

What You Don't Know CAN Hurt You

The (New) Ethics Rules All In-House Lawyers Should Know

Presented by

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Updated Rules of Professional Conduct

- Effective November 2018
- First comprehensive changes since 1989
- More consistent with ABA Model Rules
- Different numbering system
- 69 rules versus 46

Changes

- Communication with clients
- Unconscionable fees
- Fee sharing
- Conflicts of interest
- Safekeeping of client property
- Duties to prospective clients
- Prohibition on discrimination

Communication With Clients (Rule 1.4)

Old Rule 3-500

- “Communication” requires that a lawyer shall keep a client reasonably informed about “significant developments” relating to the employment or representation.

Communication With Clients (Rule 1.4)

New Rule 1.4

- In addition to requiring lawyers to keep client reasonably informed about significant developments, the lawyer must also:
 - Consult with the client about the client's objectives and the manner of achieving them; and
 - Promptly comply with reasonable requests for information and copies of significant documents when necessary.

Client Communications

Rule 1.2: Scope of Representation and Allocation of Authority

- Expressly allows limited scope
- Attorney shall abide by client decisions concerning objectives of representation
- Attorney shall reasonably consult with client as to the means by which pursued

Conflicts: Old Rules 3-300/310/320

- Rule 1.7: Current Clients
- Rule 1.8.1: Business Transactions
- Rule 1.8.6: Paid by Third Party
- Rule 1.8.7: Aggregate Settlements
- Rule 1.9: Former Clients
- Rule 1.18: Prospective Clients
- Rule 1.10: Imputation of Conflicts
- Rule 1.0.1: Informed Consent

Conflicts of Interest (Rule 1.7)

- A lawyer shall not, without informed written consent from each client, represent a client if the representation is directly adverse to another client in the same or a separate matter
- A lawyer shall not, without informed written consent from each affected client, 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
- Subject to section limitation

Current Clients (Rule 1.7 continued)

- Even if significant risk not present, need written disclosure where:
 - 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
 - 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

Current Clients (Rule 1.7(d) continued)

- If any scenarios are covered by rule, representation is only permitted if:
 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.

Delay of Litigation (Rule 3.2)

- Attorney shall not use means that have no substantial purpose other than to delay proceedings or cause unnecessary expense.

New Integrity Rules

Rule 4.1: Truthfulness to Others

- Shall not make false statements of material fact or law to third persons
- Shall not fail to disclose a material fact to a third person when disclosure necessary to avoid assisting a criminal or fraudulent act by a client unless prohibited under 6068(e)(1)
 - 6068(e)(1)-maintain client confidence at every peril

New Integrity Rules

Rule 4.2: Communication with a Represented Party

- Prohibits communication with officer, director, partner or managing agent
- Prohibits communication with current employee if the subject of the communication is an act or omission of such person in connection with the matter which may be binding or imputed to entity
- Does not prohibit communication with public official, board, committee or body

New Integrity Rules

Rule 4.3: Communication with Unrepresented Party

- May not imply disinterest when you are not and must clarify misunderstandings

Rule 4.4: Inadvertent Disclosures

- Refrain from examining
- Promptly notify sender

Prohibition on Discrimination (Rule 8.4.1)

Old Rule 2-400

- Prohibits discrimination in the management or operation of a law practice
- Requires a prior adjudication of unlawful conduct by a tribunal of competent jurisdiction before a lawyer can be subject to discipline by the State Bar

Prohibition on Discrimination (Rule 8.4.1)

- Prohibits unlawful discrimination, harassment, and retaliation in connection with:
 - The representation of a client;
 - The refusal to accept a client;
 - Termination of a client; and
 - In law firm operations.
- No requirement of a prior adjudication before discipline can be imposed

Managerial/Supervisory Lawyers (5.1)

- Lawyer who has managerial authority shall make reasonable efforts to ensure the firm has in effect measures giving reasonable assurance that lawyers comply with these Rules and State Bar Act.
- Lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of same firm, shall make reasonable efforts to ensure other lawyer complies.

Managerial/Supervisory Lawyers (5.1)

- A lawyer shall be responsible for another lawyer's violation if:
 - Lawyer orders or ratifies conduct
 - Lawyers knows of conduct at a time that its consequences can be avoided or mitigated and fails to take reasonable remedial action

Organization as Client (Rule 1.13)

(a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.

Organization as Client (Rule 1.13)

- The identity of an organization's constituents will depend on its form, structure, and chosen terminology. In the case of a corporation, constituents include officers, directors, employees and shareholders...any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization.
 - To whom do you report?
 - From whom do you take direction?

New: Rule 1.13 now mandates “reporting up” in certain circumstances

- Two-part test to determine whether a lawyer has an ethical obligation to report up the ladder:
 1. Does the lawyer have actual knowledge that a constituent is, has, or plans to act (or refuses to act)?
 2. Would a reasonable lawyer conclude that the constituent’s course of action is a violation of law or a legal duty and likely to result in substantial injury to the organization?

- Examples:
 - Volkswagen emissions scandal
 - Unlawful employment practices

Should I report to a higher authority?

In determining how to proceed, the lawyer should consider:

- The seriousness of the violation and its potential consequences;
- The responsibility in the organization and the apparent motivation of the person involved;
- The policies of the organization concerning such matters; and
- Any other relevant considerations.

Should I report to a higher authority?

If the two-prong test is met, referral to a higher authority is usually required. But there could be circumstances where the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority.

Example: The constituent has an innocent misunderstanding of law and, after being advised to reconsider, agrees to a different course of action.

- Frequent reporting to higher authorities can create distrust between legal and constituents.
- Depending on the seriousness, you may still want to report up.
- Document the discussion in case the constituent persists in conduct contrary to your advice.

What if a constituent is doing something that is unwise, counter-productive, or harmful, but not unlawful?

- No obligation to report under Rule 1.13
 - “A lawyer ordinarily must accept decisions an organization’s constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. It is not within the lawyer’s province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk.”
- However, a lawyer always has a duty to inform the client of significant developments related to the representation.
[Rule 1.4; Business and Professions Code section 6068(m).]
- Even if there is no mandatory reporting obligation under Rule 1.13, the lawyer **may** refer to higher authority any matter the lawyer reasonably believes is sufficiently important to refer **in the best interest of the organization.**

Important – Be cognizant of the duty of confidentiality

- In taking any action pursuant to Rule 1.13, the lawyer shall not reveal confidential information, except to prevent criminal act likely to result in death or substantial bodily harm.

Can I represent the organization and its constituents?

- Rule 1.13(g): Yes. A lawyer representing an organization may also represent any of its constituents, subject to all of the conflict and disclosure rules (e.g., Rules 1.7, 1.8.2, 1.8.6, and 1.8.7).
- If the organization's consent to the dual representation is required, the consent shall be given by an appropriate official, constituent, or body of the organization other than the individual who is to be represented, or by the shareholders.
 - If you are representing a corporation and its president, the president cannot sign the conflict waiver on behalf of the corporation.

It is important to be clear who you represent and who you do not represent

Rule 1.13(f): In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.

- A lawyer should not mislead a constituent into believing that he or she may communicate confidential information in a way that will not be used in the organization's interest if the organization is or becomes adverse to the constituent.
- “Anything you say may be used against you...”

“Constituents” include: the organization's directors, officers, employees, members, shareholders, etc.

It is important to be clear who you represent and who you do not represent

What happens when a change in control occurs or is threatened?

- Lawyers can face extremely complex decisions
- Personal relationships and loyalties
- Institutional relationships and loyalties
- Critically analyze what duties are owed and to whom
- Consider seeking outside advice

Confidential Information (Rule 1.6)

- A lawyer shall not reveal confidential information, unless:
 1. The client gives informed consent, or
 2. The lawyer reasonably believes the disclosure is necessary to prevent a criminal act likely to result in death or substantial bodily harm.

Confidential Information (Rule 1.6)

- Before revealing confidential information, unless to prevent a criminal act, a lawyer shall, if reasonable under the circumstances:
 1. Make a good faith effort to persuade the client to pursue a different course of conduct; and
 2. Inform the client, at an appropriate time, of the lawyer's ability or decision to reveal the confidential information.

Confidential Information (Rule 1.6)

- Disclosure is permissive, not mandatory
- 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

Wadler v. Bio-Rad

Facts:

- GC asked audit committee to investigate senior management involved in a possible bribery scandal in China – a violation of the Foreign Corrupt Practices Act
- After a four-month investigation, no direct evidence of misconduct was found
- Three days later, GC was terminated
- GC sued for whistleblower retaliation

Wadler v. Bio-Rad

Evidence:

- The head of the audit committee said GC was “absolutely correct” and “courageous” in making the report. But the whistleblower report was given to the CEO, even though it was about him.
- CEO claimed he fired GC for increasingly unruly and argumentative behavior (e.g., yelling, pounding fists on tables).
- GC had done online searches for employment lawyers before submitting the whistleblower complaint.
- CEO presented a negative performance review of the GC, which documented the reason for the termination. This was corroborated by the head of HR. However, metadata showed that the performance review document was created more than a month after the GC was fired.

Wadler v. Bio-Rad

Result:

- At trial, a jury found that GC's reporting of potential bribery was protected activity and that the report was a substantial motivating reason for his termination
- The jury awarded GC \$2.96M in economic damages and \$5M in punitive damages
- By statute, the back wages award was automatically doubled!
- Total judgment: ~\$11M + attorneys' fees

Monster Energy v. Schechter

- Client signed settlement agreement containing confidentiality provision that referenced plaintiffs and their counsel of record
- Attorney signed as “approved to form and content”
- Attorney is interviewed by lawyersandsettlements.com and discloses information about case and settlement
- Article contains link to “Monster Energy Drink Injury Legal Help”
- Monster sues attorney for breach of settlement agreement
- Attorneys file anti-SLAPP

Monster v. Schechter Holdings

- Court of Appeal reversed and granted anti-SLAPP
 - Monster did not prove that interview was advertising
 - Attorneys did not consent to be bound by settlement agreement
- California Supreme Court reversed Court of Appeal
 - Possible inference that attorneys intended to be bound by agreement
 - Paragraph included “parties and their counsel”
 - Importance of confidentiality for settlements
 - Attorney acknowledged that Monster would not settle unless confidential
- Solution:
 - Have attorneys sign that they consent to be bound by confidentiality provision
 - Include Attorney Fees provision

Knutson v. Foster (August 8, 2018)

- Plaintiff was swimmer who turned down scholarship to Auburn to swim in residence with USA Swimming in Fullerton until 2016
- Coach who made promise was fired and USA refused to honor commitment
- Plaintiff hired attorney Foster who had strong ties to USA Swimming; Ex. include chairperson for organizing committee for 2004 US Olympic swim trials, vice president of Swimming Union of Americas
- Plaintiff entered into negotiated settlement which included performance requirements she ultimately did not meet
- Plaintiff learned that attorney had hid certain emails from her
- Plaintiff sued for malpractice, fraud, intentional breach of fiduciary duty

Knutson v. Foster Outcome

- Jury awarded economic damages of \$217k, noneconomic of \$400k
- Trial court granted new trial/Court of Appeal reversed
- “But for” test does not apply to intentional torts not based on legal malpractice/Substantial factor test applies
- Court considered intentional breach of fiduciary duty to be intentional tort subject to substantial factor test

Knutson v. Foster Outcome

- Court found that Foster's failure to disclose conflicts were a substantial factor in Knutson's decision to enter into settlement
- Court affirmed emotional distress damages
- Takeaways:
 - Alleged conflicts led to intentional torts and emotional distress
 - Conflicts were not between clients/former clients
 - Failing to share emails with client likely biggest problem for Foster



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Douglas A. Pettit has extensive trial and litigation experience in the areas of civil litigation, business litigation, and professional liability. He has tried over 50 cases in California. His extraordinary record of favorable outcomes and exemplary client service has resulted in recognition by his peers over the years.

Doug was inducted into the American Board of Trial Advocates in 2007 and has achieved Martindale-Hubbell's highest rating for legal ability and ethical standards. He has also been recognized by the *Best Lawyers in America*® for his work in Legal Malpractice Law (Defendants), Professional Malpractice Law (Defendants), and Commercial Litigation. Notably, he was selected as *Best Lawyers' 2015* and *2018 San Diego Legal Malpractice Lawyer of the Year*.



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Matthew C. Smith has extensive experience in all aspects of civil litigation, including trials, arbitrations, and mediations. Matt represents individuals and business clients on a wide variety of professional and business litigation matters. He has served as lead counsel or co-counsel in more than a dozen trials and arbitrations. Matt also handled several successful appeals and has argued before the Fourth District Court of Appeal.

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