California Ethics Year in Review 1994

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The Ethics Year in Review is a survey of the past year’s developments in the field of California legal ethics. Each Year in Review reviews the preceding year’s legal developments within the following categories: California legislation regarding professional responsibility, ethics opinions promulgated by the ABA, the State Bar of California and other local bar associations, California judicial decisions, and changes to the California Rules of Professional Conduct. The goal of the Year in Review is to provide the legal practitioner with a thorough yet concise overview of the major developments in the field of California legal ethics. It should be noted that the Year in Review covers, in addition to issues solely relating to the interpretation and application of ethical rules and guidelines, other issues relating more generally to the attorney-client relationship.

I. CALIFORNIA LEGISLATION REGARDING PROFESSIONAL RESPONSIBILITY

A. Judicial Discipline Bill

On November 8, 1994, California voters approved Proposition 190 by a wide margin. This proposition significantly reformed the Commission on Judicial Performance, which is the body charged with evaluating the conduct of, and disciplining, all California judges.

1. How Proposition 190 Changed the Commission

Proposition 190 amended the state Constitution to increase the membership of the Commission from nine to eleven. Whereas previously the Commission was made up of five judges, two lawyers, and two members of the public, the Commission will now be composed of six members of the pub-

1. Final California Election Results/Statewide Offices, L.A. TIMES, Nov. 10, 1994, at A23. The measure passed by a margin of 64% to 36%. Id.
2. See, e.g., J. Clark Kelso, Don’t Forget, It’s Still the People’s Court, L.A. TIMES, Nov. 3, 1994, at B7 (Prop. 190 will “radically restructure and reform” the Commission).
3. CAL. CONST. art. VI, § 8(a); Improve the Courts, supra note 3, at A22.
lic, two lawyers and three judges.\textsuperscript{4} The members of the Commission, with the exception of the three judges, are to be chosen by either the governor, the speaker of the Assembly, or the Senate Rules Committee.\textsuperscript{5} As a result of this change, members of the public will now constitute a majority of the Commission, and judges will constitute a distinct minority.

Before Proposition 190, the Commission operated in the strictest secrecy.\textsuperscript{6} It was authorized either to privately admonish judges or to recommend to the California Supreme Court that a judge be censured or removed from office.\textsuperscript{7} Proposition 190, however, now requires that all proceedings of the Commission be open to public review once the Commission files formal charges of misconduct against a judge,\textsuperscript{8} and gives the Commission authority to remove a judge, subject to review by the California Supreme Court.\textsuperscript{9}

There were other significant features in Proposition 190. The Commission was given power to make rules for the investigation of judges.\textsuperscript{10} The measure stripped the California Judges Association of the power to amend, or adopt new provisions of, the Code of Judicial Ethics, and granted this power to the California Supreme Court.\textsuperscript{11} The Supreme Court was also given discretionary authority to review Commission determinations.\textsuperscript{12} A Commission decision, however, is final if the Court does not act within 120 days.\textsuperscript{13}

2. Arguments in Favor of Proposition 190

Proponents of Proposition 190 emphasized the beneficial effects of opening the judicial discipline process to the public.\textsuperscript{14} They contended that judges have not been seriously dis-

\begin{itemize}
  \item \textsuperscript{4} Cal. Const. art. VI, § 8(a).
  \item \textsuperscript{5} Id.
  \item \textsuperscript{6} See, e.g., Bill Ainsworth, Judges Can't Slow Discipline Bill, The Recorder, June 16, 1994, p. 1 (charge by critics that system is "so secretive that it insulates and protects judges from being punished for their behavior").
  \item \textsuperscript{7} Former Cal. Const. art. VI, § 8(b)-(c). The Commission could open hearings to the public if the charges involved "moral turpitude, dishonesty, or corruption." Id. § 18(f)(3).
  \item \textsuperscript{8} Cal. Const. art. VI, § 18(j).
  \item \textsuperscript{9} Id. § 18(d).
  \item \textsuperscript{10} Id. § 18(i)(1).
  \item \textsuperscript{11} Id. § 18(m); Anne Krueger, Even Enemies of Prop. 190 Agree: Judicial Discipline Reform Overdue, S.D. Union-Trib., Oct. 6, 1994, at A3.
  \item \textsuperscript{12} Cal. Const. art. VI, § 18(d).
  \item \textsuperscript{13} Id.
  \item \textsuperscript{14} See, e.g., Improve the Courts, supra note 3, at A22.
\end{itemize}
ciplined by the judge-dominated Commission, despite egregious ethical violations. It was pointed out that, though the number of complaints against judges rose from 260 in 1980 to 950 in 1993, the number of cases in which discipline was imposed only increased from nine to sixteen for the same period. The measure will “enable the public to assess for itself” the process of disciplining judges who behave unethically. Furthermore, opening up the process will put an end to the “misguided cloak of secrecy” which has led to “public cynicism and mistrust of the state’s judiciary.”

Stripping the judges of the power to adopt judicial ethical rules would put a halt to the California Judges Association’s practice of diluting the force of such rules, thereby ending “California’s singular practice of adopting ethics by a private interest group.”

3. Arguments Against Proposition 190

Though the opponents of Proposition 190 did not succeed in convincing voters to defeat the measure, they did raise significant questions concerning its possible impact on the judicial discipline process. One objection frequently voiced concerned the manner in which the measure injected politics into the Commission. On the new eleven member panel, eight of the members will be appointed by politicians instead of judges—creating a politically appointed majority which could “gang up” on the three-judge minority. Therefore, the temptation for politicians to “choose appointees with a political agenda is clear and unrestrained.”

15. See, e.g., Harriet Chiang, Voters Expected to OK Judicial Discipline Overhaul, S.F. CHRON., Nov. 1, 1994, at A17 (“Judges who have made racist remarks in the courtroom or accepted gifts from lawyers and clients have gotten away with a mere slap on the wrist”).
17. Id.
18. Improve the Courts, supra note 3, at A22.
19. See Krueger, supra note 11 (quoting San Diego Superior Court Judge Terry O’Rourke).
20. See Overhaul, supra note 16.
21. Id.
22. Jeremy Fogel, Fatal Flaws in Prop. 190 Court Reform, SACRAMENTO BEE, Oct. 31, 1994, at B7. Fogel points out that, under the revamped system, a “single political party, if it controlled both the Legislature and the governor’s office, could use the Commission’s disciplinary powers to advance its own political goals.” Id.
Furthermore, the dangers inherent in the politicizing of the Commission would be compounded by the enormous power given to the Commission to remove or suspend judges.\textsuperscript{23} Though the Supreme Court can review disciplinary decisions of the Commission, this right of review is lost if the Court does not act within 120 days.\textsuperscript{24} Such dangers would be enhanced due to the fact that the Commission is given broad power to "write its own rules and decide who and how, under these rules, to prosecute, judge and punish."\textsuperscript{25} It would, therefore, be a simple matter for the Commission to "get rid of a judge because he or she bucked a political agenda."\textsuperscript{26}

4. Potential Challenges to the Revamped Commission

The objections which have been voiced against Proposition 190, and the concerns expressed by the measure's opponents must be taken seriously.\textsuperscript{27} In fact, given the enormous power granted to the Commission on Judicial Performance by Proposition 190, it would not be unexpected for the revamped system to be the subject of numerous legal challenges.

One aspect of the new system which might be challenged is the public nature of the Commission's disciplinary hearings. The likelihood of success of such a challenge, however, does not appear to be strong given the California Supreme Court's ruling in \textit{G. Dennis Adams v. Commission on Judicial Performance}.\textsuperscript{28} In that case, the Court ruled that Superior Court Judge G. Dennis Adams' fundamental constitutional rights were not violated by a 1993 order of the Commission to open the disciplinary hearings against him to the public.\textsuperscript{29}

\begin{itemize}
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} Id.; \textit{Cal. Const.} art. VI, \S 18(d).
  \item \textsuperscript{25} See \textit{Overhaul}, supra note 16.
  \item \textsuperscript{26} Judge Joseph A. Wapner (Retired), \textit{Judicial Reform Propositions}, L.A. \textbf{T}IMES, Nov. 5, 1994, at B7.
  \item \textsuperscript{27} Unfortunately, serious objections to the measure by such organizations as the California Judges Association were often dismissed by proponents summarily by solely focusing on the self-interest or previous inaction of such groups. \textit{See}, e.g., \textit{Improve the Courts}, supra note 3, at A22 ("The judges' denunciation of the Commission's closed-door culture comes too late. Decades have passed with no peep from the jurists that they were willing to reform their disciplinary process").
  \item \textsuperscript{28} 882 P.2d 358 (Cal. 1994).
  \item \textsuperscript{29} Id. at 376-77. Due to a measure passed by voters in 1988, the Commission on Judicial Performance had discretion to open hearings against a judge if the charges involved "dishonesty, corruption or moral turpitude." \textit{Former Cal. Const.} art. VI, \S 18(f)(3). Due to Proposition 190, of course, this measure is
The Court stated that "the determination to open a disciplinary proceeding before the Commission does not impinge upon any fundamental right of the subject judge." Since no fundamental right to a closed hearing existed, the Court analyzed Adams' equal protection and right to privacy claims under the rational basis standard. The opening of a disciplinary proceeding was found to be rationally related to the legitimate governmental purpose of promoting public confidence in the judiciary.

The Court's blanket statement that an open disciplinary proceeding does not "impinge upon any fundamental right" of a judge appears to doom any chance of a successful challenge to the open hearing provisions of Proposition 190 on right of privacy, equal protection, or due process grounds. The Court will likely evaluate such constitutional claims under the rational basis standard, and it will be difficult to succeed with the argument that opening all formal proceedings to the public is not rationally related to the legitimate governmental purpose of promoting public confidence.

There is, however, one extremely significant difference between the open hearing order challenged in Adams and the Proposition 190 provisions. The latter mandate an open hearing whenever any formal charges against a judge are instituted, with no consideration as to the seriousness of the charges, or the existence of extenuating circumstances. The Court referred approvingly, in Adams, to the fact that the Commission, under the then existing scheme, retained "the authority to maintain the confidentiality of proceedings and thus to have an entirely private admonishment in the event it concludes that public confidence and the interests of justice would not be served by an open hearing." In contrast, under the revamped system, the Commission could not close the hearing if formal charges have been filed, even if it decided that "public confidence and the interests of justice would not be served" by opening the hearing. Therefore, it is now superfluous, for all hearings against judges will be public as soon as any charges are filed. 

31. Id. at 377.
32. Id.
33. CAL. CONST. art. VI, § 18(j).
34. G. Dennis Adams, 882 P.2d at 371-72.
possible that the Court would disapprove of Proposition 190’s open hearing provisions on the ground that the ability of the Commission to, in its discretion, protect the public and the “interests of justice” has been wholly stripped away.

Another challenge to Proposition 190 could be made on separation of powers grounds. One commentator, in fact, has deemed it “all but certain” that such a lawsuit will be brought. However, such a suit would likely prove unsuccessful as well, because a similar claim was rejected by the California Supreme Court in the Adams case. Adams had claimed that the Commission’s powers to open hearings and to determine whether formal charges against a judge involved moral turpitude were an exercise of judicial power, and that vesting such judicial power in an administrative agency violated the separation of powers clause in the California Constitution. The Court stated that, even assuming that the powers vested in the Commission were “judicial-like” functions, the judge’s claim had no merit. It pointed out that the separation of powers clause forbids the intermingling of legislative, executive, or judicial power except as permitted by the Constitution. Because the Commission was set up as a “constitutionally independent body” expressly authorized by the Constitution itself to exercise the challenged judicial-like powers, the Court held that the strictures of the separations of powers clause did not apply.

Thus, the Court has already rejected the claim that constitutional authorization for the Commission to perform judicial functions constitutes an unconstitutional usurpation of judicial power. Because Proposition 190 consisted of changes to the California Constitution itself, any claim that its provisions must be struck down on separation of powers grounds would likely fail under the Adams rationale.

B. Summary of Legislation Enacted in 1994

Presented below is a summary of significant California legislation enacted in 1994 regarding professional responsi-
bility and conduct. The summary is not intended to be comprehensive, but merely to highlight the more significant legislative developments occurring over the past year. Note that the brief descriptions of the legislation provided refer only to those sections which concern legal ethics.

1. **SB 254, approved by Governor on Sept. 26, 1994**

Requires the State Bar to submit to the Supreme Court for approval, by March 1, 1995, a rule of professional conduct governing trial publicity and extrajudicial statements made by attorneys that concern adjudicative proceedings.

2. **SB 1718, not yet approved by Governor**

Requirement that student at nonaccredited law school pass examination as condition of receiving credit for first year of study eliminated; such students only required to take the examination; examining committee shall notify a student who has taken the examination of what his or her score suggests about the student's probability of becoming attorney; student may continue legal studies as long as he satisfies the law school's academic standards; State Bar shall publish statistics for first-year law students' examination as it does for General Bar Examination.

3. **AB 2662, approved by Governor on July 9, 1994**

Information transmitted by facsimile, cellular radio telephone, or cordless telephone between attorney and client is confidential.

4. **AB 2928, approved by Governor on July 9, 1994**

Attorney complained against shall receive exculpatory evidence from the State Bar after initiation of disciplinary proceeding in State Bar Court, and thereafter whenever such evidence is discovered and available; disclosure of mitigating evidence not required.

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5. **AB 3219, approved by Governor on Sept. 10, 1994**

Concerns (1) provisions regarding mediation of complaints against attorneys: State Bar rules regarding implementation of alternative dispute resolution discipline mediation program may authorize mediation to proceed under programs sponsored by local bar associations; Board of Governors of State Bar may establish a system and procedure for mediation of attorney fee disputes which would be voluntary, and in which discussions and offers of settlement in mediation would be confidential; (2) provisions regarding fee contracts: attorney must provide client with duplicate copy of fee contract at time contract is entered into; fee contract must include any basis for attorney compensation; (3) provisions regarding attorney fee disputes: if client waives right to arbitration over fee dispute by proceeding with action, parties may thereafter stipulate to set aside waiver and proceed with arbitration; small claims court given jurisdiction to confirm, correct, or vacate a fee arbitration award not exceeding $5,000, or to conduct hearing de novo between attorney and client if amount in controversy is not more than $5,000.

6. **AB 3432, approved by Governor on Sept. 11, 1994**

Authorizes cities and/or counties to require attorneys qualified as lobbyists to register and disclose lobbying activities directed toward those jurisdictions' local agencies to the same extent as nonattorney lobbyists; any lobbying prohibitions enacted by local jurisdiction must also apply to attorney lobbyists; local jurisdictions may require disclosure of specified information concerning a lobbyist.

7. **AB 3638, approved by Governor on Sept. 30, 1994**

Limitations imposed on the amount of gifts that may be accepted by judges; judge cannot accept gifts from any single source in any year with total value of more than $250; judges prohibited from accepting any honorarium; Commission on Judicial Performance required to enforce new rules.

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8. **AB 3659, approved by Governor on Sept. 21, 1994**

Concerns (1) provisions regarding lawyer referral services: provides that the State Bar may require that application and renewal fees for lawyer referral services be determined by consideration of specified factors; attorney referral services must establish separate activities to serve persons of limited financial means; anyone having an ownership interest in a lawyer referral service that violates provisions governing such services shall be civilly liable, (2) provisions regarding attorney advertising: provides that a spokesperson may be used in advertising so long as there is no suggestion that spokesperson is advertising attorney, and spokesperson’s title is disclosed; advertisement in electronic media may not be false, misleading, or deceptive, and message must be factually substantiated; rebuttable presumption that certain messages are false, misleading, or deceptive; certain information presumed to not be misleading or deceptive when presented in electronic media advertising; certain disclosures must be made in electronic media advertising that portrays a result in a particular case; procedure created for administrative investigation of attorney advertising complaints filed with State Bar against Bar members and lawyer referral services.

II. **CALIFORNIA AND ABA ADVISORY ETHICS COMMITTEE OPINIONS**

The opinions summarized below were issued from the ABA and various California advisory ethics committees during 1994. 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 1994 by the Bar Association of San Francisco.

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A. The State Bar of California Standing Committee on Professional Responsibility and Conduct

1. Formal Opinion No. 1994-134

A client has informed an attorney of the client's intention to terminate the attorney's employment, and to replace him or her with successor counsel. No substitution of counsel form has been filed, but the original attorney has nevertheless been requested to deliver the client file to the client or successor counsel immediately. Would the attorney act ethically in retaining the client file until the substitution form is filed?

The opinion first notes that, even though the client has informed the attorney of the client's intention to discharge the attorney, the attorney remains the attorney of record until the substitution of counsel form is filed. Until that time, the attorney has the same duty under California Rule of Professional Conduct 3-110 to represent the client competently as existed before the discharge. Undoubtedly, competent representation of a client will often require possession of the client file. However, Rule 3-500 (an attorney must "keep a client reasonably informed") and Business & Professions Code Section 6068(m)(attorney must "promptly comply with reasonable requests for information") also require the attorney to make the client file available to the client or prospective new counsel at all reasonable times.

It would appear, therefore, that the attorney may face conflicting obligations once the client or successor counsel demands the file, because the attorney may not be able to represent the client competently unless the client file is kept. The opinion resolves this difficulty by stating that the attorney may retain possession and control of the file only if it is necessary to do so in order to represent the client competently and fulfill the attorney's outstanding obligations to a tribunal before which a client matter is pending. However, an attorney cannot withhold the client file from the client or successor counsel merely to await the technicality of formal with-


50. All further references are to the California Rules of Professional Conduct unless otherwise indicated.
2. *Formal Opinion No. 1994-135*\(^{51}\)

This opinion deals with the common situation wherein an attorney desires to “cash-out” his or her fee at the time of settlement, instead of receiving his percentage of the client’s settlement payments over the course of many years. The opinion first notes that, if the fee agreement originally entered into between attorney and client is silent as to the method that attorney’s fees shall be paid under a structured settlement, the attorney can only receive fees on a conventional pro rata basis. In other words, the attorney cannot agree to a settlement whereby he or she receives his fee up front unless such a possibility is provided for in the client fee agreement.

The attorney can contract with the client to receive the entire fee at the time of settlement. However, the opinion makes clear that such a contract will be scrutinized closely under Rule 4-200 (unconscionable fees) and Rule 3-300 (attorneys having pecuniary or possessory interests adverse to their clients). In addition, such a contract must be in writing, signed, and in compliance with Business and Professions Code Section 6147. Compliance with Section 6147 requires that the attorney include a statement in the contract specifying how the payment of attorney’s fees up front will affect the client’s recovery.

This opinion discusses and interprets Rules 3-300, 3-500, 3-510, and 4-200 of the California Rules of Professional Conduct, and Section 6147 of the California Business and Professions Code.

B. Los Angeles County Bar Association Professional Responsibility and Ethics Committee

1. Opinion No. 476\textsuperscript{52}

An attorney has represented a wife in a marital dissolution proceeding. The retainer agreement provides that the attorney's services will not include appeals or execution on any judgment obtained at the trial level. The case is settled at the trial level, but opposing counsel fails to prepare a judgment as required by the settlement. The client does not wish for the attorney to prepare the judgment unless the attorney agrees to do so free of charge. In addition, the client still owes the attorney $4,500 in previously earned fees, which she proposes to satisfy by assigning to the attorney the right to collect unpaid spousal support and a separate cause of action against the former husband. The attorney does not want to accept these proposals. The issues involved are (1) whether the attorney is ethically obligated to continue to represent the client on a matter (preparing the judgment) which falls outside the terms of the retainer agreements, and (2) whether an ethical conflict has developed between the attorney and client as a result of the fee dispute.

As to the first issue, the opinion states that an attorney has no general ethical obligation to represent the client on matters which fall outside the parameters of the retainer agreement. The only major limitation on this principle is that the attorney cannot withdraw from representation until appropriate steps are taken to avoid prejudice to the client's rights, i.e. giving due notice of the withdrawal to the client, allowing time for the client to employ other counsel, returning client property and papers, etc. There may be, in addition, local rules or state statutes which impose additional requirements for the withdrawal of representation.

As to the second issue, the opinion states that the attorney could not institute a civil action against the current client without creating an impermissible conflict of interest. The attorney must first terminate representation of the client before any legal action can be taken to collect the unpaid fees. The attorney cannot, in addition, condition performance of

services covered under the retainer agreement upon the payment of the unpaid fees.

This opinion discusses and interprets Rules 3-310 and 3-700 of the California Rules of Professional Conduct, and Sections 284 and 285.1 of the California Code of Civil Procedure.

2. **Opinion No. 477**

An attorney, also a licensed physician, has an ownership or partnership interest in the medical facility in which he practices medicine. As attorney, he or she refers his personal injury clients to this medical facility for treatment, though he or she does not personally treat the referred clients. Has the attorney conducted him or herself ethically?

The opinion first states that the referral of the attorney’s clients to a medical facility in which the attorney has an ownership interest is a type of transaction contemplated by Rule 3-300. Because the attorney will receive a pecuniary benefit by referring clients to the facility, the attorney will not be acting solely in the client’s best interest. Therefore, there is a potential for undue influence and overreaching by the attorney—exactly the sort of situation that Rule 3-300 was intended to cover.

Because Rule 3-300 applies to the referral of clients to the facility, the referral must comport with the Rule’s requirements. This means, first, that the referral must be fair and reasonable to the client. For example, the attorney could not condition representation of a client on the client’s seeking treatment at the facility. Second, the attorney must, contemporaneously with the referral, fully and clearly disclose to the client his or her relationship with the facility. For example, the attorney must inform the client that the client is not required to go to the referred facility.

The opinion also states that written disclosure to the client of the attorney’s relationship to the facility may be required in certain circumstances under Rule 3-310(B). In those instances in which this Rule applies, the attorney must, in addition to informing the client in writing of the nature of the attorney’s relationship with the facility, discuss in writing how this relationship may adversely affect the attorney’s representation of the client.

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This opinion discusses and interprets Rules 3-110, 3-300, and 3-310 of the California Rules of Professional Conduct, and Section 6068 of the California Business and Professions Code.

3. Opinion No. 478\(^{54}\)

A client obtains medical services paid for by a health plan. Subsequently, an attorney files a lawsuit for personal injuries on the client’s behalf. The attorney thereafter receives a notice of lien from the health plan and a copy of a lien acknowledgment form which the client has signed. Upon settlement of the personal injury lawsuit, the client instructs the attorney to remit the settlement funds to the client, as opposed to paying the lien. The attorney remits the funds to the client, thereafter requiring that the client sign a form acknowledging personal responsibility for the debt. Has the attorney acted ethically by remitting the settlement funds to the client in such a situation, or should the attorney have instead remitted the funds to the lienholder without the client’s consent?

The opinion first notes that under Rule 4-100, the attorney has an obligation to pay to the client funds in the attorney’s possession upon the client’s request, provided that the client is entitled to receive the funds. However, the attorney also has a fiduciary duty towards the third party lienholder. Because the attorney in the instant factual scenario had received both a notice of lien and a copy of a signed lien acknowledgment form, the attorney may be subject to discipline for violating this fiduciary duty should the funds be remitted to the client without the lienholder’s consent. However, the attorney may not simply disburse the settlement funds directly to the health plan, for Rule 4-210 provides that a attorney must receive the client’s consent before contested funds may be disbursted.

It is, therefore, ethically impermissible for the attorney to disburse the settlement funds in this case to the client or to the health plan. The opinion states that “several viable options” remain for the attorney in such a situation, and particularly identifies two: (1) the attorney may obtain consent from both the client and the lienholder to hold the funds in

\(^{54}\) Id., Op. 478.
trust until the dispute is settled, or (2) the attorney may commence a civil action in interpleader.

This opinion discusses and interprets Rules 4-100 and 4-210 of the California Rules of Professional Conduct.

C. San Diego County Bar Association Ethics Committee

1. Opinion 1993-1

A potential client asks an attorney for advice on how to protect his or her personal assets from existing and identifiable creditors through a transfer of assets. The attorney is asked to assist in the creation and utilization of an asset protection plan designed to prevent creditors from reaching the potential client's assets. May the attorney do so without acting unethically?

The opinion notes that Rule 3-210 forbids an attorney from advising a client to violate any law, rule, or court ruling unless the attorney believes in good faith that the law, rule, or ruling is invalid. Therefore, the ethical implications of the attorney's advice in the instant case depend on whether the advised action constitutes a legal violation. The Uniform Fraudulent Transfer Act ("UFTA") states that a asset transfer is fraudulent if the transfer is made with the intent to "hinder, delay, or defraud the creditor." An attorney who advised a transfer as is contemplated here would be aiding in a fraudulent act under the UFTA, and therefore the attorney would be subject to discipline under Rule 3-210. In addition, any legal fee charged for providing such advice and assistance would be unconscionable under Rule 4-200.

This opinion discusses and interprets Rules 3-210 and 4-200 of the California Rules of Professional Conduct, Section 6128 of the California Business and Professions Code, Section 3439 et seq. of the California Civil Code, and Sections 154(a) and 531 of the California Penal Code.

2. Opinion 1993-2

A law firm has represented a client who is charged, and ultimately convicted, of a serious felony. Subsequently, the

57. Id.
client is killed by another person. May the law firm represent the accused murderer of the deceased client? Is it relevant to this issue that (1) the deceased client was convicted of a violent crime, and the accused murderer claims self-defense, or that (2) the firm has no confidential information from the deceased client which will aid in the defense of the murderer?

The opinion states that, under this factual scenario, the law firm may not ethically represent the accused murderer, for an attorney's duty of loyalty to the deceased client does not terminate with the client's death. The conflict of interest involved cannot be waived, for the former client is unavailable to consent to the conflict. Though an impermissible conflict is most apparent when the deceased client was previously convicted of a violent crime and the accused murderer claims self-defense, the law firm could not represent the accused murderer even if such factors were not present.

The opinion also states that it is not ethically permissible for the law firm to conclude at the outset that it does not possess confidential information of the deceased client relevant to the representation of the accused murderer, because it is often not possible to judge the significance of information at the beginning of a case. A law firm which simply assumed it possessed no confidential information would jeopardize its duties to both its former and current client.

This opinion discusses and interprets Rule 3-310 of the California Rules of Professional Conduct, Section 6068 of the California Business and Professions Code, and Sections 952, 953, and 954 of the California Evidence Code.

D. ABA Committee on Ethics and Professional Responsibility

Presented below are the central holdings of the formal opinions issued in 1994 by the ABA Committee on Ethics and Professional Responsibility. Though such opinions obviously involve the interpretation of ethical rules (the ABA Model Rules) which are not binding on California practitioners, the manner in which the Committee resolves ethical dilemmas may foretell how such issues will be handled under the California Rules of Professional Conduct.
1. Formal Opinion No. 94-380

The limitations imposed by the Model Rules of Professional Conduct fully apply to attorneys representing a fiduciary in a trust or estate matter. The attorney's obligations to the fiduciary are not altered merely by the fact that the attorney also may have obligations towards the beneficiaries of the trust or estate. Nor does that fact impose on the attorneys ethical obligations toward the beneficiaries that they would not have toward other third parties. An attorney's obligation under ABA Model Rule 1.6 to preserve client confidences is not changed because the client happens to be a fiduciary.

2. Formal Opinion No. 94-381

A retainer or employment agreement which prohibits counsel for a corporation from representing anyone in the future against the corporation may not be demanded or accepted without violating Rule 5.6(a), because such a prohibition constitutes an impermissible restriction on the attorney's right to practice.

3. Formal Opinion No. 94-382

When an attorney receives, unauthorized, an adverse party's materials, once the attorney becomes aware of the privileged or confidential nature of the materials, the attorney must refrain from viewing such materials. The attorney can, however, review the materials to the extent necessary to determine the manner in which to proceed. The attorney should either notify opposing counsel, and follow such counsel's instructions regarding the disposition of the material, or should completely refrain from using the materials until a court makes a determination as to their proper disposition.


60. All further references are to the ABA Model Rules unless otherwise indicated.


4. Formal Opinion No. 94-38363

Threatening to file a disciplinary complaint against opposing counsel in order to obtain an advantage in a civil case may constitute a violation of the Model Rules of Professional Conduct, though the Rules do not expressly prohibit doing so. The attorney may not use the threat as a bargaining point if the disciplinary violation of opposing counsel seriously reflects on counsel's honesty, trustworthiness, or fitness as an attorney. Instead of making threats, the attorney is ethically required to report such misconduct. A threat used by an attorney to obtain a tactical advantage would also be ethically improper if opposing counsel's misconduct was not related to the civil claim, if the attorney's disciplinary charges against opposing counsel are not well founded in fact and in law, or if the threat has no other purpose or effect than embarrassing, delaying or burdening opposing counsel or prejudicing the administration of justice.

5. Formal Opinion No. 94-38464

When a disciplinary complaint has been filed against an attorney by opposing counsel in an ongoing matter, the attorney is not ordinarily required nor permitted to withdraw from representing his or her client solely because of the complaint. There may be circumstances, however, where the filing of such a complaint gives rise to the "good cause" necessary to permit withdrawal. Even if the Model Rules permit a withdrawal, the attorney must still comply with any additional limitations mandated by court rules.

6. Formal Opinion No. 94-38565

When an attorney's files and records relating to the representation of a current or former client have been subpoenaed, or a court order has been obtained for their production, the attorney has an ethical obligation to attempt to limit the subpoena or court order on any legitimate available grounds in order to protect confidential documents.

64. Id., Formal Op. 94-384.
7. *Formal Opinion No. 94-386*\(^{66}\)

An attorney may not cite to a court an unpublished opinion of any court, if the forum court has a specific rule which prohibits references in briefs to opinions marked by the issuing courts as "not for publication". An attorney may ask permission of the court to cite an unpublished case, but if permission is not expressly granted the attorney must refrain from presenting the opinion to the court.

8. *Formal Opinion No. 94-387*\(^{67}\)

There is no ethical duty in negotiations for an attorney to inform the opposing party that the statute of limitations on the claim of the attorney's client has run. In fact, so informing the opposing party would constitute a violation of Rules 1.3 and 1.6. If the opposing party and opposing counsel seem unaware that the statute has run, the attorney cannot discontinue negotiations solely on this ground unless the attorney's client consents. It is not unethical for the attorney to file suit to enforce a claim which is time-barred, unless doing so is prohibited by rules of the local jurisdiction. Attorneys representing government agencies are not held to a different standard regarding any of these circumstances than are attorneys representing private clients.

III. **CALIFORNIA COURT DECISIONS**

A. **General Dynamics Corporation v. Superior Court of San Bernadino County**\(^{68}\)—*Implied-in-Fact Contract and Retaliatory Discharge Claims by In-House Counsel Against Former Employer*

This case concerned a highly controversial and much-debated issue—whether in-house counsel can pursue a retaliatory discharge claim against the former employer.\(^{69}\) Andrew Rose was an attorney who began working for General Dy-

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\(^{66}\) *Id.*, Formal Op. 94-386.

\(^{67}\) *Id.*, Formal Op. 94-387.

\(^{68}\) 876 P.2d 487 (Cal. 1994).

After 14 years with the company, Rose was abruptly fired. Rose filed a complaint for damages, alleging that the discharge was the result of his (1) leading an investigation into drug use at General Dynamics' Pomona plant, (2) protesting the company's failure to investigate the bugging of the chief of security's office, and (3) advising company officials that the company's wage policy might be in violation of the Fair Labor Standards Act. General Dynamics filed a demurrer to the complaint, asserting that Rose had failed to state a claim for relief because, as an in-house attorney, he was subject to discharge at any time for any reason.

The Court first noted the dramatic increase in the number of in-house counsel in the last two decades, and noted that this growth has brought with it "a widening recognition of the descriptive inadequacy of the nineteenth century model of the lawyer's place and role in society." The Court pointed out that in-house attorneys do not possess the "significant measure of economic independence and professional distance" of law firm partners, and that the economic fate of in-house attorneys is directly tied to a single employer. In addition, the Court pointed out that the expansive scope of an in-house attorney's work, along with the close relationship between the in-house attorney and his employer, can subject the in-house attorney to "unusual pressures" to conform to the employer's wishes.

The Court reaffirmed the rule that a client has the right "to sever the professional relationship at any time and for any reason." Simply because, however, the client has a right to discharge in-house counsel does not mean that "it may do so without honoring antecedent contractual obligations to discharge an attorney-employee only on the occurrence of speci-

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70. General Dynamics, 876 P.2d at 490.
71. Id.
72. Id. at 490-91.
73. General Dynamics Corp. v. Superior Court of San Bernadino County, 876 P.2d 487, 491 (Cal. 1994).
74. Id.
75. Id.
76. Id. at 491-92.
77. Id. at 493.
fied conditions." Therefore, if an employer has chosen to limit its traditional at-will freedom to terminate in-house counsel, and implied-in-fact limitations on counsel's employment are found to exist, "no reason appears" why the employer "should not be held to the terms of its bargain." In addition, because implied-in-fact limitations are purely contractual creations, suits brought by terminated in-house counsel based on such limitations are unlikely to present issues implicating the unique values of the attorney-client relationship. Such suits can therefore be treated in the same manner as implied-in-fact claims brought by nonattorney employees.

The Court treated separately the possibility of a retaliatory discharge tort claim by in-house counsel. The Court recognized that other courts have refused to permit such a claim to be pursued as a result of the unique nature of the attorney-client relationship. Yet, the Court felt that it was precisely because of the attorney's unique position and influence that a retaliatory discharge tort should be recognized. By providing in-house counsel with a remedy in tort for "resisting socially damaging organizational conduct, the courts mitigate the otherwise considerable economic and cultural pressures on the individual employee to silently conform."

In contrast to the general approval given to implied-in-fact contract claims by in-house counsel, the Court set up a complex framework for adjudication of retaliatory discharge claims. First, in-house attorneys should have access to a judicial remedy when they are terminated for adhering to their mandatory professional duties. Therefore, the attorney can receive tort damages if fired for performing a duty required by an ethical code or statute, or for resisting an employer's demand to act in a manner clearly forbidden by the ethical code. Second, if the attorney's conduct was not required,

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78. General Dynamics Corp. v. Superior Court of San Bernadino County, 876 P.2d 487, 496 (Cal. 1994).
79. Id.
80. Id.
81. Id.
82. Id. at 498-500.
83. General Dynamics Corp. v. Superior Court of San Bernadino County, 876 P.2d 487, 501 (Cal. 1994).
84. Id. at 501.
85. Id. at 501-02.
86. Id.
but was merely ethically permissible, the court must determine (1) whether the termination was such as would give rise to a retaliatory discharge action by a nonattorney employee, and (2) whether some statute or ethical rule, such as the statutory exceptions to the attorney-client privilege, permitted the attorney to "depart from the usual requirement of confidentiality with respect to the client-employer" and engage in the conduct for which the attorney was fired.\textsuperscript{87}

The Court emphasized that its holding with respect to retaliatory discharge tort claims is of "limited scope".\textsuperscript{88} The Court stated that the contours of the attorney-client privilege should continue to be observed, and that the privilege should not be diluted for in-house counsel.\textsuperscript{89} It further noted that trial courts have a wide array of equitable measures at their disposal which can be used to prevent the former in-house counsel from disclosing client confidences.\textsuperscript{90} In addition, there are other subsidiary rules which will prevent in-house counsel from filing suits in bad faith.\textsuperscript{91} For instance, the attorney bears the burden of establishing the relevant ethical requirements and of showing that the employer was wrongfully motivated.\textsuperscript{92}

\textbf{B. Santa Clara County Counsel Attorneys Association v. Woodside—County Attorneys' Ability to Sue Employer/Client Under MPAA}

The issue in this case was whether attorneys employed by Santa Clara County as County Counsel may sue a public agency under the Meyers-Milias-Brown Act ("MMBA").\textsuperscript{94} This issue arose in the following factual context. The Santa Clara County Counsel Attorneys Association ("Association") refused to accept a wage package offered by the County.\textsuperscript{95} The Association instead sought to meet and confer with the County and its Board of Supervisors in order to argue in sup-

\textsuperscript{87} Id. at 503.
\textsuperscript{88} General Dynamics Corp. v. Superior Court of San Bernadino County, 876 P.2d 487, 503 (Cal. 1994).
\textsuperscript{89} Id. at 504.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} 869 P.2d 1142 (Cal. 1994).
\textsuperscript{94} CAL. GOVT. CODE §§ 3500-3511 (1994).
\textsuperscript{95} Woodside, 869 P.2d at 1145.
port of its position that its members deserved higher salaries.96 The Board, however, never responded to the Associations’ repeated attempts to meet and confer.97 Rather, the Board unilaterally enacted a 4 percent wage increase, which the Association had previously indicated was not acceptable.98 Thereafter, the Association filed a formal action seeking, inter alia, a declaration that a petition for a writ of mandate compelling the County to negotiate over wage issues does not create a conflict of interest or violate any ethical code such that the attorneys in the Association would be subject to discipline.99 The County cross-complained seeking to enjoin the Association from filing a petition for writ of mandate.100

The Court first determined that the County attorneys were local government employees within the scope of the MMBA’s protections, and therefore, the MMBA gave the Association the statutory right to sue their employer.101 Nevertheless, the County insisted that this statutory right to sue must be superseded by the attorney’s duty of loyalty towards a client.102 The County further argued that, because the statute authorizes a violation of the Rules of Professional Conduct by allowing an attorney to sue a client, it constituted a violation of the constitutional separation of powers by intruding on the power vested in the judiciary by the California Constitution to govern the legal profession.103

In order for the MMBA to be ruled unconstitutional on separation of powers grounds, the Court stated that “a direct and fundamental conflict” must first be shown between the operation of the MMBA as it applies to attorneys and attorneys’ ethical obligations.104 Because the MMBA had already been found to have authorized the County attorneys to sue the county, the Court searched to find an ethical or common law duty for attorneys not to sue their clients. The Court determined that there was no California Rule of Professional

96. Id.
97. Id.
98. Santa Clara County Counsel Attorneys Ass’n v. Woodside, 869 P.2d 1142, 1145 (Cal. 1994).
99. Id. at 1146.
100. Id.
101. Id. at 1147-51.
102. Id. at 1151.
103. Santa Clara County Counsel Attorneys Ass’n v. Woodside, 869 P.2d 1142, 1151 (Cal. 1994).
104. Id. at 1152.
Conduct which specifically proscribed a suit by an attorney against his or her client.\textsuperscript{105}

The Court then turned to the attorney's common law duty of loyalty. It found that the collective bargaining relationship between an attorney/employee and a client/employer was not a per se violation of the duty of loyalty.\textsuperscript{106} Though such a relationship can create "antagonism" between the attorney and client, "such antagonism in the labor relations context is unfortunately commonplace."\textsuperscript{107} The determinative question, according to the Court, was whether the attorney had allowed the antagonism to compromise client representation.\textsuperscript{108} The only possible resolution, therefore, was to permit the attorneys to bring a petition for mandate, while simultaneously holding the attorneys to "a professional standard that ensures that their actual representation of their client/employer is not compromised."\textsuperscript{109} The attorneys can therefore sue their employer so long as they are confining the dispute to the employer/employee context, and are not allowing it to affect the attorney/client relationship.\textsuperscript{110}

The last issue the Court addressed was whether a client has the traditionally absolute right to discharge an attorney regardless of any limitations of that right apparently imposed by the MMBA. The Court noted that the MMBA prohibits employers from discharging employees who exercise lawful employee rights of representation, such as engaging in union activity.\textsuperscript{111} This conflicted with the absolute power of a client to discharge an attorney with or without cause, under Code of Civil Procedure section 284.\textsuperscript{112} The Court resolved this conflict by holding that the MMBA "creates an exception to the general rule . . . that a client may discharge an attorney at

\begin{itemize}
  \item \textsuperscript{105} Id. at 1152-54.
  \item \textsuperscript{106} Id. at 1157.
  \item \textsuperscript{107} Id. at 1157.
  \item \textsuperscript{108} Santa Clara County Counsel Attorneys Ass'n v. Woodside, 869 P.2d 1142, 1157 (Cal. 1994).
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} Id. at 1157-58. The Court points out that this holding does not mean that an attorney suit against a present client is generally permissible. In cases where the attorney is an independent contractor, and no statute exists to protect the attorney's employment rights, a suit against a client may still subject the attorney to discipline. \textit{Id.} at 1158 n.8.
  \item \textsuperscript{111} Id. at 1159.
  \item \textsuperscript{112} Id. (citing Fracasse v. Brent, 494 P.2d 9 (Cal. 1972)).
\end{itemize}
The MMBA, as a later and more specific statute, was interpreted by the Court to have modified the earlier and more general statute, Code of Civil Procedure section 284.114

C. Flatt v. Superior Court of Sonoma Cty.116—Attorney’s Duty to Advise Client When Attorney Terminates Representation Due to Conflict of Interest

The facts of this case are simple enough, yet the issue it presents is deceptively complex. Attorney Donald Hinkle structured a transaction for William Daniel, in which Daniel received a two-thirds interest in a steel business.116 On June 20, 1989, during Daniel’s marital dissolution proceeding, a superior court judge ruled that Daniel’s wife had a community interest in the steel business.117 Daniel believed this outcome was a result of Hinkle’s faulty lawyering, and he telephoned attorney Gail Flatt in order to discuss his grievance with Hinkle.118 On July 27, 1989, Daniel and Flatt had an hour-long meeting, during which Daniel disclosed confidential information to Flatt and turned over several documents to her.119 According to Daniel, Flatt told him during the meeting that he definitely had a claim for legal malpractice against Hinkle.120 In a letter dated August 3, 1989, however, Flatt informed Daniel that she could not represent him in his dispute with Hinkle because her firm represented Hinkle’s firm in an unrelated matter.121 Daniel put off his search for another lawyer for a year and a half.122

On June 3, 1991, Daniel filed suit against Hinkle’s firm as well as against Flatt and the other partners in her firm.123 Daniel alleged that Flatt had breached a duty to Daniel in failing to advise him regarding the statute of limitations which governed his claims against Hinkle, and in failing to

113. Santa Clara County Counsel Attorneys Ass’n v. Woodside, 869 P.2d 1142, 1160 (Cal. 1994).
114. Id.
115. 885 P.2d 950 (Cal. 1994).
116. Id. at 952.
117. Id.
118. Id.
119. Id.
120. Flatt v. Superior Court of Sonoma County, 885 P.2d 950, 952 (Cal. 1994).
121. Id.
122. Id.
123. Id.
advise him to seek other counsel to avoid having the claim become time-barred. Flatt moved for summary judgment on the ground that she owed no duty to advise Daniel, because such advice would have been contrary to the interests of her client, Hinkle. Both the trial court and Court of Appeal denied Flatt's motion for summary judgment, focusing solely on the question of whether Daniel had, in fact, become a Flatt's client.

The California Supreme Court assumed, for the purposes of its analysis, that Daniel had in fact become a client of Flatt's during their brief meeting. The Court then examined conflict of interest principles to determine whether Flatt had an obligation to give advice to her new client Daniel upon the severance of representation. The Court explained that in "successive representation" conflicts, the primary worry is the possible intrusion upon the former client's confidentiality, whereas in "simultaneous representation" conflicts, the primary value implicated is the attorney's duty of loyalty. Since the duty of loyalty is such a vital obligation of an attorney, a mandatory rule of disqualification has been applied whenever a "simultaneous representation" conflict arises.

Not only, the Court stated, does the duty of loyalty require that an attorney disqualify him or herself from dual representation, but the duty of loyalty "forbids any act that would interfere with the dedication of an attorney's entire energies to [the] client's interests." The giving of any advice to Daniel in order to advance his lawsuit would constitute an act that would harm Flatt's existing client Hinkle.

124. Id.
125. Flatt v. Superior Court of Sonoma County, 885 P.2d 950, 952 (Cal. 1994).
126. Id.
127. Id.
128. Id. at 953.
129. Id. at 953-58.
131. Id. at 955.
132. Id. at 958 (quoting Anderson v Eaton, 293 P. 788 (Cal. Ct. App. 1930)).
133. Id. at 958-59.
fore, "any advice to Daniel regarding the statute of limitations governing his claim against Hinkle would have run counter to the interests of an existing client of Flatt and her firm and of their obligation of undivided loyalty to him." Consequently, Flatt had no duty to give Daniel such advice. In addition, Flatt had no duty to advise Daniel to promptly seek other counsel, for Daniel "obviously knew" that he had to look for an attorney if he wished to bring his claim.

Justice Kennard's dissenting opinion disagreed with the majority's reasoning because she believed the majority had misstated the issue. According to Justice Kennard, Flatt's duty was the "duty to use the skill, prudence, and diligence commonly possessed by other attorneys." Because presumably, Daniel had become a client of Flatt's, Flatt assumed a duty of care towards him. The dissent stated that it would be unprecedented to allow Flatt to give preference to the "first-engaged client" over the "second-engaged client." Instead, the extent of Flatt's duty to give advice to Daniel is an issue which should be resolved by expert evidence regarding an attorney's standard of care in such a situation. Because no evidence was presented to demonstrate what the proper standard of care required, Flatt is not entitled to summary judgment.

D. Metro-Goldwyn-Mayer v. Superior Court—Attorney's Duty to Release Client Property to Former Client Upon Request As Affected By Work Product Doctrine

Christensen, White, Miller, Fink and Jacobs ("Christensen") represented Metro-Goldwyn-Mayer ("MGM") and its majority shareholders in a merger transaction, and a subse-

134. Id. at 959.
136. Id.
137. Id. at 961.
138. Id. at 961.
139. Id. at 962.
140. Flatt v. Superior Court of Sonoma County, 885 P.2d 950, 962 (Cal. 1994).
141. Id. at 962-64.
142. Id. at 964.
sequent bankruptcy proceeding.144 Years later, MGM, represented by different counsel, sued the majority shareholders, alleging that the merger was brought about through the shareholders’ fraud and deception, leaving MGM financially destitute.145 The majority shareholders were still represented by Christensen.146 MGM filed a motion for an order directing former counsel Christensen to provide it with access to all files pertaining to the merger and subsequent bankruptcy proceeding.147 Christensen had previously allowed MGM to review some of the documents, but had refused to allow it to review, inter alia, attorney notes, writings relating to factual or legal research, and internal memoranda.148 MGM insisted that this refusal was unethical, as well as prejudicial to MGM because the documents contained essential information.149

The Court of Appeal recognized that two “seemingly conflicting lines of authority” exist for determining whether an attorney has a duty to provide all client papers and property to a former client upon the client’s request.150 One line of authority applies Rule 3-700 of the California Rules of Professional Conduct, and holds that an attorney must turn over all files of a former client to new counsel.151 The other line of authority holds that the attorney is the exclusive holder of his or her “absolute” work product (an attorney’s impressions, opinions, legal research, etc.) for purposes of discovery in litigation.152 There appear to be, therefore, two conflicting “absolutes”: the “absolute right of a client to his attorney’s work product”, and the “absolute right of an attorney to protect his

144. Id. at 372-73.
145. Id.
146. Id.
147. Id.
149. Id.
150. Id. at 374.
or her impressions, conclusions, opinions, and legal research or theories from disclosure."\(^{153}\)

Having set up this conflict between two contradictory lines of authority, however, the court decided that there was no need to resolve it in the instant case.\(^{154}\) This was because one of Christensen’s clients during the merger, the majority shareholders, already had access to the documents at issue.\(^{155}\) The court stated that “it is not conscionable to allow Christensen to use its work product developed in the underlying transaction for the benefit of some of its clients and against another.”\(^{156}\) Therefore, the court held that MGM must be allowed access to the disputed documents.\(^{157}\)

E. Summary of Other Significant Cases

1. Malpractice Cases

**ITT Small Business Fin. Corp. v. Niles**\(^{158}\)—In transactional legal malpractice cases, when the adequacy of documentation is the cause of the dispute, “actual injury” to the client occurs upon the entry of adverse judgment, settlement, or dismissal of the underlying action. Therefore, the statute of limitations under Civil Code section 340.6 is tolled until such time.

**Worthington v. Rusconi**\(^{159}\)—For purposes of determining when the statute of limitations for legal malpractice begins to run, the point at which attorney-client relationship ends must be determined from an objective point of view rather than from the client’s subjective viewpoint.

**Adams v. Paul**\(^{160}\)—Concerned the situation where a client sues attorney for malpractice after attorney misses statute of limitations and files late complaint, and defendant moves for summary judgment on statute of limitations grounds. Statute of limitations for malpractice begins to run when client suffers “actual harm” through being compelled to oppose summary judgment motion.


\(^{154}\) Id.

\(^{155}\) Id.

\(^{156}\) Id. at 376.

\(^{157}\) Id.

\(^{158}\) 885 P.2d 965 (Cal. 1994).

\(^{159}\) 35 Cal. Rptr. 2d 169 (Cal. Ct. App. 1994).

2. Criminal Cases

_Morrow v. Superior Court of Ventura County_161—Dismissal of residential burglary charges where prosecutor purposely eavesdrops on communications between defendant and his attorney, and eavesdropping results in the acquisition of confidential information.

3. Attorney Fee Disputes

_Ramirez v. Sturdevant_162—Where there is a conflict of interest between attorney and client over the negotiation of attorney's fees as part of a settlement of the client's case, and there is evidence that the conflict may have affected the final settlement, the settlement should be examined by an impartial tribunal in order to determine whether the client's interests have been adequately represented. Burden of proof is thereafter on the attorney to show that his or her pecuniary interest did not hinder the proper representation of the client.

4. Undue Influence by Attorney

_Estate of Kathryne J. Auen_163—Trial court finding that attorney exerted undue influence over testator was affirmed. Court held that presumption of undue influence arises if person alleged to have exerted influence (1) had an attorney-client relationship with testator, (2) actively participated in preparation or execution of will, and (3) benefited thereby. Proof that the benefit to attorney was "undue" was not required to trigger presumption.

5. Attorney-Client Privilege

_Rockwell International Corp. v. Superior Court_164—A cooperation clause in third party liability insurance policy requiring insured to cooperate with insurer in event of litigation does not operate as a contractual waiver of the insured's attorney-client privilege during litigation between insured and insurer.

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6. Attorney-Client Relationship

*Ronson v. Superior Court*\(^{165}\) —Triable issues of fact exist as to whether, where attorney defendants represented limited partnership, there were attorney-client duties imposed by public policy on the attorney toward the limited partners.

7. Disqualification of Counsel

*Shadow Traffic Network v. Superior Court*\(^{166}\) —Order to disqualify law firm representing defendant upheld where firm had retained expert witness who was previously interviewed by plaintiff's law firm, and where witness had disclosed confidential information about plaintiff's lawsuit.

*Hoffmann-La Roche Inc. v. Promega Corp.*\(^{167}\) —Former client unsuccessful in disqualifying former attorney because it could not be shown that the attorney actually possessed client's confidential information, or that the "substantial relationship" test had been satisfied.

*Alchemy II, Inc. v. Yes! Entertainment Corp.*\(^{168}\) —Motion for disqualification of attorney denied where it is alleged that attorney had accepted employment while possessing licensee's confidential information; attorney not disqualified because it was not shown that there ever was an attorney-client relationship between attorney and licensee; attorney defending licensee's contractual rights not presumed to represent the licensor as well; attorney may defend copyrights in previous actions and later seek to limit the scope of the copyrights.

8. Attorney Negligence

*Fleming v. Gallegos*\(^{169}\) —Negligence of two successive attorneys in failing to prosecute action for nearly four years shall not be imputed to the client under discretionary dismissal statutes.

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166. 29 Cal. Rptr. 2d 693 (Cal. Ct. App. 1994).
IV. Changes to the California Rules of Professional Conduct

A. New Rule 2-400 (Prohibition of Law Firm Discrimination)

In 1993, the California Supreme Court approved proposed Rule 2-400 of the California Rules of Professional Conduct. This rule became effective on March 1, 1994.

1. Text of Rule 2-400

(A) For purposes of this rule:
   (1) “law practice” includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;
   (2) “knowingly permit” means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and
   (3) “unlawfully” and “unlawful” shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:
   (1) hiring, promoting, discharging or otherwise determining the conditions of employment of any person; or
   (2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness
must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.\textsuperscript{170}

2. \textit{Background of Rule 2-400}

In 1989, 1991, and 1992, the State Bar Conference of Delegates approved resolutions in favor of a rule which would subject attorneys to discipline for discrimination in employment, partnership and compensation decisions (1989 and 1991) and in the acceptance and termination of clients (1992).\textsuperscript{171} The text of the rules approved by the delegates in 1989 and 1991 differs markedly from the text of the rule which the Supreme Court ultimately approved. These versions of the discrimination rule, for instance, did not require, as does Rule 2-400, that a non-dispersory tribunal first find unlawful conduct before discipline can be imposed.\textsuperscript{172} Indeed, these two versions of the discrimination rule are models of simplicity—the 1989 rule consisting of one sentence and the 1991 rule consisting of two.\textsuperscript{173}

The State Bar Committee on Professional Responsibility and Conduct disapproved of these versions of the rule, citing numerous objections.\textsuperscript{174} First, it was noted that the rule as proposed would require the State Bar to conduct an original investigation of alleged discriminatory offenses, even through the Bar did not possess expertise in doing so.\textsuperscript{175} Second, there was concern that the rule only focused on discrimination against attorneys, but not on discrimination against non-attorneys.\textsuperscript{176} Lastly, the Committee felt that the rule was not

\textsuperscript{170} \textit{Cal. Rules of Professional Conduct Rule 2-400.}

\textsuperscript{171} Request That the Supreme Court of California Approve Proposed Rule 2-400, History of Formulation of Proposed New Rule 2-400, p. 2. During the same time period in which an employment discrimination rule was being considered, the State Bar studied the feasibility of an anti-bias rule. \textit{Id.} at 2-3. The anti-bias rule would have prohibited an attorney from threatening, harassing, submitting, or impugning any other person on the basis of race, national origin, sex, sexual orientation, religion, age or disability. \textit{Id.}, Enclosure 6. The Board Committee ultimately declined to publish the draft rule for public comment as a result of First Amendment concerns. \textit{Id.} at 3.

\textsuperscript{172} \textit{Id.}, Enclosure 3.

\textsuperscript{173} \textit{Id.}, Enclosure 3.

\textsuperscript{174} \textit{Id.}, Enclosure 3.

\textsuperscript{175} Request That the Supreme Court of California Approve Proposed Rule 2-400, History of Formulation of Proposed New Rule 2-400, Enclosure 3.

\textsuperscript{176} \textit{Id.}
designed to protect the public or the attorney-client relationship.\textsuperscript{177}

In response to these objections, the rule approved by the Conference of Delegates in 1992 was significantly altered from the earlier versions. The rule now required that an “aggrieved person” first file a complaint with the California Department of Fair Employment and Housing or the Equal Employment Opportunity Commission, and that a finding of cause or no cause be obtained, before a disciplinary proceeding could be initiated by the State Bar.\textsuperscript{178} In addition, the new rule prohibited discrimination against both attorneys and non-attorneys, and protected the public in that it forbade discrimination in the acceptance or termination of a client.\textsuperscript{179}

Ultimately, the Commission for the Revision of the Rules of Professional Conduct produced a draft version of Rule 2-400, which was very similar to the 1992 rule approved by the Conference of Delegates.\textsuperscript{180} Proposed rule 2-400 was published for 120-day public comment on August 14, 1992.\textsuperscript{181} Among the objections to the rule advanced by members of the public were the following: the rule was useless because adequate legal remedies for discrimination already exist, current laws are sufficient to protect the public, the rule will have “a chilling effect on the formation of the attorney-client relationship”, the rule will have a disproportionate effect on small civil rights firms, the rule could force an attorney to represent a client whose cause the attorney finds morally repugnant, and the requirement that a previous adjudication of unlawful conduct be made makes the rule practically worthless.\textsuperscript{182} These objections notwithstanding, the Board of Governors unanimously adopted proposed rule 2-400 for submission to the California Supreme Court, where it was ultimately approved.\textsuperscript{183}

\textsuperscript{177} \textit{Id.}
\textsuperscript{178} \textit{Id.}
\textsuperscript{179} Request That the Supreme Court of California Approve Proposed Rule 2-400, History of Formulation of Proposed New Rule 2-400, Enclosure 3.
\textsuperscript{180} \textit{Id.}, Enclosure 6.
\textsuperscript{181} \textit{Id.}, Enclosure 6.
\textsuperscript{182} \textit{Id.} at 4-7.
\textsuperscript{183} \textit{Id.} at 7, Enclosure 2. Note that some of the concerns expressed by those who criticized the proposed rule were also advanced by the Florida Supreme Court in support of its rejection of a similar rule in Florida. \textit{In re Amendments to Rules Regulating the Florida Bar}, 624 So. 2d 720 (Fla. 1993). Among, for instance, the Florida Supreme Court’s objections to the proposed ethical rule
3. Important Features of Rule 2-400

There are many features of Rule 2-400 which will have a significant role in the rule's impact on California legal community. First, before discipline can be imposed upon an attorney, the attorney's conduct must be found unlawful by an appropriate non-disciplinary tribunal of competent jurisdiction.\textsuperscript{184} Until such time, the State Bar cannot initiate any disciplinary investigation or proceeding.\textsuperscript{185} The finding of the tribunal will then constitute admissible evidence of the occurrence of discrimination in the disciplinary proceeding.\textsuperscript{186}

Second, the rule not only applies to attorney actions in the employment context, but also prohibits discrimination in the "accepting or terminating representation of any client."\textsuperscript{187} Consequently, an attorney cannot refuse to accept representation of a client simply because of the client's race, national origin, sex, sexual orientation, religion, age or disability. It should be noted, however, that discipline cannot be imposed under the rule unless the attorney action would be unlawful under "applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public."\textsuperscript{188} The rule does not, in other words, expand existing discrimination law.

Lastly, the rule not only prohibits actual unlawful discrimination, but also subjects an attorney to discipline who "knowingly permits" such discrimination. An attorney "knowingly permits" unlawful discrimination under the rule if he or she fails to "advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in para-

\textsuperscript{184} \textit{CAL. RULES OF PROFESSIONAL CONDUCT} Rule 2-400, section (C).

\textsuperscript{185} \textit{Id.} The State Bar can initiate a disciplinary proceeding after a finding of unlawful conduct but before an appeal on that finding has been resolved. \textit{Id.} However, discipline cannot actually be imposed until the finding of unlawfulness is upheld on appeal, the time for filing an appeal has expired, or the appeal is dismissed. \textit{Id.}

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} \textit{Id.}, section (B).

\textsuperscript{188} \textit{CAL. RULES OF PROFESSIONAL CONDUCT} Rule 2-400, section (A)(3).
graph (B).” It would seem, for instance, that if an associate in a large law firm was aware of a partner's conscious practice of not representing women, the associate would be in violation of the rule unless he or she brought the matter to the attention of the partnership. Furthermore, the associate would presumably have to “advocate corrective action” in a manner reasonably likely to be effective in halting the discrimination.

B. Standards for Attorney Advertising Under Rule 1-400

The Board of Governors made substantial changes in 1994 to the advertising standards under California Rule of Professional Conduct 1-400. These standards define the types of “communications” which are presumed to be unethical advertising or solicitation. Listed below are the “communications” newly declared to be presumptively unethical:

1. Advertisements directed to seeking professional employment for pecuniary gain transmitted to the public by mail, television, radio, newspaper, magazine which does not state the name of the member responsible for the communication.

2. A dramatization unless it contains a disclaimer which states “this is a dramatization” or words of similar import.

3. Communications which state or imply “no fee without recovery” unless they disclose whether or not the client will be liable for costs.

4. Communications which state or imply that the attorney can provide legal service in a non-English language unless the attorney can actually do so or the communications also state the employment title of the person who

189. Id., section (A)(2).
190. It is possible that the rule was not intended to cover such scenarios. The author of the Commission draft rule stated that the inclusion of the “knowingly permit” language was intended to cover “indirect discrimination through office managers or others”, and “deliberate indifference” or “blind eye” kinds of cases. Request, supra note 144, Enclosure 6, Attachment H. These statements appear ambiguous as to the extent to which subordinate attorneys were intended to be subject to discipline for the unlawful discrimination of their superiors.
191. Note that the summaries provided do not encapsulate every element of the new standards.
192. CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-400, Standard (12).
193. Id., Standard (13).
194. Id., Standard (14).
speaks such language and that the person is not a State Bar member if such be the case.\textsuperscript{195}

(5) Unsolicited communications transmitted to the public directed to seeking professional employment for pecuniary gain setting forth specific fees or range of fees for particular services if the attorney in fact charges a greater fee within 90 days after dissemination. In the case of communications published in the phone book, legal directories or in other media not published more than once a year, the attorney shall conform to the published fee for one year after publication.\textsuperscript{196}

\textit{Michael Edelman}

\textsuperscript{195} Id., Standard (15).

\textsuperscript{196} \textsc{Cal.} \textsc{Rules} of \textsc{Professional} \textsc{Conduct} Rule 1-400, Standard (16).