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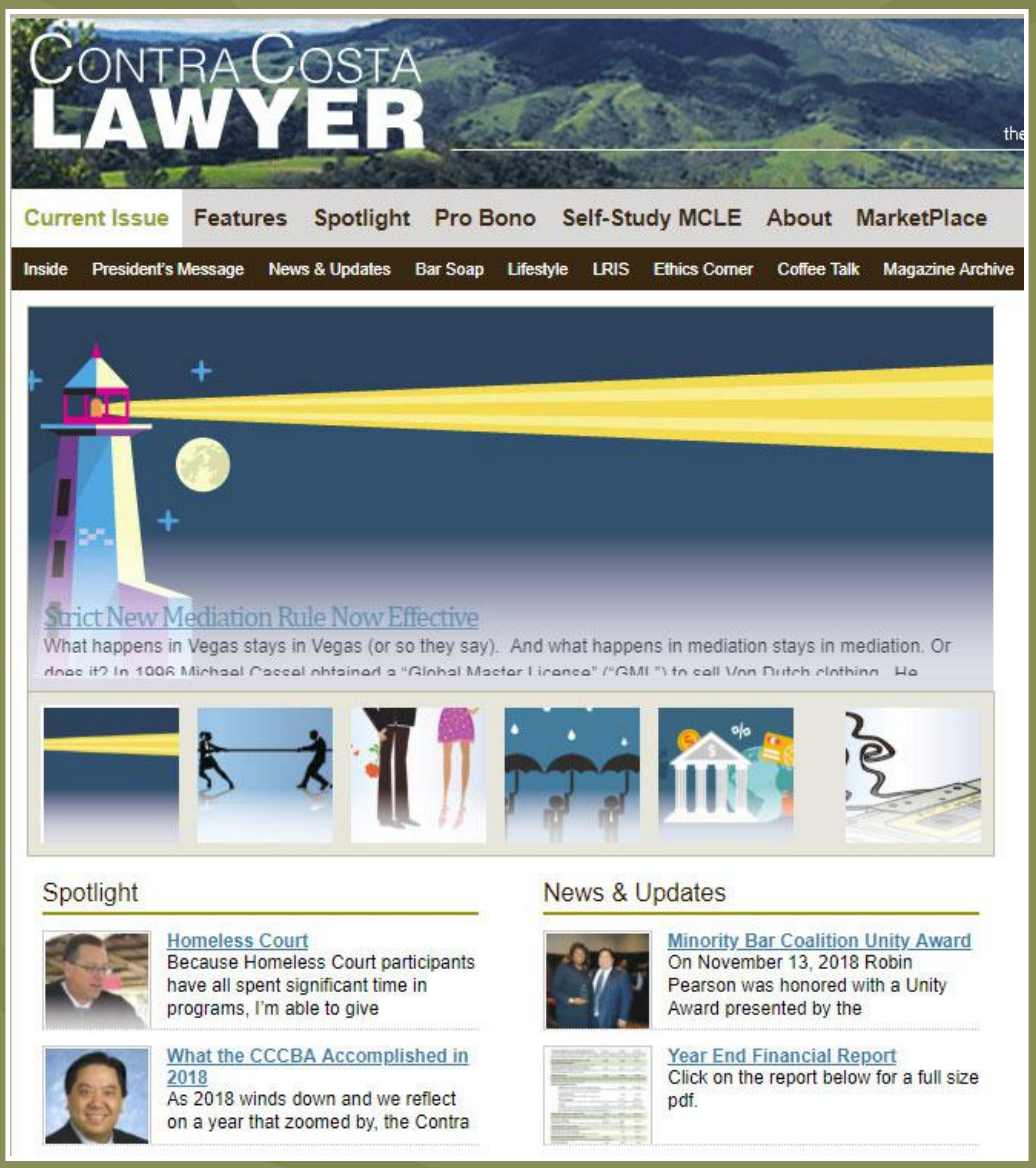

The Contra Costa Lawyer is the official publication of the Contra Costa County Bar Association (CCCBA) published 12 times a year -- in six print and 12 online issues.

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A Birth of a New Section

Friday, February 01, 2019

As most of you know, the best laid plans often go sideways. In late 2018, after all of our careful succession planning, and after the Board's strategic planning retreat lead by our President Elect, Governor Jerry Brown changed the course of 2019 for the CCCBA. Simply, Governor Brown appointed our President Elect, Hon. Wendy McGuire Coats, to a seat on the Superior Court here in Contra Costa County. So, we are lucky to have Judge Coats serving our community in a new role, but I also know she would have been a fantastic CCCBA president.

But, instead, I'm back!

One of the nice things about serving a second consecutive year is the ability to see some tasks and goals through to their intended conclusion. And, as I reported last year, approximately 34 percent of our members were over 60 years old - 34 percent! So, I wanted to be sure the CCCBA was meeting the needs of our aging membership. I put together a top-notch task force to explore how the CCCBA was serving our most experienced members - through MCLE topics of interest to them, to helping them build community, to providing them with opportunities to reconnect with the CCCBA and/or to provide ideas for new ways to volunteer both via the CCCBA and with other organizations including non-legal volunteering.

Past board member Renee Livingston lead this new task force, and I also thank Past Presidents Peter Mankin, Dick Frankel, and Mike Brown, and past board members Joscelyn Jones Torru and Richard Alexander for accepting my invitation to serve on the Task Force, and for all their work in 2018. Indeed, in 2018, the Task Force had several meetings, held several roundtables and discussions with potential section members, hosted a Happy Hour, and put on one of the most popular MCLE presentations at our annual MCLE Spectacular - a standing room only event.

Fast forward to today: We have a brand new Senior Section! The generous Lorraine Walsh has agreed to be the first section leader, and she was installed on January 25, 2019 at our annual Installation Lunch. Lorraine will be joined by Peter Mankin, David Ratner and Deborah Jo Sandler, who have agreed to take on leadership positions in the CCCBA's newest section. I send a heartfelt thank you the task force and to Lorraine and all the others who have agreed to take on leadership roles in the Senior Section.

The Section is hard at work and planning a great 2019! It already held a Happy Hour in 2019 and has planned a fantastic Law Day program to be held at lunchtime on May 1, 2019 with our District Attorney Diana Becton as the keynote speaker on the topic of "Free Speech, Free Press, Free Society". Please put this on your calendar now, and watch for more details to follow!

Membership in the Senior Section will be automatic in 2019 for those who meet the

following criteria:

1. Member of the CCCBA, and
2. An attorney who has practiced law for 30 or more years, or
3. A member 60 years of age or older.

I look forward to seeing this new section bloom! If you have an idea for a section that does not yet exist in the CCCBA, please let any board member, and/or Theresa Hurley know.

Though not yet eligible for the Senior Section, ***James Wu*** *has practiced employment law for over 22 years. He is a defense litigator for employers, and he also provides advice and counsel to reduce the risks of employment-related claims and lawsuits. James is serving his 2nd year as CCCBA President. See more at* www.linkedin.com/in/jamesywu

Ch-Ch-Ch-Ch-Changes!*

Friday, February 01, 2019

On November 1, 2018 new Rules of Professional Conduct went into effect. These new rules were the result of years of drafting and review, comments and revision and represent the first major overhaul of the rules governing attorneys in California since 1989.

Many of the revisions reflect a new numbering system for the rules, which was the direct result of wanting to bring our rules in alignment with the ABA Rules (and the rules of almost every other state), making it easier for out-of-state lawyers to determine their obligations when practicing law in California. For those of us who have practiced law for our entire careers under the old rules, the State Bar has created a helpful chart that lays out the old rule and identifies the corresponding new rule. The chart can be found here.

This chart also provides a very easy way to see where the Commission declined to adopt one of the ABA Rules or has adopted a brand new rule that had no corresponding rule under our old rules. For example, despite numerous comments from estate planning attorneys, the State Bar declined to adopt a version of ABA Rule 1.14, which provides guidance on dealing with clients with diminished mental capacity. The State Bar did not provide an explanation for this decision.

In addition, the State Bar lists the following new rules that had no corresponding rule under the old system:

Rule 1.2 Scope of Representation and Allocation of Authority
Rule 1.8.2 Use of Current Client's Information
Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
Rule 1.10 Imputation of Conflicts of Interest: General Rule
Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees
Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Rule 1.18 Duties to Prospective Client
Rule 2.1 Advisor

Rule 2.4 Lawyer as Third-Party Neutral
Rule 3.2 Delay of Litigation
Rule 3.9 Advocate in Non-adjudicative Proceedings
Rule 4.1 Truthfulness in Statements to Others
Rule 4.3 Communicating with an Unrepresented Person
Rule 4.4 Duties Concerning Inadvertently Transmitted Writings
Rule 5.3 Responsibilities of a Subordinate Lawyer
Rule 6.3 Membership in Legal Services Organizations

For those who are interested, the State Bar also provides a summary of the history of these current rules at http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Proposed-Rules-of-Professional-Conduct. This link is a great resource for understanding each of the new rules, how it was developed, what the Commission considered and whether it made changes in response to comments. It includes a separate link to each one of the new rules, so if you have questions about a particular rule, it is a great place to start.

California likes to be just a bit different and the new rules are no exception. The Commission did not simply adopt the ABA Rules wholesale. In addition to declining to adopt all rules, in some instances it specifically decided to retain some California requirements that differed from the ABA Rules so as to preserve the body of California law on that point. Making sure you know what is a new rule, what is an old rule, and what looks new but retains case law from the old is a complicated process. Therefore, in this issue, our authors have focused on specific areas of change to help you understand the new landscape governing the Rules of Professional Conduct.

The new rules represent changes to many areas of law, particularly relating to conflicts of interest. Theodore Brown has delved into the changes affecting conflicts relating to existing and former clients, including a discussion on the repercussions of the recent opinion of the California Supreme Court in *Sheppard Mullin Richter & Hampton LLP v J-M Manufacturing Co Inc.,* (2018) 6 Cal.5th 59, 237. That case looks at a myriad of issues including the identification of a current client versus a former client, a required disclosure of a known conflict and the consequences of failing to get informed consent to a conflict (spoiler alert–that can be a very expensive mistake!).

While Mr. Brown's article focuses mostly on the rules relating to conflicts with clients (either current or former), Mary Grace Guzman's article expands that discussion to the duties that attorneys owe to *potential* clients, which are duties now covered under Rule 1.18 (a rule that did not have a counterpart under the old rules). The new rules clearly describe our duties to this group of clients, not only by making them clear, but also by adding to them. More specifically, a discovery of privileged information in a potential client interview can be the basis for removing you from a case later on. Ms. Guzman's article looks at the language of the new rule, the important decision in *SkyBell Technologies, Inc. v. Ring Inc.*, No. 18-cv- 00014 (C.D. Cal Sept. 18, 2018), and discusses some of the ways in which you can prevent that result.

Everyone charges fees and everyone collects fees, so everyone needs to know the changes in the rules relating to fees– *how do we charge our clients and how do we hold our funds?* The rules in this area have changed and violating these rules can land you in a lot of trouble, so make sure to read Lorraine Walsh's article discussing these changes as they appear in Rules 1.5, 1.5.1 and 1.15.

Natasha Chee and Jeffrey Thayer explore one of the more talked about new rules, Rule 1.8.10, which represents a big change in the law governing sexual relations with a client. Interestingly, they note that there was very little enforcement under the old rule, but the Commission believed that the reason for that was not that there were no violations, but that they were very hard to prove under the old standard, so rather than engaging in a fact-heavy analysis of consent or negligence, the new rule creates a bright line with very few exceptions – no sexual relations with clients. There are a few notable exceptions to that rule (married couples, for example) but given the big changes in liability here, this is an important area to understand.

You won't find all of the big changes in the Rules of Professional Conduct. As of January 1, 2019 we also have some new Local Rules of Court. Matthew Kitson alerts us to one of the big new changes. As most of you are aware, we have not had court reporters in most of the courtrooms for a while now due to budget issues. In July, 2018 the California Supreme Court handed down its decision in Jameson v. Desta (2018) 5 Cal.5th 594, which guaranteed access to verbatim records of proceedings for litigants who qualify for fee waivers upon request. The holding in this case created the need for new court rules addressing the availability of verbatim records and the Contra Costa County Superior Court's new rules on this became effective on January 1, 2019. Anyone who represents indigent clients will want to know about this new rule!

Finally, there are big changes in the world of mediation – you don't see that sentence often! This is not the result of the Rules of Professional Conduct, but the legislative answer to the *Cassel* case, which was decided in 2011 and which upheld mediation confidentiality even between an attorney and his/her client and had the effect of denying the client's ability to use the attorney's actions in mediation as evidence in an action for malpractice. *Cassel v. Superior Court* (2011) 51 Cal. 4th 113. In its decision, the Supreme Court found that the Evidence Code granted broad protections and changes to those protections, if any, should come from the legislature and not the Supreme Court. Well, here is that change. The newly adopted California Evidence Code §1129 became effective on January 1, 2019 and it affects every single attorney who represents a client in mediation, so please take time to read Robert Jacobs' insightful article on the changes and *on your new obligations to your client!*

It's a new year and we have a lot of new rules to keep track of. I hope you find this issue of the Contra Costa Lawyer helpful in doing just that.

Nicole Mills is the owner and mediator at Empower Mediation in Walnut Creek, mediating both litigated case and divorce. www.empower-mediation.com. She is also an adjunct professor at JFKU and JFK Law School, where she teaches Professional Responsibility, Mediation/ADR, Family Law and Remedies.

*David Bowie

Strict New Mediation Rule Now Effective

Friday, February 01, 2019

What happens in Vegas stays in Vegas (or so they say). And what happens in mediation stays in mediation. Or does it?

In 1996 Michael Cassel obtained a "Global Master License" ("GML") to sell Von Dutch clothing. He founded a company ("Von Dutch Originals, L.L.C.) ("VDO") to sell clothing under that name. Cassel thereafter lost ownership of VDO, and VDO eventually filed suit and obtained an injunction against him restraining him from selling Von Dutch clothing.

Shortly before trial, VDO and Cassel submitted the case to mediation. Prior to the mediation, Cassel and his attorneys agreed he would accept no less than $2 million in exchange for assigning his GML rights to VDO.

According to the reported opinion, after "hours of mediation" Cassel's attorneys told him that VDO would not pay more than $1.25 million for the rights to the GML. Though Cassel "felt increasingly tired, hungry and ill, his attorneys insisted he remain until the mediation was concluded and they pressed him to accept the offer, telling him that he was 'greedy' to insist on more. At one point [Cassel] left to eat, rest and consult with his family, but [his attorney] called and told [Cassel] he had to come back. Upon his return, his lawyers continued to harass and coerce him to accept a $1.25 million settlement. They threatened to abandon him at the imminently pending trial, misrepresented certain significant terms of the proposed settlement, and falsely assured him they could and would negotiate a side deal that would recoup deficits in the VDO Settlement. . . Finally, at midnight, after 14 hours of mediation, when he was exhausted and unable to think clearly . . . [Cassel] signed [a settlement] agreement." *Cassel v. Superior Court* (2011) 51 Cal. 4 th 113, 119-120.

Cassel thereafter sued his attorneys for breach of their professional, fiduciary and contractual responsibilities towards him. Prior to trial, Cassel's former attorneys filed a motion in limine under the mediation confidentiality statutes to exclude all communications between Cassel and themselves relating to the mediation. The trial court granted the motion and excluded the mediation-related communications between Cassel and his attorneys. The Court of Appeal reversed, holding that the confidentiality provisions in the mediation statutes were intended to apply to communications between the disputants and not between a disputant and their legal counsel. The California Supreme Court granted review and held that the mediation statutes at Evidence Code 1115-1128 granted broad confidentiality protection to mediation communications (which included communications between a disputant and their attorney). The Supreme Court held that any limitations on mediation confidentiality needed to come from the Legislature and not the Supreme Court. As a result, Cassel's attorneys were able to successfully block the admission of mediation communications that occurred solely between Cassel and his attorneys.

Due in part to the *Cassel* decision, mediation confidentiality has been a "hot button" topic in Sacramento for several years. After years of discussion the California Legislature was poised to adopt legislation that would make admissible a limited number of mediation communications. But after receiving significant negative feedback from stakeholders throughout California, the Legislature opted instead to adopt a new statute requiring attorneys to disclose to their clients the potential effects that mediation confidentiality may have on claims between clients and their attorneys.

Newly adopted California Evidence Code §1129 became effective on January 1, 2019. That section requires an attorney who represents a client at mediation [1] to do two things:

1. Provide the client with a "printed disclosure" containing the confidentiality restrictions described in evidence code §1119 and
2. Obtain a "printed" acknowledgment signed by the client stating that he or she has read and understands the confidentiality restrictions.

The "disclosure" must:

- Be in the preferred language of the client
- Consist of printed language in at least 12-point font
- Be printed on a single page
- Not be attached to any other document provided to the client
- Include the names of the attorney and client, and
- Be dated by the attorney and the client

Section 1129 specifically requires that this disclosure be provided to the client "as soon as reasonably possible before the client agrees to participate in the mediation *or mediation consultation*." Evidence code §1129 (emphasis supplied). Thus it appears that the required form of disclosure need be given not only before the client agrees to mediation, *but also before the attorney consults with the client about mediation*. If a client has already agreed to participate in mediation before engaging counsel, then the disclosure must be given as soon as "reasonably possible" after counsel is retained.

Section 1129 doesn't provide any detail as to the nature of the disclosure which the attorney must make to the client other than to require that it contain the "confidentiality restrictions" described in Evidence code §1119. However, §1129 expressly requires that the attorney obtain from the client an "acknowledgment" that the client "understands the confidentiality restrictions." Section 1129 expressly provides that an attorney's failure to comply with its provisions is not a basis for setting aside an agreement prepared in the course of the mediation.

This is undoubtedly a broad field. Some clients understand what their attorneys tell them. Others do not. Most seasoned attorneys have had at least one client fail to fully comprehend what their attorney has told them.

So how can a California attorney know they have met both the "disclosure" and "understanding" requirements of §1129?

The drafters of §1129 included a "safe harbor" disclosure and client acknowledgment in subsection (d) of the new law. At first glance it seems like a printout of §1119 coupled with a statement of "understanding" should be adequate. But the "safe harbor" disclosure embedded within §1129 goes much further than that. The "safe harbor" disclosure states

that *" . . . all communications between you and your attorney . . . are confidential and cannot be disclosed or used . . . even if you later decide to sue your attorney for malpractice . . . ."* The "safe harbor" client acknowledgment form provided by §1129 states that *"Unless all participants agree otherwise . . . no . . . communication made during a mediation . . . can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation . . ."*

The "safe harbor" acknowledgment provides that the client's signature on the acknowledgment *"does not limit your attorney's potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney."*

Section 1129 doesn't require that the "safe harbor" disclosure and acknowledgment be used. Instead, §1129 directs that the restrictions listed at Evidence Code §1119 be disclosed to the client, and that the client understand them. How that gets accomplished is left up to the attorney. But the use of the "safe harbor" disclosure removes any doubt about whether or not the attorney has met his/her burden of providing sufficient disclosure to the client.

Attorneys are required to follow the law. [2] Therefore, except for class actions, attorneys in civil proceedings are now required to fully comply with the disclosure (and acknowledgment) requirements of §1119. Communications between attorneys and clients relating to (or at) mediation will remain subject to mediation confidentiality restrictions such that clients may not be able to introduce evidence of statements made at mediation in subsequent actions against their attorneys. But under new §1129 attorneys are now required to follow strict disclosure procedures about mediation restrictions. Counsel may be answerable to the State Bar for failing to comply with its provisions.

[1]Evidence code §1129 expressly exempts attorneys representing a class in a class action from complying with its provisions.
[2] An attorney is expected to possess a knowledge of legal principles commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may be readily found by standard research techniques. Smith v. Lewis (1975) 13 Cal. 3d 348, 358. Further, a lawyer is required to act with competence, which means applying the learning and skill reasonably necessary for the performance of such services. Rule 1.1, California Rules of Professional Conduct.

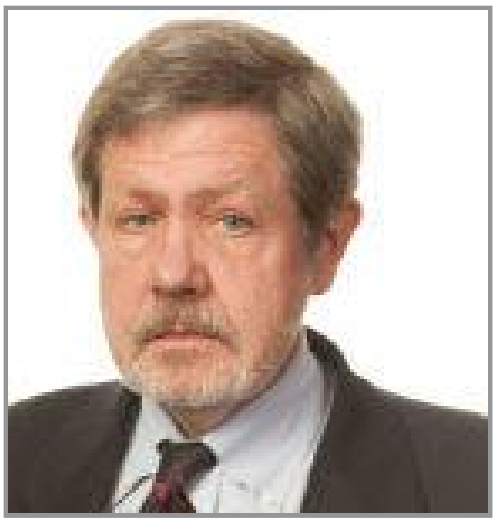
Robert B. Jacobs *is a mediator and arbitrator in the East Bay. He provides ADR services in real estate, business and construction cases throughout California.*

MCLE Self Study

Earn one hour of general MCLE credit by answering the questions on the Self Study MCLE test. Download the test here. Send your answers along with a check ($30 per credit hour for CCCBA members/ $45 per credit hour for non-members), to the address on the test form. Certificates are processed within 2 weeks of receipt. If you prefer to receive the test form via email, contact Anne K. Wolf at awolf@cccba.org or (925) 370-2540. Send your answers along with payment ($30 for CCCBA members) to the address on the test form.

Conflicts of Interest Under California's New Rules of Professional ...

Friday, February 01, 2019



Although there seems to have been no detectable tremor in the force, on November 1, 2018, California's first nearly complete overhaul of its Rules of Professional Responsibility ("Rules") in nearly 30 years came into effect. In addition to renumbering the rules to conform to the ABA Model Rules, California's new rules enact a number of substantive changes and depart from the Model Rules in material respects, particularly in identifying and (potentially) avoiding conflicts of interest.

Several of the new rules relate to conflicts of interest; the most important of these are rules:

- 1.7 (Current Clients)
- 1.9 (Duties to Former Clients)
- 1.10 (Imputation of Conflicts)
- 1.18 (Duties To Prospective Client)

The new rules have abandoned the somewhat detailed "checklist" approach embodied in prior Rules 3-300 and 3-3-1; instead, the new conflict rules are closer to expressing the principled approach of the Model Rules.

Current Clients. Rule 1.7 forbids a lawyer from representing a client in a matter (a) that is directly adverse to or (b) that would present a significant risk that the representation would be "materially limited" by the lawyer's responsibilities or relationship with another client, a former client, a third party, or the lawyer's own interests.

Direct adversity is usually fairly apparent, but "materially limited" conflicts may be more difficult to identify. Generally, the latter conflicts arise where the lawyer's judgment and advice may be significantly affected by responsibilities other than those involving the proposed representation. One example would be joint representation of multiple clients in the same matter; the best advice or strategy for one client may be detrimental to the other. Another would arise where the lawyer and the client are found jointly liable for damages or sanctions; what may be best for the lawyer is unlikely to be best for the client. In considering taking on a new representation (or continuing an existing one), the lawyer will have to think hard about whether there would be a significant risk of a material limitation on the representation.

If the conflict can be waived at all, both of these types of conflict can be waived by the fully informed consent of all clients involved; for consent to be fully informed, all reasonably foreseeable risks that would be involved must be disclosed in writing. See Rule 1.0.1 (e). Even after a waiver is obtained, it may need to be updated for the

representation to continue. See Rule 1.7, comment [10].

But some conflicts simply can't be waived. For example, if fully informing one client would require disclosing confidential information of a second client and the second client does not consent to its disclosure, the conflict cannot be waived. Rule 1.7 (d) provides additional examples.

Advance Waivers. Waivers of future conflicts are, in principle, possible under the new rules (as under California case law), but no bright lines are established by either. See Rule 1.7, comment [9]. Instead, the effectiveness of such a waiver depends on a number of factors – most importantly, the extent to which the client understands (and is informed of) the possible risks involved. There appears to be no California case that has upheld an advance waiver, although one Federal decision in California has. *Visa U.S.A., Inc. v. First Data Corp.*, 241 F.Supp.2d 1100 (N.D. Cal 2003).

Many in the legal community had hoped that the California Supreme Court would provide guidance in this area, but it did not. *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.*, (2018) 6 Cal.5th 59, [237 Cal.Rptr.3d 424]. The case turned on whether the conflict was one between current clients or between a current and a former client. The court found that the City of South Lake Tahoe was a current client of the firm when J-M Manufacturing hired Sheppard Mullin to represent it in a qui tam action in which the City of South Lake Tahoe was one of many adverse parties. Sheppard Mullin had argued that South Lake Tahoe was a former client and that, because the representation was not related to the qui tam action, there was no conflict to disclose. The court disagreed, noting a pattern of continued, albeit sporadic, representation of South Lake Tahoe in employment matters (representation that picked up again about two weeks after Sheppard Mullin agreed to represent J-M Manufacturing). Since the court found that a conflict existed between current clients, but was not disclosed at the time the waiver was given, any consent was not "fully informed," and therefore not valid.

At a minimum, all reasonably foreseeable risks of such a waiver must be disclosed, and the disclosure(s) must be updated as newly foreseeable risks arise.

Former Clients. Lawyers may not represent a client whose interests are materially adverse to a former client in a matter (whether contentious or transactional) that is the same or substantially the same as the matter in which the lawyer represented the former client. Rule 9.1(a). Similarly, a lawyer moving to a new firm cannot represent a client of the new firm whose interests are materially adverse to a client represented by the former firm in a matter that is the same or substantially related to the matter involving the former firm. Rule 9.1(b). The new firm can't either, if the new lawyer's conflict is imputed to the rest of the firm. Either type of conflict can be waived by the former client's informed written consent.

Two matters are substantially related if the former client's confidential information would be material to, and thus would be expected to be used to the former client's disadvantage, in the subsequent matter. Rule 1.9, comment[3].

Imputation of Conflicts. The former California rule was that one lawyer's knowledge of a former client's confidential information was imputed to the entire firm, so that if one lawyer was subject to disqualification, so followed the entire firm. Although there have been some cases in California suggesting that an ethical screen could mitigate the effect of this rule, new Rule 1.10 now explicitly provides that a proper screen (a term defined in Rule

1.0.l (k)) can avoid imputing the knowledge (under Rule 1.9(b)) of a newly-hired lawyer to the remainder of the firm, at least where the new hire did not play a substantial role in the matter prior to joining the new firm, and where the affected former client(s) of the new lawyer are provided prompt (and fairly detailed) written notice of the screen.

Prospective Clients. Rule 1.18 (duties to prospective clients) does not have a counterpart in the former rules. This rule provides that the receipt of confidential information from a prospective client, who does not become an actual client, can disqualify the attorney (and the firm) from later being adverse to the prospective client. Even before Rule 1.18 became effective, the Central District of California applied this new rule to disqualify not only the attorneys who had actually received detailed confidential information from a prospective client but also, by imputing the knowledge of the confidential information, the entire firm. *SkyBell Technologies Inc. v. Ring Inc*., No. 18-cv- 00014 (C.D. Cal Sept. 18, 2018). Despite the lack of a prior, corresponding rule, the court found that the same result would have been reached under prior California case law, coupled with the Supreme Court's approval of Rule 1.18. *Id.* at 18-20.

Rule 1.18 is not entirely unforgiving. As in the case of a lateral attorney hire, knowledge of the prospective client's confidential information will not be imputed to the entire firm if the attorney(s) that actually received the confidential information is promptly and adequately screened from the rest of the firm.

The alternative is to request (and receive) only sufficient information from the prospective client 1) to check for conflicts and then, 2) to determine whether the attorney wants to represent the client. This alternative, however, may not be practical in today's world of competition for clients and "beauty contests."

While the form of California's new Rules of Professional Conduct have changed significantly; the full effect of their substance may not be known for some time.

Theodore Brown is a Senior Counsel at the Silicon Valley office of Kilpatrick Townsend & Stockton LLP. His practice primarily involves patent litigation, licensing, and advice.

I’m Too Sexy . . .For My Client! New Rules on Sexual Relations Bet...

Friday, February 01, 2019

Following years of drafting, review and revision, the California Supreme Court ordered new Rules of Professional Conduct ("Rules") to go into effect November 1, 2018. This was the first such comprehensive overhaul of the Rules since 1989, and brought them more into line with the American Bar Association (“ABA”) Model Rules, albeit with a distinct California flavor. The numbering of the new Rules shadows the numbering of the ABA Model Rules to make it easier for out-of-state attorneys to find applicable rules.

Several of the new Rules provide entirely new requirements for California attorneys, or codify previously “unwritten” requirements. A key change involves the issue of intimate relations with clients.

Intimate Relations With Clients

New Rule 1.8.10 forbids sexual relations with a current client who is not a spouse or registered domestic partner, unless there was a consensual relationship already in place prior to the formation of the attorney-client relationship. [1] "For purposes of this rule, 'sexual relation' means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse." [2] "If a person other than the client alleges a violation of this rule, no Notice of Disciplinary Charges may be filed by the State Bar against an attorney under this rule until the State Bar has attempted to obtain the client's statement regarding, and has considered, whether the client would be unduly burdened by further investigation or a charge." [3] Thus if an alleged violation is reported by a third party or non-client, the State Bar will not file a Notice of Disciplinary Charge until after obtaining the client's side of the story.

Although this rule does not apply to a consensual pre-existing sexual relationship between an attorney and his/her client, a comment to the rule notes the attorney must comply with all other applicable rules, listing as examples new Rule 1.1 (Competence), new Rule 1.7 (Conflicts of Interest) and new Rule 2.1 (states lawyer's role as "Advisor"). [4] Another comment states that when the client is an organization, new Rule 1.8.10 "applies to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters." [5] A third comment notes that New Rule 1.8.10 imposes obligations different than those imposed under Business and Professions Code section 6106.9, including the requirement under that statute that a complaint be verified. [6]

The previous rule, 3-120, barred attorneys from having sex with clients if the act was the result of coercion, intimidation or undue influence, or considered a form of payment for services rendered, or where continued representation after sexual relations would result in incompetence. [7] The Commission for the Revision of the Rules of Professional Conduct ("Commission") considered whether to retain this rule or to adopt the approach in new Rule 1.8.10 that follows ABA Model Rule 1.8(j). [8] The Commission believed that California's previous rule made it difficult to prove a violation in the typical circumstance of consensual sexual relations because the previous rule was not a bright-line standard. [9] The Commission noted the previous rule also prohibited sexual relations that were not consensual as well as improper conduct seeking sexual relations that may or may not result in the occurrence of any sexual relations; for example, relations sought or obtained by coercion or as a quid pro quo for receiving legal services. [10] Although new Rule 1.8.10 no longer includes these aspects of the previous rule, attorneys continue to be subject to discipline for such misconduct under both Business and Professions Code § 6106 (acts constituting moral turpitude) and § 6106.9, which is the statutory analog to previous rule 3-120. [11]

Returning to the issue of the difficulty in proving a violation in the typical circumstances of consensual sexual relations, the Commission noted, "where consensual sexual relations occur, the State Bar must prove that the relations caused the lawyer to perform legal services incompetently." [12] "While this might represent a regulatory policy of imposing a least restrictive prohibition on conduct protected under a constitutional right of privacy, it imposes a complexity that is likely frustrating enforcement." [13] Although the general prohibition in new Rule 1.8.10 is more restrictive than the previous rule in regards to consensual sexual relations, it is not believed to be unconstitutional. The State Bar inquired on more than one occasion with other jurisdictions that have the same or similar

rule to Model Rule 1.8(j) (most recently in 2012) as to whether their rules had been challenged based on a constitutional right to privacy. [14] No jurisdiction indicated a constitutional challenge and the published disciplinary case law of other states did not show any such challenges. [15] The Commission's belief the previous rule's complexity was likely frustrating enforcement was supported by the fact there are no published California disciplinary cases applying previous Rule 3-120. [16]

The potential for the previous rule requirements to frustrate enforcement became apparent on close examination of California's duty of competent representation. [17] Mere negligence is not a violation of the duty of competence, *Lewis v. State Bar* (1981) 28 Cal.3d 683, 688, and thus even if an attorney engaged in consensual sexual relations that caused an act of simple negligence in the performance of a legal service, the attorney could not be held to have violated previous Rule 3-120(B)(3). [18] Under new Rule 1.8.10, this outcome should be different because all consensual sexual relations arising during the lawyer-client relationship will constitute a rule violation regardless of whether the lawyer provided competent legal services. [19]

The Commission also believed that this bright line prohibition would have a "salutary deterrent effect" not present in the previous California rule. [20] Public commentators provided anecdotal evidence of misconduct that was not deterred by the previous rule. [21] In addition, other professions, such as psychotherapists, have stricter rules that are more protective. [22] By comparison with the restrictions in those professions, retaining the previous rule could diminish public confidence in the legal profession. [23]

As initially drafted, Rule 1.8.10 would have also eliminated an express exception in the previous rule that permitted sexual relations between lawyers and their spouses. The Commission noted that: (1) most other jurisdictions do not have an express spousal exception but have not experienced known problems; and (2) a spouse who later becomes a client would fall under the exception for sexual relations that predate a lawyer-client relationship. [24] After comment, the Commission added an exception for spouses and registered domestic partners. [25]

Rule 1.8.10 retains the definition of sexual relations in the previous rule. This is a departure from the rule adopted in most jurisdictions, but the Commission believed it was warranted because the definition promotes compliance and because the same definition appears in the statutory prohibition on sexual relations with a client (Bus. & Prof. Code § 6106.9(d)). [26] In addition, new Rule 1.8.10 includes a comment (Comment 3) that provides an express reference to the statutory prohibition. [27]

Paragraph (c) of Rule 1.8.10 is intended to value the privacy rights of a client in those circumstances where a person other than the client alleges a violation of the rule. [28] Paragraph (c) is derived in part from the Commission's consideration of a comparable rule provision in Minnesota. [29]

Rule 1.8.10 should make it easier to determine and prosecute violations, and provide more clarity for lawyers and clients in day-to-day practice. Going forward we will see if, unlike the previous rule, this rule actually results in enforcement and prosecution.

contained in this article and we disclaim all liability in respect to actions taken or not taken based on any or all of the contents of this article to the fullest extent permitted by law. An attorney should be contacted for advice on specific legal issues.

[1] CRPC, Rule 1.8.10(a).
[2] CRPC, Rule 1.8.10(b).
[3] CRPC, Rule 1.8.10(c).
[4] CRPC, Rule 1.8.10, comment 1.
[5] CRPC, Rule 1.8.10, comment 2.
[6] CRPC, Rule 1.8.10, comment 3.
[7] RPCSBC, Rule 3-120.
[8] CRPC Rule 1.8.10, Executive Summary, p. 1.
[9] *Id.*
[10] *Id.*, fn. 1.
[11] *Id.*
[12] CRPC Rule 1.8.10, Executive Summary, p. 1 .
[13] *Id.*
[14] *Id.*, fn. 2.
[15] *Id.*
[16] CRPC Rule 1.8.10, Executive Summary, p. 1, fn. 3.
[17] CRPC Rule 1.8.10, Executive Summary, p. 1 .
[18] CRPC Rule 1.8.10, Executive Summary, p. 2.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*

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circumstance or fact situation. No action should be taken in reliance on the information contained in this article and we disclaim all liability in respect to actions taken or not taken based on any or all of the contents of this article to the fullest extent permitted by law. An attorney should be contacted for advice on specific legal issues.

Rule 1.18: Guess what? You have a duty to prospective clients

Friday, February 01, 2019

Until the passage of the new rules, a mix of Professional Rules, Evidence Code, Business and Professions Code and case law created limited duties to prospective clients. These duties emphasized an attorney's duty of loyalty, confidentiality and competence and evolved from an attorney's duty to existing and former clients. Rule of Professional Conduct 1.18 now firmly establishes an attorney's duty to a prospective client and makes an attorney's failure to comply with this rule a disciplinable offense.

Old Duties

Until Rule 1.18, an attorney's duty of loyalty to existing and a limited duty to former clients could preclude an attorney from taking on a new client whose interests were adverse to existing clients or substantially related to a former client's matter. Further, an attorney's duty of competence required the attorney to advise a prospective client regarding statute of limitations or advise on legal issues that a reasonable attorney should know and could impact the prospective client's interests. An attorney who failed to comply with these duties could be disciplined or find themselves exposed to a malpractice complaint.

Rule 1.18

With the new Rule 1.18, which parallels the model rule, attorneys now have specific duties to prospective clients that if not followed could lead to discipline and exposure to malpractice complaints.

In its entirety, Rule 1.18 [1] states:

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

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

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received from the prospective client information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the matter, except as

provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in such a matter, except as provided in paragraph (d).

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

(1) both the affected client and the prospective client have given informed written consent,* or

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

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

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

This is a long and complex rule, so let's break it down.

What is a "prospective client?"

Rule 1.18(a) defines a prospective client as an individual who consults with an attorney for the purpose of retaining or securing legal service or advice. The general concept of an attorney's duty to a person seeking representation is not a new idea to California legal ethics. California Formal Opinion 1984-84 advised that "a person who consults with an attorney is a 'client' only for purposes of evidentiary attorney client privilege," but did not extend the duty beyond evidentiary issues, and California Formal State Bar Opinion No. 2003-161 advised that a duty may be owed to an individual even when an attorney client relationship has not been established. Case law also makes this clear, with the California Supreme Court stating: "'The fiduciary relationship existing between lawyer and client extends to preliminary consultations by a prospective client with a view to retention of the lawyer, although actual employment does not result.'" (*People ex rel. Dept. of Corporations v. Speedee Oil, Inc.* (1999) 20 Cal.4th 1135, 1147-48 [86 Cal.Rptr.2d 816] [quoting *Westinghouse Elec. Corp. v. Kerr-McGee Corp., supra,* 580 F.2d 1311, 1319, fn. omitted].)

What duties are now owed to prospective clients?

Rule 1.18(b) establishes that an attorney owes a duty of confidentiality to a prospective client by incorporating Business and Professions Code § 6068(e) and Rule 1.6 but adding the limitation of Rule 1.19. Business and Professions Code § 6068(e) establishes an attorney's duty of confidentiality to a client and Rule 1.6 advises that an attorney may disclose confidential information with a client's informed consent or when an attorney reasonably believes that the disclosure of such confidential information is necessary to prevent a criminal act that is likely to result in death or substantial bodily injury. The integration of Rule 1.9 requires an attorney to consider a former client's interest when considering taking on a prospective client. Thus, applying Rule 1.9 would prohibit an attorney from taking on a representation is the same or substantially related to a

consultation of a prospect client without the prospective client's written consent.

What can you do to limit your exposure?

Rule 1.18 (c) prohibits an attorney from representing a client with interests materially adverse to those of a prospective client. This prohibition not only applies to a client in the same matter but also a matter that is substantially related to the consultation of a prospective client. Thus, when interviewing a prospective client, an attorney should limit the consultation to information reasonably necessary to allow the attorney to determine if s/he can take on the matter and, when appropriate, advise the prospective client on issues such as cost, statute of limitations and a cursory risk analysis.

Finally, this rule not only applies to the affected lawyer but also applies to the entire firm. The application of Rule 1.18 (c) can potentially disqualify an entire firm when a singular attorney obtains confidential information from a prospective client, which leads directly to Rule 1.18(d).

What can you do if you have already received confidential information from a prospective client?

Rule 1.18(d) outlines two options that an attorney or law firm could take if an attorney has received confidential information from a prospective client that is materially adverse to an client's interests.

First option: Consent. The law firm or attorney could obtain specific consent from both the affected client and the prospective client. If the prospective client refuses to provide consent, then the second option applies to law firms.

Second option: Screen off the Attorney. When an attorney took reasonable measures to avoid further exposure to a prospective client's confidential information, and for whatever reasons could not obtain consent from both the existing client and the prospective client, then the law firm:

1. Must impose a timely screen of the prohibited attorney (who is then prohibited from receiving any portion of the fee from the existing client) and

2. Must promptly provide written notice to the prospective client. The written notice must provide a general description of the subject matter in which the lawyer was consulted and the screening procedures employed.

In compliance with the law firm's continuing duty to the existing client, the firm should take care in not disclosing the existing client's confidences which includes the identification of the client whose representation is the source of the conflict of interest with the prospective client.

Guidance on the New Rule

Presently there are no California State Bar discipline cases involving Rule 1.18, but prior to the new Professional Rules of Professional Responsibilities coming into effect, the US District Court, Central District of California applied the rule in *SkyBell Technologies, Inc. v. Ring, Inc.,* No. 18-cv-14 (C.D. Cal Sept. 18, 2018).

In *SkyBell* a law firm gained confidential information during a pitch to represent SkyBell Technologies in a patent enforcement matter against Ring, Inc. SkyBell did not hire the law firm, but did proceed with the law suit against Ring, Inc., who was represented by Lawyer. Six months later, Lawyer, who had put in about 1,500 hours on the case, moved to the law firm, who implemented a screen and provided notice to SkyBell, however they never received SkyBell's written consent. SkyBell then moved to disqualify the law firm on the basis of the conflict of interest created with them as a prospective client.

Though Rule 1.18 was not yet in effect, the court applied the rule and sided with SkyBell, disqualifying the law firm because of the conflict of interest between a current client (Ring) and a prospective client (SkyBell) in the same matter without receiving informed consent pursuant to the requirements of 1.18(d). *SkyBell Technologies* is the first case to apply and interpret Rule 1.18. The decision is controversial as it has interpreted the rule to require specific consent, whereas the language of Rule 1.18(d)(2)(i-ii) does not require specific consent from the prospective client. Rather, it requires that the lawyer who received the confidential information from the prospective client be screened off and receive no portion of the fee from the current client AND that written notice was provided to the prospective client, both of which were done in this case. Ultimately, this remains a case to watch as *SkyBell Technologies* continues to work its way thought the courts.

Rule 1.18 codifies a web of California statutory law, State Bar Formal Opinions and case law to create an attorney's affirmative duty to a prospective client. State Bar Court discipline cases have yet to apply this rule thus it is not clear what kind of discipline could come from violating the rule. *SkyBell Technologies*, however, advises that not complying with Rule 1.18 could lead to disqualification and malpractice exposure.

[1] http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.18-Exec_Summary-Redline.pdf

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Rules 1.5, 1.5.1 and 1.15 - Changes to How Attorneys Hold Funds and...

Friday, February 01, 2019

In the newest version of the California Rules of Professional Conduct (“Rules”), the Commission has made several changes relating to how attorneys hold funds and charge (and divide) fees.

Rules 1.5 (“Fees for Legal Services”) and 1.15 ("Safekeeping of Funds") are the two rules that present the most significant changes concerning how attorneys charge their clients and handle client's and “non-client" money. Together, these two new rules provide three major changes from former Rules 4-100 and 4-200:

(1) The new rules set forth guidelines for charging flat fees, including what constitutes a flat fee, how you must charge a flat fee and where you must deposit those funds;

(2) The new rules expressly cover duties relating to funds of non-clients held pursuant to an agreement/contract, statute or other legal duty (e.g. lienholders); and

(3) The new rules now require that all funds, including advanced fees and deposits must be placed into client trust accounts. They provide for very limited exceptions to this, including an exception for flat fees paid in advance with client consent.

Additionally, Rule 1.5.1 (“Fee Divisions Among Lawyers”) sets forth new requirements on the timing and disclosure requirements when sharing fees with another lawyer. Most importantly, the new rules require attorneys to promptly disclose in writing any agreement to divide fees immediately (or as soon as reasonably practical) and to get their client’s written consent to that agreement.

These rules as highlighted below remind us that there are limitations in the amount and ways attorneys can charge their clients and failure to adhere to these limitations may result in a civil action or State Bar discipline.

Rule 1.5-Fees for Legal Services

http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.5-Exec_Summary-Redline.pdf

What didn’t change?

In proposing new Rule 1.5 (which replaced Rule 4-200) the Commission considered and rejected the ABA Model Rule 1.5 "unreasonable" standard for a prohibited fee and instead affirmatively decided to keep California’s 83 year old “unconscionable” fee standard for a prohibited fee, thus allowing the continuation of all previous case law and interpretation of this standard. [1]

In 1935 the California Supreme Court in *Herrscher v. State Bar* (1935) 4 Cal. 2d 399, 402-03 first announced the public policy rationale against charging an "unconscionable" fee. They reasoned that discipline should be imposed on the attorney where the "elements of fraud or overreaching on the attorney's part or failure on the attorney's part to disclose the true facts so that the fee charged, under the circumstances constituted a

practical appropriation of the client's funds under the guise of retaining them as fees." This language from *Herrscher* has been incorporated into Rule 1.5, which now sets forth the 13 factors which must be analyzed in determining whether an attorney's fee is "unconscionable." [2]

What did change?

Rule 1.5 added three new paragraphs. First, paragraph (c) prohibits charging a contingent fee in certain family law matters and in criminal cases. Second, paragraph (d) prohibits charging a client a non-refundable fee except in cases where it is a true retainer fee and is paid to the attorney solely to ensure the attorney's availability for a specified period of time. In those cases, the attorney must disclose- and the client must agree in writing- that the client will not be entitled to any refund of all or part of the amount charged. The concept of a true retainer dates back to a time when the profession had fewer attorneys to serve clients and it was necessary to ensure that the attorney was "available" when needed and not representing an opposing party. In today's practice many attorneys still try to describe their fee as "non-refundable" and will violate this rule if their fee agreement, billing and deposit of the fee show it was not paid for "availability" for service but was instead tied in some way to compensation for legal services performed or to be performed. Finally, paragraph (e) was added to explicitly permit attorneys to charge a flat fee, defined as a "fixed amount," which is complete payment for performance of services regardless of the work ultimately performed. The new requirements for charging a client a "flat fee" are now outlined in Rule 1.15.

Rule 1.15-Safekeeping Funds and Property of Clients and Other Persons

http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.15-Exec_Summary-Redline.pdf

What didn't change?

The Rule retains all of the record keeping requirements of Rule 4-100 that are part of an attorney's obligation to account for all monies deposited into trust. The State Bar Client Trust Accounting Handbook has recently been updated and should be reviewed in light of these significant changes to the Rules of Professional Conduct. The most recent version of this document has been published electronically and can be found at: http://www.calbar.ca.gov/Portals/0/documents/ethics/Publications/Portals0documentsethicsPublicationsCTA-Handbook.pdf

What did change?

Flat Fees and Advance Deposits Must Be Deposited into Trust Accounts

This Rule was changed to accommodate the practice of a large number of attorneys, including attorneys who practice criminal law and who prepare estate planning or transactional documents, who charge their client flat fees.

Rule 1.15 replaces Rule 4-100 and makes explicit in paragraphs (a) and (b) that advanced unearned fees must be placed in a client trust account until they are earned. The only way an attorney may deposit a flat fee into an operating account is if the attorney discloses to the client in writing 1) the client's right to have the flat fee deposited

into trust until the fee is earned, and 2) that the client is entitled to the unearned portion of the fee if the representation is terminated or the services are not completed. In addition the rule specifies that if the flat fee is more than $1,000, the client must waive in writing their right to have the fees deposited into trust. Therefore, you should either be prepared to deposit all funds into a trust account, or revise your fee agreements to include the new requirements, disclosures and written consent from your clients. Additionally, you may want to specify exactly how and when advance fees are considered “earned” in your fee agreements.

Attorneys Must Promptly Distribute Funds Held for Non-Clients

The other major change to the rule involves how attorneys hold the property of "other persons" typically called "non-clients." These non-clients may include lienholders found in personal injury cases and in transactions where the attorney agrees to serve as an escrow holder. Rule 1.15(d) now specifies that the attorney has a duty to promptly distribute funds on request of the non-client who also has an interest in the funds.

Rule 1.5.1 Fee Divisions Among Lawyers

http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.5.1-Exec_Summary-Redline.pdf

Finally, the Commission made one other big change with regard to fees. In new Rule 1.5.1, the Commission addressed the issue of dividing fees among lawyers. The new rule now requires the following:

1) The lawyers must enter into a written agreement to divide the fees;

2) Client consent must be obtained in writing at the time the lawyers enter into that agreement or as soon as reasonably practical thereafter. Previously, the rule required client consent to the fee splitting, but allowed that consent to be obtained at any time prior to the actual splitting of the fees; and

3) The lawyers must make the following disclosures in writing to the client prior to obtaining their consent:

- The fact of the division of fees;
- The identity of the lawyers dividing fees; and
- The terms of the division of fees.

Finally, the total amount of fees being charged may not be increased as a result of the agreement to divide fees.

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[1] California is one of five states that have decided not to adopt this Model Rule standard. Unlike many states, California has a unique Mandatory Fee Arbitration program

which is codified in Business and Professions Code Section 6200 et. seq. that handles disputes over the "reasonableness" of fees and costs an attorney may charge a client.

[2] In addition to the language from *Herrscher*, which can be seen in paragraphs (b)(1) and (b)(2) of Rule 1.5, the other 11 factors from Rule 4-200 have now been renumbered (b)(3) through (13).

This Hearing May Be Recorded for Your Protection

Friday, February 01, 2019

Introduction

If you represent clients who have been granted fee waivers, you undoubtedly are aware of *Jameson v. Desta* (2018) 5 Cal.5th 594, a July 2018 California Supreme Court decision dealing with fee waiver litigants and access to an official verbatim record of proceedings. Although *Jameson* is a lengthy opinion, its holding is summed up by this passage:

An official court reporter, or other valid means to create an official verbatim record for purposes of appeal, must generally be made available to in forma pauperis litigants upon request.

Jameson at p. 599.

Embedded in the *Jameson* opinion was a call for courts to adopt new policies, and, if necessary, new local rules:

[I]n order to satisfy the principles underlying California's in forma pauperis doctrine and embodied in the legislative public policy set forth in [Government Code] section 68630, subdivision (a), when a superior court adopts a general policy under which official court reporters are not made available in civil cases but parties who can afford to pay for a court reporter are permitted to do so, the superior court must include in its policy an exception for fee waiver recipients that assures such litigants the availability of a verbatim record of the trial court proceedings.

Jameson at p. 623.

Due to budget pressures, prior to *Jameson*, the Contra Costa County Superior Court ("Court") had precisely the sort of policy the *Jameson* court alluded to; that is, a blanket policy of not providing court reporters for most civil matters, including many matters on unlimited civil, limited civil, family law, and probate calendars. Perhaps stating the obvious, *Jameson* presented the Court with a complicated set of challenges. Put succinctly, how could the Court meet its *Jameson* obligations within the existing constraints of its budget?

This article first identifies two areas of relevant Court operations unchanged by *Jameson*. Next, it addresses some changes the Court has made, or will soon make, in response to *Jameson*. As part of that, it will point litigants and practitioners to the relevant local rule or rules that address those changes.

NO CHANGE: Felony Matters and AB 1058 Matters

Before *Jameson* was decided, the Court already provided court reporters in all proceedings in felony criminal matters. That will not change in response to *Jameson*.

In addition, the Court already provided court reporters for family law proceedings heard in Department 52, the designated AB 1058 department hearing Department of Child

Support Services matters. That will not change in response to *Jameson*.

ELECTRONIC RECORDING OF PROCEEDINGS

Effective January 1, 2019, the Court adopted Local Rule 2.50, which provides the Court discretion to utilize electronic recording to create a verbatim record of the proceedings in limited civil, misdemeanor, and infraction matters. Government Code section 69957 already provided authority for the Court to utilize electronic recording in these case types, but *Jameson* provided an impetus to systematically implement electronic recording. In the near future, many courtrooms across the Court's locations will be equipped with electronic recording capability that can be utilized to create a verbatim record of the proceedings in limited civil, misdemeanor, and infraction cases.

The Court also adopted Local Rule 3.13(7), which makes explicit that electronic recordings can be used as the record of the oral proceeding in most limited civil, misdemeanor, and infraction cases that are appealed to the Appellate Division of the Court.

Unlimited Civil, Probate and Family Law

Effective January 1, 2019, the Court adopted Local Rule 2.53, which directly addresses *Jameson*. Local Rule 2.53 provides details on how fee waiver litigants can procure court-provided court reporters to create a verbatim record of various proceedings.

The Court also created a local form, MC-30, to provide a straightforward mechanism for fee waiver litigants to request a court-provided court reporter.

TIMING OF REQUESTING A COURT-PROVIDED COURT REPORTER

Litigants and practitioners are urged to consult Local Rule 2.53 directly and familiarize themselves with its full text. This section addresses the timing of making a request for a court-provided court reporter in some common proceedings.

For most proceedings in unlimited civil, probate, and family law, a fee waiver litigant must utilize local form MC-30 to request a court-provided court reporter at least three calendar days in advance of the proceeding to be reported. However, for some proceedings, less lead time is required. The following table identifies the timing requirements applicable to various proceedings.

Some amount of advance notice is needed so that the Court can be sure to allocate its still limited court reporter resources appropriately. However, for each case type, the local rules provide the Court with the authority to continue a matter if appropriate. Parties should be mindful that mere neglect in failing to timely request a court-provided court reporter will not ordinarily warrant a continuance.

CONCLUSION

Jameson created new obligations for the Court vis-à-vis fee waiver litigants. *Jameson* also expressly recognized that trial courts across the state would need to revisit policies concerning court reporter availability. The Court has done so, and has adopted new local rules in response to *Jameson*, providing for the creation of a verbatim record of the proceedings when required by *Jameson*. As always, litigants and practitioners are urged

to familiarize themselves with those new local rules.

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