of malpractice claims is arising out of unsuccessful or otherwise disappointing results in business cases prosecuted for plaintiffs on an hourly basis where the unsuccessful client complains that he or she should not have been advised to go down the path of litigation. These are analogous to malicious prosecution cases (except they are governed by a negligence standard) and often turn on such factors as inadequacy of the original due diligence (either factual investigation, legal research, or both), failure to react to a deteriorating case by assessing the problems and counseling the client, failure to affirmatively seek out settlement opportunities or rebuffing overtures on the other side, and attorney's lack of expertise and experience in the subject matter of the case.

Much like taking on prospective clients, it is recommended that lawyers approach the case and the client as a speculative investment in which the client needs to know the "risk factors" associated with investing substantial money in prosecuting a civil lawsuit and seeking damages (profit). If a client has unreasonable expectations, and does not respond well to the communications meant to explain the realities of their case, it may be in everyone's best interest not to take the case on at all, or to plan an exist strategy.

Conflicts of Interest.

When Not to Hold Back on Disclosure: As reflected above, there are many instances in which full disclosure to the client is both advisable and required. Especially when considering new engagements, preliminary communications, and conflicts of interest, disclosure of information is regulated by the RPC. The nature and scope of disclosures have increased during the past decade as a result of changes in the RPC, and three examples should be noted in particular: (a) non-client relationships, (b) payments to the lawyer by third parties, and (c) special relationships with other party's lawyers.[30]

[25] But beware of the dangers of informal, excessively candid memos, especially relating to billing problems. They make for devastating blow-ups in a jury trial.

[26] E-mail has the advantage of time and date coding.

[27] Especially: (a) those prepared at substantial expense or which are otherwise significant to the case or the client's understanding of the case; (b) those emanating from opposing counsel so that the client is working with a full deck of cards, e.g., transactional documents or in litigation substantive motions, settlement briefs, sanction or malicious prosecution threats, and (c) those bearing on material changes in the pending matter.

[28] Rule 3-510(A)(2): requires prompt communication to the client of "all amounts, terms and conditions of any written offer of settlement." Also, the Official Discussion to this rule also states that oral offers of settlement should also be communicated if they are "significant." B&P § 6103.5(a) tracks Rule 3-510 and § 6103.5(b) provides that such offer and any required communication of a settlement offer shall be discoverable in any subsequent action in which the existence or communication of the settlement offer is an issue.

[29] Examples: (1) Client rejection of recommended settlement proposal or insistence on making an offer or demand that counsel deems unrealistic or counterproductive or refuses to participate in a settlement conference; (2) Disagreements as to whether to depose or call a particular witness, (3) Motions made or opposed at the client's instance which involve the risk of sanctions. COPRAC Opinion 1997-151.

[30] The RPC is not a model of draftsmanship. Parker, *The California Rules of Professional Conduct: The Good, the Bad, and the Utterly Confusing*, Los Angeles County Bar Update (May 2005). Until the Rules Revision Commission finishes its wholesale rewrite of the ethics rules in California, practitioners must be careful when approaching ethics issues. Consulting with an ethics expert may be warranted. Regardless, it is important to consider the rules in the context of the "official discussion" accompanying each rule, and to take advantage of rules interpretations in ethics opinions issued by COPRAC, LACBA's on Professional Responsibility and Ethics Committee and other ethics committees, including the ABA's treatment of the Model Rules.

In addition, there are a number of disclosure requirements found in places other than the RPC which should be noted. Examples include: (a) other statutes, such as the B&P requirements relating to fee agreements, e.g., the absence of malpractice insurance and appropriate indemnity pledge on file with the State Bar are contained in B&P § 6147 (contingency fee agreements) and B&P § 6148 (non-contingency fee agreements where fees are expected to exceed $1,000); (b) case law, including the law governing fiduciaries generally. *William H. Raley Co.* v. *Superior Court*, 149 Cal. App. 3d 1042 (1983) (member of law firm was a bank director and member of bank's trust committee which managed defendant's property; though the bank was *not* a client of the firm, the existence of two fiduciary duties of the partner to the bank and the bank to the defendant created a conflict as to plaintiff, the firm's present client); *Allen* v. *Academic Games Leagues of America, Inc.*, 831 F. Supp. 785 (C.D. Cal. 1993) (counsel's relationship with one party before becoming a licensed attorney created a conflict requiring disqualification, relying on *William H. Raley Co.*, *supra,* and the general principle of Rule 1-100 which states that the rules are not exclusive); (c) Ethics Opinions issued by the State Bar and other bar associations.[31] Expert opinion and the standard of care approach can also be instructive.[32]

Non-Attorney-Client Relationships: Rule 3-310(B) of the RPC requires *written* disclosure of certain kinds of present or past relationships when the attorney is taking on a new client or continuing an engagement with an existing client. If the attorney has a current "legal, business, financial, professional, or personal relationship with a party or witness in the same matter," the relationship must be disclosed **in writing**. Also, any *past* relationship with a party or witness must be disclosed, provided the past relationship would substantially affect the lawyer's proposed or current representation. Third, the attorney must disclose any past or present relationship with any person or entity which would be affected substantially by resolution of the current matter. And lastly, the lawyer must disclose any past or present legal, business, financial, or professional interest in the subject matter of the representation.

While the rule speaks to relationships involving a "**member**" (individual attorney) and does not speak to relationships involving other members of the same firm, the Official Discussion clarifies that the written disclosure requirement "is intended to apply only to a member's own relationships or interest, *unless* the member *knows* that a partner or associate . . ." has or had such a relationship or interest (emphasis added). The best way to avoid learning about such a relationship *after* the engagement has begun is to maintain a complete, firm-wide conflict list and check it for these types of relationships for every potential engagement.

The definitions of "disclosure" and "members" are important to a full understanding of Rule 3-310. "**Disclosure**" is defined as "informing the client…of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client…" "Informed written consent" (discussed on p. 11, *infra*), however, is *not* required as to the relationship disclosure rules in Rule 3-310(B). The rule is strictly for the protection of the prospective or current client, not the parties with whom the attorney previously had the relationship. *Allen* v. *Academic Games Leagues of America, Inc.*, 831 F. Supp. 785 (C.D. Cal. 1993). Additionally, the rule does not apply to relationships with other members of the firm with which the other party's attorney is associated, so long as they are not involved in the matter.

For purposes of the client conflict rules in Rule 3-310(C) and (E) the conflict of any member of a firm (partner, shareholder or associate) is imputed to the firm itself and all other members. *Flatt* v. *Superior Court*, 9 Cal. 4th 275 (1994). The same rule of imputed conflicts extends to "of counsel" attorneys. *People ex. Rel. Department of Corp.* v. *Speedee Oil Change Systems, Inc., supra*. Accordingly, if the "of counsel" is precluded from a representation by

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[31] Such opinions do not have legal effect and are not binding on the State Bar or the Courts, but they are often a persuasive source of guidance for Courts and experts.

[32] Where applicable rule was not enacted until after the conduct, expert witnesses have been known to testify that the rule merely codified pre-existing standards observed by lawyers in the community. Where the literal rule does not extend to the conduct, experts may testify that the standard of care is broader, using standard of care or common law tenets governing fiduciary relationships. Experts will sometimes rely on the ABA Model Rules where there is no applicable counterpart under the RPC. It takes little to qualify such experts. *See, Jeffer, Mangels & Butler* v. *Glickman*, 234 Cal. App. 3d 1432 (1991). The role of experts as Talmudic interpreters of the RPC is controversial, with several schools of thought: (1) the interpretation of expert rules is question of law for the Court alone; (2) the Court should instruct the jury on the applicable or arguably applicable rules and allow a battle of experts; or (3) the Court should instruct on the rules, allow counsel to argue the evidence and the jury to decide *without* experts. See Parker, Mills and Patel, *Expert Grilling*, Los Angeles Lawyer (November 2001). As stated in stated in *Stanley* v. *Richmond* (1995) 35 Cal. App. 4th 1070, 1086: "The Rules thus establish the definitive standard for the fiduciary duties of lawyers in the areas covered by the Rules of Professional Conduct, most particularly the conflict of interest rules. "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the [Rules] which, "together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client." (citing *Mirabito* v. *Liccardo* (1992) 4 Cal. App. 4th 41, 45); *David Welch Co.* v. *Erskine & Tulley* (1988) 203 Cal. App. 3d 884, 890.

reason of Rule 3-310, the firm with which he or she is affiliated is precluded as well, and vice-versa.

One other situation of interest is where a lawyer's relationship is more to the events than to the parties involved in the matter such that he or she is a percipient witness on contested matters. In subsequent litigation in such a matter, informed written consent must be obtained where said lawyer is expected to be the trial attorney in a jury trial. *See,* Rule 5-210; *Smith, Smith & Kring* v. *Superior Court*, 60 Cal. App. 4th 573 (1997).

Compensation from a Third Party: According to RPC Rule 3-310(F), informed written consent is required from the client where the lawyer is to receive compensation from a third party, provided only if there is no interference with the lawyer's independence or with the attorney-client relationship, and where the client's confidences are preserved.

This rule applies in the case where a corporation or other entity pays for separate representation of a director, officer, managing partner, etc. The same considerations can come into play where a relative or friend of the client finances the legal fees. Note, however, that the rule does not apply to an insurer-provided defense.

Other Party's Attorney: The RPC's Rule 3-320 dictates that written disclosure to the client is required where the lawyer has certain kinds of relationships with the other party's attorney, including family ties, attorney-client relationship, living in the same household, or other intimate personal relationship.

Informed written consent. This is a critical requirement in a variety of conflict situations as reflected in Rule 3-310(C) (representing multiple clients), (D) (aggregate settlements), (E) (representation adverse to a former client) and (F) (fees paid by third party) as well as Rule 5-210 (advocate in a jury trial who is also a witness).[33] "Informed written consent" is defined in Rule 3-310(A)(2) as: "Client's or former client's written agreement to the representation following written disclosure." Critical to understanding the attorney's obligations in seeking what is often called a "waiver" (though the term itself is not used in the RPC) is the defined term "disclosure". From a defensive practice point of view and to ensure faithful compliance, all disclosures must be set forth in the writing by which the waiver is sought (whether separate or, at the outset of an engagement, set forth in the retainer agreement). "Actual and reasonably foreseeable adverse consequences" requires a detailed delineation of risk factors. Arguably, this requirement obliges a lawyer to explain all of the important reasons why a waiver should not be given.

Fee Disclosure: The B&P requires disclosure in contingency engagements that there is no prescribed fee and that it is a matter of negotiation. Where there is a legal limit on the amount of chargeable fees, e.g., MICRA limitations in medical malpractice cases, there is a duty to disclose those limitations to the client. *In the Matter of Harney* (1996) Cal. Lexis 2409 (Review Dept. State Bar Court, April 4, 1995). COPRAC Opinion No. 1995-479 advises that the attorney has both a duty to inform the client of the fees charged for legal services, the methods used for calculating fees, and any alternative fee arrangements applicable to the client and a duty to obtain client's consent.

Who is the client? The term "client", which is key to conflicts issues, is not defined in the RPC at all[34], not even as to institutional clients.[35] So the question arises: When are corporate affiliates (parent, subsidiary, or sister companies) deemed "clients"? Prior to 1997, the issue had been addressed only once, in COPRAC Opinion 1989-113 dealing with wholly owned subsidiaries, which determined that a member may take on representation adverse to the wholly owned subsidiary of a present corporate client. This opinion pointed to the possibility of a conflict if the corporate client is the alter ego of the prospective adversary. *See also*, *Baxter Diagnostics Inc.* v. *AVL Scientific Corp.*, 798 F. Supp. 612 (C.D. Cal. 1992).

The 4th District Court of Appeal later addressed the issue in *Brooklyn Navy Yard Cogeneration Partners, L.P. v. Superior Court*, 60 Cal. App. 4th 248 (1997), which adopts the reasoning of the COPRAC opinion and holds that only in those limited circumstances where one corporation is the alter ego of the other should parent and subsidiary corporations be treated as the same entity for conflict purposes. The Court specifically rejected the standard of

[33] The "informed written consent" requirement is not required in Rule 3-300 (lawyer-client transactions and adverse interests in client property) or in the relationship disclosure rules in Rule 3-310(B) and Rule 3-320, or even where an attorney seeks to settle a malpractice claim with an existing client, Rule 3-400(B). Other protective measures are dictated such as a written admonition to consult independent counsel, full written disclosure and in the case of Rule 3-300, the requirement that terms of the transaction are fair and reasonable.

[34] *Evidence Code* section 950, in the context of codifying the attorney-client privilege, defines a "client" as "a person who . . . consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from [the lawyer] in [the lawyer's] professional capacity . . ."

[35] Rule 3-600 does emphasize that the organization is the client, as opposed to individuals who act in a representative capacity for the client. Arguably, this limitation extends to corporate affiliates.

"unity of interests." It noted however, that there may be times that the adverse representation impacts the other entity which *is* the client. The Court noted, however, that only "direct adverse consequences" to an existing client are barred by either Rule 3-310 (C) or Rule 1.7 (A) of the ABA Model Rules. This position is consistent with ABA Committee on Professional Ethics, Formal Opinion No. 95-390 (1995). *See* Kari & Gohata, "Resolving Conflicts: Corporate Affiliations Pose Ethical Dilemmas for Counsel," March 1995 *Los Angeles Lawyer* 13.

Spousal Issues: While married couples are often viewed as having a unity of interest when one is represented by an attorney, in *Hall* v. *Lindrum,* 108 Cal. App. 4th 706 (2003), the 2nd District found that an attorney who had been consulted in a wrongful death action by one spouse had no obligation to advise the other spouse, who never met with or retained attorney, regarding the other spouse's rights with respect to the wrongful death of couple's child, nor could attorney be held liable for failing to join spouse as a party to the suit. The Court found that if the attorney owed any duty to name the spouse as a party, he owed them only to his client. By contrast, in *Meighan* v. *Shores*, 34 Cal. App. 4th 1025 (1995), a duty to advise was found to exist when the wife accompanied the husband to the initial meeting with the lawyer and the existence of a loss of consortium claim was apparent.

Managing Conflicts:

Efficient Identification and Handling.

Later Developed Conflicts: Though they may be either non-existent or unknown at the outset of an engagement, conflicts can later arise in a number of different contexts. Later filed pleadings, e.g. amended complaints or cross complaints, can create conflicts among defendants or other third parties that may not have existed at the time the engagement began and the conflicts data was first entered, for example.

Another example would be changes in the firm subsequent to the outset of an engagement caused by mergers or lateral hires. Merging of the conflicts data should be thoroughly studied before merging and hiring in any event. *See* Peck, "Career Transitions," March 2000 California Lawyer 64; Peck, "California Joan and the Ark of Confidentiality: Beware Conflicts When Adding a Partner or Associate," January 1999 *State Bar Journal* 11. When a lateral joins the firm, his or her own knowledge and relationships from past cases are instantly imputed to the firm and its existing members. *Henrikson* v. *Great American Savings & Loan*, 11 Cal. App. 4th 109, 115-116 (1992).

While the practices of "Ethical walls," "cones of silence," and "screening" are not likely to be successful in avoiding disqualification when installed after the fact upon discovery of a conflict, they may well be effective in persuading clients and former clients to give written informed consent. *Id*.

Problematic is the question of whether such devices will be effective if employed at the outset of the lateral's arrival, especially for associates who have some actual client confidences stemming from their prior employment. Current law suggests such hiring is permissible, though again, it requires careful and deliberate planning beforehand to avoid unnecessary difficulties and, of course, appropriate conflicts inquiries. *See*, e.g., *Dieter v. Regents of the University of California* 963 F. Supp. 908 (E.D. Cal. 1997) and *Restatement of the Law Governing Lawyers* § 204, Comment (c)(ii).

Exceptions have been recognized for former judges (*Higdon* v. *Superior Court*, 227 Cal. App. 3d 1667 (1991)), former government lawyers (*Chambers* v. *Superior Court*, 121 Cal. App. 3d 893, 902 (1981)) and paralegals, subject to screening upon joining the firm (*In re Complex Asbestos Litigation*, 232 Cal. App. 3d 572 (1991); *Wallis* v. *PHL Associates, Inc,* Cal.Rptr.3d, 2006 WL 466645 (Cal. App. 3 Dist.)).

The California Supreme Court applied the Doctrine of Imputation to a firm based on the knowledge of an attorney whose relationship to the firm was "Of Counsel." *People ex rel. Department of Corporations* v. *Speedee Oil Change Systems, Inc*., *supra*. *See* also, *Gregori* v. *Bank of America,* 207 Cal. App. 3d 291 (1989) (case involving secretaries), *Allen* v. *Academic Games Leagues of America Inc*., 831 F. Supp. 785 (C.D. Cal. 1993) (case involving law students), and *Alchemy II Inc.* v. *Yes! Entertainment Corp*., 844 F. Supp. 560 (C.D. Cal. 1994). (case involving attorneys formerly employed by client's competitor in a non-attorney capacity). Yet another example of later developed conflict is the possible change in business clients as a result of subsequent business combinations, e.g., mergers and acquisitions.

Former Clients and the Doctrine of Imputation: Be aware of the different standards which apply to current and former clients, concerning possible conflicts that may arise. For instance, absent informed written consent, a member cannot act adversely[36] toward a *current* client on

[36] California no longer follows the Model Rule approach that the two clients' interests must be "directly adverse." Rule 3-310(C)(3) merely requires that their interest be "adverse." Compare, *GATX/Airlog Company* v. *Evergreen International Airlines, Inc.* (N.D. Cal. 1998) 8

any matter, no matter how unrelated to the current engagement – including potential conflicts. Rule 3-310(c)(3); s*ee, e.g., Truck Insurance Exchange* v. *Fireman's Fund*, 6 Cal. App. 4th 1050 (1992).

Concerning clients with whom the relationship has already been terminated (former clients), under Rule 3-310(E) a member may take an adverse position so long as the member is not possessed of confidential information from the former client that is material to the current engagement.[37] The courts apply a prophylactic "substantial relationship" test in comparing current and past engagement which, if it is determined that there was such a relationship, creates a presumption that that such confidential information was imparted.[38] Note: the duty to maintain a former client's confidences survives even death. *Swidler & Berlin* v. *United States*, 524 U.S. 399 (1998).

In all instances, by judicial mandate rather than the disciplinary rules, the knowledge/conflict of one member of a firm is imputed to all other members of the firm, whether partners, associates or "of counsel." *The People ex. Rel. Department of Corp.* v. *Speedee Oil Change Systems, Inc., supra*; *Flatt* v. *Superior Court*, *supra*.

Once an attorney leaves his/her former firm, the doctrine of imputation is no longer applicable. Instead, the Courts have 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. *Jessen* v. *Hartford Casualty Insurance Co*., 111 Cal. App. 4th 698 (2003).

Recommended Clearance Procedures: When a conflict is uncovered during an engagement, efficient conflict clearance procedures can minimize trouble. It should be noted that the RPC does not specify that the client must "sign," only that there be written[39] consent. Clearly, signing is the better practice, both from the standpoint of documenting the consent and from the standpoint of conveying to the client the importance of their decision. Where the client has been asked to sign off, make sure there is a follow-up so as to ensure that the written consent is returned to the law firm and filed appropriately.

It is also good practice to maintain a firm-wide conflicts waiver file in which a copy of the written consent can be filed for back up purposes. Having a second partner review the consent helps to ensure a truly objective and detached review. And finally, the law firm should maintain form files, which can also serve as a check list of the required disclosures, and to ensure relative uniformity.

Attorney's Liability to Client:

Limits on Indemnity.

While there are many actions a lawyer may legally take to protect him or herself from frivolous and unfounded complaints, it is not permissible to ask a client to agree to *prospectively* limit the attorney's liability, whether in the fee agreement or otherwise. After the fact contractual indemnity may be permitted, but whether there is a legal right to indemnity is more doubtful. There is a specific issue relating to indemnity rights with respect to corporate clients, i.e., whether or not lawyers may be deemed "agents" under *Corporations Code* section 317.

Contractual Indemnity: RPC Rule 3-400(A) forbids prospectively limiting an attorney's potential liability to the client,[40] with the possible exception of agreements that provide for indemnity in the event of claims against the attorney by third parties. Similarly, ABA Model Rule 1.8(h) prohibits prospective limits on malpractice liability, unless it is permitted by law, and the client is independently represented in making the agreement – excepting qualifications customarily given in connection with legal opinions. *See*, *e.g.*, *People* v. *Foster*, 716 P. 2d 1069 (Colo. 1986) (while assisting in resolution of dispute

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F. Supp. 2d 1182 with *Fremont Indemnification Co.* v. *Fremont Gen. Corp.* (2006), 143 Cal. App. 4th 50.

[37] There is authority for a further ethical obligation owed to a former client, separate and apart from the Rules of Professional Conduct. In *Watchumna Water Co.* v. *Bailey*, 216 Cal. 564, 573-74 (1932) the Supreme Court held that "an attorney is forbidden to do either of two things after severing his relationship with a former client. *He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him* nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." (Italics added.)

[38] Leading cases include Flatt v. Superior Court, supra at 283; Global Van Lines v. Superior Court, 144 Cal. App. 3d 483 (1983); H.F. Ahmanson & Co. v. Salomon Bros., 229 Cal. App. 3d 1445 (1991); Rosenfeld Construction Company, Inc. v. Superior Court, 235 Cal. App. 3d 566 (1991); Adams v. Aerojet General Corp., 86 Cal. App. 4th 1324, 1331-40 (2001).

[39] "Written" means any writing as defined in *Evidence Code* section 250, according to Rule 3-310(A)(3). This would include e-mailed consent.

[40] This does not preclude limitations on the scope of the engagement. *Nichols* v. *Keller.* 15 Cal. App. 4th 1672 (1993).

between two shareholders, lawyer improperly included in share purchase agreement a release of his personal liability); *In re Lawandus*, 476 N.Y.S. 2d 225 (1984) (lawyer improperly included a hold harmless provision in retainer agreement); *In re Burns*, 516 N.E. 2d 35 (Ind. 1987) (loan agreement between lawyer and client contained language to the effect that client was completely satisfied with lawyer's services).

Statutory Indemnity: Lawyer employees presumably have the same statutory indemnity rights as any other employee under the *Labor Code*. In the corporate setting, there is some disagreement on this issue as it pertains to outside corporate counsel as "agents" within the meaning of *Corporations Code* section 317. In 2000, the 3rd District Court of Appeal addressed the question in *Channel Lumber* v. *Porter Simon*, 78 Cal. App. 4th 1222 (2000) and found that section 317 did not apply to provide indemnification to an outside trial attorney, who, in that case, successfully defeated a corporation's claim for legal malpractice arising from a trial. The court reasoned that since the attorney was an independent contractor, and sued for actions conducted as an independent contractor, not as the corporation's agent, he was not entitled to the protection of section 317.

By contrast, an earlier decision by a panel in the 2nd District concluded in a depublished opinion that an attorney was an "agent" for purposes of indemnification under *Corporations Code* section 317. *See, Katayama* v. *Interpacific Properties*, 190 Cal. App. 3d 1604 (1987) (attorney is an "agent" and entitled to indemnification under *Corporations Code* section 317 after successfully defeating corporation's malpractice claim and attorney's malpractice insurance was a collateral source from which the corporation was not entitled to benefit). A decision involving outside auditors, though reaching the same result in that context, casts some doubt on *Channel Lumber*'s insistence that lawyers are not agents. *APSB Bank Corp.* v. *Thornton Grant*, 26 Cal. App. 4th 926 (1994) (CPA firm was not an agent of a bank within the meaning of subdivision (d) of section 317 and therefore was not entitled to recover its legal expenses under that section). The court went on to state that an independent contractor is not necessarily excluded from the definition of the term "agent" in section 317(a), pointing out: "Legal commentators have expressed the view that subdivision (a) is broader than directors, officers and employees: 'A less obvious "agent" may be a non-employee such as an outside lawyer . . . . It is not within the scope of this article to consider the reach of the law of agency, but it would seem that at least under some circumstances a lawyer would be treated as an 'agent' under established agency rules.' Citing, Heyler, *Indemnification of Corporate Agents*, 23 UCLA Law Rev. 1255, 1256 (1976).) The authors of the California *Corporations Code* have also advanced the view that corporate indemnification extends to "any employee or agent . . . of the corporation itself. This is intended to encompass all persons serving the corporation, whether as common law servants or independent contractors . . . .' (1 Marsh & Finkle, *Marsh's Cal. Corporation Law* (3d Ed.), § 10.38, p.739.)" Outside California the case law is in conflict. *Compare*, *Horizon Financial* v. *Hansen*, 791 F. Supp. 1561 (N.D. Ga. 1992) (lawyers successfully claimed to be released as "agents" employing analogy to the Corporations Code) (applying Pennsylvania law) *with*, *Western Fiberglass, Inc.* v. *Kirton, McConkie & Bushnell,* 789 P. 2d 34 (Utah App. 1990) (lawyers not agents). Further casting doubt on *Channel Lumber* is *Restatement of Agency 2d* §14N, which does include attorneys within the scope of "agents."

Informed Consent and Judgmental Immunity:

The Balancing Act: The Doctrine of Informed Consent originated in the medical malpractice context. While the doctrine is applied with respect to conflicts under the Rules of Professional Conduct, the extent to which the doctrine should be applied more broadly in the context of legal advice, tactical judgments or other settings, is uncertain. *See Parker & Tsudik, The Informed Consent Doctrine: What's Good for the Patient is Good for the Client*, Los Angeles County Bar Update (December 2005). Whatever the uncertainties as to the scope of its reach, from the standpoint of practicing law defensively, adherence to the basic tenets by ensuring the client has full knowledge of all relevant facts and available alternatives before agreeing to the course of action is commended.

In addition, the Judgmental Immunity Doctrine protects lawyers from liability arising from conduct based on strategy decisions or unresolved or disputed points of law. *Smith* v. *Lewis*, 13 Cal. 3d 349 (1973) (counsel's judgment must be evaluated based on the circumstances existing at the time); *Aloy* v. *Mash*, 38 Cal. 3d 413 (1985) (being right for the wrong reasons is no defense)]. Informed judgment is important. (*Davis* v. *Damrell*, 119 Cal. App. 3d 883 (1981). In practice, however, being second guessed by the client is still a source of liability risk.

In dealing with the tension between the client's right of informed consent and the lawyer's Judgmental Immunity, ask the question: whose decision is it? Err on the side of involving the client in the decision making process wherever it appears the decision is important, debatable, or risky. Below we briefly examine these considerations in the context of litigation decisions and strategy and in connection with settling disputes.

Litigation decisions: Decisions affecting substantive rights such as whether to bring an action, the parties to be named, whether to agree to waive jury, for example, in order to pursue binding arbitration, whether to dismiss a claim or party, whether to agree to mediation, all belong to the client and the attorney's duty is to ensure that the client's decision is informed, with due considerations of risk factors. Purely tactical decisions, such as granting extensions, bringing of Nonsubstantive motions, discovery plans, are generally the domain of lawyers, subject to limitations imposed by the client by way of budget or otherwise.

Settlement Communication and Documentation: In those instances, clients must not only be informed about all material aspects of liability, damage and affirmative defense issues in order to determine whether to make a settlement proposal or accept one, but must also appreciate the language and terms of the settlement agreement. What counsel regards as "boilerplate" arbitration, such as the "mutual" or "general" nature of release provisions, prevailing party attorneys fees and confidentiality provisions, may be terribly important to the client, particularly where unrelated contracts between the litigants are still in force. "Constructive ambiguities" may be tactically wise or necessary, but carry an element of risk that the client is entitled to assess. Provisions of doubtful enforceability should be avoided.[41]

Terminating the Relationship.

Bright lines: Termination of the lawyer-client relationship carries substantial legal significance inasmuch as it terminates most duties to the client, with the clear exception of maintaining former client's confidences, as discussed below, and the arguable exception of a duty to assist a former client in mitigating the adverse consequences of the attorney's own malpractice.[42]

There is uncertainty as to whether there is a continuing duty to advise former and even present clients of later developments in the law which may have material adverse impact on prior wills, trusts, contracts or other matters for which counsel was previously engaged.

This issue also raises questions as to when certain kinds of transactional client engagements conclude. The issue has not been addressed by the courts or the State Bar. However, ABA Formal Ethical Opinion No. 210 (1941) suggests a continuing duty, unless the lawyer has reason to believe that other counsel has since been engaged. It is recommended that a continuing duty should be disclaimed in the fee agreement once the relationship has ended, and a termination communication should issue once the matter has been concluded. In addition, the law firm should carefully consider whether to issue newsletters and similar publications (and if so their content) to former clients possibly impacted by changes in the law, partly for client development reasons and partly for loss avoidance purposes.

In the case of estate planning, retention of original documents by the law firm could imply a continuing responsibility. Termination prevents tolling of statute of limitations based on continuing relationship, though triggering the running of the statute requires more (discovery and actual injury).

Termination Communication:[43] The use of a written communication is critically important and should cover certain key topics which will act as protection against confusion on the part of either party and will clarify any and all details concerning the ongoing status of the matter. Certainly, the letter should establish the fact of termination of the relationship and the effective date thereof,[44] and should also confirm whether or not new counsel will be taking over. It should describe arrangements for the transfer of files on a still pending matter as specifically as possible, and address any impending deadlines and the status of pending matters. Consider whether to include the reason for the termination and if there are any other applicable steps necessary to comply with Rule 3-700 (A)(2): "A member shall not withdraw… until the member

[41] Reminder: Client must be present when settlement is put on the record, according to most authorities interpreting *Code of Civil Procedure* section 664.6.

[42] This issue has not been explored in published cases, but has been considered in the context of a COPRAC ethics opinion, Opinion No. 1992-127, where it was determined that a former criminal trial lawyer owed a duty to cooperate with the convicted client's appellate counsel. *See,* Parker & Webster, *After Attorney Error: What is the Duty to Assist the Former client in Mitigating Consequences?* Los Angeles County Bar Association *Update* (November 2003). The smart and responsible approach to such a situation may well be to provide the requested assistance, especially where it is likely that as former counsel one is positioned to head off or mitigate a problem, making clear that the attorney-client relationship is not being revived and obtaining an agreement that the attorney's efforts will not be used against him or her in a later malpractice action.

[43] *See generally*, *Kirsch* v. *Duryea,* 21 Cal. 3d 303 (1978).

[44] The latter key to the triggering the running of the statute of limitations where all other accrual factors are otherwise present and permits calendaring of dates for determining whether to pursue fee claims). Absent such a communication, date on which the relationship ended may be disputed. *See, e.g., O'Neil* v. *Tichy*, 19 Cal. App. 4th 114 (1993). Further, note that the statute of limitations may be tolled while an attorney is absent from the state. *See. Jocer Enterprises, Inc.* v. *Price,* 183 Cal. App. 4th 559 (2010).

has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client…".[45]

Continued Invoicing of Unpaid Fees: In the event that there are unpaid fees outstanding when the matter is concluded or the relationship terminated, continuing to send invoices helps to create a record for an Account Stated claim. It is suggested that this procedure be followed for 12 months after the last bill covering current services, based on the applicable one-year statute of limitations,[46] coupled with a notice of the client's right to arbitrate accompanying the last of these 12 invoices (assuming a determination has been made to proceed with collection).[47]

Transfer and Preservation of Client Files: RPC Rule 3-700(D) outlines obligations for transferring and preserving client files. These are: the prompt response to client's request and release of all "client papers and property" (Rule 3-700(D)(1))[48], and the prompt return of any unearned fees (Rule 3-700(D)(2)), unless subject to conflicting demands between multiple clients or between client and third party.

Very important - do not withhold client files as leverage in a fee or any other dispute. *See* discussion below and *Kallen* v. *Delug*, 157 Cal. App. 3d 940 (1984). "Client papers and property" are defined in Rule 3-700(D)(1). By way of examples, the scope "*includes* correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, *whether the client has paid for them or not"* (Emphasis added). The Official Discussion makes clear the point that the attorney may make copies before releasing the originals to the client, but at the attorney's expense.[49]

Work product such as notes and drafts are probably not within the definition of "client papers and property" unless in documentary form and arguably necessary to the client's future representation (e.g., results of research, drafts of documents not yet finalized, memos outlining strategies or conversations with opposing counsel), bearing in mind the overriding commandment of Rule 3-700(A)(2) that the attorney shall not withdraw "until [taking] reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client…."Note too that the work product privilege inevitably yields to the client's discovery demands in subsequent litigation between lawyer and client. CODE CIV. PROC. § 2018(f). Billing records, including time sheets, preliminary or draft bills, memos re billing matters should be regarded as business records of the firm and are not subject to Rule 3-700(D).

Self-protection measures should be considered. The law firm should establish and adhere to document retention policies, which provide for copying documents returned to clients. Copy correspondence and other key documents, and to the extent documents or files are *not* copied, the following steps are recommended in order to decrease the risk that documents or files will be destroyed: create an index of such matters, do *not* disclose to the former client the fact that some items were not copied or, if so, which ones, and where fees are owed or future disputes are otherwise anticipated, put the onus on the client to preserve and protect the documents. (*See* Byrd, "Turning Over Client Files," February 1993 *Los Angeles Lawyer* 17.)

File retention is addressed in California State Bar Formal Opinion. No. 2001-157. No specific time period for retention of any given item may be specified. Retention of certain kinds of documents or property may be governed by law such as Probate Code Section 710, requiring that certain documents and deposits be retained indefinitely. Absent express consent from the client, files in criminal matters should not be destroyed while the client remains alive. In addition, before destroying files, an attorney must make reasonable efforts to contact the client to obtain consent for destruction. If such efforts are unavailing, the attorney may destroy the items unless the attorney has reason to believe that that preservation of the files is legally required that destruction would prejudice the client (such as if the files remain reasonably necessary to the client's legal representation).

When drafting a fee agreement, an attorney should analyze the nature of the case (including whether it is a civil or criminal case) and determine whether it is an appropriate case in which to establish agreement with the client concerning file retention and destruction. If the attorney concludes it is such a case, the attorney may decide to include a provision stating that a file may be destroyed after some reasonable period of time after the engagement

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[45] Practice tip for transactional attorneys: consider the risks of listing the firm as responsible for receiving future notices pursuant to a contract, after the attorney-client relationship may have ended.

[46] CODE CIV.PROC. § 340.6; also note that section applies to all claims against attorneys arising out of their performance of professional services. *Vafi* v. *Mcloskey*, 193 Cal. App. 4th 874 (2011).

[47] Be aware, however, that even if the statute of limitations expires on the client's malpractice claim, the claim may still be raised defensively in a collection action where it operates as an offset. *Safine* v. *Sinnott*, 15 Cal. App. 4th 614 (1993).

[48] The obligation extends to electronic copies of document as well. COPRAC Formal Opinion 2007-174.

[49] Practice tip: Consider adding a provision to fee agreements providing that the copying costs are chargeable to the client. Again, however, the file cannot be withheld to force reimbursement of copying costs.

ends (such as five years) after notice is given to the client at the client's last known address, or even without notice to the client. These latter terms also should reflect the nature of the client and the representation.

More and more, attorneys are employing "paperless" document management by scanning documents upon receipt, and disposing of hard copies. Inasmuch as this is a relatively new development, it is recommended that attorneys secure advance consent to this approach and establish procedures for electronic document retention, providing copies to the client, and passing the costs on to the client.

Risks in Bargaining for a Release of Potential Claim as Part of Terminations: RPC Rule 3-400(B) permits settling a claim or potential claim for malpractice provided the client is given written notice that the client may seek the advice of an independent lawyer of the client's choice and is given reasonable opportunity to seek such advice. Practical problems: (1) to avoid the presumption of undue influence, the Attorney-Client relationship should be terminated since Rule 3-400(B) is not applicable where the Attorney-Client relationship no longer exists (*Donnelly* v. *Ayer* 183 Cal. App. 3d 978 (1986); COPRAC Official Opinion 2009-178); (2) the best chance for an expedient settlement would be if the client did not consult other counsel; (c) however, the enforceability of the settlement would always be open to some measure of doubt.[50]

Continuing duty to maintain a former client's confidences even survives the death of both lawyer and client. Caveat: cooperation with a former client in connection with the aftermath of the engagement is not required, but cooperation, whether or not ethically compelled, could be a defensive measure for the firm. However, it opens the firm to an argument in favor of tolling the statue of limitation based on a continuing relationship. *CODE CIV.PROC.* § 340.6.[51]

RPC Violations: *Beware the Risks*

Although RPC violations are not actionable *per se* (Rule 1-100*)*, the RPC is the definitive statement of the standard of conduct of attorneys concerning matters covered therein, and may be probative of the standard of care as well. *See*, *e.g*., *Mirabito* v. *Liccardo*, 4 Cal. App. 4th 41 (1992); *Day* v. *Rosenthal*, 170 Cal. App. 3d 1125 (1992). The RPC may be cited by expert witnesses and may be the basis for jury instructions, and most importantly, perceived transgressions of the RPC may have serious consequences in a jury trial.

Furthermore, attorneys are barred from being compensated for otherwise legitimate services and earned fees during a period of an unresolved actual or otherwise serious conflict in violation of the RPC. *See Image Technical Service, Inc.* v. *Eastman Kodak*, 136 F. 3d 1354 (9th Cir. 1998) (antitrust plaintiff denied recovery of statutory attorneys fees as prevailing party to the extent incurred through counsel who was later disqualified for representing concurrent conflicting interests—another division of the same corporate entity—without written informed consent, citing leading California cases on compensation preclusion). *For examples, see*, *Blecher & Collins* v. *Northwest Airlines, Inc.*, 858 F. Supp. 1442, 1457 (C.D. Cal. 1994); *Jeffry* v. *Pounds*, 67 Cal. App. 3d 6, 10 (1977). But, *Pringle* v. *La Chappelle,* 73 Cal. App. 4th 1000, 1006 (1999), concludes that "there must be a *serious violation* of the attorney's responsibilities before an attorney who violates an ethical rule is required to forfeit fees." (Emphasis added.)

Non-Clients: *Scope of Duty of Care*

In addition to recognizing the many responsibilities the attorney owes the client, as well as the protections available to insulate the attorney as much as possible in the way of risk-management, it is necessary to discuss the role of non-clients in relation to the individual lawyer and the firm. There is a duty to communicate at times with third parties who may reasonably believe that an attorney represents them, if for no other reason than to admonish them that they are not so represented. *Butler* v. *State Bar* 42 Cal. 3d 323 (1986). Non-clients with whom the attorney must interact fall into several groups, but all generally stem from some client-derived relationship, i.e. someone who maintains a relationship with the client, even if that relationship does not extend to representation by the lawyer. Knowing what obligations (if any) the lawyer has to these non-clients is an important aspect of loss-prevention, in that it both keeps the lawyer from overextending his or her powers and protects against the conferral of free legal services.

Those with whom client maintains personal relationships. Often, a client has family, friends or associates with whom close personal ties are maintained. This does not

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[50] It is impermissible to bargain for client commitment not to complain to State Bar (B&P § 6090.5), or that a previously filed complaint be dropped (See discussion *infra*). At most, a settlement might include recitals that no complaint has been filed and/or that the client has no present intention of filing a complaint with the State Bar and/or truthful factual recitals that are contrary to any later claim of wrongdoing. Such recitals are not binding on the State Bar, however.

[51] *But see*, *Beal Bank* v. *Arter & Haddan, LLP* (2007) 42 Cal. 4th 503 in which the Supreme Court determined that the statute of limitations is not tolled when an attorney leaves a law firm with the client and the client later sues both the lawyer and the law firm.

necessarily mean that those other people, who may indeed be involved in the matter at hand, are considered clients so that communications to the attorney are protected by the Attorney-Client Privilege. While there are times in which communicating information to these close associates is advisable (*Meighan v. Shore*, 34 Cal. App. 4th 1025 (1995) (duty to advise personal injury client's spouse of potential claim for loss of consortium)), it is not always obligatory. The court in *Hall* v. *Superior Ct. (Lindrum)* 108 Cal. App. 4th 706 (2003), found that an attorney had no liability for attorney malpractice to a spouse whom he had never met and who did not retain him, for his failure to name the spouse as a plaintiff in an action arising from the wrongful death of a child.

Those with whom client maintains professional or business relationships. This group of non-clients can be large and complex, depending on the sort of client in question, so it is advisable for the lawyer be familiar with the specific relevant relationships as needed. These professional and/or business relationships can include: individual clients' relationships with others (e.g., partners *Buehler* v. *Sbardellati,* 34 Cal. App. 4th 1527 (1995),[52] their own clients or customers, other fiduciary relationships, business clients (e.g., *Buehler* v. *Sbardellati, supra, (*Attorney representing a partnership does not necessarily have an attorney-client relationship with an individual partner for purposes of applying for conflict of interest rules); *Kapelus* v. *State Bar* 44 Cal. 3d 179 (1987); *Responsible Citizens v. Superior Court of Fresno County,* 16 Cal. App. 4th 1717 (1993);[53] *Johnson* v. *Superior Court* 38 Cal. App. 4th 463 (1995) (excellent discussion of other cases cited herein), corporations,[54] unincorporated associations,[55] and Co-Counsel.[56]

Closely held corporations can prove particularly problematic in terms of the scope of the lawyer's duty and conflicts of interest. See, e.g., *Skarbrevik* v. *Cohen, England & Whitfield*, 231 Cal. App. 3d 692 (1991); *see also*, *Metro Goldwyn-Mayer, Inc.* v. *Tracinda Corporation*, 36 Cal. App. 4th 1832, 1842 (1995); *Woods* v. *Superior Court,* 149 Cal. App. 3d 931 (1983); *Goldstein v. Lees*, 46 Cal. App. 3d 614 (1975).) The RPC pointedly fails to provide guidance in these areas, other than suggesting reliance on case law. See Official Discussion to Rule 3-600 ("*In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty [citations omitted]. In resolving such multiple relationships, members must rely on case law.*").

The advent of limited liability companies adds a new dimension of uncertainty, as they are structured as a hybrid between a partnership and a corporation. For an attorney who is drafted to form an LLC, what duties, if any, are owed to the "members"? Once formed, do the duties change? Are there circumstances where the attorney cannot take instructions from the managing member? The Courts have yet to address these questions. See Hecht, Mills and Parker, *Legal Ethics and the Limited Liability Company*, Lorman Educational Services, "LLCs: Advising Small Business Start-Ups and Larger Companies in California" (July-August 2004).

Those with whom clients deal at arms length. Individuals who fall into this category can include investors (*Bily* v. *Arthur Young & Co.*, 3 Cal. 4th 370 (1992); *Goodman* v. *Kennedy*, 18 Cal. 3d 335 (1976)), lenders (*Roberts* v. *Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104 (1976)), and developers (*BLM* v. *Sabo & Deitch*, 55 Cal. App. 4th 823 (1997) (City's bond counsel owed no duty of care to developer and was not liable for negligent misrepresentation in connection with opinion letter which maintained that payment prevailing wages required; excellent discussion of third party liability cases involving California attorneys)). Though these relationships may be less directly involved in the engagement, their presence may still be significant and should not be carelessly

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[52] Note: this case supports the view that it may be possible to avoid conflicts in joint representation cases by narrowing the scope of the engagement.

[53] Attorney representing a partnership does not necessarily have an attorney-client relationship with an individual partner for purposes of applying for conflict of interest rules. *Responsible Citizens v. Superior Court, supra.*

[54] RPC Rule 3-600 defines "Organization as Client": (a) organization is the client, acting through its highest authorized officer, employee, body or constituent overseeing the particular engagement, (b) duty to challenge wrongdoing by corporate officers that is detrimental to the corporation or could give rise to corporate liability to third parties and, if necessary, to resign. Thus, corporate counsel cannot represent directors and officers in a derivative action. *Forrest* v. *Baeza*, 58 Cal. App. 4th 65 (1997) (rejecting *Jacuzzi* v. *Jacuzzi Brothers, Inc.*, 243 Cal. App. 2d 1, 35-36 (1966) (Note: the same Court allowed the disqualified attorney to continue representing the corporate officers.)]; (b) duty to explain to directors, officers, etc. that the client is the organization, wherever actual or potential adversity exists; (c) ability to contemporaneously represent individual directors, officers subject to appropriate consents, pursuant to Rule 3-310, with the corporation to consent through independent representative or the shareholders or members of the organization.)

[55] Attorney for unincorporated association represents the association's individual members. *Wortham & Van Liew* v. *Superior Court*, 188 Cal. App. 3d 927 (1987).

[56] There is no fiduciary duty between co-counsel. *Saunders* v. *Weissburg & Aronson*, 74 Cal. App. 4th 869 (1999).

overlooked. Where direct contact takes place and particularly where information is received or advice transmitted, by counsel or counsel's client, it is well to admonish non-clients that they may wish to consult their own counsel on such matters.

Special Issues Concerning Lawyers in Corporate Settings: *Blurring the Line*

While it is certainly permitted for lawyers to take on directorial and investment positions in companies, including companies where the lawyer may also act as counsel, it is important to take into consideration the added complications of taking on such roles and to be vigilant about keeping information within allowed boundaries. It is all too easy for a lawyer to forget acceptable structure in the face of personal interests, but the possible consequences of blurring lawyerly duties with director's or investor's duties may be quite harsh. The key to navigating these roles is to actively practice risk-management at all times.

Lawyers as Directors.

Risks to Lawyers and Clients Alike: In the situation where the lawyer becomes the director, the risks to the lawyer are two-fold. The corporation may not provide adequate protection through insurance and indemnification, and similarly, the firm's professional liability coverage may also be insufficient.[57] Also, there are heightened standards of care and/or duties of investigation and disclosure in the contexts of securities claims. Risks to the law firm include vicarious liability for conduct of a firm attorney, even in his or her capacity as a corporate officer or director, to a corporate client or third parties.

"Deputization" or similar Respondeat Superior theory: Law firms whose member sit on corporate boards could face controlling person liability under Federal Securities Laws (§ 15 of the *Securities Act of 1933* and § 20 of the *Securities Exchange Act of 1934*).[58] Regardless of this theory, the line separating business from legal advice is often blurred or disputed. In malpractice action by a corporate client, the presence of a firm attorney as director or officer may weaken defenses otherwise available to the firm, e.g., comparative negligence. Disqualification of the firm, the threat of it or other tactical considerations may preclude the firm from representing the corporation or other directors and officers where the firm's member and/or the firm itself is sued based on a member's service as director or officer.

Risks to the law firm's client: Where a lawyer serves as an officer, director, partner, etc., of a firm business client, that individual's advice may not be attorney-client privileged, given the blurred lines between business and legal advice. Further, the client may be liable for the lawyer's conduct as director, etc. and therefore is indirectly subject to the same heightened standards or duties.

Managing the Risks: The law firm should establish a policy whether to preclude such service entirely or require prior approval of the management committee or other authorized body based on business advantage and risk sensitive criteria. Policy considerations whether to permit service in an individual case, based on the same considerations relating to client intake, include (1) inquiry as to whether the individual lawyer will have sufficient time to fulfill the duties of the proposed position, consistent with obligations to the firm, (2) determination of prospective benefit to the law firm and the individual lawyer, (3) existence of D & O insurance and indemnity rights, (4) assessment of the quality of the board and outside experts, including accountants and other counsel, and (5) evaluation of corporate compliance with formalities, securities filing and reporting requirements.

There are several key risk mitigation considerations in the wake of a decision to approve such service. Ask the following questions before proceeding. (1) Should the individual lawyer be precluded from performing legal work for this client? (2) Should the firm attorney be involved in billing the client? (3) Should the individual lawyer be permitted to retain remuneration for such service or should it go back to the law firm? (4) Should the law firm require periodic reports from the individual lawyer concerning compensation, equity ownership, continued insurance coverage, material changes in the status of the corporation?[59]

It is recommended that the law firm should: (1) provide its individual lawyers with a list of warning signs and the kinds of transactions and circumstances that create liability

[57] Many malpractice policies exclude coverage for claims arising out of any individual's activities solely as an officer, director, partner, manager or employee of another business enterprise, including even charitable organizations, and various trust positions.

[58] See Rosen & Parker, "Law Firm Liability Under the Federal Securities Laws," *Insights*, Vol. 6, No. 3 (1992); Parker and Roth, Vicarious Liability of Law Firms for Member Securities Laws Violations as Lawyers and Directors, 24th Annual Securities Regulation Seminar (1991).

[59] Practice note: law firm should "poll" all its members annually, inquiring as to whether they are serving as directors, officers, trustees or other such positions, with clients and non-clients, and whether or not they have financial interests in any firm clients. The firm should also assess whether there are exclusions in the firm's malpractice policy applicable where a member of the firm serves as a corporate officer and director and be careful in filling out applications for insurance.

peril and encourage the attorney to perform the normal due diligence that any person should perform before joining a corporate board or management; (2) develop policies and internal controls to prevent improper use or dissemination of confidential business ("insider") information provided to a firm member in their capacity as director or officer; and (3) determine whether more can be done to reinforce corporate indemnification rights, including the possibility of a separate indemnification contract between the firm attorney and the corporation. (*See* Harris & Valihura, "Outside Counsel as Director: The Pros and Potential Pitfalls of Dual Service," 53 *The Business Lawyer* 479 (February 1998).

Lawyers as Investors or Partners.

As with the scenario in which a lawyer becomes the director of a client or client-related entity, when a lawyer becomes an investor or partner, there are very important considerations to address in order to safeguard against the possible dangers of such a relationship.

Presumption of fraud: Probate Code section 16004, governing transactions between trustees and beneficiaries, applies to lawyer-client relationship and transactions. *Ramirez* v. *Sturdevant*, 21 Cal. App. 4th 904 (1994). Each such transaction is *presumed to be fraudulent* and the burden of proof lies with the attorney to establish that the terms were fair, just and reasonable.[60]

The same statute contains an exception, involving the "hiring or compensation" of the attorney and allows fee arrangements to be negotiated as a matter of arms-length dealings. This exemption even extends to negotiating or renegotiating fee arrangements with an existing client. *Walton* v. *Broglio*, 52 Cal. App. 3d 400, 404 (1975); *Vella* v. *Hudgins,* 151 Cal. App. 3d 515, 519 (1984).[61]

Under the RPC. RPC Rule 3-300 states, "A member shall not enter into a business transaction with a client, or otherwise acquire an interest adverse[62] to a client unless: (a) the transaction is fair and reasonable, (b) the terms are fully disclosed in writing to the client in a manner reasonably calculated to make it understood to the client, (c) the client is advised in writing that the client may seek the advice of independent counsel of the client's choice, (d) the client is afforded a reasonable opportunity to consult such counsel, and (e) the client thereafter consents in writing to the transaction."[63] A failure to comply not only risks State Bar discipline[64] but voids the transaction.[65]

Managing the Risks: Law firms should (1) establish a policy concerning whether its individual lawyers will be permitted to invest or otherwise take a financial stake in a client or a client's business or investment, and if so under what circumstances; (2) establish an Investment Committee and require written reports relating to any proposed transaction; and (3) annual polling of firm attorneys concerning the existence of such interests or transactions.[66]

Past or Threatened Wrongful Acts by Clients

Whistle-Blowing: Even in scenarios where the client is acting wrongfully, the attorney may not violate the rules of confidentiality[67], and therefore has a limited set of options. That being said, there are safe ways for the lawyer to remove him or herself from such situations without danger of being blamed for the behavior.

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[60] See also, Kirk v. First American (2010) 183 Cal. App. 4th 776.

[61] By contrast, where a conflict arises during settlement negotiations, between the client and the attorney, concerning structuring settlement payments, which in turn impacts the total fee to be received by the attorney, the transaction is presumed fraudulent, the burden of justification shifts to the attorney, and the best course of action is to secure separate counsel for the client and/or have the settlement judge pass on the fairness of the settlement. *Ramirez* v. *Sturdevant, supra*.

[62] The rule has two prongs, one for "business transactions" between lawyer and client and the other where an attorney acquires an "adverse interest" to that of the client. As to the latter, the Supreme Court in *Fletcher* v. *Davis* 33 Cal. 4th 61, 66 (2004) extended the rule to encompass attorney liens in hourly fee agreements, leaving open the question of whether liens in contingency engagements must also comply. Since then COPRAC has opined that Rule 3-300 should not apply where the attorney operates on a contingency basis. COPRAC Opinion 2006-170 but urged compliance pending clarification. The issue remains unresolved.

[63] *See, e.g.*, *Mirabito* v. *Liccardo*, *supra*; *Connor* v. *State Bar*, 50 Cal. 3d 1047 (1990); *Hunniecutt* v. *State Bar*, 44 Cal. 3d 362 (1988); *Rosenthal* v. *State Bar,* 43 Cal. 3d 612 (1987).

[64] In a business transaction with a client the California Supreme Court, a lawyer is obligated to give "his client 'all that reasonable advice against himself that he would have given him against a third person.'" *Beery* v. *State Bar*, 43 Cal. 3d 802, 813 (1987), quoting *Felton* v. *Le Breton* 92 Cal. 457, 469 (1891).

[65] *Passante v. McWilliams* 53 Cal. App. 4th 1240 (1997) (oral promise to give attorney 3% of the company stock in consideration for past legal services and loan unenforceable for failure to comply with the Rule 3-300 requirement of a written admonition that the client may wish to consult independent counsel); *Fair* v. *Bakhtiari* 195 Cal .App. 4th 1135 (2011) (Quantum meruit unavailable to attorney who breaches his fiduciary duty by failing to obtain client's informed written consent to transaction).

[66] For more on this subject see the article "Lawyers as Shareholders: When Law Firms Purchase Stock From Their Clients or Take Stock in Lieu of Fees," by Joseph F. Troy, which provides an scholarly analysis of the pitfalls of attorney investment in clients.

[67] Except where the lawyer "reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." Rule 3-100(B); Business & Professions Code § 6068(e)(2); Evidence Code §956.5. Substantially the same rule appears in ABA Model Rule 1.6(b)(1) (adding the word "imminent").

Withdrawal: Generally speaking, lawyers are expected to dissuade their clients from wrongful acts, and failing that, to withdraw under circumstances calculated not to prejudice the client. Where the client is an organization whose interests are threatened by wrongful conduct of its representatives (directly or as a result of illegal conduct), and efforts to disclose the wrongdoing to higher ups and urge reconsideration (Rule 3-600(B)) are unsuccessful, the lawyer's only remedy is to resign (Rule 3-600(C)), subject to the limits of Rule 3-700. However, the attorney *may not* violate the rules of confidentiality, i.e. "blow the whistle" (Rule 3-600(B); Rule 3-100(A); Business & Professions Code § 6068(e)(1)). There are other exceptions to this rule, for example, in litigation with a former client (*Evidence Code* section 958, discussed *infra*).[68]

Withdrawal is usually permissive, but may on occasion be mandatory. Mandatory withdrawal in non-litigation engagement is governed by Rule 3-700(B), which states "The member knows or should know that continued employment ***will*** result in violation of these rules or of the State Bar Act." Permissive withdrawal in non-litigation engagement is governed by Rule 3-700(C), which states that the client "seeks to pursue an illegal course of conduct or insists that the member pursue a course of conduct that is illegal or is prohibited under these rules or the State Bar Act or by other conduct renders it unreasonably difficult for a member to carry out the employment effectively or insists…that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act…" In either event, it is incumbent upon the attorney "to take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with Rule 3-700(D) (return of client papers and property on demand).[69]

Disclosure of client confidences upon withdrawal: Where the client makes claims or allegations against the lawyer, the attorney-client privilege is *waived* (CAL.EVID.CODE § 958), even without instituting formal litigation. *See also*, ABA Model Rule 1.6(b)(2). Where it is a third party which makes claims or allegations against the lawyer, the attorney's "Self-Defense" privilege, the right to make disclosures in order to defend against the claims or allegations, is much less clear. There is no provision in the RPC or California case law recognizing a self-defense exception to the attorney-client privilege. See LACBA Formal Opinion 519 (February 2007).

By contrast, ABA Model Rule 1.6(b)(2) does permit disclosures where (1) the client's conduct is involved and (2) the lawyer reasonably believes such disclosure is necessary to his or her defense. (*See*, *e.g.*, *In re National Mortgage Equity Corp. Litigation*, 120 F.R.D. 687 (C.D. Cal. 1988); *First Fed. Sav. & Loan Ass'n of Pittsburgh* v. *Oppenheim, Appel, Dixon & Co*., 110 F.R.D. 557 (S.D.NY 1986); *Meyerhofer* v. *Empire Fire & Marine Insurance Co.,* 497 F.2d 1190 (2d Cir. 1974), *cert. den.*, 419 U.S. 998 (1975); *See*, McMonigle & Mallen, "The Attorney's Dilemma in Defending Third-Party Lawsuits: Disclosure of the Client's Confidences or Personal Liability," 14 *Willamette L.J.* 355 (1978). It is recommended that the attorney should seek prior judicial approval, by way of *in camera* review, in order to lay the foundation for assertion of the self-defense privilege and to ensure that the disclosures are limited to those essential to the defense. *See*, *e.g.*, *United States* v. *Omni Int'l Corp.,* 634 F. Supp. 1414 (D. Md. 1986); s*ee*, Levine, "Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection," 5 *Hofstra L. Rev.* 783 (1977).

Colleague Wrongs: Rule 1-120 states that "A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act." However, there is no mandatory whistle blowing provision for violations by other members of the bar. By contrast, the ABA Model Rule 8.3 mandates revelation of another member's wrongdoing where it raises a substantial question of the lawyer's honesty, trustworthiness, or fitness as a lawyer. Failure to do could itself be sanctionable. *See,* Rule 8.4(a). Further, where the wrongdoing is directed to a firm client, any form of wrongdoing must be disclosed. In effect, each member of the firm has an attorney-client relationship with every client of the firm, to the extent that wrongdoing to any client must be reported. *See,* Pitulla, "Firm Commitments: Lawyers Cannot Ignore Duty to Report Ethics Violations by Colleagues," *ABA Journal* 108 (April, 1995).

Final Precautions

Appointing General Counsel: Law firms should consider appointing General Counsel or a Professional Responsibility Committee, composed of either outside counsel who are truly independent from the firm or lawyers from among the ranks of the firm's members who

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[68] As explained in greater detail later in this section, there is no self-defense exception involving third party claims against attorneys where the client refuses to waive the attorney-client privilege (LACBA Opinion 519 (2007), though the inability to defend by resort to confidential communications could be cause for dismissal of the third party's claims. See *McDermott, Will & Emery* v. *Superior* Court, 83 Cal. App. 4th 378, 385 (2000); *Solin* v. *O'Melveny & Myers*, 89 Cal. App. 4th 451 (2001).

[69] Clients are entitled to copies of electronic documents as well. COPRAC Opinion 2007-174.

have no connection to questioned activities. Advantages a law firm may gain, include protecting internal communications as privileged and benefiting from the expertise of such a person.

The law firm's assertion of its own Attorney-Client or Work-Product Privileges may protect internal communications and resulting work product in connection with a firm's investigation of claims or potential claims or its own self-defense, at least where the attorney-client relationship has terminated. Though the role of "in house" counsel for a law firm has not been treated by the courts in the context of privilege issues, the law firm's legal position should be stronger where an individual attorney has been appointed to serve as general counsel. Examples of concern: internal communications, e.g., memoranda, e-mail and partner meetings.

However, during the course of the attorney-client relationship, no such protection will be afforded based on current case law. See, e.g., *Thelen Reid & Priest v. Marland* 2007 WL 578989 (N.D. Cal. Feb 21, 2007); *In re Sonic Blue Incorporated*, 2008 WL 2875407 (Bkrtcy N.D. Cal. 2008); *In re: Sunrise Securities Litigation*, 130 F.R.D. 560 (E.D. Pa. 1989); *Bank Brussels Lambert* v. *Credit Lyonnais (Suisse) S.A.*, 220 F. Supp. 2d 283, 286-88 (S.D.N.Y. 2002); *Koen Book Distributors* v. *Powell, Trachtman, Logan, Carrier Bowman & Lombardo*, 212 F.R.D. 283, 283-85 (E.D. Pa. 2002); *VersusLaw, Inc.,* v. *Stoel Rives, LLP*, 127 Wash.App.309, 332; 111 P. 3d 866, 878 (2005). A contrary position was taken by the New York State Bar Association Committee on Professional Ethics in its Opinion 789 (October 26, 2005). Where there is a need for in depth ethics or malpractice advice on an ongoing client matter, the safer course is to consult outside counsel.

General counsel provides a focused expertise in other important areas, including (1) ethics and professional responsibility, (2) continuing education, including malpractice prevention, (3) liability insurance, (4) responding to State Bar complaints, subpoenas, etc; and (5) dealing with adverse publicity or press inquiries.[70]

There are many examples of risk-laden events where General Counsel or a Professional Responsibility Committee can perform important oversight or provide guidance, including critical writings and critical decisions. Clearly, writings, opinion letters and related documents transmitted by lawyers to clients may form a basis for liability. This is also true in the case of audit reply letters and even conflict waivers, so having a General Counsel or comparable committee who is charged with the responsibility to review these documents objectively may be advisable. Decisions involving various matters also provide potential bases for claims by clients. These critical decisions include those involving conflicts, controversial or questionable client intake decisions, withdrawal from representation of clients, pursuit of fee collection,[71] responding to outside inquiries or demands (including fee audits and subpoenas), and dealing with State Bar matters.

Complaints: Pitfalls of Responding to State Bar Complaints

In negotiating with complaining party, lawyers cannot request, agree or even bargain for commitment not to file a complaint in the future or to request that the State Bar close its file on a pending matter. B&P § 6090.5.[72]

Reportable Events: The B&P requires lawyers and/or the courts to report certain events: (1) sanctions in non-discovery matters involving $1,000 or more, contempt, reversal based on misconduct (B&P § 6086.7); (2) the filing of three or more lawsuits within a 12 month period for malpractice or other wrongful conduct in a professional capacity (B&P § 6069(o)(l)); (3) judgments based on fraud, misrepresentation, breach of fiduciary duty

[70] Additional ethics resources available to law firms include establishing an Ethics/Professional Responsibility Committee and a stable of excellent publications, such as *Annotated Model Rules of Professional Conduct* (4th Ed.1998, Center for Professional Responsibility, ABA); Mallen & Smith, *Legal Malpractice*; Hazard & Hodes, *The Law of Lawyering* (Aspen Law & Business); Vapnek, Tuft, Peck & Weiner, *The Rutter Group California Practice Guide—Professional Responsibility*; and J. Stein, *The Law of Law Firms* 366 (1994). ETHICSearch service operated by the Ethics Department of the ABA Center for Professional Responsibility (providing information regarding ABA rules, standards, ethics opinions, and additional authority, at modest rates, discounted to ABA members; excellent web-based ethics resources offered by The State Bar of California, the Los Angeles County Bar Association, and American Bar Association (respectively: www.calbar.org; www.lacba.org and: www.abanet.org).

[71] Heedless pursuit of fee collections—including even the threat to bring a collection action—is a major source of malpractice claims. Law firms must have a clear policy that precludes threatening or pursuing collection actions against clients without first obtaining formal approval from the Management Committee or other authorized body and then only after an appropriate investigation into the relevant factors of amounts involved (fees paid and unpaid), merits, collectibility, risks of malpractice claim, expenses of litigation and collection, time commitments on the part of members of the firm who will have to assist and/or give testimony, existence of signed fee agreement, including ADR or prevailing party attorneys fees provisions in fee agreement, and timing considerations based on the statute of limitations.

[72] Prior to 1997, to bargain for a complaining party to request that the State Bar cease its investigation of an already pending complaint, and close the file was permitted (*In re Franklyn Lane*), but effective 1997, the B&P was revised to prohibit even the making of such a request. At most, one can request a representation that no such complaint has been filed and perhaps a letter or other statement that exonerates the lawyer and could be used in reply to a later filed complaint.

or gross negligence committed in a professional capacity (B&P § 6086.8(a)); (4) settlements, judgments or arbitration awards against uninsured attorneys involving the same kinds of misconduct (B&P § 6086.8(c)).

Conclusion

Practice law defensively. Much like defensive driving, risk avoidance in practicing law requires constant alertness and care. A focus on the road ahead is just as important as keeping one eye on potential obstacles along the way.

The RPC and applicable case law provide broad standards within which common sense and caution must be applied to resolve the real world situations that constantly face practitioners. In order to avoid common issues that can easily turn into harder-to-repair mistakes, lawyers must be aware of the basic rules and apply them in a reasonable and prudent manner.

Diligently and consistently disclose, discuss and document. Full disclosure and conflict waivers go a long way to short stop most issues, but lawyers should never be afraid to involve their clients in the issues (as part of fulfilling the disclosure obligation) and to seek (or advise their clients to seek) outside and independent knowledgeable counsel to assist them in resolving issues that arise, especially those involving conflicts of interest.

Be thoughtful, diligent, and above all, be careful out there.

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