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An Overview of California's New Rules of Professional Conduct

COUNSEL TO GREAT COMPANIES

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CA's Newly Adopted Rules of Professional Conduct –

A Brief Overview

- **46 existing rules become 69 rules**
- Approved 27; Modified 42; Denied 1
- Numbering and organizational system based on ABA Model Rules
- Effective November 1, 2018

Communicating with Represented Persons



Communicating with Represented Persons

You are negotiating an important sponsorship agreement between Globex Corp. and the rock group Imagine Dragons (ID).

You are working alongside a senior Globex executive. ID is represented by outside counsel, and one of the ID band members is directly involved in the negotiations. Negotiations have been contentious. Even though the lawyers aren't getting along well, the Globex exec continues to have a great relationship with the ID band member.

You believe that negotiations have stalled more because of the ID lawyer's ego than substance, and are confident that if the lawyers were out of the picture, the parties would quickly agree on the last remaining term.

Communicating with Represented Persons

May you suggest that the Globex exec discuss the remaining term with the ID band member? May you draft a “script” (or set of “talking points” or “term sheet”) for him?

A. You may do both in most jurisdictions

D. You may suggest, but not script, in California

B. You may do neither under California RPC

E. A and B

C. You may do neither in most jurisdictions

Answer: E

MR 4.2: “In representing a client, a **lawyer** shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

CRPC 4.2: “In representing a client, a lawyer shall not communicate **directly or indirectly** about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.”

Answer: E

(Probably OK Elsewhere, But not CA)

Most jurisdictions:

- ABA FO 11-461: Lawyer may suggest contact and script, so long as no “overreach”; advise other side to consult lawyer
- Test: Attempting to circumvent protections of 4.2?

California:

- FO 1993-131 forbids contacts initiated by the lawyer and scripting
- Comment 3 – Rule does not prevent represented persons from communicating directly with one another, nor does it prohibit a lawyer from advising a client concerning such a communication

Reporting Misconduct



Reporting Misconduct

You are an in-house lawyer with XYZ Corp., admitted only in CA, working on a transaction with a CA-based customer. The customer has no in-house team and is represented by outside counsel who often appears disoriented and slurs her speech during meetings. You are in LA at the customer's HQ, and have just reached a favorable handshake agreement with the lawyer and her client.

Reporting Misconduct

As you are preparing to leave, with just you and the lawyer still in the room, the lawyer confesses that she is drunk. She also brags that she is billing two different clients for the full time spent in your calls and meetings

Report to the Bar?

A. Yes, you must report the billing issue (only).

C. It is your option on whether to report either.

B. Yes, you must report both issues.

D. No, you may not report either.

Answer: Arguably D

(Can't Report Either)

MR 8.3: “A lawyer who knows that another lawyer has committed a violation of the RPC that raises a **substantial question** as to that **lawyer's honesty, trustworthiness, or fitness** as a lawyer in other respects” must report

But MR “does not require disclosure of information otherwise protected by Rule 1.6”

And . . . California did not adopt MR 8.3

Let's Talk About Sex...



Sexual Relations With Current Client

Eli is an associate at XYZ LLP. One day, a partner at the firm calls Eli into his office and introduces Eli to Sally who recently retained XYZ to help guide her startup through an ICO. Eli and Sally, who have never met before, lock eyes and instantly fall in love. Three months later, after spending the day together reviewing the latest SEC comments regarding coin offerings, Sally invites Eli out for drinks. Later that night, Eli and Sally have sex.

Is Eli subject to professional discipline by the California State Bar?

Sexual Relations With Current Client

A. Yes, Eli is subject to disciplinary action by the CA State Bar.

B. No, it was consensual.

C. It depends on whether Eli is able to provide competent legal representation in light of his sexual relationship with Sally.

D.

Answer: A

(Subject to Discipline)

CRPC 1.8.10 – Sexual Relations with a Client

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.

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.

More sex!

Della is a partner with the corporate group of law firm XYZ LLP. She is married to Will, who is the CEO of DMA, Inc., which is a company engaged in the manufacture of (somewhat) unreliable computer processors. DMA has recently retained XYZ to guide it through an upcoming merger. One night (as they have once a year for the past 10 years of their marriage), Della and Will engage in sexual relations.

Is Della subject to professional discipline by the California State Bar?

More sex!

- A.** Yes, lawyers are strictly prohibited from engaging in sexual relations with a current client.
- B.** No, Della and Will had a consensual sexual relationship prior to the commencement of their lawyer-client relationship.
- C.** No, Della and Will are married.
- D.** B and C

Answer: D

(Both B and C)

“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.**” [CRPC 1.8.10]

Even more sex!

Harper is the Associate General Counsel of Hooli. One day, Hooli launches a new computer processor that is a huge commercial success. To celebrate, Harper takes the entire engineering team out for drinks. After drinking several Manhattans, Harper spots Asher sitting by himself. Asher is the lead engineer at Hooli. Harper has always had a huge crush on Asher. They proceed to talk for hours. Later that night, Harper and Asher engage in sexual relations.

Is Harper subject to professional discipline by the California State Bar?

Even more sex!

A. Yes, lawyers are strictly prohibited from engaging in sexual relations with a current client.

B. No, Harper's client is Hooli, not Asher.

C. It depends whether Asher, as the lead engineer of Hooli, is someone who "supervises, directs or regularly consults" with Harper concerning Hooli's legal matters.

Answer: Probably C

(Depends)

Comment 2: When the client is an organization, this rule applies to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization **who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.**

CRPC 1.8.10 Compared to Prior Rule 3-120

Prior CA Rule 3-120 prohibited sexual relations in circumstances where the relations are:

(i) required as a condition of a representation; (ii) obtained by coercion, intimidation or undue influence; or (iii) cause the lawyer to perform legal services incompetently.

By contrast, CRPC 1.8.10 prohibits **all** sexual relations between a lawyer and his/her client **unless** the consensual sexual relationship existed at the time that the lawyer-client relationship commenced.

Know your Company's Fraternization Guidelines

Many companies have policies designed specifically to combat fraternization.

Depending on your company's policy, fraternization can include romantic relations between managers and subordinates and/or relationships between co-workers.

Confidentiality



Confidentiality

You are reading an article in *The Daily Journal* about developments in California class action law. A lawyer who represented Zorcom, Inc. in a very-public class action lawsuit in California state court several years ago is quoted in the article, describing a (public) class certification ruling by the trial judge in that case that is contrary to recent trends. Do the ethical rules permit the lawyer to be quoted about the case without Zorcom, Inc.'s permission?

Confidentiality

A. Yes

B. Yes, as long as the quote is not to Zorcom's disadvantage.

C. Yes, if Zorcom is a former client.

D. No

Answer: D

(No)

Disclosure:

- Cal. B&P Code § 6068(e)(1): lawyer's duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client"
- CRPC 1.6(a): "A lawyer shall not reveal information protected from disclosure by ... section 6068 ... unless the client gives informed consent"
- Model Rule 1.6: "lawyer shall not reveal information *relating to the representation*"

Use:

- Current client --CRPC 1.8.2: "A lawyer shall not use a client's information protected by ... section 6068 ... to the disadvantage of the client unless the client gives informed consent"
- Former client--CRPC 1.9/MR 1.9: A lawyer cannot (1) use information to the disadvantage of a former client unless generally known or (2) **reveal it**

Confidentiality

You represent John who owns multiple plots of land along the waterfront in downtown San Diego where he wishes to develop a series of condos. During the course of your representation, John mentions that he is willing to do anything to make sure his project succeeds, including “taking care” of any local politicians that get in his way. He states that he has experience in “getting rid” of those who try to thwart his ambitions. You come to suspect that John is actually a serial killer who disposes of his victims bodies at the building sites. You fear that he may kill again.

Do the ethical rules permit you to disclose John’s comments to the police?

Confidentiality

A. Yes

B. No

C. It depends if the attorney “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

Answer: C

CRPC 1.6

(b) A lawyer may, but is not required to, reveal information protected by Bus & Prof Code § 6068(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).

(c) Before revealing information protected by Bus & Prof Code § 6068 (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 Bus & Prof § 6068 (e)(1) as provided in paragraph (b).

Conflicts of Interest: Current Clients



Advance consents (Prospective waivers)

Big Law has the foremost trademark-dispute practice in the world, and Hooli wants to hire Big Law for a highly-significant and sensitive trademark dispute with DroidCo. After much discussion, Hooli agrees to sign a broad prospective waiver as a condition of hiring Big Law.

Big Law appears for Hooli in the trademark dispute. DroidCo sends Big Law and Hooli a letter, saying the Big Law has a conflict because Big Law has done a small volume of DroidCo's employment work, on and off, for a decade. Although there were no active matters when Hooli hired Big Law, and Big Law's engagement letter with DroidCo also contains a very broad prospective waiver, DroidCo has hired Big Law for some small matters since Hooli hired Big Law.

Advance consents

Hooli fires Big Law, who sues Hooli for its unpaid fees.

(Assume that if the engagement letter is invalid, Hooli does not owe fees.) Who wins?

A. Hooli, because broad prospective consents, including this one, are generally unenforceable.

B. Hooli, because this particular prospective consent is unenforceable.

C. Big Law, because Hooli signed a valid prospective consent.

Answer: B

(This one is unenforceable in CA)

CRPC/MR 1.7: Conflicts involving current clients can be cured by **“informed consent”** (written) subject to certain limitations

“Informed consent” means consent after communication of adequate information and explanation about the risks and alternatives

Advance consents

MR cmt. 22: Advance consents are effective if based on informed consent—client must understand and accept the risk

- Disfavors “general and open-ended” consents, which are usually “ineffective” because client won’t understand risks
- If client is sophisticated or separately represented, more likely effective, especially if limited to unrelated matters

CRPC 1.7, cmt. 9: Drops the “general and open-ended” language, but includes other portions of cmt. 22

Conflicts of Interest: Current Client (Overview)

CRPC 1.7

(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.

Conflicts of Interest: Current Client (Overview) - Continued

(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.



**Can't we all just get
along...**

Anti-Discrimination

Taylor is a litigation partner at ABC, LLP. One day, he conducts an initial client consultation with Alice, who wants to file suit against her former business partner in a vegan dog biscuit business.

Alice identifies as female but was assigned a male gender at birth. Based on Alice's representations Taylor's review of the relevant corporate documents, Alice appears to have a very weak case on the merits. He tells Alice this.

Anti-Discrimination

During their consultation, Taylor comes to suspect that Alice may be transgender and promptly ends the meeting without further explanation.

Unbeknownst to Alice, Taylor is a member of “Citizens Against Transgenders” – a local group that meets to discuss their opposition to transgender individuals serving in the military.

Is Taylor subject to disciplinary action by the CA state bar?

Anti-Discrimination

A. It depends on whether Taylor ended the consultation and chose not to take on Alice's case because he suspected that she was transgender.

B. Yes

C. No, because gender identity is not a protected class.

D. No, because Alice appeared to have a weak case on the merits and Taylor discharged his ethical duties by informing her of this.

Answer: Probably A

(Depends on Reason)

Rule 8.4.1(a)

- (a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:
 - (1) unlawfully harass or **unlawfully discriminate** against persons on the basis of any **protected characteristic**; or
 - (2) unlawfully retaliate against persons.

CRPC 8.4.1 (continued)

“Protected Characteristics” means:

[R]ace, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived

CRPC 8.4.1 (continued)

Comment 3:

This rule does **not** apply to conduct protected by the First Amendment to the U.S. Constitution or by Article 1, Section 2 of the California Constitution

Did Taylor's conduct trigger this exception?

Anti-Discrimination

Hanna is a first-year associate at XYZ LLP. She has no supervisory authority. One day, she observes Rick, a junior partner, yelling at Varun, an unpaid intern. Rick says, “Dammit Varun, don’t they know how to make normal coffee in India. I ought to fire you for making this crap!” This is not the first time that Hanna has observed Rick making inappropriate comments about Varun’s Indian heritage.

Afraid that she would get fired if she reports Rick’s actions to the firm’s ethics partner, Hanna resumes working and doesn’t say anything.

Is Hanna subject to disciplinary action by the CA state bar?

Anti-Discrimination

A. No, Hanna had no affirmative duty to report Rick's conduct to the firm's ethics partner.

B. No, because Hanna had no supervisory authority at the firm.

C. Both A and B

D. No, because Varun is an unpaid intern.

E. Yes, because Hanna "knowingly permitted" Rick to harass Varun.

Answer: E

(Subject to Discipline)

CRPC 8.4.1

(b) In relation to a law firm's operations, a lawyer shall not:

on the basis of any protected characteristic,

- (i) unlawfully discriminate or knowingly permit unlawful discrimination;
- (ii) unlawfully harass or knowingly permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract;

CRPC 8.4.1(c)(2)

“Knowingly permit” means to fail to advocate corrective action where the lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b).

Anti-Discrimination

Anna is an attorney at ABC LLP. One day she is retained by Matt to negotiate the purchase of a strip mall which Matt wishes to redevelop into fancy new condos. During the course of representing Matt, Anna learns of allegations that Matt is a senior member of the KKK.

Does Anna have a duty to discontinue representing Matt?

A. Yes

B. No

Answer: B

(No)

CRPC 8.4.1(f): “This rule shall not preclude a lawyer from ... representing a client *alleged* to have engaged in unlawful discrimination” or “declining or withdrawing from a representation”

How Does the New California Rule Differ from the Old Rule?

CRPC 8.4.1 eliminates the requirement that a court of competent jurisdiction must have already found that the alleged unlawful conduct occurred.

Prior Rule 2-400(c)

“No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule ***unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred.***”

...

In order for discipline to be imposed under this rule the finding of unlawfulness must be upheld and final after appeal, however, the time for filing an appeal must have expired, or the appeal must have been dismissed.”

New Rule v. Old Rule

New requirement to report notices of disciplinary charge under this rule to State and Federal agencies tasked with enforcing laws and regulations prohibiting unlawful discrimination.

(e) Upon being issued a notice of a disciplinary charge under this rule, a lawyer shall:

- (1) if the notice is of a disciplinary charge under paragraph (a) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section; or
- (2) if the notice is of a disciplinary charge under paragraph (b) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.” [RPC 8.4.1(e)]

New Rule v. Old Rule

Additional changes include an expansion of protected categories under the rule.

Includes catchall provision for any ***“other category of discrimination prohibited by applicable law, whether the category is actual or perceived”***

CRPC 8.4.1 - Summary

- Expands scope of prohibition on discrimination, harassment, and retaliation that was in prior Rule 2-400
- Removes current pre-adjudication requirement
- ***Highly criticized!*** Analogous to MR 8.4(g) ***but broader***
- Vermont is the only state to have adopted MR 8.4(g)
 - ❑ Officially rejected in SC, TN, AZ, ID

Resources

The New California Rules (w/cross-references)

<http://www.calbar.ca.gov/Portals/0/documents/rules/Rules-of-Professional-Conduct.pdf>

The Detailed History of Each New California Rule

<http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Proposed-Rules-of-Professional-Conduct>

Rules and Concepts Considered/Not Adopted

<http://www.calbar.ca.gov/Portals/0/documents/ethics/CRRPC/RRC%20Final%20Docs/Rules%20-%20Concepts%20Considered%20but%20Rejected%202010%20-%20%2807-21-11%29.pdf>

Model Rules with Jurisdiction-by-Jurisdiction Comparison

http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/

State-by-State MJP Guidance (MR 5.5/8.5; RIHC; temporary practice)

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.pdf