

MCLE SELF-STUDY

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KNOW YOUR NEW RULES

by Natasha S. Chee and Jeffrey T. Thayer

Following years of drafting, review and revision, the California Supreme Court has ordered new Rules of Professional Conduct to go into effect November 1, 2018. This is the first such comprehensive overhaul of the Rules since 1989, and brings them more into line with the American Bar Association (“ABA”) Model Rules, albeit with a distinct California flavor. The numbering of the new rules shadows the numbering of the ABA Model Rules to make it easier for out-of-state attorneys to find applicable rules.

Several of the new Rules provide entirely new requirements for California attorneys, or codify previously “unwritten” requirements. Discussed below are some key changes expected to have a significant impact on day-to-day practice.

Diligence

New Rule 1.3 codifies reasonable diligence as an independent rule, and spells out that “reasonable diligence” will be defined as commitment and dedication to the client’s interests, and not acting with disregard, neglect or undue delay.² Under former Rule 3-110(B), diligence was used to define competence, and was not itself an independent requirement.³

Stricter language on impermissible fees

New Rule 1.5 prohibits lawyers from agreeing to, charging or col-

lecting “unconscionable or illegal” fees.⁴ This is a step up from the ABA Model Rules which merely prohibit “unreasonable” fees.⁵ Further, Rule 1.5(d) states that “earned on receipt” or “non-refundable” retainers must be “true” retainers, meaning the client agrees after disclosure that they will not be entitled to a refund of any portion.⁶

Fee Division

Pure referral fees, which were allowed under former Rule 2-200, continue to be allowed under new Rule 1.5.1, but with new restrictions.⁷ Agreements to divide fees must be consented to by the client in writing at the time of the agreement, or as soon thereafter as reasonably practicable, after full written disclosure to the client of the fact that a fee division will be made, the identity of the lawyers and/or law firms that are party to the division, and the terms of the division.⁸

Confidentiality

New Rule 1.6 keeps intact prior understanding in California on the confidentiality of client information.⁹ It prohibits lawyers from disclosing any information protected by Business & Professional Code section 6068(e)(1), with the sole exception for disclosures of information necessary to prevent a criminal act the lawyer reasonably believes

is likely to result in death or substantial bodily harm.¹⁰

Broadening of conflict of interest rules

Former Rule 3-310 provided a “checklist” approach for current client conflicts.¹¹ New Rule 1.7 moves away from this approach and instead makes the test one that asks whether there is direct adversity to another current client in the same or separate matter, or whether there is a significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to, or relationship with, another client, a former client, a third person or the lawyer’s own interests.¹² California’s long-standing “informed written consent” standard is preserved, whereas the ABA Model Rules provide for “informed consent, confirmed in writing.”¹³

Added to Model Rule 1.7 is a carryover requirement from old Rule 3-310(B): written disclosure to a client must be made, even without a significant risk that the representation will be materially limited by the lawyer’s responsibilities to or relationship with another client, former client, third person or the lawyer’s own interests, when the lawyer (1) has, or knows that another lawyer in their firm has, a legal, business, financial, professional or personal relationship with or responsibility to a party or witness in the same

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matter, or (2) 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.¹⁴

These rules have been changed to bring California more into line with the national understanding of conflicts of interest. For example, a new definition of what constitutes a legal "matter" covered by conflict disclosure and non-representation requirements – "any judicial or other proceeding, application, request for 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" – is more expansive than before.¹⁵

Intimate relations with clients

New Rule 1.8.10 forbids sexual relations with a current client who is not a spouse or registered domestic partner, unless there was a consensual relationship already in place prior to the formation of the attorney-client relationship.¹⁶ The previous rule, 3-120, barred lawyers from having sex with clients if the act was coerced or considered a form of payment for services rendered, or where continued representation after sexual relations would result in incompetence.¹⁷

Fees and trust accounts

New Rule 1.15 states that advance fee deposits must be deposited into a client trust account maintained in California.¹⁸ This rule uses the phrase "funds received or held", which means it applies to all such fees, including those received prior to effective date of the Rule.¹⁹ Former Rule 4-100 only

required advance costs to be deposited into a client trust account.²⁰

Confidentiality

New Rule 1.18 codifies the common law understanding that a lawyer owes a duty of confidentiality as to confidential information received from prospective clients.²¹ Further, a lawyer cannot represent a client with materially adverse interests to a prospective client in the same or substantially related matter if the lawyer received confidential information material to the matter from the prospective client, even if the lawyer was never hired.²²

Supervising subordinates

New Rules 5.1 and 5.3 impose a duty to supervise subordinates.²³ Formerly a duty to supervise existed only as a comment to rule 3-110.²⁴ New Rule 5.2 imposes duties on subordinate lawyers to comply with the rules.²⁵

New pro bono requirement

New Rule 6.1 provides a new "aspirational" requirement of at least 50 hours of pro bono public legal services per year.²⁶ To fulfill this responsibility, a lawyer should provide a "substantial majority" of the 50 hours without fee or expectation of fee to persons of "limited means," or charitable, religious, civic, community, governmental and educational organizations in matters designed primarily to address the needs of persons of limited means.²⁷

The remaining hours can be satisfied in any of three ways: (1) delivery of legal services at no fee or substantially reduced fee to those seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where payment of standard legal fees would significantly deplete their economic resources or otherwise

be inappropriate; (2) delivery of legal services at a substantially reduced fee to persons of limited means; and (3) participation in activities for improving the law, the legal system or the legal profession.²⁸

Finally, New rule 6.1 includes a proviso that a lawyer should additionally voluntarily contribute financial support to organizations that provide legal services to persons of limited means.²⁹

Expanded prohibition on harassment, discrimination and retaliation

New Rule 8.4.1 expands on former Rule 2-400, which prohibited discriminatory conduct in a law practice.³⁰ New Rule 8.4.1 prohibits unlawful harassment, discrimination and retaliation in the representation, termination or refusing to accept the representation of a client, and in law firm operations.³¹ This rule is limited to unlawful conduct as per applicable statutes and decisions, and per comment it excludes conduct protected by the First Amendment.³² Another comment makes clear this rule assigns "all law firm lawyers the responsibility to advocate corrective action to address known harassing or discriminatory conduct by the firm or any of its lawyers or nonlawyer personnel."³³ The state bar can now open an investigation into alleged harassment or discrimination on its own, without first requiring a civil finding by another agency, as was required under old Rule 2-400.³⁴ Lawyers who receive a related disciplinary charge from the bar will be required to notify state and federal workplace-fairness agencies.³⁵

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taken in reliance on the information contained in this article and we disclaim all liability in respect to actions taken or not taken based on any or all of the contents of this article to the fullest extent permitted by law. An attorney should be contacted for advice on specific legal issues.

¹ These rules will inevitably be tested in the courts and subject to interpretation over time, but as of publication, that has not yet occurred. Always do your own diligence on recent court cases to ensure that you have the most up to date judicial interpretation of each rule.

² California Rules of Professional Conduct (2018) (hereafter "CRPC"), Rule 1.3.

³ Rules of Professional Conduct of the State Bar of California (2017) (hereafter "RPCSBC"), Rule 3-110(B).

⁴ CRPC, Rule 1.5.

⁵ ABA Model Rules of Professional Conduct (2016) (hereafter "ABA"), Rule 1.5.

⁶ CRPC, Rule 1.5(d).

⁷ RPCSBC, Rule 2-200; CRPC, Rule 1.5.1.

⁸ CRPC, Rule 1.5.1.

⁹ CRPC, Rule 1.6.

¹⁰ *Id.*

¹¹ RPCSBC, Rule 3-310.

¹² CRPC, Rule 1.7.

¹³ *Id.*; ABA, Rule 1.7.

¹⁴ CRPC, Rule 1.7; RPCSBC, Rule 3-310(B).

¹⁵ CRPC, Rule 1.7.

¹⁶ CRPC, Rule 1.8.10.

¹⁷ RPCSBC, Rule 3-120.

¹⁸ CRPC, Rule 1.15.

¹⁹ *Id.*

²⁰ RPCSBC, Rule 4-100.

²¹ CRPC, Rule 1.18.

²² *Id.*

²³ CRPC, Rules 5.1 and 5.3.

²⁴ RPCSBC, Rule 3-110, Discussion section.

²⁵ CRPC, Rule 5.2.

²⁶ CRPC, Rule 6.1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ RPCSBC, Rule 2-400.

³¹ CRPC, Rule 8.4.1.

³² *Id.*, and comment 4.

³³ CRPC, Rule 8.4.1, comment 1.

³⁴ CRPC, Rule 8.4.1; RPCSBC, Rule 2-400.

³⁵ CRPC, Rule 8.4.1.

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November 2018

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MCLE SELF-STUDY TEST

- 1 New Rule 1.3 defines “reasonable diligence” as:
 - a. Commitment and dedication to the client’s interests
 - b. Not acting with disregard, neglect or undue delay
 - c. Both A and B
 - d. Competence
- 2 New Rule 1.5 prohibits lawyers from agreeing to, charging or collecting:
 - a. Unconscionable fees
 - b. Illegal fees
 - c. Unconscionable or illegal fees
 - d. Unreasonable fees
- 3 Referral fees require full written disclosure to the client of:
 - a. The fact that a fee division will be made
 - b. The identity of the lawyers and/or law firms that are party to the division
 - c. The terms of the division
 - d. All of the above
- 4 The exception to client confidentiality will be disclosures of information necessary to prevent:
 - a. A criminal act the lawyer reasonably believes is likely to result in death or substantial bodily harm
 - b. A civil tort the lawyer reasonably believes is likely to result in death or substantial bodily harm
 - c. A criminal act the lawyer believes will result in death or substantial bodily harm beyond a reasonable doubt
 - d. A criminal act the lawyer reasonably believes is likely to result in death or any type of bodily harm
- 5 The new conflict of interest rules will include:
 - a. A “checklist” approach
 - b. A test that asks whether there is direct or indirect adversity to another current client in the same or separate matter
 - c. A test that asks whether there is a significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to, or relationship with, another client, a former client, a third person or the lawyer’s own interests
 - d. Both B and C
- 6 Sexual relations with clients will be:
 - a. Always okay if the client consents
 - b. Only okay if there was a consensual relationship already in place prior to the formation of the attorney-client relationship
 - c. Okay unless the act was coerced or considered a form of payment for services rendered, or where continued representation after sexual relations would result in incompetence
 - d. Okay if an opposing party signs a waiver
- 7 Advance fee deposits must be deposited into:
 - a. A checking account maintained in California
 - b. A client trust account maintained in California
 - c. A client trust account maintained in the United States
 - d. A client trust account maintained offshore

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MCLE SELF-STUDY TEST (CONTINUED)

- 8 Under the new rules, a lawyer owes a duty of confidentiality:
- As to any information received from prospective clients
 - With respect to representation of a client with material adverse interests to a prospective client in the same or substantially related matter if the lawyer received confidential information material to the matter from the prospective client, even if the lawyer was never hired
 - With respect to representation of a client with material adverse interests to a prospective client in the same or substantially related matter if the lawyer received confidential information material to the matter from the prospective client, only if the lawyer was hired
 - All of the above
- 9 New Rules 5.1 and 5.3 impose a duty to supervise:
- Subordinates
 - Interns
 - Clients
 - Partners
- 10 The new pro bono requirement can be satisfied by performing a majority of the subject services on behalf of:
- Persons of “restricted means”
 - Charitable organizations
 - Silicon Valley entrepreneurs
 - All of the above
- 11 New Rule 8.4.1 prohibits:
- Unlawful harassment, discrimination and aggression
 - Unlawful harassment, premeditation and retaliation
 - Unlawful harassment, retaliation and vindication
 - Unlawful harassment, discrimination and retaliation
- 12 New Rule 6.1 includes a proviso that a lawyer should additionally voluntarily contribute:
- Financial support to organizations that provide legal services to persons of limited means
 - Financial support to organizations that provide charitable services to persons of limited means
 - Financial support to organizations that provide legal services to disadvantaged populations
 - Physical assistance to organizations that provide legal services to persons of limited means
- 13 A “legal matter” under New Rule 1.7 can include:
- A contract
 - A controversy
 - An arrest
 - All of the above
- 14 New Rule 5.2 imposes duties on subordinate lawyers to comply with:
- The rules
 - The Code of Civil Procedure
 - Directions from supervising lawyers
 - The Bluebook
- 15 Consent in California for conflicts of interest must be:
- Written consent
 - Informed written consent
 - Informed oral or written consent
 - Informed consent, confirmed by writing

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