

# Navigating the New Rules of Professional Conduct: What Lawyers Need to Know to Protect Themselves and Their Clients

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- Effective November 1, 2018, California has adopted new Rules of Professional Conduct
- All rules are re-numbered so that they are consistent with the ABA rules of professional conduct
- State bar has provided a cross-referencing chart for ease
- There are 70 rules in total
- We will cover some of the rules that get lawyers in trouble the most

# Introduction



Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably\* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable\* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.\*

## **Scope of Representation and Allocation of Authority – Rule 1.2**

- (a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.
- (b) For purposes of this rule, “reasonable diligence” shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.



## Rule 1.3 – Diligence

Old Rule – 3-110(B) Failing to act competently



- (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.
- (b) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. The factors to be considered in determining the unconscionability of a fee include without limitation the following:



## **Rule 1.5 – Fees for Services**

### **Old Rule – 4-200 fees for legal services**

- (1) whether the lawyer engaged in fraud\* or overreaching in negotiating or setting the fee;
- (2) whether the lawyer has failed to disclose material facts;
- (3) the amount of the fee in proportion to the value of the services performed;
- (4) the relative sophistication of the lawyer and the client;
- (5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (6) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

## **Fees for Legal Services, Rule 1.5 (unconscionability factors)**

- (7) the amount involved and the results obtained;
- (8) the time limitations imposed by the client or by the circumstances;
- (9) the nature and length of the professional relationship with the client;
- (10) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (11) whether the fee is fixed or contingent;
- (12) the time and labor required; and
- (13) whether the client gave informed consent\* to the fee.

## **Fees for Legal Services, Rule 1.5 (unconscionability factors)**



- (c) A lawyer shall not make an agreement for, charge, or collect:
  - (1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or
  - (2) a contingent fee for representing a defendant in a criminal case.



## Rule 1.5 – Fees for Services

### Old Rule – 4-200 fees for legal services



- (d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as “earned on receipt” or “non-refundable,” or in similar terms, only if the fee is a true retainer and the client agrees in writing\* after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer’s availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.
- (e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.

## **Rule 1.5 – Fees for Services**

### **Old Rule – 4-200 fees for legal services**

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,\* or the disclosure is permitted by paragraph (b) of this rule.
- (b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes\* the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes\* is likely to result in death of, or substantial\* bodily harm to, an individual, as provided in paragraph (c).



## **Rule 1.6 Confidential Information of a Client**

### **Old Rule – Rule 3-100 Confidential information of client**

- (c) Before revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable\* under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act; or (ii) to pursue a course of conduct that will prevent the threatened death or substantial\* bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b).



## **Rule 1.6 Confidential Information of a Client**

### **Old Rule – Rule 3-100 Confidential information of client**

- (d) In revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known\* to the lawyer at the time of the disclosure.
- (e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this rule.



## **Rule 1.6 Confidential Information of a Client**

### **Old Rule – Rule 3-100 Confidential information of client**

- (a) A lawyer shall not, without informed written consent\* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.
- (b) A lawyer shall not, without informed written consent\* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,\* or by the lawyer's own interests.

## **Rule 1.7 Conflict of Interest: Current Clients**

### **Old Rule – 3-310(b)(b)**



- (c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written\* disclosure of the relationship to the client and compliance with paragraph (d) where:
  - (1) the lawyer has, or knows\* that another lawyer in the lawyer's firm\* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or
  - (2) the lawyer knows\* or reasonably should know\* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,\* or has an intimate personal relationship with the lawyer.

## **Rule 1.7 Conflict of Interest: Current Clients**

### **Old Rule – 3-310(b)(b)**





- (d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:
  - (1) the lawyer reasonably believes\* that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law; and
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

## **Rule 1.7 Conflict of Interest: Current Clients**

### **Old Rule – 3-310(b)(b)**

- (e) For purposes of this rule, “matter” includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons,\* or a discrete and identifiable class of persons.\*

## **Rule 1.7 Conflict of Interest: Current Clients**

### **Old Rule – 3-310(b)(b)**





- (a) A lawyer shall not engage in sexual relations with a current client who is not the lawyer's spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.
- (b) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person\* for the purpose of sexual arousal, gratification, or abuse.
- (c) If a person\* other than the client alleges a violation of this rule, no Notice of Disciplinary Charges may be filed by the State Bar against a lawyer under this rule until the State Bar has attempted to obtain the client's statement regarding, and has considered, whether the client would be unduly burdened by further investigation or a charge.

## **Rule 1.8.10 Sexual Relations with Current Clients**

### **Old Rule – 3-120 Sexual Relations with Clients**



- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person\* in the same or a substantially related matter in which that person's\* interests are materially adverse to the interests of the former client unless the former client gives informed written consent.\*
- (b) A lawyer shall not knowingly\* represent a person\* in the same or a substantially related matter in which a firm\* with which the lawyer formerly was associated had previously represented a client
  - (1) whose interests are materially adverse to that person;\* and
  - (2) about whom the lawyer had acquired information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed written consent.\*



## Rule 1.9 Duties to Former Clients

### Old Rule – 3-310(E) Avoiding Representation of Adverse Interests

- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm\* has formerly represented a client in a matter shall not thereafter:
  - (1) use information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;\* or
  - (2) reveal information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client except as these rules or the State Bar Act permit with respect to a current client.

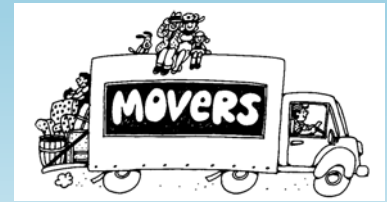
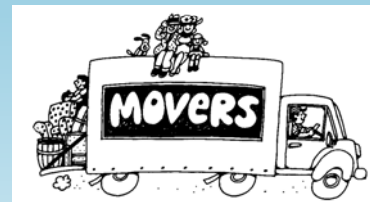
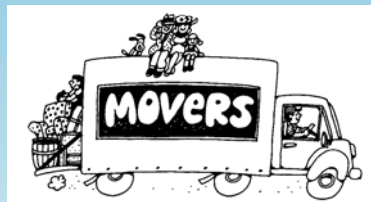
## **Rule 1.9 Duties to Former Clients**

### **Old Rule – 3-310(E) Avoiding Representation of Adverse Interests**

- (a) While lawyers are associated in a firm,\* none of them shall knowingly\* represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7 or 1.9, unless
  - (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm;\* or
  - (2) the prohibition is based upon rule 1.9(a) or (b) and arises out of the prohibited lawyer's association with a prior firm,\* and
    - (i) the prohibited lawyer did not substantially participate in the same or a substantially related matter;
    - (ii) the prohibited lawyer is timely screened\* from any participation in the matter and is apportioned no part of the fee therefrom; and
    - (iii) written\* notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this rule, which shall include a description of the screening\* procedures employed; and an agreement by the firm\* to respond promptly to any written\* inquiries or objections by the former client about the screening\* procedures.

## Rule 1.10 – Imputation of Conflicts of Interest

### No counterpart





- (b) When a lawyer has terminated an association with a firm,\* the firm\* is not prohibited from thereafter representing a person\* with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm,\* unless:
  - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
  - (2) any lawyer remaining in the firm\* has information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.9(c) that is material to the matter.
- (c) A prohibition under this rule may be waived by each affected client under the conditions stated in rule 1.7.
- (d) The imputation of a conflict of interest to lawyers associated in a firm\* with former or current government lawyers is governed by rule 1.11.

## **Rule 1.10 – Imputation of Conflicts of Interest**

### **No counterpart**

- (a) All funds received or held by a lawyer or law firm\* for the benefit of a client, or other person\* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled “Trust Account” or words of similar import, maintained in the State of California, or, with written\* consent of the client, in any other jurisdiction where there is a substantial\* relationship between the client or the client’s business and the other jurisdiction.

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- (e) The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what “records” shall be maintained by lawyers and law firms\* in accordance with paragraph (d)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

## **Rule 1.15 Safekeeping Funds and Property of Clients**

### **Old Rule – 4-100 Preserving identity of funds and property of clients**



- (a) A person\* who, directly or through an authorized representative, 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, is a prospective client.
- (b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 that the lawyer learned as a result of the consultation, except as rule 1.9 would permit with respect to information of a former client.

## **Rule 1.18 Duties to Prospective Client**

### **No counterpart**



- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received from the prospective client information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm\* with which that lawyer is associated may knowingly\* undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received information that prohibits representation as provided in paragraph (c), representation of the affected client is permissible if:
  - (1) both the affected client and the prospective client have given informed written consent,\* or
  - (2) the lawyer who received the information took reasonable\* measures to avoid exposure to more information than was reasonably\* necessary to determine whether to represent the prospective client; and
    - (i) the prohibited lawyer is timely screened\* from any participation in the matter and is apportioned no part of the fee therefrom; and
    - (ii) written\* notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this rule.

## Rule 1.18 Duties to Prospective Client

### No counterpart



Where it is reasonably\* apparent to a lawyer who receives a writing\* relating to a lawyer's representation of a client that the writing\* was inadvertently sent or produced, and the lawyer knows\* or reasonably should know\* that the writing\* is privileged or subject to the work product doctrine, the lawyer shall:

- (a) refrain from examining the writing\* any more than is necessary to determine that it is privileged or subject to the work product doctrine, and
- (b) promptly notify the sender.

## **Rule 4.4 Duties Concerning Inadvertently Transmitted Writings**

### **No Counterpart**



- (a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm,\* shall make reasonable\* efforts to ensure that the firm\* has in effect measures giving reasonable\* assurance that all lawyers in the firm\* comply with these rules and the State Bar Act.
- (b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,\* shall make reasonable\* efforts to ensure that the other lawyer complies with these rules and the State Bar Act.

## **Rules 5.1, 5.2 and 5.3 – Duty to Supervise**

### **Old Rule – Rules 3-110 competence**





- (c) A lawyer shall be responsible for another lawyer's violation of these rules and the State Bar Act if:
  - (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm\* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm,\* and knows\* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable\* remedial action.

## Rules 5.1, 5.2 and 5.3 – Duty to Supervise

### Old Rule – Rules 3-110 competence



(a) A lawyer shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.\*

(b) A subordinate lawyer does not violate these rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable\* resolution of an arguable question of professional duty.

## **Rule 5.2 Responsibilities of a Subordinate Lawyer**

**Old Rule – Rules 3-110 competence**



With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a lawyer who individually or together with other lawyers possesses managerial authority in a law firm,\* shall make reasonable\* efforts to ensure that the firm\* has in effect measures giving reasonable\* assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm,\* shall make reasonable\* efforts to ensure that the person's\* conduct is compatible with the professional obligations of the lawyer; and

## **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**

### **Old Rule – Rules 3-110 competence**

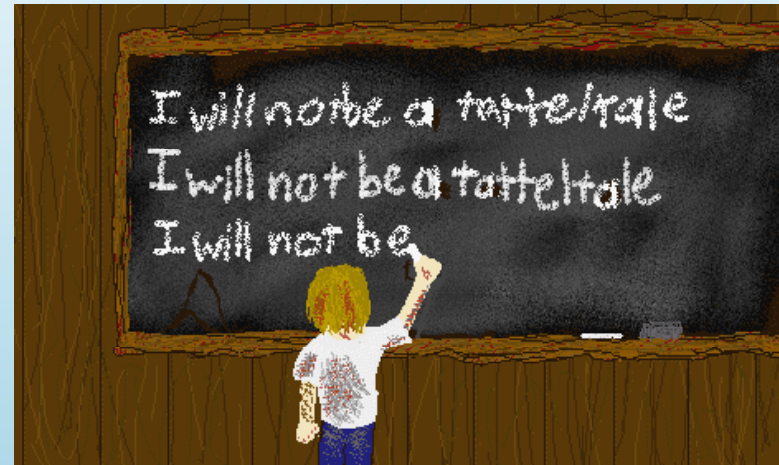
(c) a lawyer shall be responsible for conduct of such a person\* that would be a violation of these rules or the State Bar Act if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or

(2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm\* in which the person\* is employed, or has direct supervisory authority over the person,\* whether or not an employee of the same law firm,\* and knows\* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable\* remedial action.

## **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**

### **Old Rule – Rule 3-110 competence**



## Duty to Report Misconduct of Another Lawyer

### ABA Rule 8.3

Any questions, feedback or concerns:

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