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ETHICS YEAR IN REVIEW

Caitlin Whitwell*

I. INTRODUCTION

This year’s Review outlines the major changes in the California Rules of Professional Conduct and summarizes the California State Bar (“State Bar”) formal opinions issued in 2004.

The lawyer’s duty of confidentiality emerged as a dominant theme for ethics changes in 2004.¹ A California attorney owes a legal duty of absolute confidentiality² to his clients, the breach of which subjects him to liability and discipline.³ Historically, California has protected client confidences more zealously than most other jurisdictions⁴ where an attorney’s

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² See CAL. BUS. & PROF. CODE § 6068(e) (West 2004). An attorney has a duty “[t]o maintain inviolate the confidence, and at every peril to him or herself to preserve the secrets, of his or her client.” Id. § 6068(e)(1).

³ Id. § 6068(e).

⁴ To determine whether an attorney may reveal client confidences to prevent death or substantial bodily harm, the vast majority of states apply American Bar Association Model Rule 1.6(b) in full or in part. THOMAS D. MORGAN & RONALD D. ROTUNDA, MODEL RULES OF PROFESSIONAL CONDUCT AND OTHER SELECTED STANDARDS INCLUDING CALIFORNIA AND NEW YORK RULES ON PROFESSIONAL RESPONSIBILITY 146-49 (2005). ABA Model Rule 1.6 provides, in pertinent part:

(a) A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;
duty of confidentiality is "merely aspirational." For example, under the federal Sarbanes-Oxley Act, officially titled the Public Company Accounting Reform and Investor Protection Act of 2002, lawyers are permitted to reveal confidential information to prevent financial harm; California's rules still do not recognize such an exception. Nevertheless, in 2004 the California State Bar approved the first major exception to California’s broad confidentiality protection: a California lawyer may now, without violating a statutory duty, reveal confidential information to prevent death or bodily harm.

Additionally, the State Bar Standing Committee on Professional Responsibility and Conduct issued three formal opinions in 2004. The first opinion finds that state rules on confidentiality apply equally to contract lawyers making court appearances. A second formal opinion timely addresses solicitation in mass disaster internet chat rooms. The third formal opinion discusses misleading law firm trade names.

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; [or]

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.


5. ETHICS ALERT, supra note 1, at 3.

6. See infra Part III.B.

7. See infra Part II.A.


II. CALIFORNIA NOW PERMITS ATTORNEY DISCLOSURE OF CONFIDENTIAL INFORMATION TO PREVENT DEATH OR SERIOUS BODILY INJURY:

CALIFORNIA RULES OF PROFESSIONAL CONDUCT, RULE 3-100

A. Background

Until July 1, 2004, California was the only jurisdiction in the United States to impose an absolute duty of confidentiality. California Business and Professions Code section 6068(e) required attorneys "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The statute provided no exception. Accordingly, a California attorney could not violate this duty even if a client indicated she intended to commit murder.

Incongruously, since 1993, an exception to the attorney-client privilege has permitted an attorney to produce privileged communications if the client indicated he was likely to cause death or substantial bodily harm to another. The policy underlying the duty of confidentiality and the attorney-client privilege is the same: to ensure that clients are free to confide in their attorneys and thereby obtain effective legal advice. But for years, the California Rules of Professional Conduct, enacted by the California Supreme Court, recognized no exception to the attorney's duty of confidentiality to use a firm trade name or other professional designation which may be mistaken for a governmental entity or to use a current or former governmental title in promoting the attorney's law practice? (hereinafter "Formal Op. 2004-167), available at http://calbar.ca.gov/calbar/pdfs/ethics/2004-167_02-0004.pdf (last visited Aug. 6, 2005). See infra Part IV.C.

11. RICHARD ZITRIN, ET AL., LEGAL ETHICS: RULES, STATUTES AND COMPARISONS 577 (2005). The attorney's duty of confidentiality is a rule of ethics which requires the attorney not to disclose his client's confidential information. The attorney-client privilege, see Parts II.A-B infra, is a rule of evidence which requires attorneys to withhold from production their clients' confidential communications.

12. CAL. BUS. & PROF. CODE § 6068(e) (West 2003).
15. ZITRIN, supra note 11, at 577 (citing CAL. EVID. CODE § 965.5).
16. ETHICS ALERT, supra note 1, at 3.
even to prevent death or bodily harm.

B. Legislative Action

In 2003, the California legislature passed Assembly Bill 1101, carving out an exception to the absolute duty of confidentiality and allowing, but not requiring, an attorney who reasonably believes disclosure of confidential information could prevent his client from committing a crime likely to result in substantial bodily injury or death. The exception to the duty of absolute confidentiality is now codified at California Business and Professions Code section 6068(e)(2) (effective July 1, 2004).

The Legislature also amended the California Evidence Code so that the attorney-client privilege would reflect the exception to California's absolute duty of confidentiality. California Evidence Code section 956.5, which previously provided that there was no attorney-client privilege if the lawyer believed disclosure was necessary to prevent the client's commission of a crime, remained inconsistent with the absolute duty of confidentiality. Effective January 1, 2005, California Evidence Code section 956.5 now reflects legisla-
tive intent to prevent harm regardless of who threatens it, whereas the 1993 version emphasized the client's threat of harm. To finalize this change, the legislature invited the President of the State Bar to appoint a task force to work with the California Supreme Court to help the Court conform the Rules of Professional Conduct to the new Business and Professions Code section 6068(e)(2) exception.

C. State Bar Adopts Rule 3-100

1. New Rule Contains Narrow Exception

On an expedited schedule, the State Bar task force drafted a proposed rule which the California Supreme Court adopted after only minor modifications. California Rule of Professional Conduct Rule 3-100, effective July 1, 2004, acknowledges the general rule that an attorney, absent his client's informed consent, may not violate the absolute duty of

23. CAL. EVID. CODE § 956.5 (West 2003); see also CAL. RULES OF PROF'L CONDUCT R. 3-100.
24. ZITRIN, supra note 11, at 578.
26. Rule 3-100 provides:
(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.
(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member 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.
(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member 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 member's ability or decision to reveal information as provided in paragraph (B).
(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.
(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.
CAL. RULES OF PROF'L CONDUCT R. 3-100 (2004).
27. Id.
California Business and Professions Code section 6068(e)(1). But Rule 3-100(B) provides a narrow exception to the absolute duty. The language of the Rule 3-100(B) exception reflects California Business and Professions Code section 6068(e)(2) in that it permits but does not require disclosure based on an attorney's subjective belief that disclosure could prevent death or serious bodily harm. Disclosure under Rule 3-100 should be a last resort. If reasonable under the circumstances, the attorney must first try to dissuade the client from the harmful course of conduct. Then the attorney must advise the client of the attorney's ability to disclose in a manner which is least likely to have a chilling effect on the attorney-client relationship. If after these efforts the attorney believes the client still intends to commit the harm, then the attorney may disclose no more of the client's confidences than necessary to prevent the crime.

2. California Rule Has No Time Requirement

The American Bar Association Model Rules, which are not binding on California practitioners, reflect the longstanding majority rule that an attorney should be permitted to disclose confidential information to prevent death or substantial bodily harm to another. In many respects, the new California Rule 3-100 is analogous to Model Rule 1.6(b)(1), in that each uses the standard of a lawyer's reasonable belief to determine the necessity of disclosing confidential information, and each also permits, but does not require, disclosure to prevent death or substantial bodily harm. Model Rule 1.6(b)(1)

28. Id.
29. Judicial Council of California, supra note 19; see also CAL. RULES OF PROF'L CONDUCT R. 3-100 (2004).
30. Id.
32. CAL. RULES OF PROF'L CONDUCT R. 3-100(C)(1).
33. CAL. RULES OF PROF'L CONDUCT R. 3-100(C)(2), Comments ¶ 10.
34. CAL. RULES OF PROF'L CONDUCT R. 3-100(D).
35. See note 4 infra.
36. Model Rule 1.6(b)(1) provides: "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm..." MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2003). Subsection (1) of this rule has not been amended since 1983, though subsections (b)(2) and (b)(3) of the rule were amended in 2002 and 2003. Id. at 1.6(b); see also ZITRIN, supra note 11, at 578.
37. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1).
permits disclosure only where the harm is "imminent" or a "present and substantial threat" that the harm will occur at a later date.\textsuperscript{38} However, California Rule 3-100 has no such time requirement, though an attorney may consider imminence as a factor in deciding whether to disclose the information.\textsuperscript{39} The comments to Model Rule 1.6 note that a client's discharge of toxic waste into a town's water supply constitutes a "present and substantial threat" and that a lawyer may disclose otherwise confidential information to prevent the harm that could occur if residents began drinking the water.\textsuperscript{40} Though not binding on California lawyers, these comments may be considered in light of California Proposition 64,\textsuperscript{41} which amended California's unfair competition laws.\textsuperscript{42} The unfair competition law amendments eliminate standing to sue to enjoin future harm caused by unfair, unlawful, or fraudulent business practices, requiring instead that the harm have already occurred.\textsuperscript{43} In light of Proposition 64, a lawyer may advise his corporate client, about to dump toxins likely to cause substantial bodily harm, that the client's unfair competition liability for such conduct has been diminished. But now, under Rule 3-100, a lawyer with such knowledge may also disclose this information to the relevant authorities.\textsuperscript{44} Proposition 64 has reduced or even eliminated unfair competition liability as a deterrent to corporate misconduct, but now opponents of Proposition 64 may look to Rule 3-100's permissive disclosure of confidential information to offset the intended effect of Proposition 64.

In an order on Rule 3-100\textsuperscript{45} the California Supreme Court

\textsuperscript{38} Id. at Comment 6.
\textsuperscript{39} \textsc{Cal. Rules of Prof'l Conduct} R. 3-100, Discussion 6. "Imminence of the harm is not a prerequisite to disclosure, and a member may disclose the information without waiting until immediately before the harm is likely to occur."\textsuperscript{Id.}
\textsuperscript{40} \textsc{Model Rules of Prof'l Conduct} R. 1.6 Comments, ¶¶ (6)-(8); \textsc{Zitrin}, \textit{supra} note 11.
\textsuperscript{41} Initiative Measure Proposition. 64, § 3, approved Nov. 2, 2004, effective Nov. 3, 2004.
\textsuperscript{42} \textsc{Cal. Bus. \\ & Prof. Code} § 17200 et seq. (West 2005) (providing a cause of action against defendants who engage in unfair, unlawful and fraudulent business practices).
\textsuperscript{43} \textsc{Cal. Bus. \\ & Prof. Code} § 17204 (West 2005).
\textsuperscript{44} \textsc{Cal. Rules of Prof'l Conduct} R. 3-100.
\textsuperscript{45} In the Matter of the Request of the State Bar of California for Approval of Rule 3-100, Rules of Prof'l Conduct, No. 125414 (2004) at 3 (hereinafter "Order").
weighed "the overriding value of life" against longstanding "public policies of paramount importance" in reconsidering California's strict confidentiality rule.\(^4\) Preserving confidentiality in California remains "the hallmark of the client-lawyer relationship" that encourages clients to seek legal advice where necessary and to communicate "fully and frankly" with the lawyer.\(^4\) The Court reaffirmed that a lawyer may not reveal a client's past completed crimes, but determined in light of the overriding value of life that a lawyer may disclose confidential information to prevent death or bodily harm.\(^4\) The Court stopped short of imposing a mandatory duty to reveal confidential information, and noted that a lawyer may consider the following factors and subsequently decide not to reveal the confidential information.\(^4\)

3. **Factors Attorney Should Consider before Disclosure**

To determine whether to reveal confidential information, the Court enumerated the following factors that an attorney should consider:

1. the amount of time that the member has to make a decision about disclosure;
2. whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;
3. whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;
4. the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;
5. the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and
6. the nature and extent of information that must be dis-

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46. *Id.*; see also *Cal. Rules of Prof'L Conduct R. 3-100, Comments, ¶¶ (1)-(3) (citing *In re Jordan*, 12 Cal. 3d 575 (1974)).
47. *Cal. Rules of Prof'L Conduct R. 3-100, Comments ¶ (1).
49. *Id.*
closed to prevent the criminal act or threatened harm.\textsuperscript{50}

If the lawyer decides that disclosure is appropriate, he or she must first make a good faith effort to persuade the client (1) not to commit the crime, or (2) to pursue a course of conduct that will prevent the threatened death or bodily harm, or (3) both.\textsuperscript{51} If the client takes corrective action (whether or not the client follows the lawyer's advice), the lawyer must keep the information confidential or be subject to discipline under Rule 3-100.\textsuperscript{52}

If the criminal actor is not a client, or if the act is deliberate or malicious, the lawyer may decide that his or her own personal safety precludes personal contact with the actor or that any efforts to persuade the client to take corrective action would be futile.\textsuperscript{53} Other than under these circumstances, the lawyer should first advise his or her client of the lawyer's intended disclosure, and urge the client to warn the threatened third party.\textsuperscript{54} Even when the lawyer has concluded, in light of these factors, that Rule 3-100 does not permit disclosure, the lawyer may counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of the information.\textsuperscript{55}

An attorney should also consider what means of disclosure are reasonable under the circumstances known to the lawyer.\textsuperscript{56} Relevant factors include the time constraints known to the attorney, whether the victim is aware of the threat, the lawyer's prior dealings with the client, and the potential adverse effect on the client.\textsuperscript{57}

In any event, the disclosure of confidential information must be no more extensive than the lawyer reasonably believes is necessary to prevent the criminal act or harm.\textsuperscript{58} The lawyer must reveal only as much information as is necessary, and must limit disclosure to those persons who can act to prevent the harm.\textsuperscript{59} This allows disclosure to the potential

\textsuperscript{50} Id. at 4.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Order, supra note 45, at 4.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 5.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 4-5.
\textsuperscript{59} Id. at 5.
victim or to appropriate law-enforcement authorities only.60

A lawyer should also consider whether he or she owes a duty to a third party.61 Balancing the following factors determines whether a lawyer owes a duty to a third party: (1) the extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm to that third party, (3) the degree of certainty of the harm, (4) the closeness of connection between the negligence and the harm, (5) the policy of preventing future harm, and (6) whether imposing a duty would constitute an undue burden on the legal profession.62

4. Keeping the Client Informed

Under Rule 3-500, a lawyer has a duty to keep his client reasonably informed about the representation.63 The lawyer should recognize that disclosure may increase the risk of harm to persons other than the originally-intended victim of the crime, such as the client, the client's family, the lawyer, and the lawyer's family.64 Because potential harm to the lawyer and his family are compelling reasons not to inform the client of the disclosure, a lawyer need only inform the client

60. Order, supra note 45, at 5.
61. In 2004 alone, California courts published several judicial opinions on this limited topic, suggesting that third-party duty is a rapidly growing area of law. The California Supreme Court, as a matter of first impression, held that an attorney owed a duty to the successor fiduciary of an estate in probate, where the client had been the predecessor fiduciary. Borisoff v. Taylor & Faust, 93 P.3d 337, 339 (Cal. 2004). The Sixth District Court of Appeals similarly held that an attorney was subject to malpractice liability for breach of duty owed to third-party prospective beneficiary, who was the care custodian of the client-testator and sole known potential beneficiary. Osornio v. Weingarten, 21 Cal. Rptr. 3d 246, 262 (Cal. Ct. App. 2004). Thus far, the courts have stopped short of imposing a duty to third parties whose adverse interests would place the attorney in an "untenable position of divided loyalty." Boranian v. Clark, 20 Cal. Rptr. 3d 405 (Cal. Ct. App. 2004) (no duty of care owed to client-testator's children as potential beneficiaries).
62. See Biakanja v. Irving, 320 P.2d 16 (Cal. 1958) (establishing the first five factors); see also Lucas v. Hamm, 364 P.2d 685 (Cal. 1962) (adding the sixth factor).
63. Order, supra note 45, at 5. California Rule 3-500 (2003) provides in full: "A member shall keep a client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." CAL. RULES OF PROF'L CONDUCT R. 3-500 (2003).
64. Order, supra note 45, at 5; CAL. RULES OF PROF'L CONDUCT R. 3-500.
pursuant to Rule 3-500 if informing the client of the disclosure is reasonable under the circumstances.\textsuperscript{65} Factors to be considered in determining an appropriate time (if any) to inform the client are:

1. whether the client is an experienced user of legal services;
2. the frequency of the member's contact with the client;
3. the nature and length of the professional relationship with the client;
4. whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty;
5. the likelihood that the client's matter will involve information within paragraph (B) \[of Rule 3-100];
6. the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and
7. the member's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.\textsuperscript{66}

5. \textit{Consequences of Disclosure}

After a lawyer has revealed confidential information, "in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation impossible."\textsuperscript{67} A lawyer must then withdraw under Rule 3-700(B)\textsuperscript{68} unless the client gives informed consent to continued representation.\textsuperscript{69} Finally, where appropriate, the Court noted that the lawyer should also consider this new rule in light of existing Rule 5-210\textsuperscript{70} (lawyer called as wit-

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\textsuperscript{65} Order, \textit{supra} note 45, at 5; CAL. RULES OF PROF'L CONDUCT R. 3-500.
\textsuperscript{66} Order, \textit{supra} note 45, at 5; CAL. RULES OF PROF'L CONDUCT R. 3-100.
\textsuperscript{67} Order, \textit{supra} note 45, at 6.
\textsuperscript{68} California Rule 3-700(B) (2003), provides, "[a] member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from that employment, if . . . [t]he member knows or should know that continued employment will result in violation of these rules or of the State Bar Act." CAL. RULES OF PROF'L CONDUCT R. 3-700(B) (2003).
\textsuperscript{69} Order, \textit{supra} note 45, at 6.
\textsuperscript{70} California Rule 5-210, provides: "A member shall not act as an advocate
ness), and Rule 3-110\textsuperscript{71} (duties of loyalty and competency).\textsuperscript{72}

III. SECURITY AND EXCHANGE COMMISSION ATTORNEY CONDUCT RULES AND CALIFORNIA'S DUTY OF CONFIDENTIALITY

When Congress passed the Sarbanes-Oxley Act of 2002, it directed the Securities and Exchange Commission ("SEC") to set minimum standards for attorneys appearing and practicing before the SEC.\textsuperscript{73} The SEC standards, known as "Part 205" rules,\textsuperscript{74} permit, and in some cases require, disclosure of confidential information to prevent substantial financial injury.\textsuperscript{75} California has no such exception to the duty of confidentiality.\textsuperscript{76}

A. "Appearing Attorney" Broadly Defined

Representing a client in an SEC proceeding is only one of many ways an attorney may be subject to the Part 205 rules. According to section 205.2(a)(1),\textsuperscript{77} "appearing and practicing

\begin{itemize}
\item before a jury which will hear testimony from the member unless . . . (C) [t]he member has the informed, written consent of the client." CAL. RULES OF PROF'L CONDUCT R. 5-210 (2003).
\item California Rule 3-110, provides: "(A) A member shall not act intentionally, recklessly, or repeatedly fail to perform legal services with competence." CAL. RULES OF PROF'L CONDUCT R. 3-110 (2003).
\item Order, \textit{supra} note 45, at 6.
\item ETHICS ALERT, \textit{supra} note 1.
\item For purposes of Part III only, all rule references are to 17 C.F.R. § 205 et seq (2005).
\item 17 C.F.R. § 205.3.
\item CAL. BUS. & PROF. CODE § 6068(e); CAL. RULES OF PROF'L CONDUCT R. 3-100; \textit{see infra} Part II.
\item 17 C.F.R. § 205.2(a)(1) defines "appearing and practicing" as:
\begin{enumerate}
\item Transacting any business with the Commission, including communications in any form;
\item Representing an issuer [of stock] in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena;
\item Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document; or
\item Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be
\end{enumerate}
\end{itemize}
before the Commission” includes transacting business with the SEC, representing issuers of stock in administrative proceedings, and advice on securities law or SEC rules.\(^{78}\)

Under this broad definition, a lawyer may be an “appearing attorney” even without directly interacting with the SEC.\(^{79}\) For example, a lawyer is still subject to Part 205 rules even if he only (1) gives federal securities law advice on a document that the attorney knows will be submitted to the SEC, (2) advises a client as to whether information must be filed with the SEC, or (3) provides a summary of pending litigation for a 10-K or 10-Q report.\(^{80}\)

B. Duty to Report Material Violations “Up the Ladder”

Rule 205.3(b)(1)\(^{81}\) imposes a duty, with only limited exceptions, on an appearing attorney who becomes aware of “evidence of a material violation” of securities laws, or of a breach of fiduciary duty by the issuer or its agents, to disclose the information.\(^{82}\) The appearing attorney must report the evidence of violation to the issuer’s chief legal officer.\(^{83}\) Unless the appearing attorney reasonably believes the chief legal officer has responded appropriately to the report, the appearing attorney must continue reporting the evidence of violation up the corporate ladder. If the attorney is not satisfied that the corporation has resolved the violation or breach, the attorney must disclose the information to the SEC.\(^{84}\)

C. Permissive Disclosure to the SEC

An appearing attorney may reveal to the SEC confidential information related to the attorney’s representation without the client-issuer’s consent.\(^{85}\) Disclosure is permitted if the

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\(^{78}\) 17 C.F.R. § 205.2(a)(1).

\(^{79}\) ETHICS ALERT, supra note 1, at 1.

\(^{80}\) Id. Forms 10-K and 10-Q are financial disclosure forms required by the Securities and Exchange Commission to be filed annually or quarterly by companies issuing securities or having a threshold amount of gross assets.” http://www.sec.gov/answers/form10k.htm (last visited Sept. 10, 2005).

\(^{81}\) For purposes of section II.B only, all Rule references are to 17 C.F.R. § 205 et seq.

\(^{82}\) ETHICS ALERT, supra note 1, at 1.

\(^{83}\) Id.

\(^{84}\) Id. at 1-2 (citing Rule 205.3(b)).

\(^{85}\) 17 C.F.R. § 205.3(d)(2).
appearing attorney reasonably believes that disclosure is necessary to (1) prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or its investors, (2) prevent the issuer from committing any proscribed act that is likely to perpetrate a fraud on the SEC in an SEC proceeding, or (3) rectify the consequences of a material violation by the issuer that may cause substantial injury to the financial interest or property of the issuer or its investors and in which the attorney's services unwittingly were used.  

Even if authorized to disclose confidential information under Part 205, an appearing attorney practicing in California would nonetheless violate his fiduciary duty "at every peril to himself or herself to preserve the secrets, f his or her client" in doing so. If a California lawyer knows that an agent of the client-entity is violating a law or is likely to cause substantial injury, the lawyer may take action "in the best lawful interests of the organization." California's confidentiality law only permits the attorney to report a known violation "up the corporate ladder" to the board of directors, whereas Part 205 requires "up the ladder" reporting. 

But while Part 205 permits outside disclosure of confidential information under certain circumstances, California law proscribes it under all circumstances. In other words, California's "ladder" ends at the top corporate executive, and never extends to the SEC. In California, if an agent of the client-entity persists in unlawful conduct that is likely to result in substantial financial injury despite the lawyer's internal reporting, that lawyer has the right (and in some cases the duty) to resign, rather than disclose the information to the SEC.

86. Id.  
87. CAL. BUS. & PROF. CODE § 6068(e).  
88. CAL. RULES OF PROF'L CONDUCT R. 3-600(B) (2004). See also Goldstein v. Lees, 120 Cal. Rptr. 253 (Cal. Ct. App. 1975) (a California attorney owes his duties, including confidentiality, to the organization rather than to its constituents).  
89. ETHICS ALERT, supra note 1, at 3-4.  
90. Id. at 3.  
91. Id.  
92. CAL. RULES OF PROF'L CONDUCT R. 3-700.  
93. ETHICS ALERT, supra note 1, at 3 (citing CAL. RULES OF PROF'L CONDUCT R. 3-600(C), R. 3-700(B), R. 3-700(C) (2004)).
D. Purported Preemption of State Law Is Untested

Rule 205.1 provides that SEC standards preempt any applicable state law, and that SEC rules shall govern. But California’s Corporations Committee of the Business Law Section and the California Committee on Professional Responsibility acknowledge that actual preemption of state law is hotly debated, and that some attorneys have challenged the preemption claim by arguing that Congress did not intend to grant the SEC authority to preempt state ethical rules and standards of liability. Surprisingly, the Committees found no case addressing the issue. They advise that “California attorneys cannot presume there is a safe harbor if they disclose client confidences to the SEC.”

IV. FORMAL OPINIONS OF THE CALIFORNIA STATE BAR STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

A. Formal Opinion 2004-165: Using Contract Lawyers to Make Court Appearances

1. Hypothetical Facts

Lawyer represents numerous clients in litigation. Court Appearance Service (“CAS”) is a service, operated by lawyers, which provides independent attorneys to law firms and solo practitioners on a contractual basis. Lawyer decides to pay CAS an hourly fee for a CAS lawyer to appear for Lawyer’s clients at law and motion hearings, status conferences, depositions, and other matters. None of CAS’s attorneys are members of Lawyer’s firm.

CAS truthfully advertises its services through legal newspapers and at local bar association meetings. CAS’s literature disclaims the existence of any attorney-client rela-

95. ETHICS ALERT, supra note 1, at 2.
97. Id. at 4.
tionship between CAS and the lawyers who hire CAS attorneys, and also between CAS and the clients on whose behalf CAS lawyers appear.

2. Discussion

(a) Duty of Competent Supervision

Under Rule 3-110, Lawyer has a duty to perform legal services competently.99 Lawyer's delegation of tasks does not abrogate him of his duty of competent representation.100 Rather, the duty of competent representation includes the corresponding duty to supervise the work of Lawyer's employees and agents.101

What constitutes competent supervision is a factual inquiry.102 Even when CAS is retained on short notice, Lawyer should adequately prepare the CAS lawyer to represent the client on all matters before the court.103 The Committee recognizes that "there may be some exigent circumstances in which Lawyer will have no choice other than to have another lawyer appear in his place. In such circumstances, the Committee states simply that Lawyer should directly or through the CAS lawyer attempt to continue the matter or limit the scope of the appearance to matters that the CAS lawyer is prepared to handle competently."104 This attempt to continue would satisfy Lawyer's minimum duty of competence.105

(b) Lawyer's Duty to Inform Clients

Under Rule 3-500 and California Business and Professions Code section 6068(m), Lawyer must keep his client reasonably informed about significant developments relating to the representation.106 Whether use of an outside lawyer is a significant development depends on the circumstances of the

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100. Id. at 2 (citing discussion to CAL. RULES OF PROF'L CONDUCT R. 3-110(A)).
101. Id.
102. Id.
103. Id.
104. Id.
106. Id.
case. Relevant factors include, but are not limited to, the following: (1) whether responsibility for overseeing the client's case is being changed; (2) whether the outside attorney will be performing a significant portion or aspect of the representation; (3) whether staffing of the matter changed from what was specifically indicated or agreed to; and, (4) whether the client reasonably expects Lawyer to be present at the appearance. Any one of these factors may constitute a significant development in the case and require disclosure.

Whenever possible, the disclosure should be timed to give the client the opportunity to consider whether she is comfortable with the arrangement. If Lawyer anticipates using CAS at the outset of the engagement, Lawyer should address CAS's representation and fees and costs in the written fee agreement at the outset.

Under the hypothetical facts presented, the Committee concluded that no division of fees occurs, and therefore that Rule 2-200 is not invoked.

(c) CAS Lawyer's Duty to Maintain Confidentiality

Lawyer's duty of competent representation may require Lawyer to reveal, and identify as confidential, confidential information. The CAS lawyer who receives this information has a duty to maintain it in confidence, despite CAS's disclaimer of attorney-client relationship. Rather, the Committee found, under these hypothetical facts, an attorney-

107. Id. at 3.
108. Id.
109. Id.
110. Id.
112. Id. at 4. The Committee uses a three-part test for determining whether there is a division of fees under Rule 2-200:

(1) [t]he amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the outside lawyer is paid by the client,
(2) the amount paid by Lawyer to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client, and
(3) the outside lawyer has no expectation of receiving a percentage fee.

113. Id. at 5.
114. Id.
client relationship exists between Lawyer's client and the CAS representative.\textsuperscript{115} Though it noted that the existence of an attorney-client relationship is a question of law, the Committee opined that it existed under these facts because the client would expect it to exist.\textsuperscript{116}

In brief, hiring a contract attorney may be a cost-effective alternative to personal appearances for many practitioners, so long as the hiring attorney and the appearing attorney comply with ethical duties of competence, confidentiality, conflicts of interest, and disclosure to the client of significant developments in the representation.\textsuperscript{117}

B. Online Chatting with Mass Disaster Victims: Formal Opinion 2004-166

1. Hypothetical Facts\textsuperscript{118}

"Attorney," a personal injury lawyer, searches the Internet and discovers a chat room for victims and families of a recent mass disaster. The purpose of the chat room for its participants is to provide emotional support to each other and to victims of the disaster. After monitoring the chat room conversation for a while, Attorney introduces herself as a lawyer and offers to answer any questions. Attorney hopes the chat room participants will hire her to perform legal services.

2. Discussion

The Committee first determined that Attorney's participation in the chat room is a "communication" for purposes of Rule 1-400(A).\textsuperscript{119} By identifying herself as an attorney and answering questions, she communicates her availability for professional employment.\textsuperscript{120}

The Committee then determined that Attorney's communication is not a "solicitation" within the meaning of the

\begin{itemize}
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id. (citing In re Responsible Citizens v. Sup. Ct., 20 Cal. Rptr. 2d 756, 766 (Cal. Ct. App. 1993) (client's expectation one of the most important facts in finding attorney-client relationship), Streit v. Covington & Crowe, 98 Cal. Rptr. 2d 193 (Cal. Ct. App. 2000), and In re Brindle, 154 Cal. Rptr. 563, 572-73 (Cal. Ct. App. 1979)).
\item \textsuperscript{117} Formal Op. 2004-165 at 9.
\item \textsuperscript{118} Formal Op. 2004-166.
\item \textsuperscript{119} Id. at 2, n.2.
\item \textsuperscript{120} Id. at 2.
\end{itemize}
Rule 1-400(B)(2)(a). That Rule proscribes only those communications that are delivered "in person or by the telephone" as being improper solicitation. Acknowledging that Internet chatting occurs in "real time" and the communication is delivered over telephone lines, the Committee strictly construed the language of Rule 1-400 and determined that the communication was permitted because it was not delivered by telephone. Noting that other jurisdictions have prohibited solicitation via real-time chat, the California Committee nonetheless adhered to its narrow construction of the language in the Rule.

However, the Committee still concluded that Attorney's conduct violates Rule 1-400(D). Rule 1-400(D) proscribes attorney communication or solicitation "in a manner which involves intrusion, coercion, [or] duress." Because disaster victims entered the chat rooms to seek emotional support, Attorney's conduct under these facts is intrusive, and therefore presumptively violates Rule 1-400(D).

3. Conclusion of Formal Opinion 2004-166

Attorney's conduct in the real-time chat room violates Rule 1-400(D), though it does not violate Rule 1-400(B). The Committee's opinion is narrowly drawn: noting that a chat room is a public setting in which participants have no expectation of privacy, the Committee distinguished chat rooms from electronic bulletin boards, listservs, and instant messaging. The Committee did not "mean to suggest that all visits to all chat rooms by attorneys motivated to generate legal business are improper... for example, [in] a chat room dedicated to the 'legal rights and remedies of mass disaster victims'... the same conduct exhibited by Attorney here

121. Id. at 4.
122. Id. at 2.
123. Id. In support of its reasoning, the Committee referenced Formal Op. 2001-155, which determined that e-mail was more like traditional writing than like telephone communication because "the status nature of an e-mail message allows a potential client to reflect, re-read, and analyze." Id. at 3.
125. Id. at 4.
126. Id. See also CAL. RULES OF PROF'L CONDUCT R. 1-400(D)(5).
128. Id. at 3, 5.
129. Id. at nn.1, 2.
would not involve intrusion." Of course, as in all solicitation, the lawyer's communication may not be false, misleading, or deceptive.


1. Hypothetical Facts

Formal Opinion 2004-167 considers trade names in use at the following three hypothetical law firms: "Worker's Compensation Relief Center," "Smith, Brown & Williams," and "Senator Richard Jones and Associates."

Rule 1-400(D), which the Committee applies in all three scenarios, provides that Attorneys may use trade names for firms subject to three restrictions that are set forth in the Rule. A trade name presumptively violates Rule 1-400(D) if: (1) the name implies that the firm is publicly supported, (2) the name is deceptive with respect to the identity of the firm members, or (3) the name is misleading as to the types of services offered.

(a) "Workers' Compensation Relief Center"

Willard White, an attorney, intends to open a private law firm called "Workers' Compensation Relief Center." The firm will represent applicants filing for workers' compensation benefits.

Under the first test, the name "Workers' Compensation Relief Center" is improper because it implies that the firm is a governmental office connected with the Division of Workers' Compensation or the Workers' Compensation Appeal Board. Under the third test, the name is also misleading as to the type of services being offered, because a prospective client could reasonably believe the office grants relief by awarding benefits, instead of offering legal representation to those seeking such benefits. The Committee noted that White

130. Id. at n.11.
131. Id.
133. Id. at 2.
134. Id.
135. Id.
136. Id.
could likely rebut the presumption by adding the words "A Private Law Firm" after "Workers' Compensation Relief Clinic" to eliminate the possibility of confusion with a governmental agency.\textsuperscript{137}

(b) "Smith, Brown & Williams"

Joan Smith, a part-time councilperson for the City of Oz, operates a private law practice at a firm called Smith, Brown & Williams. On the firm's letterhead, each partner is identified by full name in small type in the right-hand margin. Ms. Smith is listed as "Joan Smith, Member of the City Council of the City of Oz."

Similarly, Joan Smith presumptively violated Rule 1-400 by including her city council credentials in her law firm letterhead.\textsuperscript{138} Although not part of the firm name itself, Smith's letterhead nevertheless conflates her government status with her professional designation as an attorney.\textsuperscript{139} Because Smith does not hold the governmental position for the purpose of assisting private clients, the implication that her government position is a credential or qualification in her private practice is improper.\textsuperscript{140} To the extent that Joan Smith's letterhead suggests she wields influence with a governmental agency, it is also misleading because it suggests that her ability to influence the agency is her principal qualification as an attorney.\textsuperscript{141}

(c) "Senator Richard Jones and Associates"

Richard Jones, former State Senator from the County of Oz, operates a firm called "Senator Richard Jones and Associates." Not unexpectedly, the Committee concludes that Senator Jones' use of the term "Senator" in his firm name is both false and inherently misleading.\textsuperscript{142} Because he is retired, Jones is no longer a senator.\textsuperscript{143} The firm name implies public support, misleads as to Jones's identity, and misleads as to the type of services Jones can provide. Therefore, Jones has

\textsuperscript{137} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 3-4.
\textsuperscript{142} Id. at 4.
\textsuperscript{143} Formal Op. 2004-167 at 5.
presumptively violated Rule 1-400(D)(1-3).\textsuperscript{144}

Even if Jones used "retired" or a similar qualifier, the Committee concluded that the term "Senator" is still likely to confuse the public as to the type of services offered, for the same reasons as Councilmember Smith's letterhead.\textsuperscript{145} Use of the title "Senator" could still be a violation of Rule 1-400(D)(2), though not presumptively if a qualifier such as "retired" were added.\textsuperscript{146} Truthful references to former government titles should be evaluated on a case-by-case basis for their potential to confuse the public.\textsuperscript{147}

In short, while Rule 1-400 permits truthful, clear references in firm names and professional designations, attorneys should be mindful of references that could be confusing as to attorneys' relationships with governmental agencies.\textsuperscript{148} Even where truthful, such references to governmental agencies should be evaluated on a case-by-case basis to avoid confusing or misleading potential clients.\textsuperscript{149}

V. CONCLUSION

California now permits its attorneys to disclose confidential information relating to a client's intent to commit a crime if disclosure is to prevent death or substantial bodily harm.\textsuperscript{150} Previously existing discrepancies between the California Evidence Code and the California Business and Professions Code have been resolved.\textsuperscript{151} California now conforms with the majority in recognizing a "death or substantial bodily harm" exception to the attorney's duty of confidentiality; however, it has not recognized a "financial harm" exception.\textsuperscript{152} Although the SEC permits outside disclosure to prevent financial harm, California does not recognize such an exception.\textsuperscript{153} California attorneys, many of whom may fall within the SEC's broad definition of "appearing attorney," should note that courts have not yet determined whether the SEC rules preempt

\begin{itemize}
\item \textsuperscript{144} Id. at 4.
\item \textsuperscript{145} Id.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} Id. at 5.
\item \textsuperscript{148} Id.
\item \textsuperscript{149} Formal Op. 2004-167 at 5.
\item \textsuperscript{150} See Part II.C supra.
\item \textsuperscript{151} See Part II.B supra.
\item \textsuperscript{152} See Part III supra.
\item \textsuperscript{153} See Part III supra.
\end{itemize}
Finally, recent advisory opinions have imputed some existing ethical duties of lawyers to contract attorneys making brief appearances and to internet chat rooms. California's ethical focus remains, as it should, on the client.

154. See Part III.D supra.
155. See Part IV supra.