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The new Rules of Professional Conduct

A LOOK AT SOME OF THE MOST IMPORTANT CHANGES TO THE RULES OF PROFESSIONAL CONDUCT THAT BECAME EFFECTIVE NOVEMBER 1, 2018

On May 10, 2018, the California Supreme Court approved a comprehensive set of 69 Rules of Professional Conduct ("Rules") which replaced the 46 existing Rules on November 1, 2018. Major substantive changes to the Rules had not been approved since 1987. The new Rules adopt the numbering scheme of the American Bar Association ("ABA") Model Rules of Professional Conduct ("Model Rules") in order for easier comparison between the ABA Model Rules and California's Rules. However, California has not adopted the ABA Model Rules. (The State Bar has a cross-reference table between the new and old Rules as well as the new Rules and the ABA Model Rules.)

California attorneys have an ethical duty to familiarize themselves with the new Rules. So, sit back, relax and prepare for a scintillating discussion of some highlights of the new Rules (there is no way to cover all of the new Rules in this article).

Blind date (entirely new rules)

There are 27 entirely new rules that are part of the Rules as of their effective date on November 1, 2018. Some are adapted from ABA Model Rules. Some of these rules put into rule version standards that have come into existence through common law. This syllabus has selected a couple of the new rules to highlight, but as stated above, you should get to know each and every new rule.

Rule 1.18 Duties to Prospective Clients

Attorneys often focus on their duties to clients, but attorneys must also think about their duties to prospective clients. But who is a prospective client? Thankfully the new Rule 1.18(a), derived from the ABA Model Rules, expressly defines a prospective client as "A person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity." The Commission for the Revision of the Rules of Professional Conduct ("Commission")'s Report and Recommendation for Rule 1.18 ("Report") states that this Rule is intended to protect both prospective clients and also to "protect current clients from losing the lawyer of their choice."

Rule 1.18(b)'s requirement that attorneys safeguard confidential information shared by a prospective client is not a new legal theory in California. In fact the definition in Rule 1.18(a) borrows language from California Evidence Code section 951 (which relates to the attorney-client privilege). The duty of confidentiality is much broader than the attorney-client privilege.

Rule 1.18 prohibits an attorney from representing a client with "materially adverse" interests to those of a prospective client in the same or a substantially related matter if the lawyer obtained confidential information from a prospective client. The conflict is imputed to the attorney's firm. The only way for the attorney to continue the representation in this situation is to obtain the informed consent of both his current client and the prospective client. The attorney's firm may continue the representation only if the attorney took reasonable measures to avoid exposure to the prospective client's confidential information, the attorney is screened from the matter, the attorney is given no part of the fee, and the firm promptly notifies the prospective client so that the prospective client may ensure compliance with Rule 1.18. The Commission stated in its Report that there was no "one-size-fits-all" definition of material adversity and that the facts and circumstances of a particular matter must be considered to determine whether there is material adversity.

The client intake process is rife with room for error and conflicts of interest. Attorneys will now need to implement procedures to make sure that they take reasonable measures to avoid exposure to a prospective client's confidential information.

Tip: If your firm website has a contact form or even has your email address listed, be sure to include caveats about not providing any confidential information. Consider adding a layperson's definition of confidential information such as "Please do not submit any information that you would not want other members of the public to know."

Tip: If your firm does not already have a robust conflicts check procedure, consider implementing one so that you may check conflicts before any substantive conversations take place. Schedule meetings or telephone calls

See Feldman & Beckwith, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2019 Issue

with prospective clients only after conflicts have cleared.

Rule 4.3 Communicating with an Unrepresented Person

Rule 4.3 was adopted in an effort to ensure that unrepresented persons are not misled by virtue of their communications with an attorney. (See Comment 1 to Rule 4.3 in endnotes.) When communicating with unrepresented persons on behalf of a client, an attorney cannot state or imply that the attorney is disinterested.

A lawyer must not attempt to obtain privileged or confidential information the lawyer knows or reasonably should know the unrepresented person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive. This portion of the Rule is meant to address, in part, the limitations of how an attorney may obtain evidence. In the Commission's Report and Recommendation for Rule 4.3, this portion of the Rule was suggested, in part, because even though "the lawyer's client might have the ability to engage in such conduct is no reason to permit a lawyer to do so; lawyers who are trained advocates should be held to a higher standard of conduct."

Tip: Friending unrepresented parties on social media platforms is generally considered communicating. An attorney (or an attorney's staff acting on the attorney's behalf) may need to explain the purpose of requesting to connect or friend an unrepresented party, including possibly with a statement that the attorney represents a particular client and wants access to the social media of the unrepresented party for purposes of that representation.

Something has changed (changes to existing rules):

Of the 69 Rules that became effective on November 1, 42 are current rules that are receiving a modification (some to a large degree and with others, more minor changes). Note that Rule 1.1, now the very first substantive rule, is "Competence." In short, if you are not performing your work with competence, you will be in violation of Rule 1.1 and many of the subsequent Rules.

Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons

There is no easier way to wind up in front of the State Bar than to mishandle a client's money. Under the current Rules (Rule 4-100) attorneys have a robust set of duties and prohibitions related to handling of client money, but the new Rule 1.15 has some important changes of which attorneys must be aware.

Rule 1.15(a) states, "All funds received or held by a lawyer or law firm for the benefit of a client, or other person to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled 'Trust 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."

This portion of Rule 1.15 is of paramount importance because it not only governs monies received by an attorney after the Rule is implemented, but it requires that attorneys take certain steps with respect to monies that are being held as of the effective date. Prior to the implementation of Rule 1.15, attorneys were not required to place advance fees into a Client Trust Account ("CTA"). Now, not only are attorneys required to place advance fee deposits into a CTA, attorneys also have to determine what advance fee deposits it has received in the past that may have been placed into an operating account, trace these funds, and deposit them into a CTA.

This portion of the rule does not apply to "true retainers." True retainers are defined in new Rule 1.5(d) as, "A lawyer may make an agreement for, charge, or collect a fee that is denominated as 'earned on receipt' or 'non-refundable,' or in similar terms, "only if the fee is a true retainer and the client agrees in writing after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed." As stated above, a true retainer requires informed written consent by the client in order to be compliant with the Rules.

Flat fees do not have to be deposited into a CTA if an attorney complies with certain requirements. A flat fee is defined by new Rule 1.5(e) as, "A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services." Under new Rule 1.15, in order for the attorney to *not* place a flat fee in a CTA, the attorney must disclose, in writing, to the client: (i) that the client has a right to require that the flat fee be deposited in an identified trust account until the fee is earned and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed. If the flat fee is more than $1,000, the client must give written informed consent for the attorney to place the flat fee anywhere other than a CTA.

Conclusion

Some Rules touch an attorney's practice regularly, like Rule 1.15 (Safekeeping Funds and Property of Clients and Other Persons), and require that an attorney not only be familiar with the Rule, but that the attorney understands the nuances and changes that became part of the new Rules on November 1. Although attorneys can always consult an ethics attorney or call the State Bar's Ethics hotline, some ethical pitfalls can happen just from picking up a call from a prospective client (see new Rule 1.18) and attorneys need to be armed and ready to deal with everyday situations that trigger the application of the new Rules.

See Feldman & Beckwith, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2019 Issue

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Text of Rules referenced in this article.

Rule 1.18 Duties To Prospective Client

(a) A person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.

(b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 that the lawyer learned as a result of the consultation, except as rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received from the prospective client information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph

(d) When the lawyer has received information that prohibits representation as provided in paragraph (c), representation of the affected client is permissible if:

both the affected client and the prospective client have given informed written consent, or

the lawyer who received the information took reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client; and

the prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

written notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this rule.

Comment

As used in this rule, a prospective client includes a person's authorized representative. A lawyer's discussions with a prospective client can be limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Although a prospective client's information is protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 the same as that of a client, in limited circumstances provided under paragraph (d), a law firm is permitted to accept or continue representation of a client with interests adverse to the prospective client. This rule is not intended to limit the application of Evidence Code section 951 (defining "client" within the meaning of the Evidence Code).

Not all persons who communicate information to a lawyer are entitled to protection under this rule. A person who by any means communicates information unilaterally to a lawyer, without reasonable expectation that the lawyer is willing to discuss the possibility of forming a lawyer-client relationship or provide legal advice is not a "prospective client" within the meaning of paragraph (a). In addition, a person who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person (*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]), or who communicates information to a lawyer without a good faith intention to seek legal advice or representation, is not a prospective client within the meaning of paragraph (a).

In order to avoid acquiring information from a prospective client that would prohibit representation as provided in paragraph (c), a *lawyer* considering whether or not to undertake a new matter must limit the initial interview to only such information as reasonably appears necessary for that purpose.

Under paragraph (c), the prohibition in this rule is imputed to other lawyers in a law firm as provided in rule 1.10. However, under paragraph (d)(1), the consequences of imputation may be avoided if the informed written consent of *both* the prospective and affected clients is obtained. (See rule 1.0.1(e-1) [informed written consent].) In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all prohibited lawyers are timely screened and written notice is promptly given to the prospective client. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is prohibited.

See Feldman & Beckwith, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2019 Issue

Notice under *paragraph* (d)(2)(ii) must include a general description of the subject matter about which the lawyer was consulted, and the screening procedures employed.

Rule 4.3 Communicating with an Unrepresented Person

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of the unrepresented person are in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Comment

This rule is intended to protect unrepresented persons, whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

Paragraph (a) distinguishes between situations in which a lawyer knows or reasonably should know that the interests of an unrepresented person are in conflict with the interests of the lawyer's client and situations in which the lawyer does not. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer discloses that the lawyer represents an adverse party and not the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into the agreement or settle the matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document and the underlying legal obligations.

Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see rule 8.4, Comment [5].

Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons

All funds received or held by a lawyer or law firm for the benefit of a client, or other person to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust 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.

Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:

the lawyer or law firm discloses to the client in writing (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and

if the flat fee exceeds $1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing signed by the client.

Funds belonging to the lawyer or the law firm shall not be deposited or otherwise commingled with funds held in a trust account except:

funds reasonably sufficient to pay bank charges; and

funds belonging in part to a client or other person and in part presently or potentially to the lawyer or the law firm, in which case the portion belonging to the lawyer or law firm must be withdrawn at the earliest reasonable time after the lawyer or law firm's interest in that portion becomes fixed. However, if a client or other person disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.

A lawyer shall:

promptly notify a client or other person of the receipt of funds, securities, or other property in which the lawyer knows or reasonably should know the client or other person has an interest;

identify and label securities and properties of a client or other person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

maintain complete records of all funds, securities, and other property of a client or other person coming into the possession of the lawyer or law firm;

promptly account in writing to the client or other person for whom the lawyer holds funds or property;

preserve records of all funds and property held by a lawyer or law firm under this rule for a period of no less than five years after final appropriate distribution of such funds or property;

comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar; and

promptly distribute, as requested by the client or other person, any undisputed funds or property in the possession of the lawyer or law firm that the client or other person is entitled to receive.

The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers and law firms in accordance with subparagraph (d)(3). The standards formulated and adopted by the

See Feldman & Beckwith, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2019 Issue

Board, as from time to time amended, shall be effective and binding on all lawyers.

Standards:
Pursuant to this rule, the Board of Trustees of the State Bar adopted the following standards, effective _____, as to what "records" shall be maintained by lawyers and law firms in accordance with subparagraph (d)(3).
A lawyer shall, from the date of receipt of funds of the client or other person through the period ending five years from the date of appropriate disbursement of such funds, maintain:

a written ledger for each client or other person on whose behalf funds are held that sets forth:

the name of such client or other person;

the date, amount and source of all funds received on behalf of such client or other person;

the date, amount, payee and purpose of each disbursement made on behalf of such client or other person; and

the current balance for such client or other person;

a written journal for each bank account that sets forth:

the name of such account;

the date, amount and client affected by each debit and credit; and

the current balance in such account;
all bank statements and cancelled checks for each bank account; and

each monthly reconciliation (balancing) of (a), (b), and (c).

A lawyer shall, from the date of receipt of all securities and other properties held for the benefit of client or other person through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written journal that specifies:

each item of security and property held;

the person on whose behalf the security or property is held;

the date of receipt of the security or property;

the date of distribution of the security or property; and

person to whom the security or property was distributed.

Comment

Whether a lawyer owes a contractual, statutory or other legal duty under paragraph (a) to hold funds on behalf of a person other than a client in situations where client funds are subject to a third-party lien will depend on the relationship between the lawyer and the third-party, whether the lawyer has assumed a contractual obligation to the third person and whether the lawyer has an independent obligation to honor the lien under a statute or other law. In certain circumstances, a lawyer may be civilly liable when the lawyer has notice of a lien and disburses funds in contravention of the lien. (See *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302 [54 Cal.Rptr.2d 665].) However, civil liability by itself does not establish a violation of this rule. (Compare *Johnstone v. State Bar of California* (1966) 64 Cal.2d 153, 155-156 [49 Cal.Rptr. 97] ["'When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.'"] with *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358 [90 Cal.Rptr. 600] [lawyer who agrees to act as escrow or stakeholder for a client and a third-party owes a duty to the nonclient with regard to held funds].)

As used in this rule, "advances for fees" means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client's behalf. With respect to the difference between a true retainer and a flat fee, which is one type of advance fee, see rule 1.5(d) and (e). Subject to rule 1.5, a lawyer or law firm may enter into an agrement that defines when or how an advance fee is earned and may be withdrawn from the client trust account.

Absent written disclosure and the client's agreement in a writing signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer's trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer's obligations under paragraph (d) or the lawyer's burden to establish that the fee has been earned.

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