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ETHICS YEAR IN REVIEW

Heather Owen*

I. INTRODUCTION

The state of California is often deemed "progressive." While this is true for many issues, the same cannot be said for all. For example, the legal issues facing California's low-income population are not adequately addressed. In fact, the needs of California's poor are becoming more complex while the number of poor people in California is rising, creating a bleak situation in need of attention. The state of California's poor may not be attractive; however, the State Bar of California Standing Committee on Professional Responsibility and Conduct issued three formal opinions involving pertinent ethical and professional responsibility issues in 2002. While California grappled with its own issues over the past year, the American Bar Association (ABA) completed its revision of the Model Rules of Professional Conduct. It remains to be seen whether California will adopt the revisions made by the ABA.

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3. See id. at 7.
4. See infra Part III.
5. See infra Part IV.
6. The recently appointed Commission for the Revision of the Rules of Professional Conduct will soon decide whether California should pattern its Rules of Professional Conduct after the ABA’s Model Rules of Professional Conduct [the Model Rules], or whether California should continue to go its own way with a unique set of professional responsibility rules.

Samuel L. Bufford, California Should Adopt ABA Model Rules, (2002), at
This article addresses the ethical developments in California and across the nation over the past year. Part II discusses the state of California's low-income population and its access to justice within the state. Part III summarizes the formal ethics opinions issued by the State Bar of California Standing Committee on Professional Responsibility and Conduct in 2002. Part IV addresses and highlights the ABA's revision of the Model Rules of Professional Conduct.

**II. ACCESS TO JUSTICE IN CALIFORNIA**

The goal of the California Commission on Access to Justice (Commission) is to coordinate and advance efforts to ensure access to civil justice. In October 2002, the Commission released a five-year status report entitled The Path to Equal Justice. The report recognized the bleak reality that "[f]ew who need legal help [actually] get it." While California made some modest attempts at improving access to legal services for the poor, numerous shortcomings cannot be ignored. The Commission specifically calls upon the legal profession, among others, to help improve California's justice system and the access afforded California's underprivileged.

The legal profession must respond to ensure the legal rights
of California's poor are properly addressed. Specifically, the Commission stresses the importance of breaking down the barriers obstructing the poor's access to "employment, housing, health care and transportation while monitoring how state and federal policies affect those who lack the resources to assert their own rights and move toward self-sufficiency." The Commission characterizes as "critical" the need for legal aid advocates assistance to low-income individuals. Legal aid advocates tackle a variety of issues facing low-income Californians. These issues range from ensuring educational opportunities for children, working to provide safe and affordable housing, assisting victims of domestic violence, attending to the legal requests of immigrants, to aiding with employment-related matters. Given that the resources are inadequate—the ratio of poor people to legal aid attorneys in California is 10,000 to 1—the success stories of legal aid advocates are commendable. To illustrate, consider the plight of a domestic violence victim who sought enforcement of spousal and child support and needed the assistance of legal advocates:

Although she had been married 19 years and had obtained a dissolution, the woman's ex-husband claimed they were never married. Legal services helped her assemble the necessary papers, and she successfully represented herself in court, where both orders were upheld.

The legal issues facing California's poor vary in nature and complexity, however, none can be ignored. The legal profession must step to the plate and make a difference in the life of California's low-income population.

While cries to the legal profession for assistance with the legal needs of California's poor may sometimes appear to go unnoticed, giving California's legal community a bad rap, the criticism is not entirely warranted. "Given the high debt burden that accompanies professional education for most law

15. See id. at 8.
16. Id. at 8.
17. See id.
18. See id. at 11.
19. See id. at 12-14.
20. See CAL. COMM'N ON ACCESS TO JUSTICE, supra note 2, at 14.
21. Id. at 12.
graduates, debates continue about how to facilitate entry into social justice legal work, which is usually low-paying in relation to corporate practice." While it is difficult to truly understand how debt factors into a law graduate's decision making process in terms of selecting an occupation, one cannot ignore the income disparity between public interest jobs and private practice jobs. Given the fact the majority of law graduates incur some debt throughout their legal education, the fact that private practice jobs pay substantially more money than public interest jobs, and the fact that the majority of legal issues facing California's poor will not be handled within private practice law firms, it is not difficult to understand the lack of access to justice experienced by California's poor. While these facts may explain why California's poor are not afforded adequate access to justice, they do not make the situation any more tolerable.

A. The Changing Needs of California's Lower-Income Families

Although the past five years witnessed many improvements made to the California justice system, the state of California's poor remains bleak and much remains to be done. From 1990-2000, the number of people in poverty in the United States increased by 1,955,826, while the number of people in poverty in California alone increased by 1,078,545. Of those who fell into poverty in California, 478,627, or 24.5% of the total poverty increase in the United States, reside in Los Angeles County. The legal issues of low-income people have become more extensive and complicated over the past five years. While the late 1990s were a time of vast economic growth for many in

24. See MAHONEY, ET AL., supra note 22, at 26. In 1999, large private law firms (more than 250 lawyers) paid $90,000, while legal service positions paid from $22,500-$38,000 and public interest jobs ranged in pay from $25,000-$48,000. See id. citing NATIONAL ASSOCIATION OF LAW PLACEMENT, JOBS AND J.D.S, EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 1998 29,39 (1999).
25. See generally MAHONEY, ET AL., supra note 22.
26. CAL. COMM'N ON ACCESS TO JUSTICE, supra note 2, at 7.
27. The Commission highlights four areas of improvement within California: 1) establishment of the Access Commission; 2) improved state funding; 3) improved judicial leadership; and 4) development of a more innovative state planning approach. See CAL. COMM'N ON ACCESS TO JUSTICE, supra note 2, at 1-2.
28. See id. at 7.
29. See id.
30. See id.
California, California's poor did not benefit from the boom. Instead, the gap between the poor and the rest of California noticeably widened.\textsuperscript{31} During the 1990s, the number of Californians seeking assistance from the legal aid system increased dramatically due to a 30% increase in the number of people living in poverty.\textsuperscript{32} The explanation for the chasm between the rich and the poor and the increase in poverty is twofold: "[h]igh-tech doesn't create a vast array of well-paying factory jobs, and it puts a premium on an educated work force. And California, more than other states, has a high concentration of uneducated immigrant workers."\textsuperscript{33}

B. Findings and Recommendations

The Commission created a set of findings and recommendations to guide California's "effort to provide access to justice to all Californians."\textsuperscript{34} The Commission's recommendations are "[r]ooted in the understanding that access to justice is a governmental responsibility and a community obligation," and "emphasize the need for increased funding and participation from civic and business leaders in the equal justice effort."\textsuperscript{35} The nine recommendations for California, as outlined by the Commission, are discussed below.\textsuperscript{36}

First, the Commission recommends that California's government should have an affirmative duty to supply access to justice for all Californians.\textsuperscript{37} A governments' legal obligation to provide low-income populations access to the legal system has been recognized for many years in a "majority of Europe's western democracies and Canada's provinces."\textsuperscript{38} California needs to catch up and implement a system in which "right[s] to representation in cases involving basic human needs such as housing, food, health care, employment, education, safety, child custody and public assistance" are government funded.\textsuperscript{39} The problem of inadequate legal services is a problem not relegated to an individual matter, but rather a concern for all of us in

\textsuperscript{31} See id. at 8.
\textsuperscript{32} See CAL. COMM'N ON ACCESS TO JUSTICE, supra note 2, at 8.
\textsuperscript{33} Id. note 4 (internal quotations omitted).
\textsuperscript{34} Id. at 35.
\textsuperscript{35} Id.
\textsuperscript{36} See id. at 36-39.
\textsuperscript{37} See id. at 40.
\textsuperscript{38} CAL. COMM'N ON ACCESS TO JUSTICE, supra note 2, at 40.
\textsuperscript{39} Id.
society, lawyers and non-lawyers alike. "California law should... expressly recognize that government has an obligation to ensure all Californians meaningful access to quality justice when they need it."40

Next, the Commission highlights the need for increased funding for legal aid to ensure that suitable representation can be afforded in cases relating to basic human needs.41 Funding from private and public sources must increase to guarantee access to legal representation for all, irrespective of income.42 The Commission states that "[d]uring the next five years, the Equal Access Fund ['Fund'] must be dramatically enhanced, and total resources for legal services for the poor should be increased so as to fill 50 percent of the legal needs of the poor."43 With the help of private and public sources, the Fund can be substantiated to provide for future generations.44 In addition, the legal services provided must be accessible to all because "[m]any of the services that are available are unusable by those who need help most: uneducated litigants with limited competence and English language skills."45

Next, the Commission stresses the importance of maintaining its leadership role in the struggle to provide legal access to all Californians.46 Providing access to legal representation for all Californians is by no means an easy task, nor should it be shouldered by any single organization or individual.47 Rather, because the problem is one that impacts Californians collectively, the solution must also be a collective one. With the Commission's vision of reaching the goals of delivering legal services to the poor, attorneys must find imperative the need to volunteer their time and assistance to legal aid. With the Commission taking the lead, all Californians should follow.48

The Commission specifically calls upon attorneys to be key contributors and leaders in the movement to provide legal

40. Id.
41. See id.
42. See id.
43. Id.
44. See CAL. COMM'N ON ACCESS TO JUSTICE, supra note 2, at 40.
45. MAHONEY, ET AL., supra note 22, at 67 (citing Deborah L. Rhode, Access to Justice, 69 FORDHAM L. REV. 1785 (2001)).
46. See CAL. COMM'N ON ACCESS TO JUSTICE, supra note 2, at 40
47. See id.
48. See id.
representation to all Californians. Attorneys must take a personal interest in the communities they serve as officers of the court and not accept the fact that “pro bono service occupies less than 1% of lawyers’ working hours.” While attorneys cannot solve the “crisis in access to justice” single-handedly “given their unique role within the legal system and their capabilities as contributors and volunteers, attorneys must be leaders in the access to justice effort.” The Commission must also continue working with the State Bar, the judiciary, and the legal profession to “encourage expanded pro bono service within the legal profession.” In addition, the Commission should encourage greater financial support, volunteered time, and services from the State Bar, the judiciary, and the legal profession.

“Law schools [also] have a unique opportunity and a corresponding obligation to insure that issues concerning access to legal services occupy a central place in their curricula, and that pro bono activity plays a central role in their students’ educational experience.”

Coordinated efforts must continue to ensure provision of legal services to low-income populations regionally and statewide. The Commission states that “[s]uch coordination is necessary to avoid unacceptable gaps in services across the state, particularly with regard to immigrant families and rural areas.” The Commission recognized four important areas to target: (1) focus on addressing the legal service needs of rural communities and implement programs to effectuate such change; (2) employ technological advances to facilitate and improve legal services; (3) create or find alternative mechanisms that are efficient in the delivery of legal services; and (4) locate and build partnerships with other enterprises and law firms and continue to leverage existing resources to provide to legal aid in order to maximize the effectiveness and quality of services.

49. See id. at 41.
50. MAHONEY, ET AL., supra note 22, at 69 (citing Deborah L. Rhode, Access to Justice, 69 FORDHAM L. REV. 1785 (2001)).
51. CAL. COMM’N ON ACCESS TO JUSTICE, supra note 2, at 41.
52. Id. at 40.
53. See id. at 40-41.
54. MAHONEY, ET AL., supra note 22, at 70 (citing Deborah L. Rhode, Access to Justice, 69 FORDHAM L. REV. 1785 (2001)).
55. See CAL. COMM’N ON ACCESS TO JUSTICE, supra note 2, at 40-41.
56. Id at 41.
Next, the Commission focuses on its desire to see the implementation of "innovative methods for delivery of low-cost legal services" to assist those of modest means. The cost of living in California precludes many people from affording legal services. Programs to assist these individuals in accessing low-cost legal assistance must be a component of any effort to achieve equal access to justice." The Commission notes the correlation between addressing the need to provide low-cost legal representation to low-income individuals and the advances that automatically follow in supplying equal access to the poor.

The Commission highlights three suggestions under this particular recommendation: "Explore innovative methods for delivering low-cost legal services; [e]xpand use of paraprofessionals in cases that do no require a lawyer's expertise; and [e]xpand availability of limited-scope legal assistance." Another recognized problem is the inaccessibility of our judicial system for California's lower-income population. To expand the accessibility of the courts, California's courts must focus on the community in which they operate and respond to the community's needs. "Self-help centers and Web sites, judicial training on access to justice issues and efforts to remove language barriers should continue to be priorities." The Commission suggests four points of focus under this recommendation: "Build on expanded self-help programs to provide [a] full spectrum of services"; "[c]ontinue to improve small claims courts"; "[e]xpand efforts to provide assistance for litigants with limited English proficiency"; and "[c]ontinue to develop ways to simplify the law and evaluate progress." Given the diversity of our state, with its inhabitants speaking a multiplicity of languages as broad and varied as anywhere in the world, the needs of poor immigrants, particularly indigents of

57. See id.
58. Id. at 42.
59. See id.
60. Id.
61. See CAL. COMM'N ACCESS TO JUSTICE, supra note 2, at 40-41.
62. Id.
63. See id. at 42.
64. See id.
65. Id.
66. Id. at 43.
color, would benefit greatly from any attempt to bridge the language and cultural divide in our justice system.

The Commission next emphasizes the need to educate the public on the issues surrounding access to justice.67 A well-educated general public can “contribute to the development of sound public policy in this area of governmental responsibility.”68 While the Judicial Council and the State Bar have progressed "in educating the general public about their legal rights, how courts function and the legal system in general, ... public opinion surveys reveal a woeful lack of knowledge and numerous misconceptions about the status of equal justice in California.”69 In response, the Commission is making a concerted effort to educate the public about the problems of the delivery of justice.70 With the high number of attorneys in California, it is unfortunate that the requirements of those most in need are far from adequately met.

The Commission next notes that evaluation tools used to assess “ongoing and experimental service delivery approaches” must take a high priority.71 “All resources must be directed to the best possible use, and triage needs to be part of the mixed delivery system so that a person’s legal need is met with the most appropriate delivery system.”72

C. Conclusion

As society continues to evolve and becomes increasingly pluralistic in terms of demographics, legal issues facing California’s poor will constantly change and, in turn, demand on the attorneys who must be fluent in the ways they practice law, to best zealously serve their clients, members of our society most in need of legal aid. The direct and indirect benefits that are conferred upon the citizens of our state, and California as a whole cannot be hindered by attorneys unwilling to take up the cause of the poor, and perpetuate further feelings of alienation about society’s low-income sector. Resources from all possible avenues must not be closed to the detriment to all. As the Commission reminds us, the role of attorneys in assisting

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67. See CAL. COMM’N ACCESS TO JUSTICE, supra note 2, at 44.
68. Id.
69. Id.
70. See id.
71. Id.
72. Id.
California’s poor is a great one that must be taken seriously in order to better the state of California.

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

In 2002, the State Bar of California Standing Committee on Professional Responsibility and Conduct (Committee) issued three formal opinions, albeit non-binding advisory opinions, regarding concerns involving ethics and professional responsibility submitted by the Board of Governors, individual attorneys, and local bar associations.

A. Avoid Ethical Issues Arising Out of the Representation of Multiple Criminal Defendants: Formal Opinion 2002-158

In Formal Opinion 2002-158, the Committee addressed the creation of a physically separate "firm" within a public office so as to avoid potential conflicts of interest arising from the representation of multiple defendants. Such conflicts are prohibited by Rules 3-110 and 3-310 of the Rules of Professional Conduct of the State Bar of California (Rules). The Committee

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74. See id.
75. See id. Rule 3-110 states:
(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
(C) If a member does not have sufficient learning and skill when the legal service is undertaken the member may nonetheless perform such services competently by 1) associating with or where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

CAL. RULES OF PROF'L CONDUCT R. 3-110 (2002). Rule 3-310 states:

(A) For purposes of this rule:
(1) "Disclosure" means informing the client or former client of the relevant circumstances of the actual and reasonably foreseeable adverse consequences to the client or former client;
(2) "Informed written consent" means the client's or former client's written agreement to representation following written disclosure;
(3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client
concluded that by creating "a physically separate 'firm' within a public office charged with indigent criminal defense, so that different 'firms' represent different defendants," conflicts created by the representation of numerous defendants can be avoided. However, the Committee noted that such conflicts without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
(2) The member knows or reasonably should know that:
   (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
   (b) the previous relationship would substantially affect the member's representation; or
(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter or
(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interest of the clients potentially conflict; or
(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
(3) Represent a client in a matter and at the same time in a separate matter accept as client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

(F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or the client-lawyer relationship; and
(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and
(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:
   (a) such nondisclosure is otherwise authorized by law, or
   (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

The Committee examined *People v. Christian*, 41 Cal. App. 4th 986 (1996), in detail in reaching its conclusion. In *Christian*, the Contra Costa County Public Defender's (PD) office established a distinct unit within its office and designated it the Alternative Defender Office (ADO). Even though the ADO is housed in the PD's office, it conducts its everyday business autonomously from the rest of the PD office and maintains effective safeguards to ensure that attorney-client discussions remain confidential. Given the precautions taken by the Contra Costa County PD's office, the California court of appeals upheld the representation of two co-defendants by the PD's office and the ADO. The court allowed this representation to withstand the objection of one of the defendants, even without the consent from either defendant. The court held that "the PD and the ADO are separate firms for purposes of conflict analysis." Hence, traditional conflict analysis may be employed to analyze the potential ethical issues arising from the division of a public defender's office into two offices.

The Committee addressed the need for further analysis beyond the use of traditional conflict analysis caused by the unique circumstances surrounding the divide within the PD's office. The remainder of the opinion was devoted to five distinct situations that warrant further analysis, and which are discussed below in turn.

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77. Id.
78. See id.
80. See Formal Op. 2002-158, *supra* note 73. For instance, the ADO office is only accessible by ADO employees, the files of each respective unit are housed separately, the ADO employs its own file numbers for its cases, and the ADO uses its own communications network. See id.
81. See *Christian*, 41 Cal. App. 4th at 1000.
82. See id.
84. The Committee characterizes traditional conflict analysis as the analysis "used when separate private law firms are involved." Formal Op. 2002-158, *supra* note 73.
85. See id.
86. See id. The Committee notes that the five situations addressed in the opinion are not intended to be exhaustive. See id.
1. Repeat Offenses

The Committee analyzed the following hypothetical: A and B were prosecuted as co-defendants; A was represented by private counsel; B was represented by the PD; the PD successfully transferred blame to A. A was convicted; B was acquitted; later, A, who became indigent, was involved in a new unrelated criminal matter. The question of concern to the Committee was whether the PD should represent A over A’s objection.

The Committee stated that ultimate resolution of the issue is for the court to decide, but provided guidelines for the PD to consider when handling such a matter in conducting a conflict check. According to the Committee, the PD should consider whether it can preserve A’s confidences. The PD should also determine, given the circumstances, whether it should recommend to the court that the ADO, instead of the PD, be selected counsel for A. The result of this structure is that the existence of an ADO within a PD’s office may make a court more willing to appoint public counsel, as opposed to private counsel, for indigent defendants in similar situations.

2. Representation of One of Two Co-defendants by the PD

Another situation of possible conflict of interest may arise when one co-defendant is represented by the PD herself and the other co-defendant is represented by an attorney in the ADO. The apparent conflict of interest stems from the potential promotional opportunities for the attorney in the ADO. For example, under the measures in the Christian case, promotions for ADO attorneys are administered by the PD, although the initial promotional recommendation is made by the ADO.

87. See id.
88. See id.
89. See id.
91. See id, citing CAL. BUS. & PROF. CODE § 6068(e) (2002). Section 6068(e) states:
It is the duty of an attorney to do all of the following:
(e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
CAL. BUS. & PROF. CODE § 6068(e).
93. See id.
94. See id.
95. See id.
supervising attorney. Therefore, there is a question as to whether the ADO attorney can adequately represent her client, the co-defendant, when her boss, the PD, represents the other co-defendant. For instance, the ADO attorney may be "concerned that the outcome of the criminal proceedings might substantially affect her financial or promotional interests in the office." In other words, the system of division between the PD's office and the particular ADO may be a legal fiction for the purposes of arguing that a conflict of interest does not exist.

Rule 3-310(B)(4) mandates a "member to make written disclosure to a client when the member has or had a legal, business, financial, or professional interest in the subject matter of the representation." It follows then that the partitioning of the PD's office is far from being immune from the possibility of attorneys in the same office sharing information with one another regarding any given caseload. The California Supreme Court stated, "[t]he primary purpose of this prophylactic rule is to prevent situations in which an attorney might compromise his or her representation of the client in order to advance the attorney's own financial or personal interests." The Committee, therefore, recommends that ADO attorneys be aware of this type of conflict and the application of Rule 3-310(B)(4) prior to agreeing to or carrying on any representation. If a conflict of interest under Rule 3-310(B)(4) develops, the ADO attorney must make a written disclosure of "the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client."

3. Transfer of Personnel Between the PD and the ADO

Deputy attorneys transferring from the PD's office to do work at the ADO and from the ADO back to the PD's office

98. Id.
99. Id. Rule 3-310(B)(4) states: "(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation." CAL. RULES OF PROF'L CONDUCT R. 3-310(B)(4) (2002).
100. Santa Clara County Counsel Attorneys Ass'n v. Woodside, 28 Cal. Rptr. 2d 617 (1994).
create another potential conflict of interest. One of the main concerns is the possibility of a deputy transferring from the PD's office to the ADO, having acquired confidential information from the PD that would benefit a client of the ADO. This information may be adverse to the client, yet get back to the other attorney on the case.

A possible solution to this conflict is for the receiving office not to accept a client whose case evokes relevant confidential information from a transferring attorney. This solution offers protection for any potential client. Another possible solution is to set up an ethical screen. The ethical screen would shield the transferring attorney in possession of the relevant confidential information from other attorneys in the office who could potentially benefit from the relevant confidential information. The court of appeals in *Henriksen v. Great American Savings & Loan*, 11 Cal.App.4th 109, 116 (1992), articulated the usual elements of an ethical wall: "physical, geographic, and departmental separation of attorneys; prohibitions against and sanctions for discussing confidential matters; established rules and procedures preventing access to confidential information and files; procedures preventing a disqualified attorney from sharing in the profits from the representation; and continuing education in professional responsibility."

4. Supervision and Promotion of ADO Personnel

The PD, within a particular PD's office, may be responsible for overseeing the work of subordinate attorneys, including

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103. Deputies may transfer for a number of reasons, including the changing needs of one branch or for reasons relating to promotional opportunities in one branch over the other. See Formal Op. 2002-158, *supra* note 73.
104. See id.
105. See id.
106. See id.
107. See id.
108. See *id.* See e.g., *Chadwick v. Superior Court*, 164 Cal. Rptr. 864 (1980). Similar problems may arise with the transfer of non-attorney support staff from one office to another. In such situations, both the transferring and receiving offices should instruct the transferring non-attorney support staff that it possesses confidential information and a sufficient ethics screen should be constructed by the receiving office. See Formal Op. 2002-158, *supra* note 73.
ADO attorneys. The Committee addressed this issue through the following example: "an issue relating to the imposition of office discipline could arise out of the representation of a client by an ADO deputy. In such circumstances the [PD] may want to review the ADO office file relating to that representation."  

The Committee’s response to the issue of supervision and promotion of ADO personnel implicates the imposition of limitations consistent with section 6068(e) of the Business and Professions Code (B & P Code) and Rule 3-110. The PD has more freedom accessing confidential client information in her own office than in the ADO. However, Rule 3-110 requires the PD to maintain the competence of ADO attorneys, while section 6068(e) of the B & P Code precludes the PD from total access to the necessary records to ensure the competence of ADO attorneys. Thus, the PD must uphold the duty under Rule 3-110, while not violating her ethical obligations under section 6068(e) of the B & P Code.

5. Financial Considerations

Ethical dilemmas may develop in situations in which one person, the PD, manages the money of two offices—the Public Defender’s office and the ADO. The PD has a duty to provide zealous and competent representation to all clients. However, the PD can easily compromise his duty when he controls the finances of the PD’s office and the ADO. For example, “where the [PD] is responsible for the budgets of both offices and the assignment of personnel to them, the [PD] must take care not to discriminate... against [or show bias in favor of] one client or class of clients in assigning work or providing

110. See Formal Op. 2002-158, supra note 73; see also supra note 75 and accompanying text.
112. See id. See also CAL. BUS. & PROF. CODE § 6068(e); CAL. RULES OF PROF'L CONDUCT R. 3-110.
113. See Formal Op. 2002-158, supra note 73. Confidential client information may not be disclosed to someone outside the “firm.” Therefore, the Public Defender may not access confidential client information in the ADO because the Public Defender is not a member of the ADO “firm.” See id.
114. See id.
115. See id.
116. See id.
117. See id. (citing People v. McKenzie, 194 Cal. Rptr. 462 (1983)).
119. Id.
investigation, testing, or other resources.” The Committee concludes its discussion of this situation by stating, “avoiding this problem by not providing the services to either client might also violate the duty to provide competent representation to both clients.”

6. Conclusion

The Committee closes Formal Opinion 2002-158 by reiterating that dividing a PD’s office into two distinct offices does not violate any laws. However, the Committee again notes that this separation raises ethical issues, from financial and many other practical fronts, which must be addressed with sufficient safeguards. “With the passage of time and as the use of such bifurcated offices under the auspices of the same [PD] becomes more prevalent because of the need for fiscal economy,” the ethical issues raised in this opinion will undoubtedly become more widespread, thus highlighting the importance of the issues raised in this opinion.

B. The Ethical Permissibility of a Lawyer Employing a Specified Escrow Arrangement to Fund Legal Representation: Formal Opinion 2002-159

In Formal Opinion 2002-159, the Committee analyzed a particular set of facts dealing with a proposed escrow arrangement between an attorney and client. Specifically, the Committee examined the ethical permissibility of a lawyer:

(1) tell[ing] a potential client of the possibility of financing the legal representation by taking out a mortgage loan on the client’s real property and (2) refer[ring] the client to an independent broker who might arrange the financing, where the resulting loan funds are placed in an escrow account which is not controlled by the lawyer and from which the funds are disbursed to the lawyer for fees and costs for work performed on behalf of the client[.]

The Committee determined the applicability of specific

120. Id.
121. Id.
122. See id.
123. Id.
125. Id.
authorities to the proposed escrow arrangement and highlighted concerns of which attorneys should be aware based on the following hypothetical set of facts.

1. *Hypothetical Statement of Facts*

A potential client contacts Attorney A seeking her services. The potential client is currently unable to pay for Attorney A's services, but "owns real estate which can be encumbered as security for a loan, the proceeds of which could be used to pay for legal services." Attorney A refers the potential client to a licensed broker who may be able to set up a loan to finance Attorney A's services. Attorney A states in writing that she is neither "advising the potential client concerning alternative methods for financing legal representation nor recommending the use of the particular broker." In addition, Attorney A is not compensated with respect to the referral, the loan, or the escrow and Attorney A's representation is not conditioned upon the potential client using the recommended broker for the financing. Attorney A collects her costs and fees by sending "statements each billing cycle to the escrow account" requesting payment of funds for her compensation. Attorney A mails a copy of the bill to the client and the client is given a reasonable amount of time to contest the bill. If the client does not object, "the funds then are released for payment of legal services according to the fee agreement between the attorney and the client."

2. *Discussion*

The Committee divides its discussion into three subsections.

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126. See id.
127. Id.
128. See id.
129. Id. The facts further state:

The lawyer further states in writing that she does not represent the broker, the lender, or the prospective client in the loan transaction, and that she does not represent any of them or the escrow company with regard to the escrow in which the lender and the prospective client agree to place the loan proceeds.

131. Id.
132. See id.
133. Id.
a. The Proposed Escrow Arrangement Does not Require Compliance with Rule 3-300

Rule 3-300 controls an attorney’s business transactions with a client. Rule 3-300 controls an attorney’s business transactions with a client. The rule “prohibits a lawyer from entering into a business transaction with her client, and from knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to her client, unless she first complies with the requirements set out in the rule.” The referral and escrow arrangement established in the hypothetical does not amount to an impermissible business transaction under Rule 3-300. Attorney A and the client did not enter into a business transaction. Attorney A “is not a direct or indirect party to the loan, [because] the broker is independent of the lawyer, and the lawyer does not benefit from the loan transaction.” The Committee highlights that Attorney A did not receive a financial benefit from the referral and escrow arrangement, thus making the arrangement permissible under Rule 3-300. Further, Attorney A’s interest in the escrow account is not a “pecuniary interest” within the meaning of Rule 3-300. Deposit of the loan proceeds in the escrow account does not create a pecuniary interest for Attorney A because Attorney A will not earn any of the funds until the completion of legal

134. See id.
135. See id., n.2.
136. See Formal Op. 2002-159, supra note 124. Rule 3-300 provides:

A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and
(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client’s choice and is given a reasonable opportunity to seek that advice; and
(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

CAL. RULES OF PROF’L CONDUCT R. 3-300 (2002).

138. Id.
139. See id. The Committee notes that Attorney A “does receive some benefit from the escrow arrangement—she is assured that there are funds available to pay her fees and costs—this is no different from the benefit the lawyer receives by requiring an advanced fee and placing it in her trust account.”
140. See id.
services for the client. Moreover, assuming that one were to consider the loan and escrow arrangement as creating a pecuniary interest for Attorney A, the arrangement is not "adverse" under Rule 3-300. The California Supreme Court developed a precise definition of "adverse"—"almost any financial transaction can be adverse to a client if he or she has to pay money." Within the meaning of Rule 3-300, a lawyer's pecuniary interest is 'adverse' to the client, "if the lawyer acquires the ability to extinguish a client's interest in the property, without the possibility of judicial intervention, whether or not the lawyer ever acts to do so."

Based on the hypothetical statement of facts and the California Supreme Court's definition of "adverse," Attorney A cannot extinguish the client's interest absent judicial intervention. "The mere deposit of funds in escrow does not extinguish the client's interest. It is the escrow holder, not the lawyer, who is in possession of the funds." Attorney A, therefore, is limited to requesting payment for her services in a manner consistent with the fee agreement and the escrow.

The Committee concludes this subsection by reiterating that "unless the lawyer has a financial interest in the broker or receives some form of compensation from the broker for referring a potential client, rule 3-300 does not apply."

b. The Proposed Escrow Arrangement Does not Require Compliance with Rule 4-100

Rule 4-100 deals with the regulation of attorneys'
management of client funds.\textsuperscript{149} Rule 4-100(A) provides generally that any funds received by the attorney for the benefit of the client must be placed in the attorney's client trust fund account.\textsuperscript{150} Rule 4-100(B) holds attorneys to the careful requirements of handling client funds. For example, regardless of whether the client funds are deposited in the attorney's client trust fund account, the attorney is subject to the rule.\textsuperscript{151} The requirements of Rule 4-100(B) include: "(1) a notice requirement, (2) a requirement to maintain specified records, and (3) a requirement to render appropriate accounts to a client."\textsuperscript{152}

\begin{flushright}
\textsuperscript{149} See id.
\textsuperscript{150} See Formal Op. 2002-159, supra note 124. Rule 4-100(A) provides:
\begin{enumerate}
\item All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:
\begin{enumerate}
\item Funds reasonably sufficient to pay bank charges.
\item In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.
\end{enumerate}
\end{enumerate}
\textsuperscript{151} See Formal Op. 2002-159, supra note 124.
\textsuperscript{152} Id., n.6. Rule 4-100(B) provides:
\begin{enumerate}
\item A member shall:
\begin{enumerate}
\item Promptly notify a client of the receipt of the client's funds, securities, or other properties.
\item Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
\item Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.
\item Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.
\end{enumerate}
\end{enumerate}
\textsuperscript{151} CAL. RULES OF PROF'L CONDUCT R. 4-100(A) (2002).
\textsuperscript{152} Id., n.6. Rule 4-100(B) provides:
\begin{enumerate}
\item A member shall:
\begin{enumerate}
\item Promptly notify a client of the receipt of the client's funds, securities, or other properties.
\item Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
\item Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.
\item Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.
\end{enumerate}
\end{enumerate}
\textsuperscript{151} CAL. RULES OF PROF'L CONDUCT R. 4-100(B) (2002).
In this subsection, the Committee addressed two issues: first, "whether rule 4-100(A) requires that the loan proceeds be placed in the lawyer's trust account rather than the escrow account and second, even if the proposed arrangement does not activate rule 4-100(A)'s deposit requirement, whether it nevertheless triggers rule 4-100(B)'s notice, record-keeping, and accounting requirements." 153

The Committee quickly dismissed the Rule 4-100 requirements "because the loan proceeds are never 'received or held' by the lawyer." 154 To the contrary, the lender deposits the loan proceeds directly in the escrow account. 155 Attorney A may collect her costs and fees only after she has performed. At this time, the fees are "fixed and earned." 156 Therefore, the fees belong to Attorney A and should not be placed in Attorney A's client trust account. 157

c. The Proposed Escrow Arrangement Does Not Require Written Disclosure Under Rule 3-310(A)

Rule 3-310 mandates that attorneys disclose to clients in writing any legal, business, financial, professional, or personal relationship with a party in the same matter or a business, financial, or professional interest in the subject matter of the representation. 158 Neither of these provisions, however, control Attorney A under the hypothetical facts. 159 Rule 3-310(B)(1) does not apply because Attorney A does not have a relationship, formal or informal, with the broker. 160 While Attorney A does refer potential clients to the broker for assistance in financing, she does not have an obligation to do so. 161 Similarly, Rule 3-

154. Id.
155. See id.
156. See id.
157. See id.
158. See id. Rule 3-310(B) provides in pertinent part:
   (B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:
   (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness to the same matter; or
   
   (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.
CAL. RULES OF PROF'L CONDUCT R. 3-310(B) (2002).
160. See id.
161. See id. The Committee notes further, "[t]he broker is not a witness or a
310(B)(4) is inapplicable because Attorney A does not have "an interest in the client's representation." Nor is Attorney A likely to "compromise that representation 'in order to advance the attorney's own financial or personal interests.'"

The Committee briefly addressed the applicability of Rule 3-310(F), "which prohibits a lawyer from accepting 'compensation for representing a client from one other than the client' unless certain conditions are met." Rule 3-310(F) does not apply to the hypothetical set of facts because subsection (F) only applies to situations "where the funds of a third party are being used to pay the lawyer." The rule is meant to protect the attorney's duty of undivided loyalty to her client, due to the possibility of an attorney's duty of loyalty being affected by a third party's interests in paying the attorney's costs and fees.

3. Conclusion

The Committee's analysis illustrates an alternative means of payment available to clients who are unable to pay their attorney's costs and fees at a particular point in time, but who nonetheless own other valuable assets. While the opinion is limited to the hypothetical set of facts, it raises valuable considerations for attorneys to consider in their practices.

...party to the subject matter of the representation, the lawyer receives no compensation from the broker for referring potential clients, and the lawyer does not represent the potential client in the transaction among broker, lender, and client." Id. The Committee also cautions against unintentionally misleading the client by stating, "[w]ith respect to this, the lawyer must be careful not to inadvertently mislead the prospective client into believing the lawyer represents the client in the identification of financing alternatives, in deciding to use a particular loan broker, or in the loan or escrow transactions." Id., n.10.

166. See id. The Committee notes further, "[h]ere, that risk does not appear to exist where the third party is an escrow agent who does not own the loan proceeds, but only is responsible for holding and disbursing the client's own funds." Id. The Committee also warns of the possibility that confidential information may be disclosed in the billing statements. See id. at n.12.
C. The Ethical Constraints Upon an Attorney's Ability to Settle a Claim and Ability to Collect Legal Fees When Communication with the Client Is Not Possible: Formal Opinion 2002-160

In Formal Opinion 2002-160, the Committee addresses the scope of an attorney's authorized authority with respect to settlements and the collection of legal fees associated with authorized settlements when communication with the client is not possible. More specifically, the Committee examines the ethical constraints governing an attorney whose client has conferred upon her authority to settle, without instituting litigation, claims of the client for specific percentages of the amounts claimed, when the client has disappeared and the ethical constraints governing the attorney's right to collect legal fees from settlement proceeds when communication with the client is not possible. The Committee employs the following set of hypothetical facts in its analysis.

1. Statement of Facts

Client retains Attorney A to assist him in the collection of outstanding medical claims. The written retainer agreement agreed to by Client and Attorney A provides for Attorney A to receive as full payment for her services a contingency fee of 25 percent of each claim collected. Client authorizes Attorney A to perform the following functions in writing: to accept on Client's behalf settlement offers of two-thirds or more of the amount sought in any claim, to receive the resulting settlement proceeds, to endorse Client's name to the settlement check, and to pay herself from such proceeds the agreed contingency fees for her legal services. In addition, Client directs Attorney A not to institute litigation on any claim without further specific

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168. See id.
169. Id.
170. Id.
171. See id.
172. See id.
174. Id. "To avoid delay in effecting settlement on behalf of Client, Attorney A's check endorsement authority is contained in an acknowledged power of attorney from Client." Id.
authorization from Client."\textsuperscript{175}

Client disappears after Attorney A has been retained.\textsuperscript{176} "Attorney A then receives two offers of settlement of Client’s claims: Attorney B offers to settle several claims for two-thirds of their face amount; and Attorney C offers to settle another group of Client’s claims for one-half of their face amount."\textsuperscript{177}

2. \textit{Discussion}

The Committee presents three questions stemming from the statement of facts, which will be taken in turn below.\textsuperscript{178}

\begin{itemize}
\item[a.] \textbf{Must Attorney A Accept Attorney B’s Two-thirds Offer on Behalf of Client?}
\end{itemize}

The Committee initially addressed this issue by articulating a basic principle: "[a]lthough a client may specifically authorize the attorney to settle and compromise a claim, the attorney must bear in mind that she may not accept any proposed settlement which contains substantive terms at variance with the authority conferred on her by the client."\textsuperscript{179} The Committee further noted, "[h]ence, even if a settlement offer comes within an amount previously authorized by the client, installment terms, non-cash consideration, non-standard terms in a release, or other unanticipated conditions may render the settlement offer beyond the attorney’s authority."\textsuperscript{180}

In addition to the specific authorization required for an attorney to accept a settlement offer, ethical obligations bind the attorney and prevent the attorney from "accepting any settlement within the scope of the client’s authorization."\textsuperscript{181} Specifically, Rule 3-110(A) states that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."\textsuperscript{182} "Competence" is defined under Rule 3-110(B) as "to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably

\textsuperscript{176} See id.
\textsuperscript{177} Id.
\textsuperscript{178} See id.
\textsuperscript{179} Id. See e.g., Blanton v. WomanCare, Inc., 212 Cal. Rptr. 151, 159 (1985); Alvarado Cmty. Hosp. v. Superior Court, Cal. Rptr. 52, 56 (1985).
\textsuperscript{180} Id.
\textsuperscript{182} See id. quoting CAL. RULES OF PROF'L CONDUCT R. 3-110 (2002).
necessary for the performance of such service.” 183 Hence, Attorney A must decide whether to accept the offer as is or whether to negotiate for a greater than two-thirds settlement. 184

In addition to her duty under Rule 3-110, Attorney A must also satisfy her duties under Rule 3-500 and Business & Professions Code section 6068(m). 185 These rules call for Attorney A “to inform Client of significant developments relating to the representation.” 186 Therefore, Attorney A must “consider whether she should advise Client of changes in the law, business developments of which she becomes aware, information about the settlement practices of a defendant, or other information about the strength or collectability of a claim that might affect Client’s authorization to Attorney A.” 187

The Committee concluded its discussion by articulating the fiduciary relationship between attorneys and clients. 188

183. See id.

184. See Formal Op. 2002-160, supra note 167. “[R]ejecting the offer, or delaying acceptance, might result in the offer being withdrawn entirely.” Id. The Committee further notes, “[t]rying to negotiate a higher settlement might benefit Client beyond any increased recovery. Accepting without negotiation every offer that is at or above two-thirds of the claim might establish a reputation for Client among debtors of never negotiating and prejudice Client’s subsequent attempts to settle claims.” Id.

185. See id.

186. See id. Rule 3-500 provides:

A member shall keep a client reasonably informed about significant developments relating to the employment or 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 (2002). CAL. BUS & PROF. CODE § 6068(m) provides:

To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

BUS. & PROF. CODE § 6068(m) (2002).

187. Formal Op. 2002-160, supra note 167. The Committee posits the interplay of Rule 3-510(A), “which requires an attorney promptly to communicate to her client any written or significant offers of settlement.” Id. at n.5. Clearly, compliance with this rule is difficult when an attorney’s client has disappeared.

Nevertheless, because the client’s disappearance makes it impossible for the lawyer to communicate with the client, the lawyer should exercise independent professional judgment on behalf of the client. If in exercising this judgment the lawyer concludes that no development takes the offer outside her original authorization, the lawyer should accept the offer even though she can not comply with the rule 3-510(A) communication requirement.

Id. at n.5.

According to the Committee, the fiduciary relationship is one in which "the lawyer has a duty of undivided loyalty to his or her client." 189 That being said, "in all situations where Attorney A has discretion to accept or not accept settlement offers on behalf of Client, her desire to be paid from the settlement proceeds must not influence the exercise of that discretion." 190

The Committee held that under Rule 3-700 "an attorney may withdraw if the client 'renders it unreasonably difficult for the attorney to carry out the employment effectively' and that absence of the client may be a sufficient basis to withdraw." 191 Therefore, under Rule 3-700, in situations in which "it reasonably appears to the attorney that she cannot carry out her instructions and fulfill her ethical obligations because of the client's disappearance, the attorney would have an obligation to try to find the client or to withdraw in compliance with rule 3-700." 192

b. May Attorney A Accept Attorney C's One-half Offer on Behalf of Client?

The Committee quickly dismissed this issue in light of the principles previously discussed. Therefore, "Attorney A cannot accept any settlement offer at variance with her authority from Client." 193 Nonetheless, the applicable statute of limitations could create an issue. For instance, if the statute of limitations were about to toll and Client was about to lose her claim altogether, "it might appear that the duty of competence would require Attorney A to accept the one-half offer to save some recovery for Client." 194 The Committee, however, found this

189. Id. (citing Zador Corp. v. Kwan, 37 Cal. Rptr. 2d 754, 762 (1995)).
192. Formal Op. 2002-160, supra note 167. The Committee further notes, while there are no definitive standards with regard to locating missing clients, the attorney should consider the procedures discussed in State Bar Formal Opinion Number 1989-111, including retention of a private investigator or skip-tracing service, search of public records, use of registered or certified mail with return receipt or address correction requested, and telephone contact with the missing client's relatives or colleagues.
193. See id. (citing Silver v. State Bar, 117 Cal. Rptr. 82, 92; Sampson v. State Bar 115 Cal. Rptr. 43, 55 (1974); Alvarado Cmty Hosp. v. Superior Court, 219 Cal. Rptr. 489, 493 (1985)).
perception ill-founded for two reasons: (1) "the client has not given Attorney A authority to accept a one-half offer" and (2) "Attorney A is not authorized to determine independently what is in Client's best interests from a substantive as opposed to a procedural standpoint."

Another issue the Committee raised is "whether the duty of competence would allow Attorney A to reject the one-half offer, but file a complaint to preserve Client's claim." Under the Committee's analysis, this conduct would not be proper.

Although lawyers generally have authority to make tactical decisions during litigation, for example, calling a particular witness, they do not, merely by virtue of being retained by a client, have authority to file suit.

If Attorney A were to file suit on behalf of Client, she would be in violation of section 6104, which states "corruptly or willfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension." Moreover, filing suit might be detrimental to Client and thus constitute a violation of Attorney A's duty of competence.

c. May Attorney A Apply the Proceeds from Any Settlement to Her Fees?

Under the hypothetical facts at issue, Client executed a power of attorney expressly authorizing Attorney A "to endorse Client's name to the settlement checks." If a proposed settlement is in accord with Attorney A's authorization and the fee agreement giving lawyer 25 percent of each claim collected is enforceable, then she may endorse and deposit the settlement check. Therefore, "Attorney A... must deposit into trust the

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195. Id.
196. Id.
197. Id.
198. See id.
199. Id. (citing Blanton v. Womancare Inc., 212 Cal. Rptr. 151 (1985)).
200. Formal Op. 2002-160, supra note 167. However, "preparing a complaint for filing in the event Client were found before the statute of limitations ran would not be a violation of section 6104." Id. at n.7. This conduct does not constitute "appearing" under section 6104, as opposed to filing a lawsuit, which does constitute "appearing as an attorney" under section 6104. See id.
201. Formal Op. 2002-160, supra note 167. "For example, Client might have had reasons relating to finances, reputation, or other matters for instructing Attorney A not to file suit. Preserving the claim is only one of the considerations." Id.
202. Id.
203. Id. The enforceability of the contingency fee arrangement depends upon its
proceeds of the settlement—which represent both Client's recovery on the claim and Attorney A's fee by virtue of the contingency fee arrangement—and promptly withdraw that portion of the settlement funds representing her fee.”

3. Conclusion

In Formal Opinion 2002-160, the Committee raises thought-provoking issues confronted by attorneys when clients are unavailable. While the exact situation examined by the Committee may not be confronted on a daily basis by attorneys in general, the Committee's examination provides valuable insight into the ethical considerations associated with settlements and collecting legal fees stemming from settlements facing attorneys when communication with clients is impossible.

IV. AMERICAN BAR ASSOCIATION (ABA)

A. ABA Model Rules of Professional Conduct (MRPC)

The mission of updating the ABA MRPC was completed in February, 2002. After five years of consideration and negotiation, the ABA House of Delegates (House) completed the project with approximately an hour left. "Many of the biggest battles over the ethics recommendations took place at last year's ABA Annual Meeting in Chicago," and thus, the House focused on only a few areas of controversy. There was, however, one area intentionally reserved for another day. "Under a plan supported by the Ethics 2000 Commission and the Commission on Multijurisdictional Practice, the House agreed to defer consideration of changes in the Model Rules that deal with lawyers practicing law outside jurisdictions in which they are admitted." Therefore, "[w]ith the adoption of the compliance with Rule 4-200, "which provides a multi-factor balancing analysis to determine whether a fee is illegal or unconscionable."" Id. at n.8. The Committee's discussion presupposes the fee is enforceable. See id.

204. Id. "In collecting and accounting for the proceeds, Attorney A is governed by rule 4-100, which provides that an attorney must deposit in one or more client trust accounts all funds received or held for the benefit of a client." Id.


206. See id.

207. Id. at 65.

208. See id.

209. Id.
Commission's [Ethics 2000 Commission] recommendations by the ABA House on February 5, 2002, the amendments to the Model Rules became effective as ABA policy.\textsuperscript{210}

Later in 2002, the Commission on Multijurisdictional Practice, after two years, twenty-five days, and nine public hearings, completed its proposed revisions to the ABA MRPC relating to multijurisdictional practice.\textsuperscript{211} The House, in turn, approved all of the recommendations made by the Commission on Multijurisdictional Practice.\textsuperscript{212} According to the new Model Rules:

a lawyer licensed and in good standing in one state may practice temporarily in another jurisdiction when the lawyer is 1) performing nonlitigation work arising out of, or reasonably related to, the lawyer's home-state practice; 2) representing clients in arbitration or mediation proceedings; 3) providing litigation-related services in a state where he or she is or expects to be admitted pro hac vice; or 4) working in association with a lawyer licensed in the host state.\textsuperscript{213}

Additionally, motions to appear in other states are permitted by attorneys seeking to practice in states where they are not admitted to practice law.\textsuperscript{214} The Commission on Multijurisdictional Practice's recommendations are also consistent with the ABA's stance that "lawyers should be regulated primarily at the state level."\textsuperscript{215} The recommendations also include a provision which clarifies that, "under the Model Rules, a state may discipline a lawyer who practices in the state even if the lawyer is not licensed there."\textsuperscript{216}

\textsuperscript{210} Margaret Colgate Love, The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000, 15 GEO. J. LEGAL ETHICS 441, 444 (2002). Love also notes, "[o]f course, these rules are not binding on lawyers unless and until they are adopted by the particular jurisdiction in which the lawyer is admitted to practice or, in some cases, is in fact practicing." Id.


\textsuperscript{212} See id.

\textsuperscript{213} Id.

\textsuperscript{214} See id. Specified conditions must be met in order to be admitted without taking that state's bar exam. See id. Also, foreign lawyers, under certain conditions, "may practice temporarily in the United States." See id.

\textsuperscript{215} Id.

\textsuperscript{216} Mark Hansen, Smooth Sailing: House Approves Proposals to Ease MJP Rules with Minimal Debate, 88 A.B.A. J. 69 (2002).
B. Revisions, not Revolution

The ABA MRPC was not completely overhauled. Rather, it was updated "in light of important developments since they were adopted in 1983." While the amendments "are by no means radical," a great majority of jurisdictions—forty-four at last count—model their codes, with some variation, after the ABA MRPC. Further, by mid-October, "43 states were at least in the early stages of reviewing the revisions to determine which changes, if any, to adopt."

There is some controversy as to whether the rules governing lawyer ethics will be more uniform after the states have had an opportunity to review the revisions. "Some in the lawyer regulation field see widespread state review of the revisions to the Model Rules as an opportunity to achieve the uniformity in professional conduct standards for lawyers that has been lacking in recent years." Others see the potential for "'both more and less uniformity.'" The reason for less uniformity rests with the notion that, "many states will consider adopting revisions in the Model Rules that were recommended by the commission but rejected by the House of Delegates." Apart from how the states respond to the revisions, at least one significant advancement will occur: more lawyers will be focused on the ethics rules, regardless of their final form.

Following are some of the most significant topics addressed under the ABA MRPC revisions.

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218. Id.
219. Id.
221. Id.
222. See id.
223. Id. Robert A. Creamer, chair of an Illinois State Bar Association committee that is reviewing the revisions to the ABA MRPC, states, "[t]he rules were always thought to be local, . . . [b]ut people have begun to acknowledge what we all knew for a long time: Even in smaller firms, the practice of law is national." Id.
224. Id.
225. Podgers, supra note 220.
226. See id.
1. Improving Communication with Clients

It is all too common that clients complain about their lawyers not communicating with them. The revised ABA MRPC now mandates "that lawyers put more of their communications with clients in writing." A newly created Model Rule (MR) 1.0 defines "writing" and "confirmed in writing." Under MR 1.0, "writing" is defined as "a tangible or electronic record of a communication or representation" and "confirmed in writing" must take the form "of a client's informed consent to include a writing transmitted by the lawyer to the client confirming a prior oral discussion."

Model Rule 1.5 relates to attorneys' fees and was amended to require that a lawyer's fee referral "be agreed to by the client, including the share each lawyer will receive, and that the agreement be confirmed in writing." Similarly, MR 1.8 now requires "a lawyer who enters into a business transaction with a client to advise the client in writing of the desirability of seeking the advice of independent counsel." Additionally, under revised MR 1.8, the client is also required to "give informed consent in writing to both the essential terms of the transaction and the lawyer's role in it, with particular reference to whether the lawyer will be representing the client in the transaction."

2. Recognizing New Firm Structures

The organization and structure of the practice of law is changing and the revisions to the ABA MRPC respond to these changes. A newly created rule, MR 2.4, requires a lawyer who is acting as an arbitrator, mediator, or some other neutral third-party "to confirm to unrepresented parties that the lawyer is not representing them." Model Rule 1.12 has been amended to

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227. See Moore, supra note 217.
228. See id.
229. Id.
230. See id.
231. Id. "A comment explains that if it is not feasible for the lawyer to obtain or transmit the written confirmation when the client gives informed consent, the lawyer must do so within a reasonable time after the client has given consent." Id.
232. Id.
233. Moore, supra note 217.
234. Id.
235. See id.
236. See id.
237. See id.
"clarify that conflict-of-interest rules prohibiting former judges and arbitrators from representing anyone in conjunction with a matter in which they were previously involved in an adjudicative capacity also should apply to lawyers who previously served as mediators or other third-party neutrals."238

Screening the lawyer who previously served as a mediator or other third-party neutral to prevent disqualification of the whole law firm is permissible under the amended rule.239

The revisions, however, do not allow screening under all circumstances. The House rejected a proposal that "would have allowed a firm to continue to represent a client when a lawyer for an adverse party joins the firm as long as the firm screens the incoming lawyer from any participation in the matter and notifies the lawyer’s form client of the screen."240 While this proposal was rejected by the House, states may seriously consider extending screening to additional situations.241

3. Responding to Technology242

Electronic mail is now included in the definition of a "writing" under the ABA MRPC.243 This is just one of the ABA’s responses to the ever-changing technological world in which we live. The ABA responds to technological advances by addressing them in relation to the rules governing advertising and solicitation.244 Under MR 7.2, an attorney may now advertise through "electronic communication, including public media."245 Model Rule 7.3 permits contacting a potential client by email, but prohibits computerized telephone calls to prospective clients.246

Another area impacted by technology is the scope of MR 1.6 dealing with client confidential information. Model Rule 1.6 is a hotly contested issue and is "[t]he rule with the greatest variation" from state to state.247 The Ethics 2000 Commission, in an effort to align the ABA MRPC with the majority of states,

238. Id.
239. See Moore, supra note 217.
240. Id.
241. See id.
242. See id.
243. See id.
244. See id.
245. Moore, supra note 217.
246. See id.
247. Id.
recommended revisions to MR 1.6 to "permit a lawyer to disclose client confidences to prevent, rectify or mitigate financial losses arising out of crimes or frauds of a client." 248 The House, however, rejected the Ethics 2000 Commission's recommendation and implemented its own amendment that "permits a lawyer to reveal client information to prevent reasonably certain death or serious bodily harm even when such harm is neither imminent nor the result of a client's crime." 249

V. CONCLUSION

This past year has exemplified some of the shortcomings of California's judicial system. While the results of the Commission's five-year study are daunting, the recommendations made by the Commission will undoubtedly help to eradicate the plight of low-income families in their efforts to obtain access to justice. California will, as it has done many times in the past, respond to this issue and overcome it. The State Bar of California Standing Committee on Professional Responsibility and Conduct responded to pertinent ethical issues in the three formal opinions it issued in 2002, providing valuable insight to practicing attorneys on ethical issues likely to arise in the course of their respective practices.

In addition, while the revisions to the ABA MRPC have come to an end, it now remains to be seen how many states will adopt the revised ABA MRPC, or at least sections of the revised ABA MRPC. While many worthy revisions have been made to the ABA MRPC, clearly not all the amendments will be adopted by every state and the legal profession is far from resolving all of its ethical issues. The path California will choose is an interesting and timely issue with proponents hoping for substantial alignment with the revised ABA MRPC. 250

248. Id.
249. Id.
250. See Bufford, supra note 6.