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## California Ethics in Review 1993

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# CALIFORNIA ETHICS IN REVIEW 1993

## I. CALIFORNIA LEGISLATION REGARDING PROFESSIONAL RESPONSIBILITY

The chart presented in this section tabulates some of the California legislative activity in the year 1993 regarding professional responsibility and conduct. Details and actions taken with respect to each of the bills were obtained from a reporting service, Information for Public Affairs, Inc. The selection of bills, and descriptions relating thereto, are intended only as a meter of current ethical considerations being addressed by our state legislators. Interest in any of the selected bills should serve as an invitation for further investigation and research, rather than as an end in itself.

Bill	Brief Description	Assembly	Senate	Governor
AB 21	Upon approval by the court, an attorney may provide compensated legal services to a trust or an estate for which the attorney serves as guardian, conservator, personal representative, or trustee.	Passed	Passed	Signed 7/30/93.
AB 195	A conservatee may not make a valid testamentary gift to the conservator or to others having certain relationships with the conservator, such as certain relatives, cohabitants, and entities having established business relationships with the conservator. Gifts in trusts or other instruments are similarly restricted. An attorney acting as guardian or conservator cannot be awarded as attorney's fees additional compensation from the estate.	Introduced		
AB 208	Regulates advertising statements made by attorneys and, among other things, requires certain disclosures.	Passed	Passed	Signed 9/26/93.
AB 797	Requires attorneys to refrain from solicitations stating that a cause of action against a real estate agent or broker may exist arising out of either a party's mere dissatisfaction with a real estate transaction or an unlawful disclosure performed in compliance with specified legal provisions.	Introduced		
AB 1272	If an attorney fails to pay a final arbitration award concerning fees charged by the attorney, the State Bar can place the attorney on involuntary inactive status until the award is paid and impose penalties.	Passed	Passed	Signed 10/11/93.
AB 1300	Provides in pertinent part that advertising of legal services for acquiring workers' compensation benefits must include the name of an attorney who is associated with the provisions of those services.	Passed	Passed	Signed 7/16/93.
AB 1422	Current restrictions, which generally prohibit a law firm from representing both the assessor and the County Board of Equalization on matters before that Board, are applied, with exceptions, to subsequent litigation.	Passed	Passed	Vetoed 10/10/93.
AB 1544	In a disciplinary action against an attorney, any complaint against that attorney must be written and signed, and the attorney must receive any exculpatory evidence. Grounds for disciplinary action do not exist in complaints by health care providers, their agents, or assignees over disputes involving the enforcement of liens.	Passed	Passed	Vetoed 10/11/93.
AB 2355	An attorney for the parent of an individual with exceptional needs cannot recommend placement in a nonpublic, nonsectarian school or agency, in which that attorney has a conflict of interest or from which that attorney receives a benefit.	Passed	Passed	Signed 10/8/93.
SB 255	An attorney representing prospective adoptive parents in an independent adoption must disclose in writing to those parents that the birth parents can change their minds, and must disclose any moneys to be spent in connection with the child's adoption that are not reimbursable.	Passed	Passed	Signed 9/24/93.

## II. CALIFORNIA ADVISORY ETHICS COMMITTEE OPINIONS

The opinions summarized below were issued from various California advisory ethics committees in 1993. Each opinion is advisory only, and is not binding on the courts, the State Bar of California, its Board of Governors, any person or tribunal charged with regulatory responsibility, or any other member of the State Bar. There were no advisory ethics opinions published in 1993 by the Bar Association of San Francisco or by the San Diego County Bar Association.

### A. THE STATE BAR OF CALIFORNIA STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

#### 1. FORMAL OPINION NO. 1993-128

Where a member of a law firm directly assisted in the prosecution of a criminal matter as a government attorney before joining the firm, the firm may represent the defendant client if: (1) the affected member does not participate in the defense of the action and does not share in any fee earned therefrom; and (2) the law firm takes measures to prevent the affected member from having any contact with the case. The opinion discusses Rules 1-120 and 3-310 of the California Rules of Professional Conduct of the State Bar of California, and California Business and Professions Code, Section 6131.

#### 2. FORMAL OPINION NO. 1993-129

In order for an attorney or law firm to hold out another attorney or law firm as "of counsel," the relationship between them must be "close, personal, continuous, and regular." If this requirement is met, an attorney or law firm may be designated as "of counsel" by an unlimited number of other attorneys or firms. Except as provided by 3-310 of the California Rules of Professional Conduct of the State Bar of California, an attorney or firm and its "of counsel" attorneys or firms cannot represent adverse or potentially adverse interests. The opinion discusses Rules 1-400 and 3-310 of the California Rules of Professional Conduct of the State Bar of California.

### 3. FORMAL OPINION NO. 1993-130

An attorney, employed by the executor of an estate to perform legal services for the estate including some or all of the executor's duties, may receive both personal payment from the executor and the statutory fee from the estate, if the following conditions are met: (1) the estate does not make double payment; (2) the executor's informed written consent is obtained; (3) Rule 3-300 of the California Rules of Professional Conduct is met; and (4) court approval is received. The opinion discusses Rule 3-300 of the California Rules of Professional Conduct of the State Bar of California, and California Business and Professions Code, Section 6148.

### 4. FORMAL OPINION NO. 1993-131

Unless consent is obtained by opposing counsel, an attorney cannot make direct or indirect communications on the merits with the party represented by that opposing counsel. This rule does not prevent the parties from communicating with each other in the absence of their counsel, provided that the content of such communication does not originate with or is not directed by either attorney. The opinion discusses Rule 2-100 of the California Rules of Professional Conduct of the State Bar of California.

### 5. FORMAL OPINION NO. 1993-132

Where an attorney on the board of directors of a corporation is approached by a person wishing to propose to that corporation a transaction of the type which the corporation regularly receives representation by other counsel, and where the person seeks the attorney's representation, the following considerations apply: (1) regardless of whether the corporation is the attorney's "client," the attorney must perform her fiduciary duties to the corporation in her capacity as director; (2) the attorney has a duty to conform her communications with the corporation to Rule 2-100, and must give written disclosure to the person pursuant to Rule 3-310(B); (3) if the corporation is deemed the attorney's "client," then Rules 3-310(C)(1), 3-310(C)(2), and 3-310(E) may apply; and (4) depending on the nature of any conflict between the person and the corporation, the attorney may be required to withdraw from any joint representation. The opinion discusses Rules 2-100 and 3-310 of the California Rules of Professional Conduct

of the State Bar of California, and California Business and Professions Code, Section 6068(c).

#### 6. FORMAL OPINION NO. 1993-133

In a first lawsuit defendant B, represented by Attorney B, prevails against plaintiff A, represented by Attorney A. Plaintiff A now wishes to have Attorney B represent him in a malpractice suit against Attorney A. The following applies if Attorney B chooses to undertake such representation.

Attorney B may not communicate with A regarding the subject of the representation, if A is still represented by counsel, without the consent of such counsel. Further, Attorney B must provide A with a written disclosure of the relevant circumstances and of the actual and potential adverse consequences to A, because of Attorney B's representation of B. Attorney B must also obtain the informed written consent of at least B, as well as the written consent of A if Attorney B continues to represent B.

The Committee believes it imprudent for Attorney B to accept the representation of A in such a lawsuit where the negligence of Attorney A resulted in the loss of the case against B. The opinion discusses Rules 2-100, 3-310, and 5-210 of the Rules of Professional Conduct of the State Bar of California, and the California Business and Professions Code, Section 6068(e).

### B. LOS ANGELES COUNTY BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

#### 1. OPINION NO. 472

Any communication by an attorney addressed to the opposing party's board of directors is a communication with a "party" (the opposing corporation itself), and thus is within the scope of Rule 2-100 of the California Rules of Professional Conduct of the State Bar of California. A communication by the attorney written directly to the opposing party's board of directors, but which addresses the board in care of and to the address of the corporation's attorney, is not within the scope of Rule 2-100 of the California Rules of Professional Conduct of the State Bar of California. The opinion discusses Rules 2-100 and 5-310 of the California Rules of Professional Conduct of the State Bar of California, and American Bar Association

Model Code of Professional Responsibility, Disciplinary Rule 7-104(A)(1).

2. OPINION NO. 473

An attorney may be required to disclose to her client that other attorneys are also acting as attorneys for the client, if the attorney knows or reasonably should know that the client expects that only that attorney will act on her behalf. The opinion also discusses fee-splitting situations. The opinion discusses Rules 1-100(B)(4), 2-200(A), and 3-500 of the California Rules of Professional Conduct of the State Bar of California, and California Business and Professions Code, Sections 6068(m) and 6148.

3. OPINION NO. 474

An arrangement where a private investigator refers clients to an attorney, and where both the private investigator and the attorney may then work for the client on separate retainer agreements, violates Rule 1-400(C). The private investigator's compensation depends upon the attorney's retention of clients referred by the private investigator. The opinion discusses Rule 1-400 of the California Rules of Professional Conduct of the State Bar of California.

4. OPINION NO. 475

Upon dissolution of a law firm, reasonable efforts must be made to notify former clients having closed matters in storage at the firm that the files relating to those matters may be retrieved by those clients. Certain conditions pertain to the destruction of the files, one being the failure of the former client to respond. The opinion discusses Rules 2-300(2)(a), 3-700(D), and 4-100(B)(3) of the California Rules of Professional Conduct of the State Bar of California.

