

OPINION REQUESTS FOR CONSIDERATION AT PRESENT

F.1. New Opinion Topics
12-01-23 Meeting
Open Session

Number	Requestor/ Date	Issue / Disposition
<u>2</u>	Attorney (10-03-22)	<p>Re: Can California lawyers aid out-of-state pregnant individuals with seeking abortion care in or involving states that permit abortion access?</p> <p>Status: Discussed at a high level at the May 12, 2023, COPRAC meeting. Considered amending or updating the marijuana opinion to incorporate this concept and address rule 8.3 to some degree.</p> <p>Disposition:</p>
<u>4</u>	Attorney (01-26-23)	<p>Re: What are the security risks of current AI technologies and can guidelines for AI developers be created to safeguard confidential information</p> <p>Status:</p> <p>Disposition:</p>
<u>6</u>	Attorney (8-22-22)	<p>Re: Amendment to Rule 7.2 “Advertising” with bolded language:</p> <p>"This rule permits public dissemination of accurate information concerning a lawyer and the lawyer's services, including for example.....; .and other information that might invite the attention of those seeking legal assistance; when advertising or reporting results, cite client actual results net of fees and costs. This rule also prohibits the dissemination of false or misleading information, for example, an advertisement that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges or intends to charge a greater fee than that stated in the advertisement or, for example, that guarantees results.</p> <p>Status:</p> <p>Disposition:</p>
<u>7</u>	Attorney (6/27/23)	<p>Re: Does an attorney, serving as elected official of a municipality, and charged with approving employment agreements submitted to city employees, have the ethical duty or legal obligation to recuse themselves fro voting on employment contracts, drafted by the City Attorney, that contain language that is illegal?</p> <p>Status:</p> <p>Disposition:</p>
<u>8</u>	Attorney (8-30-23)	<p>Re: I would like to propose a rule that requires attorneys, when discussing a case publicly, to disclose if they represent, or are likely to be representing one of the parties. I think this is in line with attorneys’ ethical responsibility of professionalism and candor to the public. Well-known attorney may be offering what is presented as an impartial expert opinion, when in fact they</p>

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		<p>may be trying to sway public opinion, or perhaps even influence the sentiments of potential jurors in high profile cases.</p> <p>Status:</p> <p>Disposition:</p>
<u>9</u>	State Bar Staff	<p>Re: ABA Model Rule 1.16</p> <p>Status:</p> <p>Disposition:</p>
<u>10</u>	State Bar Staff	<p>Re: Updates to Diminished Capacity Opinion (2021-207)</p> <p>Status:</p> <p>Disposition:</p>
<u>110</u>	Out-of-State Attorney 08-09-21	<p>Re: What are the deportation attorney's ethical duties in relation in admitting or denying the deportation allegations? Should the deportation attorney explain to the client the right to admit or deny? Where the deportation attorney waives the advisals, does not explain [to] the client the right to admit or deny, and admits everything, does the attorney acts [sic] unethically?</p> <p>Where the attorney waives, does not inform his client the right to challenge the alienage allegations, and waives the defense, doesn't the attorney act unethically or ineffectively?</p> <p>Status: Hold for future consideration. 12-2-22</p> <p>Disposition:</p>
111	COPRAC	<p>Re: <i>People vs. Meredith</i>. What a defense lawyers obligations in respect to evidence in a case. Investigator took evidence, lawyer should turn it over and disclose where it was found. Criminal defense attorneys on how to investigate and the process of turning it over.</p> <p>Status: Hold for future consideration. 12-2-22</p> <p>Disposition:</p>
112 (AA)	Staff	<p>Re: How to handle mediation confidentiality (<i>Cassell</i> case)</p> <p>Status: Hold for future consideration. 12-2-22</p> <p>Disposition:</p>

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Number	Requestor/ Date	Issue / Disposition
113	COPRAC	<p>Re: Lawyers soliciting favorable online reviews from clients. Similar but a different context to 2019-199. Can you ask clients to post a favorable review for you and issues related to that?</p> <p>Status: Hold for future consideration. 12-2-22</p> <p>Disposition:</p>
100	COPRAC	<p>Re: Gifts to indigent clients</p> <p>Status: Hold for future consideration. 12-2-22</p> <p>Disposition:</p>
101	COPRAC	<p>Re: Office sharing with people not part of the law firm and the ethical implications involved.</p> <p>Status: Hold for future consideration. 12-2-22</p> <p>Disposition:</p>
102	COPRAC	<p>Re: Can a departing attorney take their work-product with them?</p> <p>Status: Hold for future consideration. 12-2-22</p> <p>Disposition:</p>

OPINION REQUESTS FOR CONSIDERATION AT PRESENT

Number	Requestor/ Date	Issue / Disposition
<u>104</u>	Attorney 02-28-18	<p>Re: Request an ethics opinion stating that the rule articulated in <i>Moeller v. Sup. Ct.</i> (1997) 16 Cal.4th 1124, may not be waived, that attorneys may not seek to impose its waiver, and that any attempted or purported waiver is invalid and unenforceable.</p> <p>Bank was acting as trustee and trust beneficiaries desired its removal. Bank agreed to resign as trustee in favor of beneficiaries nominated successor, but only on terms of a settlement agreement that Bank would prepare. The settlement agreement gave Bank a full release and covenant not to sue, which the beneficiaries signed. The agreement also contained provisions which required the beneficiaries and all interested persons to waive the rule of the <i>Moeller</i> case which held that the person who currently serves in the position of trustee is the holder of the attorney-client privilege (Evid. Code § 950 <i>et seq.</i>). Under this rule, a successor trustee can demand that a prior trustee turn over communications with its counsel because, upon succession, the prior trustee is no longer the holder of the privilege.</p> <p>Status: Hold for future consideration. 7-26-19</p> <p>Disposition:</p> <p>Andrew's Note: see also, <i>Morgan v. Superior Court</i> (2018) 23 Cal.App.5th 1026 – “trust provision stating trustee was free of any duty to disclose communications with legal counsel to successor trustee was void as against public policy; and former trustee was not entitled to withhold communications with trust’s former counsel on ground of attorney-client privilege.”</p>
106	COPRAC Request	<p>Re: If client comes to you but you have a conflict, can you refer the client to another lawyer without violating your duties?</p> <p>Status: Hold for future consideration. 6-2-17</p> <p>Disposition:</p>

IN PROGRESS

Number	Requestor/ Date	Issue / Disposition
109	COPRAC (12/02/22)	Re: Scope of mediation privilege and what use can be made of information that only comes from mediation and other proceedings such as a State Bar Complaint. Status: Hold for future consideration. 12-2-22 Disposition: ACCEPTED

DECLINE TO OPINE

Number	Requestor/ Date	Issue / Disposition
##	Attorney (Name) Date	Re: Status: Disposition at 7/26/19 meeting: DECLINE TO OPINE
1	Attorney (09-26-22)	Re: If a mechanism for allocating overhead charges in a written fee agreement is arbitrary, in that the mechanism is not rationally related to the actual overhead incurred by an attorney, is it unethical to include that mechanism in a fee agreement, even if the fee agreement is agreed to beforehand by a client? Status: Disposition: 5/12/23 meeting DECLINE TO OPINE
3	Attorney (01-26-23)	Re: If Party A makes the submission that the arbitration cannot be completed in 4 hours, and if the arbitration panel agrees, and the other party (Party B) believes that the arbitration will not take longer than 4 hours to complete, and refuses to pay the compensation to the panel; has Party B failed to participate as required under the Rules and therefore is deprived of his right to arbitration? Or, alternatively, if Party A pays for the compensation of all arbitration panel members in order to proceed with the arbitration, does Party B's share of the compensation merely become part of the calculations for the Award? Does the panel have jurisdiction to make such an Award. Status: Disposition: 5/12/23 meeting DECLINE TO OPINE
5	Attorney (4-3-23)	Re: Is an attorney acting within ethical guidelines if he discloses information learned through the representation of a deceased client, a convicted murderer, in order to prevent the ongoing hard and wrongful execution of a death row inmate, whose conviction and death judgment resulted from a murder potentially committed by the deceased client and/or aided by her false testimony at his trial? Status: Disposition: 5/12/23 meeting DECLINE TO OPINE

DECLINE TO OPINE

3 OCTOBER 2022

[REDACTED]

[REDACTED]

We, the [REDACTED] a project sponsored and directed by [REDACTED] [REDACTED] are seeking an advisory opinion (on shortened time) so that California lawyers can aid out-of-state pregnant individuals with seeking abortion care in or involving states which permit abortion access.

In the aftermath of the U.S. Supreme Court's June 24, 2022 opinion, *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, 142 S. Ct. 2228 (2022), and *Whole Women's Health v. Jackson*, 594 U.S. ___, 141 S. Ct. 2228 (2021) (S.B. 8 litigation), in which the U.S. Supreme Court allowed a Texas law to stand effectively banning abortion by permitting private causes of action against people assisting residents of Texas with seeking abortion care, we ask that the State Bar issue the following advisory opinion:

As a result of and in response to the U.S. Supreme Court cases Dobbs v. Jackson Women's Health Organization and Whole Women's Health v. Jackson (S.B. 8 litigation), a California lawyer

who engages in conduct that is legal in California, specifically that of seeking an abortion, or facilitating or aiding and abetting a person seeking abortion care or other reproductive health care access to secure that care, in a state where that care is legal, whether or not that facilitation or care is legal or authorized in another state, the California attorney will not face discipline (original or reciprocal) from the California Bar. Aiding a person who seeks abortion care is not considered an act of moral turpitude, nor does it affect the lawyer's fitness to practice law.

RATIONALE FOR THE REQUEST:

(i) California Lawyers

California Model Rule 1.2.1(a) states that:

A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.

California Model Rule 8.4(b) which states that:

It is professional misconduct for a lawyer to: (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

California Model Rule 8.2 Comment [4] which states that:

A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

The above opinion contemplates these six scenarios:

1. An attorney who is a member of the California Bar is domiciled in a restrictive state, such as Texas, working in an in-house counsel position at a national company, and helps a woman travel to another state to seek abortion care. Absent this opinion, the attorney would be subject

to discipline by the California bar for breaking a Texas law (due to choice of law).

2. An attorney who is a member of the California Bar in California has a client domiciled in a restrictive state such as Texas, who has retained the attorney on another matter. Through privileged or non-privileged communications, the attorney learns the client needs abortion care and helps the client in that pursuit.
3. An attorney who is a member of the California Bar helps a non-client domiciled in a restrictive state such as Texas seek an abortion in California (or another more protective state) in violation of state law.
4. An attorney who is a member of the California Bar engages in digital communications with a client or non-client in a restrictive state, such as Texas, in furtherance of seeking abortion care.
5. An attorney who is a member of the California Bar is disciplined by the Bar of another state due to violating anti-aiding and abetting statutes in a restrictive state.
6. An attorney who is a member of the California Bar represents a corporation or entity with employees in a restrictive state such as Texas and provides legal advice regarding his/her/their client's intention to provide health care benefits to those employees that include abortion care and/or funds to facilitate travel to procure abortion care.

We look forward to your formal opinion on this matter.

Sincerely,

A solid black rectangular box used to redact the signature and name of the sender.

[REDACTED]

[REDACTED]

March 13, 2023

[REDACTED]

[REDACTED]

Re: Request for Formal Ethics Opinion

[REDACTED]

[REDACTED]

I am under appointment by the California Supreme Court to represent [REDACTED], a death row inmate, in the above-referenced matter. Co-counsel is [REDACTED]. We are presently in active habeas corpus litigation before the [REDACTED] Superior Court on various issues, including innocence.

The Hon. [REDACTED] has ordered that we seek an advisory opinion from the State Bar on a contested issue in the case. (See attached Order, at p. 2.) The matter concerns an attorney's ongoing duty of confidentiality to a deceased client versus his desire to disclose information learned through that representation that may prevent the wrongful execution of a death row inmate.

Under Rule 1.6(b) of the California Rules of Professional Conduct and Business and Professions Code section 6068(e)(2), an attorney may disclose information learned through his representation if it "is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." Furthermore, the Comment section on Rule 1.6 provides: "Although a lawyer is not permitted to reveal information protected by section 6068, subdivision (e)(1) concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act." (Cal. Rules of Prof. Conduct, Rule 1.6, Comment 3 "Narrow exception to duty of confidentiality under this rule.") Thus, the relevant hypothetical is:

Is an attorney acting within ethical guidelines if he discloses information learned through the representation of a deceased client, a convicted murderer, in order to prevent the ongoing harm and wrongful execution of a death row inmate, whose conviction and death judgment resulted from a murder potentially committed by the deceased client and/or aided by her false testimony at his trial?

Your advice is appreciated.

Yours very truly,

[REDACTED]

Enclosure: [REDACTED]

[REDACTED]

1
2
3
4 SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
5

6 In re [REDACTED],)
7)

8 Petitioner,)
9)

10 On Habeas Corpus)
11)

ORDER TO PROVIDE RECORD AND
SUPPLEMENTAL BRIEFING

12 On [REDACTED], this court issued an order requesting
13 that habeas counsel provide electronic files of the complete
14 record from the automatic appeal in [REDACTED]
15 [REDACTED], including both the reporter's and clerk's
16 transcripts, if electronic records were available. In the same
17 order, the court requested that habeas counsel provide the record
18 of any and all motions and/or rulings filed in the habeas
19 proceedings in the California Supreme Court prior to the transfer
20 of the petitions to this court. As of the date of this order, the
21 court can find no record of any response to the court's request.

22 Because resolution of the present petitions will require a
23 review of the arguments and evidence presented on appeal in
24 petitioner's first habeas proceeding in the California Supreme
25 Court, the court hereby directs habeas counsel to provide the
26 court with both the complete appellate record from petitioner's
27 automatic appeal and the record of petitioner's first habeas
28 proceeding in the California Supreme Court within 45 days of the
date of this order.

1 Finally, the court previously requested supplemental briefing
2 regarding whether newly discovered evidence demonstrated that
3 petitioner was innocent of the murder of [REDACTED]. In part,
4 the court requested that the parties address whether the attorney-
5 client privilege currently prevented attorney [REDACTED] from
6 disclosing potentially exonerating evidence obtained from his
7 deceased former client. In addition, the court directed the
8 parties to address whether any other exception and/or waiver of
9 the attorney-client privilege applied.

10 In supplemental briefing, the parties appear to agree that
11 the attorney-client privilege does not prevent disclosure but they
12 dispute whether a duty of confidentiality prevents [REDACTED]
13 from disclosing information from his deceased client.

14 Members of the California State Bar may submit requests for
15 formal and informal written ethics opinions to the State Bar's
16 Standing Committee on Professional Responsibility and Conduct.

17 (See [https://www.calbar.ca.gov/Attorneys/Conduct-](https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Committees/COPRAC)
18 [Discipline/Ethics/Committees/COPRAC.](https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Committees/COPRAC)) In addition to providing
19 the previously requested record, the court directs habeas counsel
20 to consult with the California State Bar to obtain a formal ethics
21 opinion addressing whether Mr. Mugridge can ethically divulge the
22 communications at issue. At the time of the filing of the
23 previously requested record, habeas counsel shall provide the
24 court with supplemental briefing addressing progress in obtaining
25 the formal ethics opinion and an anticipated timeframe as to when
26 an ethics opinion may be available for this court's review.

27 //

28 //

[REDACTED]	<div style="text-align: right;">COURT USE ONLY</div> <div style="font-size: 2em; color: blue; text-align: center;">FILED</div> <div style="text-align: center;">[REDACTED]</div>
[REDACTED]	[REDACTED]
CLERK'S CERTIFICATE OF MAILING	[REDACTED]

I certify that I am not a party to this cause and that a true copy of the **Order To Provide Record And Supplemental Briefing** was placed in a sealed envelope and:

- ☐ Deposited with the United States Postal Service, mailed first class, postage fully prepaid, addressed as shown below.
- ☒ Placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

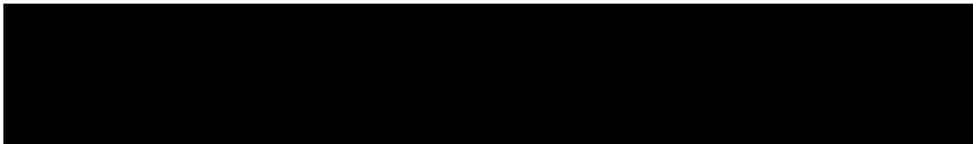
Place of mailing: [REDACTED] on:

Date: [REDACTED]

Clerk, b [REDACTED], Deputy

[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

☐ Clerk's Certificate of Mailing Additional Address Page Attached



Thank you for providing me the redacted/ amended proposed Rule 7.2 on Advertising proposed for the Rule of Professional Conduct.

The proposed rule pending amendment still appears lacking.
This recommends inclusion of the following.

This hereby submits the following Public Comment for COPRAC.

Public Comment

Amendment to Rule 7.2 "Advertising"

"Comment Section"

Amended "Item [1]" **(Additions in Bold)**

"This rule permits public dissemination of accurate information concerning a lawyer and the lawyer's services, including for example.....; and other information that might invite the attention of those seeking legal assistance; **when advertising or reporting results, cite client actual results net of fees and costs. This rule also prohibits** the dissemination of false or misleading information, for example, an advertisement that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges or intends to charge a greater fee than that stated in the advertisement **or, for example, that guarantees results.**

Discussion

The exhibits supporting the amending the Rule provided this committee exemplifying multiple high profile law firm advertisements supporting the necessity for including the above provisions. The advertising examples evidence attorneys soliciting employment advertising gross and inflated client recoveries and going so far as guaranteeing "twice the results for half the cost".

Respectfully Submitted

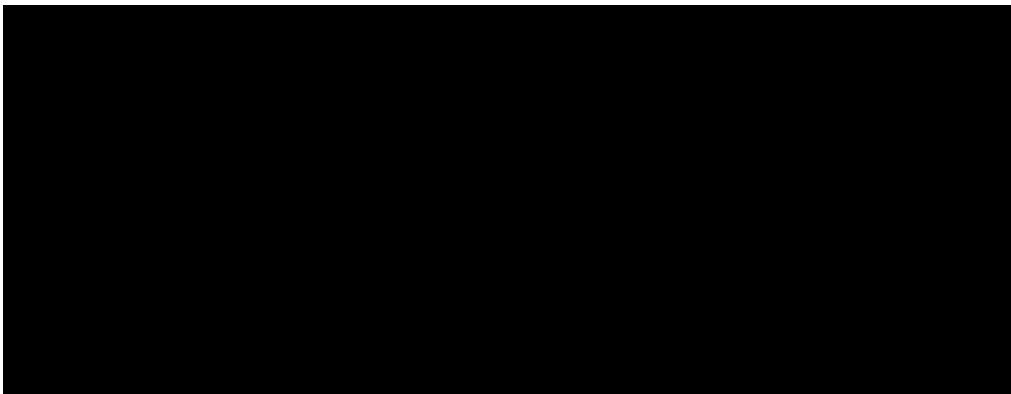
-----Original Message-----



Good afternoon,

Your email was directed to my attention regarding proposed amendments to former rule 1-400 of the Rules of Professional Conduct. Linked is the updated, current rule, [rule 7.1](#), which along with [rules 7.2-7.5](#) address attorney advertising. I've reviewed your proposed changes to the former rule, and believe that the current rule's text may address some of your recommendations.

If you'd like to recommend additional revisions, please submit those changes to my attention and they can be provided to the State Bar's [Committee on Professional Responsibility and Conduct](#) (COPRAC), which is tasked with addressing proposed amendments to the Rules of Professional Conduct.



Working to protect the public in support of the mission of the State Bar of California.

Please consider the environment before printing this email.

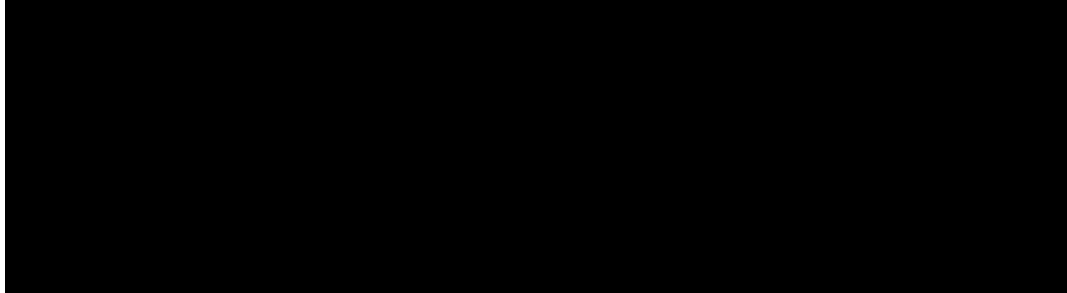
[LinkedIn](#) | [Twitter](#) | [Facebook](#) | [Instagram](#)

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CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

This requests confirmation the attached rules recommendation was submitted to the rules committee submitted April 8, 2022.

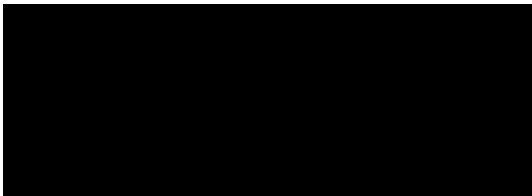
This requests the schedule of future meetings and agenda for the rules committee be provided.



Please direct the attached:

Recommendation to Amend Rule 1-400
governing Professional Conduct
to the rules committee for their
consideration.

Please confirm.





Attn: State Bar of California Committee on Rules

Distribution: Center for Public Interest Law

PUBLIC COMMENT

RECOMMENDATION TO AMEND RULE 1-400

Subject: Advertising by Attorneys and Law Firms

Rule: Rules of Professional Conduct
Rule 1-400 - Advertising and Solicitation

Proposed: **The Real Result Rule**

Amend Rule 1-400, Item (D)(2) as follows:

“Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; **states the gross recovery but fails to state the real and actual net result realized by client(s) from a matter cited or advertised, success rate, or ...”**

Issue

The current advertising and communication rule permits and allows advertising and solicitations that serves to confuse, deceive and mislead the public and considering and potential litigants.

There is a need to revise provisions of the Rule 1-400 regarding advertising and methods of solicitation increasingly used by attorneys in their communications and multi-media advertising including but not limited to client testimonial and other evidence that exclusively cites gross monetary results but fails to specify the actual or “the real result” attained by the client and fails to state the percent of actions handled by the attorney or law firm resulting in a net monetary result to the client.

Discussion

It is now standard practice for attorneys and law firms to actively, even heavily solicit the public promoting legal services and actions in communications. multi media advertising, making representations in advertising and on web pages representing huge results but which advertising, communications and solicitations altogether fail to give an accurate picture nor discloses the real actual results achieved by the client arising from the action. That is, the net amount the client actually realized after all fees and costs were deducted, the net amount after the court reduced or entered statutory verdicts, the net amount after post verdict settlements or appeals. The client's real result. Such information is important to a party considering representation or deciding to undertake litigation.

Current Examples of Attorney Advertising Abuse and Misleading Practices

1. Attorney uses fake checks in advertising representing this amount is client's result. [Exhibit A]
2. Client states in attorney's advertising the gross recovery as the result. [Exhibit B]
3. Attorney's advertising and web page citing grossly misleading actual results. [Exhibit B-1]

Reference: Current Rule

Rule 1-400 Advertising and Solicitation

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

- 1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
- 2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or
- (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(B) For purposes of this rule, a "solicitation" means any communication:

- (1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and
- (2) Which is:
 - (a) delivered in person or by telephone, or
 - (b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

(D) A communication or a solicitation (as defined herein) shall not:

- (1) Contain any untrue statement; or
- (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
- (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
- (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
- (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

(6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.

(E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

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Advertising & Solicitation

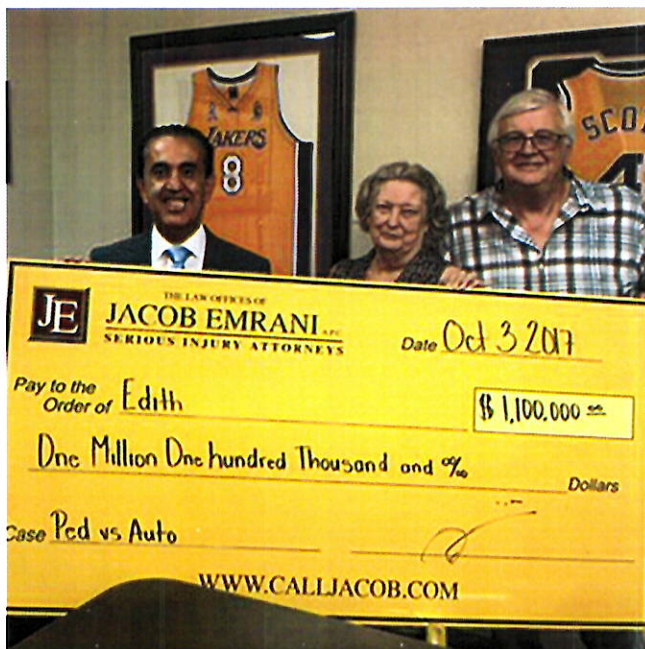


EXHIBIT A

TO AG
FLI

Attorney: Daniel J. Callahan, Managing Partner
Law Office of Callahan and Blaine

1. Callahan advertises he is California's "**Premier Business Litigation Firm**".
Not supported.
2. Callahan advertises "**Twice the Results at Half the Cost**".
Not supported.
3. Callahan advertises "*Beckman Coulter vs Flextronic's a \$ 934,000,000.00.*"
Actual Result, before attorneys fees, \$ 23 million. Exhibit 1.

Attorney Callahan statement to the press: *"It was pretty obvious that verdict was either going to be thrown out or chopped down to a few million bucks at best"*.

4. Callahan advertises "*Plaintiff vs Richo Electronics*" defense verdict saved his client millions. The case, "*Halluck vs Richo Electronics*" verdict was appealed, Court of Appeals overturned the verdict, Callahan appealed to Supreme Court who cited attorney Callahan behaved unethically in court and upheld the Court of Appeal ruling. Exhibit 2
5. Callahan clients filed a class action citing unethical conduct. "*Roldan vs Callahan*". Claims included their attorney illegally and unethically claimed senior citizen clients mentally incompetent asserting control and over decision-making. Plaintiffs prevailed and were awarded costs. New case law protecting clients resulted. Exhibit 3

Ex. B

to fix the cars before we shipped them to the dealers."

Rivera said Hyundai's long-term plan is to install Blue Link technology in all of its cars. Nearly half get the software now.

Until then, it wants to use data it receives from connected cars to help inform audit practices on nonconnected vehicles in order to create efficiencies, not just for its engineers but also for the departments it provides reports to, such as manufacturing, design, and research and development.

"Our focus is to get ahead of the issue as much as possible—let's contain it before it gets to the dealer," Rivera said, explaining that the idea is to save the customer time.

"It's also being able to pre-diagnose the vehicles before they show up at the dealer for service. If you know why they're coming in, you can check if [the dealer] has the right part, the right technicians with the right training before they get to the dealer."

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Until then, it wants to use data it receives from connected cars to help inform audit practices on nonconnected vehicles in order to create efficiencies, not just for its engineers but also for the departments it provides reports to, such as manufacturing, design, and research and development.

"Our focus is to get ahead of the issue as much as possible—let's contain it before it gets to the dealer," Rivera said, explaining that the idea is to save the customer time.

"It's also being able to pre-diagnose the vehicles before they show up at the dealer for service. If you know why they're coming in, you can check if [the dealer] has the right part, the right technicians with the right training before they get to the dealer."



Rivera (far right) demonstrates Hyundai's Blue Link technology for better quality ranking.

Orange County's Premier Business Litigation Firm

Experience Matters - 30 Senior Litigation Attorneys

Business Litigation

Beckman Coulter
vs.
Flextronics
\$934,000,000

Largest Jury Verdict
in OC History

Business Fraud

Manufacturer
vs.
Distributor
\$45,000,000

International
Business Dispute

Insurance

Manufacturer
vs.
Farmers Insurance
\$58,000,000

Largest Insurance Bad faith
Judgment in OC History

Employment Dispute

Plaintiff
vs.
Technology Co.
Defense Verdict

C&B Wins Again

Product Defect

Wolfgang Puck
Distributor
vs.
Manufacturer
\$9,400,000

Complex Business Dispute

Discrimination Suit

Plaintiffs
vs.
Ricoh Electronics
Defense Verdict

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J.D. Power

J.D. Power said its survey is based on responses of more than 75,000 buyers and lessees of new 2013 vehicles from February through May of this year. It looks at a vehicle's exterior and interior, and safety and performance in eight rated categories.

The study also ranks car, truck and SUV models of domestic and international automakers. Hyundai Motor Group models that won their segments based on size are Kia's Rio and Sorento, Hyundai's Tucson, and Genesis G90.

Other OC automakers received plaudits. Irvine-based Mazda Motor of America Inc. was cited as the most-improved brand over last year. Mitsubishi Motors North America Inc. a Cypress was also found to have improved its vehicles but ranked in the bottom five out of the 31 rated brands, U.K.-based Land Rover ranking the worst.

Overall, the study showed new-vehicle quality improved for the fourth consecutive year, up 4% from last year.

J.D. Power Vice President of Global Automotive Dave Sargent said automakers are listening to consumers but warned that some buyers are still finding problems.

"As vehicles become more complex and automated, it's critical that consumers have complete confidence in automakers' ability to deliver fault-free vehicles," he said in a statement.

Rivera said Hyundai has gotten more efficient at spotting red flags in its vehicles, thanks to technology advances. It can be alerted of prob-

EXHIBIT 1

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FROM THE ARCHIVES

Beckman Coulter's earnings climb

August 2, 2007

Beckman Coulter Inc.,

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Beckman Coulter Agrees to a Huge Cut in Judgment

A U.S. Supreme Court case in April that limited punitive damages leads the firm to settle its suit.

November 27, 2003 | Lisa Girion | Times Staff Writer

Conceding that the days of massive punitive damage awards may be over, Beckman Coulter Inc. on Wednesday settled its fraud and breach-of-contract lawsuit against Flextronics International Ltd. for \$23 million, a far cry from the \$934 million it was awarded by a jury.

The settlement is the latest fallout from a U.S. Supreme Court decision in April that is being interpreted by lower courts as limiting punitive damages to no more than nine times actual damages. On Tuesday, a California appeals court slashed a \$290-million verdict against Ford Motor Co. more than 90%.

"You don't have to be a weatherman to know which way the wind is blowing," Daniel J. Callahan, a lawyer for Fullerton-based Beckman Coulter, said, paraphrasing Bob Dylan. "It was pretty obvious to us that our verdict was either going to be thrown out or chopped down to a few million bucks at best."

Flextronics said in a statement that it had agreed to pay far more than appellate courts might have allowed in order to get the case out of the way and get on with business. "Although the settlement remains larger than we believe the law would have allowed, it relieves the company of the significant burden and distraction that the original verdict imposed," Flextronics Chief Executive Michael E. Marks said in a statement.

Beckman, which sells test equipment to medical labs and drug companies, claims it was defrauded when Flextronics broke a contract to supply circuit boards for medical testing devices.

An Orange County jury decided in late September that Flextronics had engaged in fraud and broke its contract to provide the circuit boards, and awarded Beckman \$498,000 in compensatory damages and \$931 million in punitive damages.

The state appellate court in Santa Ana recently interpreted April's U.S. Supreme Court decision for the first time, reducing punitive damages to four times compensatory damages in a case called *Diamond Woodworks vs. Argonaut Insurance*. That court, the 4th District Court of Appeal, would have reviewed the Beckman Coulter award had the settlement not been reached.

Instead of risking a huge reduction, Beckman Coulter took the settlement, which amounts to about 40 times compensatory damages.

"The jury gave us \$934 million based upon the potential damages that Beckman Coulter could have faced," Callahan said. "Using potential damages, the multiplier was 2.5 to 1. However, on the actual damages we have \$498,000, and we were given \$931 million, so that's a pretty high multiplier."

Callahan said the reduction in the Ford verdict Tuesday brought a quick close to two months of settlement negotiations.

We were already staring down the gun barrel of Diamond Woodworks, and then you have [the Ford opinion] where three people were killed in a car crash -- and the appellate court likened it to manslaughter -- and all they got was \$23 million in punitive damages," he said. "We didn't have personal injury. All we had was economic loss."

The settlement will result in third-quarter costs of 3 cents a share, Flextronics said in its statement.

"This is a positive event from Flextronics' point of view," said Avi Benus, a bond analyst at J.P. Morgan Securities Inc. in New York. "It's more like a disaster averted, as opposed to a big win."

Shares of Flextronics, which is based in Singapore but has administrative offices in San Jose, rose 45 cents to \$15.84 on Nasdaq. Beckman dropped 50 cents to \$50.61 on the New York Stock Exchange.

*

Bloomberg News was used in compiling this report.

From the Web

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EXHIBIT 2

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HALUCK v. RICOH ELECTRONICS

Case

Case Number S154322

Opinions

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.



Page

Case Citation: none

Date	Description
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Haluck et al. v. Ricoh Electronics, Inc. et al.
Case Number G035681



Party	Attorney
Haluck, James : Plaintiff-appellant-x/respond	Marjorie G. Fuller Law Offices of Marjorie G. Fuller 110 E. Wilshire Ave, Ste. 501 Fullerton, CA 92832-1960 Michelle Reinglass Law Offices of Michelle Reinglass 23161 Mill Creek Drive, Suite 170 Laguna Hills, CA 92653
Litton, Michael : Plaintiff-appellant-x/respond	Marjorie G. Fuller Law Offices of Marjorie G. Fuller 110 E. Wilshire Ave, Ste. 501 Fullerton, CA 92832-1960 Michelle Reinglass Law Offices of Michelle Reinglass 23161 Mill Creek Drive, Suite 170 Laguna Hills, CA 92653
Ricoh Electronics, Inc. : Defendant-respondent-x/appellant	Daniel J. Callahan Callahan & Blaine LLP 3 Hutton Centre Drive, Ste. 900 Santa Ana, CA 92707
Vaughn, Larry : Defendant-respondent-x/appellant	Daniel J. Callahan Callahan & Blaine LLP 3 Hutton Centre Drive, Ste. 900 Santa Ana, CA 92707
Uesako, Haruo : Defendant-respondent-x/appellant	Daniel J. Callahan Callahan & Blaine LLP 3 Hutton Centre Drive, Ste. 900 Santa Ana, CA 92707
Ide, Yoji : Defendant-respondent-x/appellant	Daniel J. Callahan Callahan & Blaine LLP 3 Hutton Centre Drive, Ste. 900 Santa Ana, CA 92707
Nomura, Yoshihiro : Defendant-respondent-x/appellant	Daniel J. Callahan Callahan & Blaine LLP 3 Hutton Centre Drive, Ste. 900 Santa Ana, CA 92707



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Illustration by Lars Leetaru

My father, who was a trial judge and then an appellate court judge for many years, loved to tell jokes in court. His tipstaff, the courtroom deputies and most of the gallery would laugh, and then he would come home and tell us what he said. My family thought the so-called jokes were not funny. We eventually realized that anytime a judge tells a joke, everyone has to laugh. I learned this lesson, literally at my father's knee: Judges tell stories they think are funny. Laugh. And then get on with the case.

Whatever you do, don't try to match the judge joke for joke. You are not at a comedy club. And you might find yourself torpedoing your client's case. In *Haluck v. Ricoh Electronics*, a defense lawyer and the judge seemed to egg each other on to ever more frivolous comments. The 30-day trial ended with a defense verdict. The transcript included so many indecorous comments, I'll just give you the appellate court's summary, as it ordered a new trial:

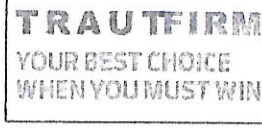
"[The judge] allowed, indeed helped create, a circus atmosphere, giving defendants' lawyer free rein to deride and make snide remarks at will and at the expense of plaintiffs and their lawyer. ... It is obvious that much of the judge's conduct was not malicious but rather a misguided attempt to be humorous; and defendants' lawyer played into it, often acting as the straight man. But a courtroom is not the Improv and the presider's role model is not Judge Judy."

So my advice to you is: Don't be funny. Your clients' problems are serious, at least to them.


This article originally appeared in the November 2015 issue of the ABA Journal with this headline: "Don't Be Funny: Litigation is no laughing matter to your clients."



*Janet S. Kole is a retired trial lawyer from Philadelphia and the author of numerous books, including *Avoiding Bad Depositions: A Simple Guide to Complex Issues* and the murder mystery *Suggestion of Death*.*



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FindLaw Caselaw California CA Ct. App. HALUCK v. RICOH ELECTRONICS INC

HALUCK v. RICOH ELECTRONICS INC

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Court of Appeal, Fourth District, California.

James HALUCK et al., Plaintiffs and Appellants, v. RICOH ELECTRONICS, INC., et al., Defendants and Appellants.

No. G035681.

Decided: June 01, 2007

Law Offices of Michelle A. Reinglass, Michelle A. Reinglass, Laguna Hills; Law Offices of Marjorie G. Fuller and Marjorie G. Fuller, Fullerton, for Plaintiffs and Appellants. Callahan & Blaine and Jim P. Mahacek, Santa Ana, for Defendants and Appellants.

OPINION

Plaintiffs James Haluck and Michael Litton appeal from a judgment in favor of defendants Ricoh Electronics, Inc., Larry Vaughn, Haruo Uesaka, Yoji Ide, Yoshihiro Nomura, and Houssam El Jurdi on their complaint for employment discrimination on the ground the trial judge's misconduct so infected the proceedings they were deprived of a fair trial. Defendants filed a protective cross-appeal, claiming the trial court erred by denying their motions for summary judgment and summary adjudication on the ground the action was barred by a United States treaty with Japan. Defendants also filed a motion for sanctions against plaintiffs and their counsel, claiming the appeal is frivolous.

We conclude the trial judge's conduct was sufficiently egregious and pervasive that a reasonable person could doubt whether the trial was fair and impartial and reverse on that ground. On remand, the case shall be assigned to a different judge. Because we reverse, the motion for sanctions is denied. As to defendants' cross-appeal, the court properly found the treaty did not bar the action and thus we affirm its ruling.

FACTS

Based on the nature of this appeal, few of the underlying facts are relevant. Plaintiffs were employed by defendant Ricoh. They sued Ricoh and certain of its employees for damages for statutory and common law discriminatory employment practices, claiming they were passed over for promotions, and Litton ultimately wrongfully terminated, because they were Caucasian and complained about racial discrimination. After a 30-day plus trial, the jury returned a defense verdict.

THE MISCONDUCT

We recite only the most egregious instances of the judicial misconduct cited by plaintiffs.

Ricoh sought to introduce a video it used for training or public relations purposes. (Characterization by the trial court.) Plaintiffs' lawyer contended, among other reasons for

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June 20, 2023

Request for Ethics Opinion

With regard to grounds that preclude a request for an ethics opinion, I submit the following:

1. I am not a member of a local bar association which has an ethics committee.
2. There is no pending complaint or investigation, proceeding or litigation concerning the subject matter of the request.
3. The request does not constitute a complaint against a member of the State Bar.
4. The request does not involve a procedure.
5. The request does not involve a question/issue which turns principally on law unrelated to the law governing lawyers.
6. There is no litigation or threatened litigation.

The Request for Ethics Opinion is related to State Bar of California Formal Opinion Interim No. 19-0003, Advising Client on Illegal Contract Provisions.

My request for an Ethics Opinion seeks an opinion on whether an attorney, serving as elected official of a municipality, and charged with approving employment agreements submitted to city employees, has the ethical duty or legal obligation to recuse him/herself from voting on employment contracts, drafted by the City Attorney, that contain language that is illegal?

Opinion 19-0003 focuses to the obligations of an attorney who is requested by a client/ employer to prepare an employment contract with illegal provisions.

The Issue I raise is whether the Employer/Elected Municipal Official, who is an attorney, would violate ethical or legal duties by approving an Employment Agreement containing illegal provisions which Employment Agreement is presented to a current City Employee as a condition of continued employment?

A hypothetical Employment Agreement is attached.

The provisions of the Employment Agreement include a forfeiture of severance pay unless the employee agrees to execute a waiver and release of all claims against, not only the City, but the employee's direct supervisor - the city manager- AND the city council members' individual and collectively.

The language suggests the "severance pay" is quid pro quo for the Waiver and Release of All Claims, and from a public policy point of view would provide strong financial incentive for a public employee to conceal a former employer's negligence, malfeasance, or collusion.

It is respectfully requested that the State Bar consider this important public issue.



Enclosure

CITY OF [REDACTED]
EMPLOYMENT AGREEMENT
FOR
NON-REPRESENTED EMPLOYEE
(EXECUTIVE MANAGEMENT)

1. PARTIES AND DATE.

This Agreement (hereinafter referred to as the "Agreement") is made and entered into this 19 day of July, 2021 by and between the CITY OF [REDACTED], a municipal corporation (hereinafter referred to as "City") and [REDACTED] (hereinafter referred to as "Employee"), in order to provide in writing the terms and conditions of employment for Finance Director services. City and Employee are sometimes individually referred to herein as "Party" and collectively as "Parties."

2. RECITALS.

2.1 City.

City desires to employ the services of Employee as Finance Director for the [REDACTED]s [REDACTED], and Employee desires to accept employment as Finance Director. It is the desire of the Parties through this Agreement to provide for certain benefits, establish conditions of employment, and to set working conditions for Employee.

3. TERMS.

3.1 Duties.

3.1.1 Designated Duties. City hereby agrees to employ Employee as Finance Director of City to perform the functions and duties in accordance with applicable state law, the City's Charter and Municipal Code, as well as the approved City job description for the position. Employee shall also perform other legally permissible and proper duties and functions as the City Manager shall from time-to-time assign.

3.1.2 Control and Supervision. Employee shall serve at the will and pleasure of the City and will be under the day-to-day supervision and direction of the City Manager.

3.1.3 City Council Meetings. Employee shall attend all City Council meetings, unless excused or directed otherwise.

3.1.4 Moonlighting. Employee will focus his/her professional time, ability, and attention on City business during the term of this Agreement. To the extent consistent with applicable law, Employee shall not engage in any other business duties or pursuits whatsoever or, directly or indirectly, render any services of a business, commercial, or professional nature to

any other person or organization, whether for compensation or otherwise, without the prior consent of the City Council, except that:

(1) The expenditure of reasonable amounts of time not in conflict with the City's needs and interests, for educational, charitable, community, and professional activities, shall not be deemed a breach of this Agreement and shall not require prior consent.

(2) This Agreement shall not be interpreted to prohibit Employee from making passive personal investments or conducting private business affairs if those activities do not materially interfere with the services required under this Agreement or create conflicts of interest.

3.1.5 City Documents. All data, studies, reports and other documents prepared by Employee while performing his/her duties during the term of this Agreement shall be furnished to and become the property of the City, without restriction or limitation on their use. All ideas, memoranda, specifications, plans, procedures, drawings, descriptions, computer program data, input record data, written information, and other materials either created by or provided to Employee in connection with the performance of this Agreement shall be held confidential by Employee. Such materials shall not, without the prior written consent of the City Manager, be used by Employee for any purposes other than the performance of his/her duties. Nor shall such materials be disclosed to any person or entity not connected with the performance of services under this Agreement, except as required by law. The obligations of the City and Employee under this section shall survive the termination of this Agreement.

3.2 Term; Termination; Severance Pay.

3.2.1 Term. This Agreement shall become effective on July 19, 2021, ("Effective Date"), and shall continue until terminated by either Party.

3.2.2 Termination. The Parties understand and agree that the employment relationship created by this Agreement is "at-will" and that the Employee shall serve at the will and pleasure of the City Manager, and may be terminated at any time, without notice and with or without cause, but subject to the terms of this Agreement. Nothing in this Agreement, any statute, ordinance, or rule, shall prevent, limit or otherwise interfere with the right of the City Manager to terminate, without cause or right of appeal or grievance, except for those rights set forth in Section 3.2.6 below, the services of the Employee at any time during the Term of this Agreement. Employee agrees that this Agreement sets forth the only terms and conditions applicable to the termination of his/her employment.

3.2.3 Automatic Termination. This Agreement, and Employee's employment, shall automatically terminate and Employee shall not be entitled to any severance payment, except for compensation for accrued and unused vacation leave, upon the happening of any of the following events:

(1) Upon mutual agreement in writing by both Parties to terminate this Agreement.

(2) Upon resignation by Employee.

(3) Upon the death of Employee.

(4) When Employee has been unable to perform all or substantially all of the essential functions of his/her position, with or without reasonable accommodation, due to illness or other disability for a period of three (3) months, provided, however, whenever required by applicable law, Employee shall be entitled to use accrued but unused sick leave before this three (3) month period begins to run.

3.2.4 Termination Without Cause; Severance. This Agreement, and Employee's employment, may be terminated without prior notice at any time, with or without cause, by the City Manager. Nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of the City Manager to terminate this Agreement at any time, with or without cause, subject to the Termination provisions of this Agreement. In the event Employee is terminated without cause at such time as Employee is willing and able to perform his/her duties under this Agreement, other than under an Automatic Termination instance as provided for in Section 3.2.3, the City agrees to pay Employee a severance payment equal to three (3) months' base salary (as described in Section 3.3 below) ("Severance Payment"). The Severance Payment is expressly contingent on Employee executing a valid waiver and release of all claims against the City, City Manager, and City Council members individually and collectively ("Separation Agreement and General Release"). Should Employee fail to execute the Separation Agreement and General Release, Employee will forego any right to the Severance Payment. Recovery and enforcement of the Severance Payment shall be Employee's sole remedy for a termination without cause. The Severance Payment shall be paid in one lump sum. Upon termination, with or without cause, Employee shall also be entitled to compensation for accrued and unused vacation leave pursuant to City policy.

3.2.5 Notice for Resignation. In the event Employee voluntarily resigns his/her position with City, then Employee shall give City three (3) weeks notice in advance, unless the Parties otherwise agree. Upon voluntary resignation, Employee shall be entitled to accrued vacation leave benefits, but not to the Severance Payment described in Section 3.2.4 above.

3.2.6 Termination for Cause; Procedure. Except as provided in Subsection (6) below, in the event Employee is terminated for cause, City shall have no obligation to pay the Severance Payment described in Section 3.2.4 above. The following procedures shall apply to any termination for cause:

(1) At least thirty (30) calendar days before the effective date of any termination for cause, the City shall deliver to Employee a written specification of the charges or other reasons upon which "cause" is alleged, as well as the specific effective date of termination. After furnishing Employee with written notice of his/her intended termination for cause and without the need to wait for the thirty (30) day appeal/hearing period discussed below to expire, the City Manager may suspend him/her from duty, but his/her base salary shall continue for

thirty (30) days from the effective date of suspension, regardless of the effective date of termination.

(2) Employee shall then have seven (7) calendar days from notice of termination to challenge such termination for cause by delivery of a written response to such specifications. Within such seven (7) day period, Employee may also demand a hearing upon the specifications. Failure to submit a written response or demand a hearing within the seven (7) calendar day period shall constitute a waiver of such right, and the City Manager's determination shall be final.

(3) If a hearing is demanded, such hearing shall be held before the City Manager, unless the Parties agree to an alternative procedure or alternative hearing body or officer. No hearing shall be held in public unless requested by Employee. Regardless of the date issued, the decision of the City Manager or other hearing body or officer shall be binding, final as of the effective date of termination provided for in the notice under Subsection (1) above, and without right of further appeal.

(4) The issues to be determined in the hearing shall be whether the specification(s) alleged constitute "cause" pursuant to this Agreement and whether the specifications are supported by a preponderance of the evidence.

(5) The Parties acknowledge that a requested hearing for cause shall be held at the earliest possible date, and to that extent, they shall cooperate in selecting a date for the hearing which shall be no later than sixty (60) days following the City's notice of termination for cause.

(6) In the event the City Manager or other hearing body or officer concludes in favor of Employee that no cause exists, Employee shall be entitled only to the appropriate amount of severance pay and benefits as he/she would have received if terminated without cause pursuant to Section 3.2.4 above. Employee shall not have any reinstatement rights.

(7) If a written response is submitted, but no hearing is demanded, the City Manager shall review his/her decision based upon Employee's written response. However, any determination by the City Manager after reviewing such written response (where no hearing has been demanded) shall be final and without right of appeal.

3.2.7 Government Code Provisions. In accordance with Government Code sections 53243 through 53243.4, if Employee is paid any leave salary pending investigation, if City provides funds for the legal defense of Employee, or if Employee receives any cash settlement related to the termination of this Agreement, including the Severance Payment specified above, and Employee is subsequently convicted of a crime involving the abuse of his or her office as defined by Government Code section 53243.4, Employee shall fully reimburse City for such monies paid. These provisions shall survive termination of this Agreement.

3.3 Salary.

City shall compensate Employee at an annual base salary equal to Step E of Range A to E, Tier 2 of the Resolution 2021-14 Regarding Salary and Benefits for Non-Represented Employees ("Salary and Benefits Resolution"). The salary shall be payable bi-weekly at the same time as other employees of City are paid, and may be modified from time-to-time by the City Manager pursuant to the Salary and Benefits Resolution.

3.4 Fringe Benefits.

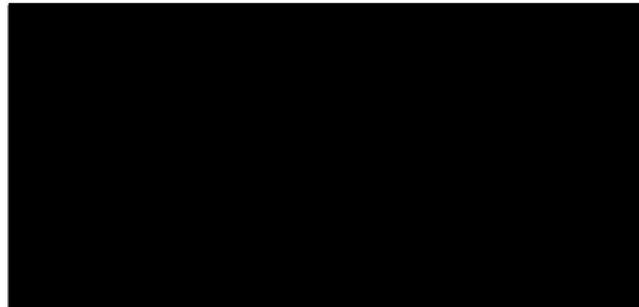
Except as otherwise set forth herein, Employee shall be entitled to those benefits, including holidays, bereavement, temporary disability, jury duty, vacation, sick leave, disability, health and life insurance, and retirement, provided for Executive Management employees in the Salary and Benefit Resolution.

3.5 Notices.

Notices pursuant to this Agreement shall be given by deposit in the custody of the United States Postal Service, postage pre-paid, addressed as follows:

CITY:

EMPLOYEE:



Alternatively, notices required pursuant to this Agreement may be personally served in the same manner as is applicable to civil judicial practice. Notice shall be deemed given as of the date of personal service or as of the date of deposit of such written notice in the course of transmission in the United States Postal Service.

3.7 General Provisions.

3.7.1 Entire Agreement. The text herein shall constitute the entire agreement between the Parties.

3.7.2 Severability. If any provision, or any portion thereof, contained in this Agreement is held unconstitutional, invalid or unenforceable, the remainder of this Agreement, or portion thereof, shall be deemed severable, shall not be affected and shall remain in full force and effect.

3.7.3 Salary and Benefit Resolution for Non-Represented Employees. The terms and provisions of the Salary and Benefits Resolution, as it now exists on the Effective Date

of this Agreement, shall be applicable to Employee only to the extent not inconsistent with this Agreement, and this Agreement therefore shall take precedence over the Salary and Benefits Resolution with respect to any inconsistencies in its interpretation or enforcement.

3.7.4 Bonding. If applicable, the City shall bear the full cost of any fidelity or other bonds required of Employee in the performance of his/her duties as Finance Director.

3.7.5 Modification. Any modification of this Agreement will be effective only if it is in writing and signed by both Parties.

3.7.6 Effect of Waiver. The failure of either Party to insist on strict compliance with any of the terms, covenants, or conditions of this Agreement by the other Party shall not be deemed a waiver of that term, covenant, or condition, nor shall any waiver or relinquishment of any right or power at any one time or times be deemed a waiver or relinquishment of that right or power for all or any other times.

3.7.7 Assignment. Neither this Agreement, nor any right, privilege or obligation of Employee hereunder shall be assigned or transferred by him/her without the prior written consent of the City Manager. Any attempt at assignment or transfer in violation of this provision shall, at the option of the City Manager, be null and void and may be considered a material breach of this Agreement.

3.7.8 Law Governing Agreement. This Agreement shall be governed by and construed in accordance with the laws of the State of California. Venue shall be in ██████████ County, California.

3.7.9 No Presumption of Drafter. The Parties acknowledge and agree that the terms and provisions of this Agreement have been negotiated and discussed between the Parties, and this Agreement reflects their mutual agreement regarding the subject matter of this Agreement. Because of the nature of such negotiations and discussions, it would be inappropriate to deem any Party to be the drafter of this Agreement and, therefore, no presumption for or against validity or as to any interpretation hereof, based upon the identity of the drafter shall be applicable in interpreting or enforcing this Agreement.

3.7.10 Assistance of Counsel. Each Party to this Agreement warrants to the other Party that it has either had the assistance of counsel in negotiation for, and preparation of, this Agreement or could have had such assistance and voluntarily declined to obtain such assistance.

[SIGNATURES ON NEXT PAGE]

[Redacted]

By:

[Redacted]

City Manager

Attest:

[Redacted]

City Clerk

EMPLOYEE

By:

[Redacted]

APPROVED AS TO FORM:

[Redacted]

City Attorney

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 19-0003
ADVISING CLIENT ON ILLEGAL CONTRACT PROVISIONS**

ISSUES: What are a lawyer's ethical duties when advising a client regarding the use of a contract provision in a transaction with a third party that is illegal under the law of the jurisdiction applicable to the transaction?

DIGEST: A California lawyer has a duty not to counsel or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal. That conduct includes the use of a contract provision in a transaction with a third party that has been found to be illegal under the law of the jurisdiction applicable to the transaction. If the lawyer knows that the provision is illegal, the lawyer should advise the client accordingly, may not recommend the use of the provision, and must counsel the client not to use it. If the client insists on the use of the illegal provision against the lawyer's advice, the lawyer may not participate in presenting the illegal provision to the third party. In that event, the lawyer may withdraw from the representation but is not required to do so. If the lawyer concludes that the conduct is a violation of law reasonably imputable to the organization and likely to result in substantial injury to the organization, the lawyer for an organization must report the actions of the client constituent to a higher authority, unless the lawyer reasonably concludes that it is not in the best lawful interest of the organization to do so.

AUTHORITIES

INTERPRETED: California Rules of Professional Conduct 1.1, 1.2.1, 1.4, 1.13, 1.16(b), 4.1, 8.4(c).^{1/}

Business and Professions Code section 6068(d).

INTRODUCTION

Certain types of contract provisions have been found to be illegal under California law. For example, provisions in employment contracts that impair the ability of employees to compete against their employers following termination of employment have generally been found to be illegal under California law, subject to limited exceptions. See *Edwards v. Arthur Andersen LLP*

^{1/} Unless otherwise indicated, all references to "rules" in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

(2008) 44 Cal.4th 937, 945 [81 Cal.Rptr.3d 282]; *Robinson v. U-Haul Co. of California* (2016) 4 Cal.App.5th 304, 309 [209 Cal.Rptr.3d 81]; Business and Professions Code section 16600. For purposes of this opinion, the Committee does not opine on whether a particular clause in a contract is illegal as this raises an issue of law; instead, the Committee confines its discussion to the ethical issues presented by the factual scenarios set forth below.

STATEMENT OF FACTS

Lawyer works for a large California corporation providing employment law advice to the Human Resources department ("HR") responsible for all non-executive hiring. Employees hired through HR are presented with a standard form written employment agreement ("Agreement"). This Agreement is presented by HR to new hires as a non-negotiable agreement that must be signed as a condition of employment. Lawyer is tasked with reviewing and updating the Agreement, which contains a provision that has been found to be illegal under California law.

Factual Scenarios

1. Lawyer knows that the provision has been found to be illegal, but advises HR to use the Agreement anyway, without further advice or analysis.
2. Same facts, except that Lawyer does not know that the provision is illegal.
3. Same facts, except that Lawyer advises that the contract provision has been found to be illegal under California law, but does not recommend against including the provision.
4. Same facts, except that Lawyer advises that the contract provision has been found to be illegal under California law and recommends against including the provision. HR advises Lawyer that it understands the provision is illegal but would still like to include it in the Agreement for its chilling effect. HR has asked the Lawyer to assist in enforcing the provision.

DISCUSSION

A. Duty to Advise of an Illegal Contract Provision

Rule of Professional Conduct 1.2.1(a) states that a "lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, *or a violation of any law, rule, or ruling of a tribunal.*" (Emphasis added.) Rule 1.2.1 is modeled in substance after former rule 3-210 but adds clarifying language derived from ABA Model Rule 1.2(d). The California rule is broader than the ABA Model Rule 1.2(d), which merely prohibits counseling or

assisting a client on conduct known to be criminal or fraudulent.^{2/} Both the California rule^{3/} and the ABA Model Rule allow a lawyer to discuss the legal consequences of any proposed course of action and counsel or assist the client in interpreting the application of any law, rule or ruling to that course of action.^{4/}

The California rule on its terms applies to every type of legal representation, including transactional work and negotiation. A lawyer cannot knowingly advise a client to propose an illegal provision in a contract that will be offered to a third party. See ABA Model Rule 1.2, Comment [10] ("The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed."); ABA Section of Litigation, *Ethical Guidelines For Settlement Negotiations* (August 2002), at pp. 46-47) ("A lawyer should not negotiate a settlement provision that the lawyer knows to be illegal.").^{5/}

In Scenario 1, Lawyer is knowingly recommending the inclusion of a provision that Lawyer knows is illegal in violation of rule 1.2.1(a).^{6/} Conversely, in Scenario 2, Lawyer does not know that the specific type of contract provision is illegal and, thus, does not violate the rule. However, Lawyer likely violated the duty of competence under rule 1.1(a). Knowing that the specific provision was illegal is likely to be reasonably necessary to provide competent legal advice to HR on employment law matters consistent with rule 1.2.1(b), and Lawyer's failure to acquire such knowledge before advising the client, might be grossly negligent under rule 1.1(a). See also rule 1.1(b).

^{2/} ABA Model Rule 1.2(d): "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

^{3/} Rule 1.2.1(b): "Notwithstanding paragraph (a), a lawyer may: (1) discuss the legal consequences of any proposed course of conduct with a client; and (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal."

^{4/} See California State Bar Formal Opn. 2020-202, generally, for discussion on the scope of permitted advice and assistance a lawyer may provide to clients related to conduct described in rule 1.2.1(a).

^{5/} The ABA Model Rules may be looked to for guidance on proper professional conduct, particularly in areas where there is no contrary California authority or conflicting public policy. See California Rule of Professional Conduct 1.0, Comment [4] ("Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered" for guidance on proper professional conduct).

^{6/} The Committee would reach the same conclusion in all four scenarios if Lawyer was drafting the agreement *ab initio*.

B. Duty Not to Assist Enforcement of an Illegal Contract Provision

While the ABA frames this issue in terms of fraud or crime, the duty is broader in California because our variation of ABA Model Rule 1.2(d), rule 1.2.1, also adds violation of any law, rule, or ruling of a tribunal, even if those violations do not amount to a crime or fraud.

In Scenario 3, Lawyer has a duty not only to advise the client or client constituent, HR, on the interpretation of the applicable law and the possible consequences of using the provision in question, but also to recommend against its use and avoid assisting the client's enforcement of the illegal provision.

In Scenario 4, because the client or client constituent insists on including the illegal provision for its in terrorem effect contrary to Lawyer's advice, Lawyer must advise the client regarding the limitations on Lawyer's conduct, including that Lawyer will not represent the client in advocating or attempting to enforce the illegal provision. Rule 1.2.1, Comment [5]; rule 1.4(a)(4).

A lawyer may not knowingly make a false statement of law to a third person. Rule 4.1(a). Rule 8.4(c) states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation." California statutory law states the duty in broader terms. See Business and Professions Code section 6068(d)^{7/} (It is the duty of an attorney "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth . . ."). Accordingly, advocating or attempting to enforce an illegal provision in an employment agreement for its chilling effect on third parties would violate rule 8.4(c) and Business and Professions Code section 6068(d). See also, California State Bar Formal Opn. 2015-194, where this Committee opined that a lawyer may not knowingly make false statements of fact or implicit misrepresentations of material fact during negotiations because such statements could constitute deceit, employment of means not "consistent with truth," and dishonest conduct, all of which are ethically prohibited by Business and Professions Code sections 6106, 6128(a), and 6068(d), and related California case law.^{8/}

Traditionally, in representing a client in arm's length business negotiations, a lawyer owes a limited duty to the other side that does not include a duty to inform that party of relevant facts. "[I]n drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document." Rule 4.1, Comment [1]. Nonetheless, a "nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer

^{7/} While the statute has most often been applied in the context of a lawyer's duty not to mislead the Court, relying on the second clause of the statute [citation], there is no textual limitation of the application of the first clause to transactional work.

^{8/} California State Bar Formal Opn. 2015-194 was issued prior to the time that rule 4.1 was enacted, but the Committee also relied on ABA Model Rule 4.1 in support of its argument.

makes a partially true but misleading material statement or material omission.” *Id.*; see also California State Bar Formal Opn. 2015-194.

Lawyers have less latitude to make or ratify a false statement of *law* made by the client. See South Carolina Bar Ethics Opn. 05-03 (2005) (lawyer for ex-wife sent letter to ex-husband falsely claiming that ex-husband was required under divorce decree to undergo drug testing; this conduct violated South Carolina Rules of Professional Conduct 4.1 and 8.4(c)); *In re Discipline of Attorney* (2008) 451 Mass. 131 [884 N.E.2d 450] (lawyer disciplined under Rule 8.4(c) alone for sending letters to insurers of opposing parties falsely claiming entitlement to lien on insurance payments payable to his clients). Rule 4.1(b) is limited to disclosures necessary to avoid assisting in a “criminal or fraudulent” act by a client, which is narrower than illegal conduct. However, the advocacy of a contract provision *known both by the client and the lawyer* to be illegal for its chilling effect is a fraudulent act.^{9/}

C. Lawyer May Have a Duty to Withdraw from the Representation

In Scenario 4, if HR insists on including the illegal provision, Lawyer may withdraw but is not compelled to withdraw merely because the client chooses to use the illegal provision, despite the lawyer’s admonition, even if the use of that contract provision is deemed fraudulent or even criminal. Rule 1.2.1, Comment [2]; rule 1.16(b)(1) -(3).^{10/} If, however, HR conditions Lawyer’s employment on continued participation in HR’s use of the contract provision, or enforcement thereof, Lawyer may be required to withdraw under rule 1.16(a)(2), which makes withdrawal mandatory if “the lawyer knows or reasonably should know that the representation will result in violation of these rules or of the State Bar Act,” that is, a violation of rules 1.2.1, 4.1, and 8.4 and Business and Professions Code section 6068(d).^{11/}

D. Duty to Report Up in An Organization

Because the client is an organization, in Scenario 4 Lawyer will have a duty to report the conduct of the corporate constituent (*e.g.*, HR) to the higher authority in the organization if

^{9/} Under rule 1.0.1(d): “Fraud” or “fraudulent” means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.

^{10/} See rule 1.16 (b) (“Except as stated in paragraph (c), a lawyer *may* withdraw from representing a client if: (1) the client insists upon presenting a claim or defense in litigation, or *asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law*; (2) the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer’s services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud; (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent . . .”). (Emphasis added.)

^{11/} The lawyer may not reveal confidential advice or information regarding the use of the illegal provision, except as required by rule 1.13. (See rule 1.6 and Cal. Bus. & Prof. Code § 6068(e)(1). See also Cal. State Bar Form. Opn. 2015-192, generally, for discussion on lawyer’s duty to maintain confidential information when withdrawing from a client representation.)

Lawyer knows or reasonably should know that the conduct is “(i) a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization” unless the lawyer reasonably believes that “it is not necessary in the best lawful interest of the organization to do so.” Rule 1.13(b).

Labor Code section 432.5 provides that “[n]o employer, or agent, manager, superintendent, or officer thereof, shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer, or agent, manager, superintendent, or officer thereof to be prohibited by law.” Business and Professions Code section 16600 states that “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.” For purposes of this opinion, we assume that the contract provision is unlawful under California law. Given the possibility of substantial injury to the organization, Lawyer must evaluate carefully whether disclosure to a higher authority is reasonably necessary. (See rule 1.4 and rule 1.13, Comment [2].) Moreover, because Lawyer has a duty not to withdraw without taking reasonable steps to avoid reasonably foreseeable prejudice to the organization client. Rule 1.16(d), this disclosure must be made even if Lawyer opts to withdraw as provided by rule 1.16(c)(1) – (3).

CONCLUSION

A California lawyer has a duty not to counsel or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal. That conduct includes the use of a contract provision in a transaction with a third party that has been found to be illegal under the law of the jurisdiction applicable to the transaction. If the lawyer knows that the provision is illegal, the lawyer: (1) should advise the client accordingly; (2) may not recommend the use of the provision; and (3) must counsel the client not to use it.

If the client insists on the use of the illegal provision against the lawyer’s advice, the lawyer may not participate in presenting the illegal provision to the third party and may not assist the client in enforcing the provision. In that event, the lawyer may withdraw from the representation but is not required to do so.

If the lawyer concludes that the conduct is a violation of law reasonably imputable to the organization and likely to result in substantial injury to the organization, the lawyer for an organization must report the actions of the client constituent to a higher authority, unless the lawyer reasonably concludes that it is not in the best lawful interest of the organization to do so.

[REDACTED]

[REDACTED]

Although related to 3.6, my thought is that it would be separate rule, because it is more about disclosing to the public an attorney's interest in a matter, rather than not disclosing certain details of a matter. But I suppose it could be added to 3.6.

Regards,

[REDACTED]

Attorney

[REDACTED]

[REDACTED]

[REDACTED]

Thank you for providing your recommendation. Are you thinking an expansion of rule [3.9](#) or [3.6](#), or something different entirely?

Thank you again,

[REDACTED]

[REDACTED]

[REDACTED]

I would like to propose a rule that requires attorneys, when discussing a case publicly, to disclose if they represent, or are likely to be representing one of the parties. I think this is in line with attorneys' ethical responsibility of professionalism and candor to the public. Well-known attorney may be offering what is presented as an impartial expert opinion, when in fact they may be trying to sway public opinion, or perhaps even influence the sentiments of potential jurors in high profile cases.

By the way, this has absolutely nothing to do with my own practice area.

Regards,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Your email was forward to me for response. If you wish to propose changes to a Rule of Professional Conduct, you may submit the request to the Committee on Professional Responsibility and Conduct (COPRAC) for consideration. Please provide the request to myself and Angela Marlaud, copied here. We are the committee's staff.

COPRAC would then review the request and either decline to move the request forward or submit the proposal to the Board of Trustees for consideration, public comment period(s), and approval. If approved by the Board of Trustees, the proposed amendments would be submitted by petition to the California Supreme Court to consider adoption.

Please let me know if you have further questions.

Warm regards,

[REDACTED]

[REDACTED]
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Subject: How to recommend changes to California Bar ethics rules

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi,

Is there a procedure in place to recommend specific changes to California State Bar ethics rules?

Regards,

[REDACTED]
[REDACTED]

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Rule 1.16: Declining or Terminating Representation

(a) A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; ~~or~~

(3) the lawyer is discharged; or

(4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] Paragraph (a) imposes an obligation on a lawyer to inquire into and assess the facts and circumstances of the representation before accepting it. The obligation imposed by Paragraph (a) continues throughout the representation. A change in the facts and circumstances relating to the representation may trigger a lawyer's need to make further inquiry and assessment. For example, a client traditionally uses a lawyer to acquire local real estate through the use of domestic limited liability companies, with financing from a local bank. The same client then asks the lawyer to create a multi-tier corporate structure, formed in another state to acquire property in a third jurisdiction, and requests to route the transaction's funding through the lawyer's trust account. Another example is when, during the course of a representation, a new party is named or a new entity becomes involved. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.1, 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Under paragraph (a)(4), the lawyer's inquiry into and assessment of the facts and circumstances will be informed by the risk that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. This analysis means that the required level of a lawyer's inquiry and assessment will vary for each client or prospective client, depending on the nature of the risk posed by each situation. Factors to be considered in determining the level of risk may include: (i) the identity of the client, such as whether the client is a natural person or an entity and, if an entity, the beneficial owners of that entity, (ii) the lawyer's experience and familiarity with the client, (iii) the nature of the requested legal services, (iv) the relevant jurisdictions involved in the representation (for example, whether a jurisdiction is considered at high risk for money laundering or terrorist financing), and (v) the identities of those depositing into or receiving funds from the lawyer's client trust account, or any other accounts in which client funds are held. For further guidance assessing risk, see, e.g., as amended or updated, Financial Action Task Force Guidance for a Risk-Based Approach for Legal Professionals, the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing, A Lawyer's Guide to Detecting and Preventing Money Laundering (a collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe), the Organization for Economic Cooperation and Development (OECD) Due Diligence Guidance for Responsible Business Conduct, and the U.S. Department of Treasury Specially Designated Nationals and Blocked Persons List.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.



October 6, 2023

Honorable Patricia Guerrero
Chief Justice
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Recent amendments to Rule 1.16 of the ABA Model Rules of Professional Conduct

Dear Chief Guerrero:

We write to report on recent amendments to Rule 1.16 of the ABA Model Rules of Professional Conduct 1.16 that the ABA House of Delegates adopted on August 8, 2023. The amendments clarify a lawyer's responsibility to inquire into and assess the facts and circumstances of a matter before accepting a new recommendation and, under some circumstances, before continuing the representation. The inquiry is required to determine whether the lawyer's services would be used to commit a crime or fraud.

We hope that your Court will review these changes and consider integrating them into your jurisdiction's rules of professional conduct. Members of the ABA Center for Professional Responsibility are available to speak with you and your court and with others who review proposed amendments to your state's professional conduct rules. A clean copy of revised ABA Model Rules of Professional Conduct 1.16 as well as a copy of the redline version of the amendments are enclosed. Also enclosed is the Report that accompanied the proposal explaining its purpose.

Specifically, these amendments to Rule 1.16 and the accompanying Comments:

- Make explicit in the black letter of paragraph (a) what was implicit in the Model Rules of Professional Conduct: that lawyers must inquire into and assess the facts and circumstances of a representation to ensure that they will not be facilitating a client's fraud or crime;
- Make explicit in new paragraph (a)(4) that when faced with a client who wants to use or persists in using the lawyer's services to commit or further a crime or fraud, the lawyer must discuss the limitations on the lawyer's services;
- Explain in Comment [1] that the lawyer's inquiry and assessment will vary depending on the level of risk posed;



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Center for Professional Responsibility

- Identify factors for a lawyer to consider when determining the level of risk a representation may involve, including: (i) the identity of the client, such as whether the client is a natural person or an entity and, if an entity, the beneficial owners of that entity; (ii) the lawyer's experience and familiarity with the client; (iii) the nature of the requested legal services; (iv) the relevant jurisdictions involved in the representation (for example, whether a jurisdiction is considered at high risk for money laundering or terrorist financing); and (v) the identities of those depositing into or receiving funds from the lawyer's client trust account, or any other accounts in which client funds are held.
- Provide additional guidance in Comment [x] with examples of situations that might trigger further inquiry and assessment.

The proposal to amend Model Rule 1.16 was brought to the ABA House of Delegates by the ABA Standing Committee on Ethics and Professional Responsibility and the ABA Standing Committee on Professional Regulation after more than two years of study and public hearings.

Please do not hesitate to contact us, Ellyn Rosen, Regulation and Global Initiatives Counsel or Mary McDermott, Lead Senior Counsel at the ABA Center for Professional Responsibility regarding any information or assistance we can provide. Their email addresses are ellyn.rosen@americanbar.org and mary.mcdermott@americanbar.org respectively.

We will be emailing copies of this letter and the enclosures to your State Bar Association President, State Bar Association Executive Director, lawyer disciplinary agency head, and to the ABA state delegate from your jurisdiction so that they are aware of our invitation to assist in your jurisdiction's study and possible adoption of these Model Rule amendments.

Thank you for your consideration.

Respectfully,

A handwritten signature in black ink, appearing to read 'Daniel J. Crothers'.

Hon. Daniel J. Crothers, Chair
Standing Committee on
Professional Regulation

A handwritten signature in black ink, appearing to read 'Bruce Green'.

Professor Bruce Green, Chair
Standing Committee on
Ethics and Professional Responsibility

cc by electronic communication:

State Bar Association President
State Bar Association Executive Director
State Chief Disciplinary Counsel

Rule 1.16: Declining or Terminating Representation

(a) A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; ~~or~~

(3) the lawyer is discharged; or

(4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] Paragraph (a) imposes an obligation on a lawyer to inquire into and assess the facts and circumstances of the representation before accepting it. The obligation imposed by Paragraph (a) continues throughout the representation. A change in the facts and circumstances relating to the representation may trigger a lawyer's need to make further inquiry and assessment. For example, a client traditionally uses a lawyer to acquire local real estate through the use of domestic limited liability companies, with financing from a local bank. The same client then asks the lawyer to create a multi-tier corporate structure, formed in another state to acquire property in a third jurisdiction, and requests to route the transaction's funding through the lawyer's trust account. Another example is when, during the course of a representation, a new party is named or a new entity becomes involved. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.1, 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Under paragraph (a)(4), the lawyer's inquiry into and assessment of the facts and circumstances will be informed by the risk that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. This analysis means that the required level of a lawyer's inquiry and assessment will vary for each client or prospective client, depending on the nature of the risk posed by each situation. Factors to be considered in determining the level of risk may include: (i) the identity of the client, such as whether the client is a natural person or an entity and, if an entity, the beneficial owners of that entity, (ii) the lawyer's experience and familiarity with the client, (iii) the nature of the requested legal services, (iv) the relevant jurisdictions involved in the representation (for example, whether a jurisdiction is considered at high risk for money laundering or terrorist financing), and (v) the identities of those depositing into or receiving funds from the lawyer's client trust account, or any other accounts in which client funds are held. For further guidance assessing risk, see, e.g., as amended or updated, Financial Action Task Force Guidance for a Risk-Based Approach for Legal Professionals, the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing, A Lawyer's Guide to Detecting and Preventing Money Laundering (a collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe), the Organization for Economic Cooperation and Development (OECD) Due

Diligence Guidance for Responsible Business Conduct, and the U.S. Department of Treasury Specially Designated Nationals and Blocked Persons List.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

REVISED REPORT

Introduction

The Standing Committee on Ethics and Professional Responsibility (the “Ethics Committee”) and the Standing Committee on Professional Regulation (the “Regulation Committee”) propose amendments to the Black Letter and Comments to ABA Model Rule of Professional Conduct 1.16, Declining or Terminating Representation.

This Resolution constitutes another piece of the ABA’s longstanding and ongoing efforts to help lawyers detect and prevent becoming involved in a client’s unlawful activities and corruption, as described in this Report. In February 2023, the ABA House of Delegates adopted Resolution 704 proposed by the Working Group on Beneficial Ownership. Resolution 704 updates ABA policy on entities providing the federal government with information about the identity of the entity’s beneficial owners. Resolution 704, like this Resolution, represents a compromise among those with diverse and strongly held views. This Resolution presents a balanced approach to ensuring that lawyers conduct inquiry and assessment - appropriate to the circumstances - to detect and prevent involvement in unlawful activities and corruption.

The proposed amendments to the Black Letter clearly state for lawyers their obligations to inquire about and assess the facts and circumstances when considering whether to undertake a representation and their ongoing obligations throughout the representation. The amendments further state that the lawyer must decline the representation or withdraw when the prospective client or client seeks to use or persists in using the lawyers’ services to commit or further a crime or fraud after the lawyer has advised of the limitations on the lawyer’s services.

These are not new obligations. Lawyers already perform these inquiries and assessments every day to meet their ethical requirements. For example, they do so to identify and address conflicts of interests. They also do so to ensure they represent clients competently (Rule 1.1); to develop sufficient knowledge of the facts and the law to understand the client’s objectives and to identify means to meet the client’s lawful interests (Rule 1.2(a)); and, if necessary, to persuade the client not to pursue conduct that could lead to criminal liability or liability for fraud (Rule 1.2(d)).¹ Implicit duties – like unwritten rules – do not serve lawyers or the public well. Therefore, the Committees present these amendments to the Black Letter of Model Rule 1.16 from which both lawyers and the public will benefit.

In addition to the proposed changes to the Black Letter of Rule 1.16, proposed new language in Comment [1] elaborates on the duty to inquire about and assess the facts and circumstances of the representation. The Comment makes clear that the duty is one that continues throughout the course of the representation.²

¹ See *also* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 463 (2013) & 491 (2020).

² GEOFFREY C. HAZARD JR., W. WILLIAM HODES & PETER R. JARVIS, *LAW OF LAWYERING* § 21.02 (4th ed. 2021) (“Rule 1.16 often plays a role *during* representation of a client as well. By focusing attention on situations

New language proposed in Comment [2] explains that under new Black Letter paragraph (a)(4) of Rule 1.16, the scope of the lawyer's inquiry and assessment is informed by the risk that the prospective client or current client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. The use of a risk-based inquiry and assessment of the facts and circumstances of each representation set forth in Comment [2] ensures that the scope and depth of the inquiry and assessment a lawyer must make will be based on the unique facts and circumstances presented by each client or prospective client. There is no "one-size-fits-all" obligation. Proposed amendments to Comment [2] provide examples for lawyers to consider in assessing the level of risk posed to determine whether lawyers must decline the representation or withdraw from an ongoing representation.

While the impetus for these proposed amendments was lawyers' unwitting involvement in or failure to pay appropriate attention to signs or warnings of danger ("red flags") relating to a client's use of a lawyer's services to facilitate possible money laundering and terrorist financing activities, it is clear that lawyers' existing obligations to inquire and assess apply broadly to all lawyers. The proposed amendments will help lawyers avoid entanglement in criminal, fraudulent, or other unlawful behavior by a client, including tax fraud, mortgage fraud, concealment from disclosure of assets in dissolution or bankruptcy proceedings, human trafficking and other human rights violations, violations of U.S. foreign policy sanctions and export controls, and U.S. national security violations.

In developing this Resolution, the Standing Committees on Ethics and Professional Responsibility and Professional Regulation circulated widely for comment, inside and outside the ABA, three Discussion Drafts of possible amendments to the Model Rules of Professional Conduct addressing these obligations. The Committees held four public roundtables to obtain testimony regarding the Discussion Drafts.³ The Committees are grateful to all who commented. Their comments and testimony informed the substance of this Resolution and Report.⁴

Background

Concerns Underlying This Resolution

As noted, the impetus for this Resolution related to lawyers' unwitting involvement in money laundering and terrorist financing or their failure to pay appropriate attention to "red flags" relating to the proposed course of action by a client or prospective client. Money laundering occurs when criminals obscure the proceeds of unlawful activity (dirty

in which the lawyer either may or must withdraw, it serves as a reminder to lawyers and clients alike that they must continually communicate with each other and monitor their relationship, to minimize the likelihood that such withdrawals will occur.").

³ These meetings were held in February and August 2022 and February 2023.

⁴ Comments received and recordings of the public roundtables are available on the Center for Professional Responsibility website for public viewing at:

www.americanbar.org/groups/professional_responsibility/discussion-draft-of-possible-amendments-to-model-rules-of-profes/ (last visited Apr. 28, 2023).

money) using “laundering” transactions so that the money appears to be the “clean” proceeds of legal activity. Terrorist financing is just that, providing funds to those involved in terrorism.⁵ The proceeds of money laundering are used to facilitate terrorism and other illegal activities, including human trafficking, drug trafficking, and violations of U.S. government sanctions.

Lawyers’ services can be used for money laundering and other criminal and fraudulent activity. One common way to do so is by asking a lawyer to hold money in a client trust account pending completion of the purchase of real estate or equipment, or to fund another transaction. After a period of time, the client asks the lawyer to return the funds because the “transaction” has fallen apart. By holding money in a law firm trust account then disbursing the money back to the client when the transaction does not close, the money has been laundered through the lawyer’s client trust account. Of course, more sophisticated means exist by which individuals seek to use lawyers’ services to launder money, either with or without the lawyer’s knowledge. It is illegal and unethical for lawyers to knowingly launder money, finance terrorism, or knowingly assist another in doing so. It is also unethical for a lawyer to ignore facts indicating a likelihood that the client intends to use the lawyer’s services to assist the client in engaging in illegal or fraudulent conduct.

Domestic and international laws and regulations are designed to prevent, detect, and prosecute money laundering. Anti-money laundering and counter terrorism financing laws and regulations applicable to lawyers are a complex subject.⁶ Generally, the issues can be divided into three overarching topics: (1) client due diligence; (2) disclosure of entity beneficial ownership information; and (3) suspicious activity reporting.

In the U.S., the primary anti-money laundering laws are the Bank Secrecy Act (“BSA”) and the Money Laundering Control Act. The U.S. Department of Treasury created the Financial Crimes Enforcement Network (“FinCEN”) to implement, administer, and enforce compliance with the BSA. Most recently, Congress enacted the Corporate Transparency Act (“CTA”) to enhance the identification and disclosure of certain beneficial ownership information. The CTA is part of the Anti-Money Laundering Act of 2020, which is part of the National Defense Authorization Act for Fiscal Year 2021.⁷

⁵ The U.S. Department of Treasury’s 2018 National Money-Laundering Risk Assessment estimated that \$300 billion is laundered every year in the U.S. alone, with that amount growing and methodologies of money-launderers ever evolving and becoming more sophisticated according to the Department’s 2022 National Money-Laundering Risk Assessment. See U.S. DEPARTMENT OF THE TREASURY NATIONAL MONEY LAUNDERING RISK ASSESSMENT (2018), https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf and U.S. DEPARTMENT OF THE TREASURY NATIONAL MONEY LAUNDERING RISK ASSESSMENT (Feb. 2022), <https://home.treasury.gov/system/files/136/2022-National-Money-Laundering-Risk-Assessment.pdf>.

⁶ Additional resources may be found at ABA TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, https://www.americanbar.org/groups/criminal_justice/gatekeeper/ (last visited Apr. 19, 2023); ABA GATEKEEPER REGULATIONS ON ATTORNEYS, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/ (last visited Apr. 19, 2023).

⁷ The full name of the NDAA is the WILLIAM M. (MAC) THORNBERRY NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2021, Pub. L. No. 116-283 (H.R. 6395), *available at* <https://www.congress.gov/116/plaws/publ283/PLAW-116publ283.pdf>. 116th Cong. 2d Sess. Congress’ override of the President’s veto was taken in Record Vote No. 292 (Jan. 1, 2021). The CTA consists of §§

Outside the U.S., the Financial Action Task Force (“FATF”) is a powerful inter-governmental entity that coordinates efforts to prevent money laundering or terrorism financing among and between its member countries. The U.S. is a charter member of the FATF. The FATF exerts tremendous pressure on member countries, even though it has no “official” legislative or enforcement power. A primary way in which it does so is through its Mutual Evaluation Reports of countries’ compliance with the FATF Recommendations.⁸ The most recent Mutual Evaluation Report of the U.S. was in 2016, and the FATF found the US. noncompliant in four areas, including the lack of sufficient client due diligence by the legal profession and lack of enforceable obligations in that regard.⁹

The Organization for Economic Cooperation and Development (“OECD”) is another international organization that has been active in this arena. The OECD is not a standard-setting entity like the FATF. While a primary focus of the OECD is fighting international tax evasion, it is supportive of the FATF’s critiques of the legal and other professions on the subjects of money laundering and other white-collar crime.

These groups, along with U.S. and international governments, continue to focus in very public ways on lawyers as facilitators of money laundering, terrorism financing, and other related illegal and fraudulent conduct. They point to the 2016 FATF Report’s recommendations, and events like the Paradise Papers, the Panama Papers, and the more recent Pandora Papers and FinCEN Files, as necessitating further and enforceable action by the legal profession.¹⁰

The ABA has long supported state-based judicial regulation of lawyers and the practice of law and opposed federal legislative or executive branch efforts to regulate the practice of law at the federal level.¹¹ National and international concerns about lawyers unwitting

6401-6403 of the NDAA. Section 6402 of the NDAA sets forth Congress’ findings and objectives in passing the CTA and § 6403 contains its substantive provisions, primarily adding § 5336 to Title 31 of the United States Code.

⁸ See THE FATF RECOMMENDATIONS, <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html> (last visited Apr. 28, 2023).

⁹ FATF UNITED STATES’ MEASURES TO COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2016), <https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-united-states-2016.html>.

¹⁰ See, e.g., PARADISE PAPERS: SECRETS OF THE GLOBAL ELITE, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/investigations/paradise-papers/> (last visited Apr. 28, 2023); THE PANAMA PAPERS: EXPOSING THE ROGUE OFFSHORE FINANCE INDUSTRY, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/investigations/panama-papers/> (last visited Apr. 28, 2023); PANDORA PAPERS, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/investigations/pandora-papers/> (last visited Apr. 28, 2023); and FINCEN FILES, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/investigations/fincen-files/> (last visited Apr. 19, 2023).

¹¹ See, e.g., COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS’N, LAWYER REGULATION FOR A NEW CENTURY 2 (1992) [hereinafter MCKAY REPORT], *available at* http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html; AM. BAR ASS’N COMM’N ON MULTIJURISDICTIONAL PRACTICE REPORT TO THE HOUSE OF DELEGATES Report 201A (2002), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/20

involvement in client crimes like money laundering and terrorism finance greatly raise the risk of federal legislative and regulatory action.

The U.S. Congress has demonstrated its willingness to act in this regard. For example, initial versions of the Corporate Transparency Act (“CTA”) would have required lawyers to disclose beneficial ownership information relating to their clients to the federal government, in contravention of their ethical obligations under ABA Model Rule 1.6. Additionally, various Members of Congress have sought enactment of the ENABLERS Act, which would have regulated many lawyers and law firms as “financial institutions” under the BSA.¹² Such regulation could require those lawyers and law firms to report to the federal government information protected by the attorney-client privilege or Model Rule 1.6 by requiring them to comply with some or all of the BSA’s requirements for financial institutions, such as submitting Suspicious Activity Reports (SARs) on clients’ financial transactions and establishing due diligence policies.¹³

To date, the ABA has successfully advocated against such incursion on the regulatory authority of state supreme courts. In response to concerns raised by the ABA and others, the sponsors of the final version of the CTA that became law omitted the language from previous versions of the bill that would have directly regulated lawyers. Therefore, the final version of the CTA passed by Congress in early 2021 only requires “reporting companies”—not their lawyers or law firms—to report the companies’ beneficial ownership information to the government.¹⁴ Similarly, in response to objections by the ABA¹⁵, numerous state and local bar associations, and many small business groups,

[1a.pdf](#); and JUDICIAL OVERSIGHT OF THE LEGAL PROFESSION, https://www.americanbar.org/advocacy/governmental_legislative_work/letters_testimony/independence/ (last visited Apr. 19, 2023).

¹² The original ENABLERS Act legislation, introduced on October 8, 2021, by Rep. Tom Malinowski (D-NJ) as H.R. 5525, is available at <https://www.congress.gov/bill/117th-congress/house-bill/5525/text?s=1&r=1>. A revised version of the ENABLERS Act, sponsored by Rep. Maxine Waters (D-CA) and included in the House-passed version of the FY 2023 National Defense Authorization Act (H.R. 7900) as Section 5401, is available at https://amendments-rules.house.gov/amendments/GATEKEEPERS_NDAA_xml%20v3220711190941114.pdf. A third version of the ENABLERS Act, sponsored by Sen. Sheldon Whitehouse (D-RI) and offered as an amendment to the Senate version of the FY 2023 National Defense Authorization Act (H.R. 7900 and S. 4543) as SA 6377, is available at https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/whitehouse-enablers-act-amendment-to-ndaa-september2022.pdf.

¹³ See ABA URGES SENATORS TO OPPOSE ENABLERS ACT AMENDMENT TO DEFENSE AUTHORIZATION BILL, ABA WASHINGTON LETTER (Oct. 31, 2022), *available at* https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/oct22-wl/enablers-1022wl/.

¹⁴ See Corporate Transparency Act (CTA), available at [H.R.6395 - 116th Congress \(2019-2020\): William M. \(Mac\) Thornberry National Defense Authorization Act for Fiscal Year 2021 | Congress.gov | Library of Congress](#) (contained in Title LXIV of the National Defense Authorization Act for FY 2021, P.L. 116-283) (Jan. 1, 2021). Division F of the FY 2021 National Defense Authorization Act is the Anti-Money Laundering Act of 2020, which includes the CTA.

¹⁵ See ABA letter to Senate leaders opposing the ENABLERS Act amendment to the FY 2023 National Defense Authorization Act and urging them not to include it in the final version of the legislation. Letter to Majority Leader Schumer, et al. re: Opposition to ENABLERS Act Amendment to the FY 2023 National Defense Authorization Act (H.R. 7900 and S. 4543) (Oct. 5, 2022), *available at*

Congress declined to include the ENABLERS Act in the final version of the FY 2023 National Defense Authorization Act (P.L. 117-263, H.R. 7776) or the FY 2023 Consolidated Appropriations Act (P.L. 117-328, H.R. 2617) that were signed into law in December 2022.

ABA Responses in the Context of the Model Rules of Professional Conduct

2013 Ethics Opinion

In 2013, the Ethics Committee issued ABA Formal Ethics Opinion 463 focusing on efforts to require U.S. lawyers to perform “gatekeeping” duties to protect the domestic and international financing system from criminal activity arising out of worldwide money-laundering and terrorism financing activities. Opinion 463 explained that “[i]t would be prudent for lawyers to undertake Client Due Diligence (“CDD”) in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. . . .”¹⁶ An appropriate assessment of the client and the client’s objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold.”¹⁷

2020 Ethics Opinion

In 2020, the Ethics Committee issued Formal Ethics Opinion 491 in response to ongoing concerns regarding lawyers’ obligations to inquire and assess. As explained in the Formal Opinion, a lawyer’s duty to inquire into and assess the facts and circumstances of each representation is not new and is applicable before the representation begins and throughout the course of the representation. This obligation already is implicit in the following Rules:

- Rule 1.1 and the duty to provide competent representation. Comment [5] explains, “Competent handling of a particular matter requires inquiry into and analysis of the factual and legal elements of the problem.”
- Rule 1.2(d) and the prohibition against knowingly assisting a client in a crime or fraud.
- Rule 1.3 and the duty to be diligent which “requires that a lawyer ascertain the relevant facts and law in a timely and appropriately thorough manner.”
- Rule 1.4 and the duty to communicate which requires “consultation with the client regarding ‘any relevant limitation on the lawyer’s conduct’ arising from the client’s expectation of assistance that is not permitted by the Rules of Professional Conduct or other law.”
- Rule 1.13 which requires “further inquiry to clarify any ambiguity about who has authority and what the organization’s priorities are.”

https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-letter-to-senate-leaders-opposing-enablers-act-amendment-to-ndaa-october52022.pdf.

¹⁶ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 463 (2013).

¹⁷ *Id.*

- Rule 1.16(a) and the duty to withdraw when the representation will result in a violation of the law or the Rules.
- Rule 8.4(b) and (c) in the prohibition against committing a criminal act or engaging in dishonesty, fraud, deceit, or misrepresentation.

The Proposed Amendments to Model Rule 1.16 and Its Comments

After careful consideration over several years of concerns raised by ABA members and outside groups that the ABA Model Rules of Professional Conduct lacked sufficient clarity on lawyers' obligations to inquire about and assess the facts and circumstances relating to a matter, the Committees concluded that Model Rule of Professional Conduct 1.16 should be amended to make explicit that which is already implicit.

Amendments to Paragraph (a)

The proposed amendments to the Black Letter of Rule 1.16(a) include a statement addressing the nature and scope of lawyers' inquiry and assessment obligations when the lawyer is deciding whether to accept a representation, deciding whether to terminate the representation, and considering the matter throughout the course of a representation. The following statement is added to the beginning of Rule 1.16(a):

A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation.

In addition to the proposed change to the Black Letter of Rule 1.16(a), new language in Comment [1] provides guidance on the duty to inquire about and assess the facts and circumstances of the representation. The addition to Comment [1] reads:

Paragraph (a) imposes an obligation on a lawyer to inquire into and assess the facts and circumstances of the representation before accepting it. The obligation imposed by Paragraph (a) continues throughout the representation. For example, a client traditionally uses a lawyer to acquire local real estate through the use of domestic limited liability companies, with financing from a local bank. The same client then asks the lawyer to create a multi-tier corporate structure, formed in another state to acquire property in a third jurisdiction, and requests to route the transaction's funding through the lawyer's trust account. Another example is when, during the course of a representation, a new party is named or a new entity becomes involved.

This additional language in Comment [1], that the obligation continues throughout the representation, helps lawyers understand that if changes in the facts and circumstances occur during a representation, lawyers must inquire and evaluate whether they can

continue the representation. A new cross-reference to Model Rule 1.1 (Competence) also is added.

Creating a new provision for mandatory withdrawal in paragraph (a)(4)

Current Model Rule 1.16(a)(1) requires a lawyer to decline or withdraw from a representation if “the representation will result in violation of the Rules of Professional Conduct or other law.”

Current Comment [2] explains: “A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.” Model Rule 1.4(a)(5), regarding communications obligations, explains that lawyers must consult with the client about any relevant limitation on the lawyer’s conduct. Rule 1.2(d) tells lawyers that one of those limitations on what a lawyer may do is counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent.

But these statements appear in three different Rules and their respective Comments. As a result, lawyers must hunt for this guidance – that when a client suggests a course of conduct that is criminal, fraudulent, or otherwise illegal or violates the Rules, a lawyer must consult with the client about the limits of the lawyer’s representation and that the lawyer is prohibited from engaging or assisting a client in a crime or fraud. After the conversation, if the client is not deterred from the suggested conduct, the lawyer must decline the representation or withdraw if already in the matter.

The Committees believe that lawyers deserve clear direction regarding inquiry about and assessing the facts and circumstances, and have clear advice on what to do when concerns or questions arise about the scope, goals, and objectives of the representation. Therefore, the Committees recommend clarifying the Black Letter of Rule 1.16(a) to provide that the lawyer must decline or withdraw from the representation if:

(4) the client or prospective client seeks to use or persists in using the lawyer’s services to commit or further a crime or fraud, despite the lawyer’s discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.

Expanding the guidance provided in Comment [2]

New language proposed for Comment [2] explains that the lawyer’s obligation to inquire and assess is informed by the risk that the client or prospective client seeks to use or persists in using the lawyer’s services to commit or further a crime or fraud. The use of a risk-based inquiry and assessment of the facts and circumstances of each representation

set forth in Comment [2] ensures that the scope and depth of the inquiry and assessment a lawyer must perform will be based on the unique facts and circumstances presented by each client or prospective client. There is no “one-size-fits-all” obligation, and this risk-based approach is the least burdensome for lawyers. The proposed amendments take a balanced approach to the issue.

To assist lawyers, new language in Comment [2] provides examples for lawyers to consider in assessing the level of risk posed to determine whether they must decline the representation or withdraw from an ongoing representation. This risk-based approach differs from a rules-based approach that requires compliance with every element of detailed laws, rules, or regulations irrespective of the underlying quantum or degree of risk. As noted in ABA Formal Ethics Opinion 463, implementing risk-based control measures helps a lawyer avoid being caught up in a client’s illegal activities, while decreasing the burden on lawyers whose practice does not expose them to the problems sought to be addressed.

In addition to these exemplary factors, new language in Comment [2] provides lawyers with a range of additional resources to guide their inquiry and assessment. For example, the new language references the 2010 ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing, which provides excellent practice examples that help lawyers using the risk-based approach better identify situations that should be considered “red flags” and provides “practice pointers” to offer further insight.

The U.S. Department of Treasury’s Specially Designated Nationals and Blocked Persons List is another sample resource to assist lawyers in conducting their inquiry and assessment, which is comprised of “individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific.”¹⁸

Conclusion

The proposed changes to Model Rule 1.16 will benefit lawyers and the public by making explicit the nature and scope of lawyers’ existing obligations to inquire about and assess the facts and circumstances regarding a matter in the enforceable Black Letter of the Rule. Doing so will help lawyers avoid unwittingly becoming involved in clients’ criminal and fraudulent conduct and will help them better identify and respond to “red flags.” In doing so, this Resolution also will demonstrate to the U.S. Government, entities like the FATF, and the public that the profession takes seriously its obligations to avoid becoming involved in a client’s criminal and fraudulent conduct, including money laundering, terrorist financing, human trafficking and human rights violations, tax related crimes, sanctions evasion, and other illicit activity.

¹⁸ See OFFICE OF FOREIGN ASSETS CONTROL, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST (SDN) HUMAN READABLE LISTS (last updated Apr. 27, 2023), <https://ofac.treasury.gov/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists>.

The ABA Standing Committees on Ethics and Professional Responsibility and Professional Regulation respectfully request that the House of Delegates approve this Resolution to amend the Black Letter of Model Rule 1.16 and its Comments.

Respectfully submitted,

Lynda C. Shely, Chair
ABA Standing Committee on Ethics
and Professional Responsibility

Justice Daniel J. Crothers, Chair
ABA Standing Committee on
Professional Regulation

August 2023