

# LEGAL ETHICS AND THE LIMITED LIABILITY COMPANY<sup>©</sup>

By David B. Parker, William K. Mills and Steven Hecht

## I. ETHICAL ISSUES

### A. Rules and Standards.

Malpractice prevention and self-protection are essential elements to the practice of law successfully. Practicing law defensively is the key to staying on course, and rests on various legal rules and standards, including the California *Rules of Professional Conduct* (“RPC”), *Business & Professions Code* (“B&P Code”), and legal decisions. That successful practice flows from understanding the interplay between the laws governing conduct and ethics and the practical aspects of real-world decisions confronting attorneys.

Applying the rules and standards to daily practice requires a disciplined, organized and systematic approach. This article seeks to explore the context of representations relating to limited liability companies (“LLCs”) formed pursuant to the Beverly-Killea Limited Company Act, found in California *Corporations Code* section 17000, *et. seq.* However, ultimately it should be clear that practicing law defensively with respect to engagements involving LLCs is substantially the same as representations of individuals or other types of business entities.

#### 1. Initiating the Relationship.

##### a. *Written Fee Agreements are Recommended.*

Every client relationship, including those in the LLC context, should commence with a written fee agreement, as provided in B&P Code section 6148. That section specifies those instances in which written agreement are required. In addition, good practice mandates that a written fee agreement be obtained in most instances.<sup>1</sup> The sanction for failure to obtain a written fee agreement in required contexts is that the lawyer is limited to a recovery of

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<sup>1</sup> Section 6148 provides in relevant part: “In any case not coming within Section 6147 [contingency relationships] in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars (\$1,000), the contract for services in the case shall be in writing.”

*quantum meruit* (the reasonable value of services rendered, rather than the actual fees charged or incurred, or the “agreed upon” value) and the attorney cannot enforce the contract terms between lawyer and client. The case of *Iverson Yoakum, etc. v. Berwald* (2000) 76 Cal.App.4<sup>th</sup> 990, helps clarify that absent a written fee agreement, which “shall clearly state the basis thereof, including the amount, rate, basis for calculation, or other method of determination of the member’s fees” (citing B&P Code section 6148), an attorney cannot even sue on promissory note to which the fee receivable was converted. In that case, the attorney was limited to *quantum meruit* subject to a two (2) year statute of limitations under *Civil Code* section 339.

In addition, the failure to obtain a written fee agreement could be raised, as evidence in a malpractice action, especially where there is a controversy over the scope of the engagement and can be an effective weapon in the hands of an expert witness. Also, that failure to obtain a required written fee agreement could be State Bar sanctionable, especially based on a pattern of violations. See *In The Matter of Harney*, 1996 Cal. Lexis 2409 (Review Dept. State Bar Court, April 4, 1995) (though violations of these statutes are not disciplinable offenses, the underlying conduct does violate the RPC and can be targeted for discipline).

Based on *Iverson Yoakum, supra*, a common count (e.g., account stated) is also precluded by a violation of section 6148’s required written fee agreements. An account stated is considered a form of written contract that later arises when a client acquiesces in response to a lawyer’s invoice. According to the Second District, such an implied contract does not satisfy the writing requirement. Obviously – *practicing defensively* means using a written fee agreement in every matter for every client, even LLCs or other corporate clients (to protect against changes in management, bankruptcy or receivership), which may form, gain membership in or acquire interests in LLCs. Though the State Bar publishes form agreements, no specific form is prescribed by law. Even a brief confirming letter, signed by the client and covering most important

items (fee arrangements, scope of engagement and alternative dispute resolution) will suffice. Also, in those instances in which a written agreement is required by section 6148, the attorney must also provide a duplicate, fully executed copy of the written fee agreement to the client.<sup>2</sup>

**b. Identifying the Client.**

In LLC contexts, most often, individuals with a plan use an LLC to conduct business are the attorney's initial point of contact. Just as in similar situations in which an attorney is retained to incorporate a business or form a partnership, the relationship between the initial organizers, the LLC to be formed and the attorney, requires prior planning and consideration. Often the attorney already has a relationship with one or more of the initial organizers and wishes to preserve the ability to represent some or all of the organizers in future, as well as to continue to represent the LLC. If so, then disclosure of the relationships, and waivers of the future conflicts should be obtained at the time of the client initially retains the attorney. That precaution still may not prevent a conflict from disqualifying the attorney should a dispute arise among the organizers or later among the members, or between the members and the LLC, each of whom might be covered by a waiver or consent obtained in advance. However, once the issue is raised through a letter by which the material information is disclosed and a waiver or consent is sought, and ultimately obtained, that disclosure letter is likely to provide a useful and important guideline for the attorney should disputes later arise.

**c. Scope of Representation and Excluded Areas of Responsibility Defined.**

The written fee agreement provides the first opportunity to limit exposure for areas outside the scope of the attorney's engagement. (*Nichols v. Keller* (1993) 15 Cal.App.4<sup>th</sup> 1672; *Di Loreto v. O'Neill* (1991) 1 Cal.App.4<sup>th</sup> 149.) In addition, the scope of the engagement should be periodically reviewed, and any changes identified after a fee agreement is executed should be brought to the client's attention in writing or the fee agreement formally amended. This protects the client and permits a knowing

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<sup>2</sup> Remember: fee agreements are confidential and privileged (B&P Code § 6149). Consider translating into client's native language where client's fluency in reading and understanding English is in doubt (see *Civil Code* § 1632 relating to agreements negotiated in Spanish).

decision on both sides if the engagement is later to be expanded to include the new issue. It also further documents the limits on the attorney's responsibilities, just as with a prospective client. In particular, B&P Code sections 6147(a)(3) and 6148(1a)(2) and (3) mandate disclosing excluded services. Thus, the written fee agreement should specifically define the attorney's role and responsibility with the LLC or its members, whether at formation, or later through transaction or litigation based relationships with the client(s). *There is no more important step in practicing law defensively in this area than a written fee agreement that makes the scope of work and the identities of the clients explicit.* Copies of the agreement should be provided to any LLC members or representatives that are not identified as clients and/or a letter make it clear should be sent to them to preclude any genuinely mistaken impressions or after-the-fact claims that the attorney's services included or benefited them, such that a duty was owed to them.

**d. Billing Procedures and Payment Responsibilities.**

In general, billing frequency (i.e., monthly or otherwise) should be set forth in the written fee agreement. Frequent billing also serves several important loss prevention functions. First, it keeps billing attorneys informed of the work being performed on a given matter by others in the firm, especially associates, for whom there is supervisory responsibility. Second, monthly billing also keeps the client informed concerning the details of the handling of the matter while at the same time minimizing rude surprises that result from a build up in fees and costs over a period of months. Third, monthly billing better enables attorneys and clients alike to track budgets/estimates, where applicable. Fourth, frequent billing also reinforces the attorney's position with respect to the issue of waiver in later fee disputes where the written fee agreement imposes a timing requirement for client objections to the attorney's invoices. If the client is to have a problem with specific billing entries, it is always better to deal with the issue sooner rather than later. If the client does not object, frequent billing thus improves (though not guarantee) the attorney's position in a subsequent fee dispute, especially where the objection seems contrived. The client's silence is also key to account stated claims in a subsequent collection action. *But see, Iverson Yoakum, supra.*

In addition, regularly timed billing also helps the

attorney in those instances where the written fee agreement calls for interest charges to be added when timely payments are not made. The attorney is not in the business of interest free loans and whether the attorney ultimately charges interest or insists on the client paying interest charges can be determined at the time of billing (or even later). However, if the right is not established in the contract, the attorney is left only with a contested claim to prejudgment interest in a collection action. The existence of a right to collect interest may provide small leverage in resolving fee disputes (e.g., attorney may offer to waive interest in exchange for prompt payment of the balance due). Use caution and be aware that usury laws apply.

**e. Billing Rate Changes.**

Written fee agreements should include the ability to change rates, especially when the engagement contemplates services to be rendered over a sustained period of time, as is often the case in forming new business entities. In practice, the attorney should give written notice in advance of a scheduled rate increase, preferably by letter, but at least through an invoice that clearly shows the increased rates. Otherwise, rate changes will not be permitted absent a modification agreement to which the client consents. (*Severson, Werson, et al. v. Bolinger* (1991) 235 Cal.App.3d 1569; see also, RPC Rule 4-200(B)(11) [client's informed consent to the fees is one factor in determining unconscionability].)

**f. Advance Retainers.**

The written fee agreement should specify precisely what an advance retainer payment represents and how it is to be applied. The agreement should be clear whether retainers are “front end” (applied as the matter is billed until exhausted) or “evergreen” (replenished as and when billed) or “back end” (security for non-payment of fees at the conclusion of the engagement). Whichever form of retainer is agreed upon, the attorney must be vigilant to enforce the agreement, especially in the case of “evergreen” retainers.

In general, unless agreed upon as an earned fee, becoming then a “true retainer” (*Baranowski v. State Bar* (1979) 24 Cal.3d 153), a retainer should be deposited into the attorney’s trust account where it remains until it is earned, in accordance with the terms of the fee agreement. Retainers deposited into the trust account should not be accessed except with the client’s authorization, either in advance through the

written fee agreement or as funds are proposed to be withdrawn. (*Most v. State Bar* (1967) 67 Cal.2d 589; *Trafton v. Youngblood* (1968) 69 Cal.2d 17.)

**g. Alternative Dispute**

**Resolution.**

Written fee agreements can also include various alternative methods of resolving future disputes between the client, whether the LLC or its members, and the attorney. As in any other legal dispute, litigation can be avoided through arbitration or mediation:

**(1) Binding Arbitration.**

Arbitration clauses in fee agreements are ethical and enforceable since they do not involve a prospective limitation on liability (prohibited by RPC Rule 3-400(A)), but merely prescribe how disputes will be resolved. State Bar Ethics Committee Opinion 1989-116. In contrast to State Bar mandated fee arbitration, these provisions allow for a truly comprehensive resolution of all other issues. (See, Peck & Kichaven, “Enforcing Arbitration of Lawyer-Client Disputes: Some Questions and Even a Few Answers,” *California Litigation* 14 (Winter 1998).)<sup>3</sup> Further, in *Aguilar v. Lerner* (2004) 32 Cal. 4<sup>th</sup> 974, the Supreme Court concluded that once a client files a malpractice lawsuit against his or her former attorney, the client has effectively waived any mandatory fee arbitration rights.

Among the presumed advantages beneficial to attorneys who engage in binding arbitration of attorney-client disputes are: (a) an expedited proceeding, (b) less expensive (discovery limited or prohibited), (c) confidentiality of proceedings, (d) avoidance of jury risks: prejudice, passion, confusion—both as to liability and damage (including punitive damages) aspects, (e) arbitrators can be expected to be more sophisticated, especially retired jurists. There are downside risks to consider as well: (a) waiver of right of appeal; (b) lesser ability to dispose of the suit or individual claims or problematic evidence through motions for summary judgment or summary adjudication and motions *in limine*; and (c) Solomon-like compromise awards.

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<sup>3</sup> Leading cases include: *Alternative Systems Inc. v. Carey* (1998) 67 Cal.App.4<sup>th</sup> 1034; *Huang v. Cheng* (1998) 66 Cal.App.4<sup>th</sup> 1230; *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4<sup>th</sup> 1102; *Mayhew v. Benninghoff, supra*; *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501.

If an attorney elects to use binding arbitration clauses as a matter of business practice, they are well advised to clear it with his or her malpractice carrier as some discourage such provisions.

Arbitration clauses should be drafted to become conspicuous, plain and clear. Ambiguities will be construed against the attorney as the drafter of the fee agreement. (*Lawrence v. Walzer & Gabrielson, supra*; *Mayhew v. Benninghoff, supra*.) However, where the arbitration provision is clear and unambiguous, it will be enforced without allowance for parol evidence as to the intent of the parties. (*Powers v. Dickson, Carlson & Campillo, supra*.)

It is highly recommended that this provision should be set forth in a separate section of the fee agreement with an appropriate title calculated to provoke the client's attention. Some commentators suggest an entirely separate dispute resolution agreement. However, the ten-point, bold red print required for arbitration clauses in medical services contracts, pursuant to *Code of Civil Procedure* section 1295, is not applicable to attorney-client fee agreements. (*Powers v. Dickson, Carlson & Campillo, supra*.) Still, it might be advisable. (See, Peck & Kichaven, "Enforcing Arbitration of Lawyer-Client Disputes: Some Questions and Even a Few Answers," *supra* at 19.)

The arbitration clause must make clear that arbitration extends to all claims based upon or arising out of the fee agreement and the performance or failure to perform services, including claims of acts, errors or omissions on the part of the firm. Some commentators urge reference to potential causes of action (negligence, fraud, breach of fiduciary duty, breach of contract). However, it is not required that the arbitration clause use the word "malpractice" or comparable phrases. (*Powers v. Dickson, Carlson & Campillo supra*.)<sup>4</sup>

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<sup>4</sup> In *Powers*, the Court upheld the following wording in the context of a malpractice claim: "If any dispute **arises out of, or related to, a claimed breach of this agreement, the professional services rendered** by [attorney], or Clients' failure to pay fees for professional services and other expenses specified, or **any other disagreement of any nature, type or description regardless of the facts or the legal theories which may be involved**, such dispute shall be resolved by arbitration before

The written fee agreement should urge, or at least remind, the client of their right to consult other counsel before agreeing to the contract, though this is not required merely because of the binding arbitration provision. (*Powers v. Dickson, Carlson & Campillo, supra*.) It is advisable for the attorney to allow the client a reasonable period of time to review and sign the agreement, rather than signing them up on the same day as the agreement is presented. There should be a paper trail as to the delay between sending and signing, indicating this was for the benefit of the client's careful review before signing.

In addition, consideration should be given to including a specific designation as to who the arbitrator would be and how chosen. The American Arbitration Association has established a special panel of arbitrators to handle such claims. (See Richard Chernick & Ellen Peck, "ADR Clauses in Fee and Retainer Agreements", Winter 1994-95 *Lawyers' Letter* 18.) On the other hand, many believe that a single arbitrator in the person of a retired judge is more consistent with an expedited approach to dispute resolution.

In addition, make sure arbitration is described as "final and binding." In fact, it is advisable that the provision makes clear to the client that an agreement for binding arbitration involves a waiver of the constitutional right to a jury trial. Toward this end, some attorneys find it useful to require this particular disclosure to be initialed by the client. However, neither step is necessary to the enforceability of the agreement. (*Powers v. Dickson, Carlson & Campillo, supra*.)

### (3) Mediation.

Mediation is a potentially useful way of forcing the parties to cool off and consult a neutral third party. It is a possible alternative to arbitration or could be required as a precondition to arbitration.

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the American Arbitration Association." (Emphasis added.)

Contrast the arbitration clause in *Lawrence v. Walzer & Gabrielsen, supra*, which was held not to extend to malpractice claims: "In the event of a dispute between us regarding fees, costs or any other aspect of our attorney-client relationship, the dispute shall be resolved by binding arbitration." This was held to relate to the financial aspects of the relationship only.

#### (4) Prevailing party

##### attorney's fees.

The only case to address the issue of prevailing party attorney's fees holds that a firm which represents itself in a collection action cannot recover prevailing party attorneys fees (applying the same rule as for non-attorney pro per litigants). (*Trope v. Katz* (1995) 11 Cal.4<sup>th</sup> 274.)

It is recommended that the written fee agreement expressly authorize recovery of such fees for self-representation. Even so, it is not clear whether *Trope* even overrides an express agreement. Pending clarification of the issue, law firms are advised to use the services of an outside attorney in pursuing collection. Consider also the risks of "one way" enforcement in the client's favor either by virtue of the *Trope* prohibition or client insolvency.

#### (h) Dealing with estimates.

Providing estimates of the costs involved in litigation is often difficult. Several important rules should be considered: First rule: Don't give estimates, especially at the outset of engagement. Second rule: If you do, do it in writing with full statement of limitations, both those inherent to any estimate in such matters and those specific or unique to the particular matter for which the firm is to be engaged. Third rule: incorporate statement in fee agreements that no estimate has been requested or given and that any future estimates will be in writing. Fourth rule: If an estimate has been given and later events make clear that the estimate is no longer realistic, follow the 3-D's: Disclose, Discuss and Document.

#### (i) Charging Liens.

The Supreme Court's recent decision in *Fletcher v. Davis* (2004) 33 Cal.4<sup>th</sup> 61, 71, clarifies that a charging lien in a fee agreement, or connected to lawyer-client representation, in the context of an hourly engagement, constitutes an "adverse interest" mandating that the attorney comply with Rule 3-300.<sup>5</sup>

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<sup>5</sup> Rule 3-300 provides:

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

#### (j) New Matters for Existing Clients.

Where a new matter is taken on for an *existing* client, there should be a new fee agreement with an arbitration clause. A former agreement that was intended for a different engagement will not be extended to compel arbitration of a later engagement, especially if it does not truly involve legal services. (*Mayhew v. Benninghoff, supra*.)

Where an attorney wants to *modify* an existing written fee agreement with an ongoing client, the Standing Committee on Professional Responsibility and Conduct of the State Bar has taken the view that "ethical considerations aside from any legal considerations require that the attorney fully disclose the terms and consequences of the provision and that the client knowingly consent to it. ... [C]ompliance with the provisions set forth in California *Code of Civil Procedure* § 1295 . . . would satisfy the ethical concerns present when an arbitration provision is negotiated with an existing client." (*Cal. Compendium on Prof. Responsibility*, pt. IIA, State Bar Formal Opinion No. 1989-116, p. 4.) This includes advising (preferably *requiring*) the client to consult independent counsel before agreeing to modification of the existing contract. (See, Peck & Kichaven, "Enforcing Arbitration of Lawyer-Client Disputes: Some Questions and Even a Few Answers", *supra* at 14-16.) Stated otherwise, though Rule 3-300 does not literally apply, compliance with its elements is an excellent "defensive" approach to the issue.

### B. Representing Multiple Clients.

#### 1. LLCs and Members.

Nearly every engagement relating to LLCs potentially involves the representation of multiple clients, unless the attorney represents only the LLC and none of its members. However, because the membership of LLCs can consist of

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

individuals, and various forms of business entity, including other LLCs, potential ethical issues arise whenever an attorney consults on the formation an LLC, or is involved in legal issues relating to the post-formation LLC or its members.

## **2. Concurrent/Simultaneous Representation of Multiple Clients.**

The primary value at stake in cases of simultaneous or dual representation is the attorney's duty—and the client's legitimate expectation—of *loyalty*. (*Flatt v. Superior Court* (1994) 9 Cal.4<sup>th</sup> 275.)

a. *Informed Consent Required.* An attorney should not, *without the informed written consent* of each client: (1) accept representation of more than one client in a matter in which the interests of the clients potentially conflict; (2) accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or (3) represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter. (Rule 3-310(C)(1)-(3).)<sup>6</sup>

b. *Aggregate Settlements.* An attorney who represents two or more clients should not enter into an aggregate settlement of the claims of or against the clients *without the informed written consent of each client*. (Rule 3-310(D).) Although not necessarily required by Rule 3-310, even where informed written consents are obtained, a prudent attorney may seek further insulation from future problems by also requiring the parties be advised to consult with independent outside legal counsel.

## **C. Representing Current or Former Clients.**

Different standards govern conflicts of interest as between current and former clients; absent informed written consent: A member cannot act adversely toward a current client on any matter no matter how unrelated to the current engagement – including potential conflicts.

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<sup>6</sup> The “official discussion” to the ethics rules generally should be regarded as of equal import to the rule itself, which is evident in the “official discussion” following Rule 3-310, as it extends the application of the rule beyond the individual “member’s” relationships to those with whom the member is associated in the law firm, if the relationship is known.

(Rule 3-310(c)(3); see, e.g., *Truck Insurance Exchange v. Fireman’s Fund* (1992) 6 Cal.App.4<sup>th</sup> 1050.) A member may take an adverse position to a former client so long as the member is not possessed of confidential information from the former client that is material to the current employment. (Rule 3-310(E).)

## **1. Successive Representation and Duties Owed to Current or Former Clients.**

Where the potential conflict is one that arises from the *successive* representation of clients with potentially adverse interests, the courts have recognized that the chief fiduciary value jeopardized is that of client *confidentiality*. (See, *Flatt, supra*, 9 Cal.4<sup>th</sup> at 283.)

a. An attorney should not accept or continue representation of a client without providing written disclosure to the client where: (1) the attorney has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; (2) the attorney knows or should reasonably know that: (a) the attorney previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and (b) the previous relationship would substantially affect the attorney’s representation; or (3) the attorney has or had a legal, business, financial, professional, or personal relationship with another person or entity the attorney knows or reasonably should know would be affected substantially by resolution of the matter. (Rule 3-310(B)(1)-(3).)

b. An attorney should not, *without the informed written consent* of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment. (Rule 3-310(E).)

c. *Disqualification.* Where a former client seeks to have a previous attorney disqualified from serving as counsel to a successive client in litigation adverse to the interests of the first client, the governing test requires that the client demonstrate a “*substantial relationship*” between the subjects of the antecedent and current representations. (See, *Flatt, supra*, 9 Cal.4<sup>th</sup> at 283.) The “substantial relationship” test mediates between two interests—the freedom of the subsequent client to counsel of choice, on the one hand, and the interest of the former client in ensuring the permanent confidentiality of matters disclosed to

the attorney in the course of the prior representation, on the other. (*Id.*)

Where the requisite “substantial relationship” between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant by definition, to the second representation) is presumed and disqualification of the attorney’s representation of the second client is mandatory, and extends vicariously to the entire firm. (*Id.*; citing *Rosenfeld Construction Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 575; also see, *T.C. Theater Corp. v. Warner Brothers Pictures* (1953) 113 F.Supp. 265, 268-269.)

The knowledge/conflict of one member of a firm is imputed to all other members of the firm, whether partners, associates or “of counsel.” (See, *People ex. Rel. Department of Corp. v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4<sup>th</sup> 1135.) However, once an attorney leaves his/her former firm, the doctrine of imputation is no longer applicable, as the Courts have recently fashioned a “two variable” rule focusing on (1) the relationship between the nature of the legal problem involved in the former representation and that which is presented in the pending matter; and (2) the relationship between the challenged attorney and the former client with respect to the legal problem involved in the prior matter. In practical terms, disqualification will turn on whether the attorney had a “direct relationship” with the former client, in which case the conclusive presumption that the attorney possesses relevant confidential information arises. (*Jessen v. Hartford Casualty Insurance Co.* (2003) 111 Cal.App. 4<sup>th</sup> 698.) The exception is when the prior representation involves joint clients, and the subsequent action relates to the same matter, the propriety of disqualification is not dependent upon the “substantial relationship” test, as it will always exist in these situations, rather it generally turns upon the scope of the clients’ consent. (*Zador Corporation v. Kwan* (1995) 31 Cal.App.4<sup>th</sup> 1285, 1294.)

d. *Advance Waivers and Ethical Screens.* An advance waiver of potential future conflicts, with full disclosure to, and informed consent by the clients, can protect the attorney or firm from disqualification and allow the continued representation of one of the clients, even if an actual conflict does arise between the two. (*Id.*) Ethical walls or screens alone will not generally protect a law firm from a possible

breach of its duty of loyalty or vicarious disqualification (See, *Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4<sup>th</sup> 109), but when combined with an informed advance waiver, can protect the duty of confidentiality and rebut the presumption of shared information (*Visa U.S.A., Inc. v. First Data Corporation* (2003) 241 F.Supp.2d 1100, 1110.)

## **2. Payment of Attorney Fees by a Third Party.**

The duty of undivided loyalty to the client may come into question when a third party (i.e. family member, manager, or agent) is paying for the client’s legal services. An attorney should not accept compensation for representing a client from one other than the client *unless*: (1) There is *no interference* with the attorney’s independence of professional judgment or with the client-attorney relationship; Information relating to the representation of the client is protected and kept *confidential*; and The attorney obtains the client’s *informed written consent*. (Rule 3-310(F)(1)-(3).) This rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See, *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358.)

The question of whether or not Rule 3-310 applies to the situation of when an attorney is representing an indemnitee, or whether such a situation would be treated as an exception to the rule (similar to insurers and insureds), has not been addressed. However, it is more likely that the rule would apply, especially in situations where the indemnitor is an existing or possible co-defendant in the action, for obvious conflict reasons.

## **3. Attorney – Client Business Transactions.**

An attorney is prohibited from entering into a business transaction<sup>7</sup> with a client, or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, *unless* each of the following requirements has been satisfied: (1) the transaction or acquisition and its terms are fair and reasonable to the

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<sup>7</sup> “Business transactions” is an exceedingly broad term, which includes non-legal services contracts, investments, and loans, and just about anything, other than fee agreements.

client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; (2) the client is advised in writing that the client may seek the advice of an independent attorney of the client's choice and is given a reasonable opportunity to do so; and (3) the client thereafter consents in writing to the terms of the transaction or the terms of the acquisition. (Rule 3-300 (A) – (C).)

#### **4. Attorney Limiting Liability to Client.**

Under Rule 3-400 an attorney shall not (1) contract with a client prospectively limiting the attorney's liability to the client for the attorney's professional malpractice; or (2) settle a claim for the attorney's liability to the client for the attorney's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent attorney of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice. (Rule 3-400(A)(B).)

Rule 3-400 is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent an attorney from reasonably limiting the scope of the attorney's employment or representation. (See, *Nichols v. Keller* (1993) 15 Cal.App.4<sup>th</sup> 1672.) Threatening a plaintiff with criminal prosecution to obtain an advantage in a civil case, in violation of Rule 3-400, is a sufficient legal basis to state a cause of action for intentional infliction of emotional distress and to seek monetary damages. (*Kinnamon v. Staitman & Snyder* (1977) 66 Cal.App.3d 893; *overruled* on other grounds by *Silberg v. Anderson* (1990) 50 Cal.3d 205.)

#### **5. Risk of Disqualification in Litigation Based On Firm Members Being Witnesses to Underlying Transaction.**

There are popular misconceptions that exist relating to an attorney being a possible witness to a client's litigation; such as: (1) that law firms cannot try cases where members of the firm will appear as witnesses; and (2) that trial attorneys cannot appear as witnesses in support of their client's case. Due to the following exceptions to Rule 5-210, these misconceptions do not actually hold true. An attorney cannot not act as an advocate before a jury which will hear testimony from the attorney *unless*: (1) the testimony relates to an uncontested matter; or (2) the testimony relates to the nature and value of legal services rendered in the case; or the

attorney has the informed, written consent of the client. (Rule 5-210.)

In any event, prior to doing so, it is important for the attorney to carefully consider many questions, such as: Is it necessary and/or wise for the trial attorney to testify? Can the testimony be provided by another member of the firm, or by the client? Can the argument relating to the attorney's testimony be handled by another member of the trial team? Is there a risk to the client's cause if the trial attorney is subjected to cross-examination or by the specter of arguing his/her credibility to the jury? In drafting the written consent/waiver for the client to allow the attorney to testify, the waiver should be carefully drafted in a way that the document can be disclosed in the event it is necessary to do so in order to fend off a motion to disqualify.

#### **D. Dealing with the Inevitable Conflicts: Waivers, Consents and Disclosures.**

##### **1. RPC Changes have Increased The Nature and Scope Of Disclosures.**

Three (3) examples should be noted:

**(a) Rule 3-310(B):** This rule requires *written* disclosure of certain kinds of present or past relationships in taking on or continuing with an engagement where the attorney: (1) *has* a "legal, business, financial, professional, or personal relationship with a party or witness in the same matter" or (2) *had* a past such relationship with a party or witness (*provided* the past relationship would substantially affect the member's proposed or current representation) or (3) *has or had* such a relationship with another person or entity which would be affected substantially by resolution of the current matter or (4) *has or had* a legal, business, financial, or professional interest in the subject matter of the representation.

For purposes of Rule 3-310 the principal and "of counsel" relationship is considered a single, de facto firm and disqualification of one from representation is imputed to the other. (*People ex. Rel. Department of Corp. v. Speedee Oil Change Systems, Inc.*, *supra*, 20 Cal.4<sup>th</sup> at 1135.) Accordingly, if the "of counsel" is precluded from a representation by reason of Rule 3-310 the firm with which he or she is affiliated is presumptively precluded as well, and vice-versa.

"Disclosure" is defined as "informing the client... of the relevant circumstances and of the actual

and reasonably foreseeable adverse consequences to the client ....” Informed consent is *not* required, however. The rule does not apply to relationships with other members of the firm with which the other party’s attorney is associated, so long as they are not involved in the matter. This rule is strictly for the protection of a prospective or current client, not the parties with whom the attorney had the relationship. (*Allen v. Academic Games Leagues of America, Inc.* (C.D. Cal. 1993), 831 F.Supp. 785.)

Also, Rule 3-310(B) speaks to relationships involving a “member” (individual attorney) and does not speak to relationships involving other members of the firm. However, the Official Discussion states that the rule “is intended to apply only to a member’s own relationships or interest, *unless* the member *knows* that a partner or associate . . .” has or had such a relationship or interest. (Emphasis added.) Contrast the situation where the attorney’s relationship is more to events than parties such that he or she is a percipient witness on contested matters. In subsequent litigation, informed written consent must be obtained where such lawyer is expected to be the trial attorney. (See Rule 5-210; *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4<sup>th</sup> 573.)

**(b) Rule 3-310(F):** This rule requires written informed consent from a client where the attorney is to receive compensation from a third party, and provided only if (a) there is no interference with the lawyer’s independence or with the attorney-client relationship and (b) client’s confidences are preserved.

**(b) Rule 3-310(F):** This rule applies where a corporation, LLC, or other entity pays for separate representation of a director, officer, member, manager, managing partner, etc. The same considerations can come into play where a relative or friend of the client finances the legal fees. Note, however, that the rule does not apply to an insurer-provided defense. Whether the rule applies in the context of fees paid pursuant to a pre-dispute contractual indemnity obligation, or such more nearly resembles the insurance defense scenario is unclear.

**(c) Rule 3-320:** This rule also requires written disclosure to a client where there is a relationship with the *other party’s attorney*, including family ties, attorney-client relationship, living in the same household, or other intimate personal relationship.

## **2. Disclosure and Other Ethical Obligations Above and Beyond The RPC.**

(a) Disclosure requirements beyond the RPC are found elsewhere. Examples include: (1) Other statutes, such as the B&P Code requirements relating to fee agreements, e.g., the absence of malpractice insurance and appropriate indemnity pledge on file with the State Bar are contained in section 6147 (contingency fee agreements) and section 6148 (non-contingency fee agreements where fees are expected to exceed \$1,000); (2) case law, including the law governing fiduciaries generally. (*William H. Raley Co. v. Superior Court* (1993) 149 Cal.App.3d 1042 [member of law firm was a bank director and member of bank’s trust committee which managed defendant’s property; though the bank was *not* a client of the firm, the existence of two fiduciary duties of the partner to the bank and the bank to the defendant created a conflict as to plaintiff, the firm’s present client]; *Allen v. Academic Games Leagues of America, Inc.* (C.D. Cal. 1993) 831 F.Supp. 785 [counsel’s relationship with one party before becoming a licensed attorney created a conflict requiring disqualification, relying on *William H. Raley Co., supra*, and the general principle of Rule 1-100 which states that the rules are not exclusive]); (3) Expert opinion and the standard of care approach;<sup>8</sup> (4) Ethics opinions issued by the State Bar and other bar associations.<sup>9</sup>

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<sup>8</sup> Where applicable rule was not enacted until after the conduct, expert witness often testify that the rule merely codified pre-existing standards observed by lawyers in the community. Where the literal rule does not extend the conduct, experts may testify that the standard of care is broader, using standard of care or common law tenets governing fiduciary relationships. Experts will often rely on the ABA and Model Code rules to establish standard of care. It takes little to qualify such experts. (See *Jeffer, Mangels & Butler v. Glickman* (1991) 234 Cal.App.3d 1432.) The role of experts as Talmudic interpreters of the RPC is controversial, with several schools of thought: (1) question of law for the Court alone; (2) instruct the jury on the applicable or arguably applicable rules and allow a battle of experts; or (3) instruct on the rules, allow counsel to argue the evidence and the jury to decide without experts.

<sup>9</sup> The opinions of other bar associations do not have legal effect and are not binding on the State Bar or the Court’s, but they are often a

(b) Other examples to consider include:

(1) *When are corporate affiliates (parent, subsidiary or sister company) deemed "clients" for conflicts purposes?* The term "client", which is key to conflicts issues, is not defined in the RPC at all, not even as to institutional clients.<sup>10</sup>

Prior to 1997, the issue had been addressed only once, in a State Bar ethics opinion dealing with wholly owned subsidiaries, which determined that a member may take on representation adverse to the wholly owned subsidiary of a present corporate client. (*Cal. Standing Comm. On Prof. Responsibility and Conduct*, Formal Opinion 113 (1989).) This opinion pointed to the possibility of a conflict if the corporate client is the alter ego of the prospective adversary. (See also, Judge Gadbois' ruling in *Baxter Diagnostics Inc. v. AVL Scientific Corp.* (C.D. Cal. 1992) 798 F.Supp. 612.)

The 4<sup>th</sup> District Court of Appeal has addressed the issue in *Brooklyn Navy Yard Cogeneration Partners, L.P. v. Superior Court* (1997) 60 Cal.App.4<sup>th</sup> 248, which adopts the reasoning of the State Bar opinion and holds that only in those limited circumstances where one corporation is the alter ego of the other should parent and subsidiary corporations be treated as the same entity for conflict purposes. The Court specifically rejected the standard of "unity of interests." It noted however, that there may be times that the adverse representation impacts the other entity which *is* the client. The Court noted, however, only "direct adverse consequences" to an existing client are barred by either Rule 3-310 (C) or Rule 1.7 (A) of the ABA Model Rules. This position is consistent with pronouncements under the ABA Code and the Model Code (e.g., Ethical Consideration 5-18 under Canon 5). (See ABA Committee on Professional Ethics, Formal Opinion No. 95-390 (1995); see also, Kari & Gohata, "Resolving Conflicts: Corporate Affiliations Pose Ethical Dilemmas for Counsel," March 1995 *Los*

persuasive source of support for Courts and experts.

<sup>10</sup> Rule 3-600 does emphasize that the organization is the client, as opposed to individuals who act in a representative capacity for the client. Arguably, this limitation extends to corporate affiliates.

More recently, in *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4<sup>th</sup> 223, the 1<sup>st</sup> District Court of Appeal rejected the holding in *Brooklyn Navy Yard, supra*, by affirming a lower court grant of a motion for preliminary injunction and recognized that based on the "unity of interest" standard. The court determined that a pragmatic approach permitted application of that standard, as an alternative to alter ego, under appropriate circumstances.

(2) *Spouses may not both be clients.* While married couples are often viewed as having a unity of interest when one is represented by an attorney, however, in *Hall v. Lindrum* (2003) 108 Cal.App.4<sup>th</sup> 706, the 2<sup>nd</sup> District found that an attorney who had been consulted in a wrongful death action by one spouse had no obligation to advise the other spouse, who never met with or retained attorney, regarding the other spouse's rights with respect to the wrongful death of couple's child, nor could attorney be held liable for failing to join spouse as a party to the suit. The Court found that if the attorney owed any duty to name the spouse as a party, he owed them only to his client.

### 3. **Later Developed Conflicts.**

Though either non-existent or unknown at the outset of an engagement, conflicts can later arise in a number of different contexts:

(a) Later filed pleadings, e.g., amended complaints or cross-complaints, creating conflicts among defendants or other third parties that may not have existed at the time the engagement began and the conflicts data was first entered is one such example.

(b) Another example would be subsequent changes in the firm by merger or lateral hires. Merging of the conflicts data should be thoroughly studied before merging and hiring in any event. (See Peck, "Career Transitions," March 2000 *California Lawyer* 64; Peck, "California Joan and the Ark of Confidentiality: Beware Conflicts When Adding a Partner or Associate," January 1999 *State Bar Journal* 11.) When a lateral joins the firm, his or her own knowledge and relationships from past cases is instantly imputed to the firm and its existing members. (*Henrikson v. Great American Savings & Loan* (1992) 11 Cal.App.4<sup>th</sup> 109, 115-116.)

(c) “Ethical walls,” “cones of silence” or “screening” are no defense after the fact when a conflict is uncovered—but they may well be effective in persuading clients and former clients to give written informed consent. *Id.* Unresolved is the question whether such devices will be effective if employed at the outset of the lateral’s arrival, especially for associates who have no actual client confidences stemming from their prior employment (the issue of “double imputation”). Current law suggests such hiring is permissible. (See, e.g., *Dieter v. Regents of the University of California* (E.D. Cal. 1997) 963 F. Supp. 908 and *Restatement of the Law Governing Lawyers* § 204, Comment (c)(ii); *Jessen v. Hartford Casualty Insurance Co.*, *supra*, 111 Cal.App. 4<sup>th</sup> at 698; *Farris v. Fireman’s Fund* (June 17, 2004) 2004 Cal. App. LEXIS 941.)

(d) Exceptions have been recognized for former judges (*Higdon v. Superior Court* (1991) 227 Cal.App.3d 1667), former government lawyers (*Chambers v. Superior Court* (1981) 121 Cal.App.3d 893, 902) and paralegals, subject to screening upon joining the firm (*In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572). The California Supreme Court recently applied the Doctrine of Imputation to a firm based on the knowledge of an attorney whose relationship to the firm was one of “Of Counsel.” (*People ex. Rel. Department of Corp. v. Speedee Oil Change Systems, Inc.*, *supra*, 20 Cal.4<sup>th</sup> at 1135; see also, cases involving secretaries (*Gregori v. Bank of America* (1989) 207 Cal. App. 3d 291), law students (*Allen v. Academic Games Leagues of America Inc.* (C.D. Cal. 1993) 831 F.Supp. 785), and attorneys formerly employed by client’s competitor in a non-attorney capacity (*Alchemy II Inc. v. Yes! Entertainment Corp.* (C.D. Cal. 1994) 844 F.Supp. 560).

(e) Yet another example of later developed conflict is changes in business clients as a result of subsequent business combinations, e.g., mergers and acquisitions. In the context of these often-complex business relationships, the RPC do not speak of “waivers,” rather “informed written consent.”<sup>11</sup>

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<sup>11</sup> “Informed written consent” is defined in Rule 3-310(A)(2) as: “client’s or former client’s written agreement to the representation following written disclosure. “Disclosure” is defined in Rule 3-310(A)(1): informing the client or former client of the relevant circumstances

#### **4. Recommended Conflicts**

##### ***Clearance Procedures.***

It should be noted that the RPC do not specify that the client must “sign,” only that there is written consent. Clearly, signing is the better practice, both from the standpoint of documenting the consent and from the standpoint of conveying to the client the importance of their decision. Where the client has been asked to sign off, make sure there is a follow-up so as to ensure that the written consent is returned to the law firm and filed appropriately.

#### **5. Other Recommended**

##### ***Procedures.***

It is recommended that attorneys (a) maintain a firm-wide conflicts waiver file in which a copy of the written consent can be filed, for back up purposes; (b) use a second partner to review the consent, to ensure an objective and detached review; and (c) the attorney should maintain form files, which will also serve as a check list of the required disclosures, and to ensure relative uniformity.

#### **6. Claimed Violations of The RPC Pose Significant Risks In Subsequent Litigation With Former Clients.**

The RPC may be cited by expert witnesses and may be the basis for jury instructions. RPC violations are not actionable *per se*, but they are the definitive statement of the standard of conduct of attorneys with respect to the matters covered by the RPC and may be probative of the standard of care, as well. (See, e.g., *Mirabito v. Liccardo* (1992) 4 Cal.App.4<sup>th</sup> 41; *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125. Perceived transgressions of the RPC may have serious consequences in a jury trial; *also see fn. 8, infra.*)

Further, attorneys are barred from being compensated for otherwise legitimate services and earned fees during a period of unresolved conflict in violation of the RPC. (See *Image Technical Service, Inc. v. Eastman Kodak* (9th Cir. 1998), 136 F.3d 1354 [antitrust plaintiff denied recovery of statutory attorneys fees as prevailing party to the extent incurred through counsel who was later disqualified for representing concurrent conflicting interests—another division of the same corporate entity—

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and of the actual and reasonably foreseeable adverse consequences to the client or former client.”

without written informed consent, citing leading California cases on compensation preclusion]; see also, *Blecher & Collins v. Northwest Airlines, Inc.* (C.D. Cal. 1994) 858 F.Supp. 1442, 1457; *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, 10; *Huskinson & Brown v. Wolf* (2004) 32 Cal.4<sup>th</sup> 453 [validates prior authority but permits *quantum meruit* recovery despite failure to obtain client's consent to fee splitting, so long as enforceability is not otherwise prohibited (i.e., no conflict of interest)].)

## 7. Other Disclosure Issues.

**(a) Client Communications During Engagement.** Clients expect to be fully informed about the progress of their matters. The failure to do so is a major source of client dissatisfaction and malpractice claims.

The importance of *written* communications cannot be understated. The use of a writing is calculated to better communicate, stimulate a more thoughtful approach by counsel, allow the client a greater opportunity to absorb the information, fulfill general admonition in RPC Rule 3-500 ("A member shall keep a client reasonably informed about significant developments . . . and promptly reply to reasonable requests for information."), makes a record for defensive purposes, and enhances the lawyer-client relationship, which, in turn, promotes prompt payment and the prospects of future business.

Written communications need not always be by formal correspondence. Alternative methods of making a protective record include, maintaining file memoranda,<sup>12</sup> e-mails,<sup>13</sup> detailed bills with a cover letter, and sending along copies of significant or interesting documents with cover letter.<sup>14</sup>

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<sup>12</sup> Beware of the dangers of informal, excessively candid memos, especially relating to billing problems. They make for devastating blow-ups in a jury trial.

<sup>13</sup> E-mail has the advantage of time and date coding.

<sup>14</sup> Especially: (a) those prepared at substantial expense or which are otherwise significant to the case or the client's understanding of the case; (b) those emanating from opposing counsel so that the client is working with a full deck of cards, e.g., transactional documents or in litigation substantive motions, settlement briefs, sanction or malicious prosecution threats, and

Material events and circumstances that warrant written reports to the client are those that bear (particularly negatively) on the client's objectives. They include losses in court, deposition testimony or witness interviews resulting in harmful or credibility impaired testimony, settlement offers/demands or other significant communications bearing on the availability of a settlement option,<sup>15</sup> the client's rejection of the attorney's advice or other major instances of disagreement.<sup>16</sup> Memorializing important decisions in which the client has concurred (i.e., incurring substantial expense, as in hiring an expert, particularly where the client has accepted financial responsibility, or if outside vendors are expected to look only to the client for payment, this must also be documented with the vendor).

**(b) Informed Consent and Judgmental Immunity.** The Doctrine of Informed Consent originated in the medical malpractice context. The doctrine applies to attorneys through the codification in the RPC as to conflicts waiver based on informed written consent. Informed consent is *not* limited to conflicts.

In addition, the Judgmental Immunity Doctrine protects lawyers from liability arising from conduct based on strategy decisions or

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(c) documents bearing on material changes in the pending matter.

<sup>15</sup> Rule 3-510(A)(2): requires prompt communication to the client of "all amounts, terms and conditions of any written offer of settlement." Also, the Official Discussion to this rule also states that oral offers of settlement should also be communicated if they are "significant." B& P Code section 6103.5(a) tracks Rule 3-510 and section 6103.5(b) provides that such offer and any required communication of a settlement offer shall be discoverable in any subsequent action in which the existence or communication of the settlement offer is an issue.

<sup>16</sup> Examples: (1) client rejection of recommended settlement proposal or insistence on making an offer or demand that counsel deem unrealistic or counterproductive or refuses to participate in a settlement conference; (2) disagreements as to whether to depose or call a particular witness, (3) motions made or opposed at the client's instance which involve the risk of sanctions. [State Bar Ethics Opinion 1997-151, 97 CDOS 6078.]

unresolved or disputed points of law. (*Smith v. Lewis* (1975) 13 Cal.3d 349 (counsel's judgment must be evaluated based on the circumstances existing at the time); *Aloy v. Mash* (1985) 38 Cal.3d 413 (being right for the wrong reasons is no defense).) Informed judgment is important. (*Davis v. Damrell* (1981) 119 Cal.App.3d 883.) In practice, however, second-guessing is still a source of liability risk.

In dealing with the tension between the client's right of informed consent and the attorney's Judgmental Immunity, ask the question: Whose decision is it? Err on the side of involving the client in the decision making process wherever it appears the decision is important, debatable, or risky.

#### **E. Beauty Contests May Not Be Pretty.**

In the typical "beauty contest" (i.e., interviewing with a prospective client with full knowledge that others are also interviewing and with no guarantee of later retention) a prospective client, interested in retaining new counsel, usually for a specific representation, identifies, interviews and ultimately selects that attorney from a pool of competitors. It is often a difficult, and intense process, which poses interesting challenges, whether the prospective client is an LLC, or other business entity, or individual. In every beauty contest there is only one winner, but if not approached defensively, there could be lots of losers. The winner or losers can avoid ugly consequences by using the same disciplined, organized and systematic approach of practicing defensively.

##### **1. Client Intake.**

New or potential clients (those not previously represented by the attorney) present the purest opportunity to determine basic issues relevant to malpractice prevention, including conflicts of interest and statutes of limitations. The decision to take on a particular client must hinge on the answer to several basic inquiries: (a) conflicts (bearing in mind the expanded notions of conflicts beyond adverse interests of past or present clients or with the firm itself, to include relevant relationships or other client or firm institutional issues – discussed *infra*); (b) qualifications, including the attorney's, the attorney's firm; (c) various "comfort tests" relating to the prospective client (e.g., (1) ability to pay (consider credit or other background check), (2) willingness and ability to cooperate and assist, (3) prospective client's

reasonableness of expectations;<sup>17</sup> and (4) track record (including, similar such matters and relationships with other lawyers); and, last but not least, (d) the merits of the case. Even attorneys participating in beauty contests should consider those factors.

##### **2. Confidentiality.**

In addition, preliminary consultations, involving the exchange of confidential information, are and remain privileged regardless of whether an engagement later materializes. That means, attorneys have both a duty to preserve the prospective client's confidences and to avoid later adverse representation substantially related to the preliminary consultation. So, in the context of beauty contests every effort should be made to avoid receipt of confidential information, and at a minimum, one should memorialize what information was received from and provided to prospective client.

##### **3. Declinations.**

Ultimately, the attorney, even after winning the beauty contest, has the power to accept or reject the representation. In those instances in which the work is declined, the attorney should always confirm the declination in writing, especially where, as in a beauty contest, there have been personal meetings with the prospective client, repeated contacts or receipt of materials (confidential or otherwise). Also, all materials received during the process must be returned.

Declination letters *must* establish the fact that the attorney is declining the engagement, and should include (a) the dates the lawyer was consulted, (b) the subject matter of the consultation, (c) confirm the fact, timing and substance of prior communications, (d) disclose statute of limitations or other deadlines (*see Flatt v. Superior Court* (1994) 9 Cal.4<sup>th</sup> 275; *Miller v. Metzinger* (1979) 91 Cal.App.3d 31), (e) disclose reasons (but balance candor against dissuading from pursuing claims or rights), (f) memorialize referrals to other counsel, if any were given to the client, and (g) enclose any materials provide to the attorney by the prospective client. Attorneys should also be aware of whether a file was opened and whether records of the contact

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<sup>17</sup> Be wary of the "Come Hell or High Water" Client and be especially careful about clients whose expectations involve subjective considerations, such as vengeance or honor, particularly where the ostensible objective (e.g., money judgment) will not necessarily lead to the desired outcome.

with the prospective client were preserved, and whether the information was recorded in some form within the attorney's conflict system.

### **3. *Prospective Client's Decision Not to Retain.***

Legally, with respect to the duties to preserve confidences or advise clients as to impending deadlines or avoid conflicts, it makes no difference if it is the client's decision not to hire the attorney, as opposed to the attorney declining the engagement. From a practical standpoint, once the client retains other counsel prior to the expiration of any deadlines, such counsel would necessarily assume the duties relating to the client relationship. (*Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46.)

## **II. CONCLUSION**

Whether representing parties in the context of LLCs or otherwise, practicing law defensively, like driving defensively, requires alertness and care. A focus on the road ahead is just as important as keeping one eye on potential obstacles along the way.

The RPC and applicable case law, which is highlighted above, provide broad standards within which common sense and caution must be applied to resolve the real world situations that constantly face practitioners. In order to avoid common issues that turn easily into mistakes, attorneys must be aware of the basic rules and apply them in a reasonable and prudent manner. Full disclosure and conflict waivers go a long way to short stop most issues, but attorneys should never be afraid to involve their clients in the issues (as part of fulfilling the disclosure obligation) and to seek (or advise their clients to seek) outside and independent knowledgeable counsel to assist them in resolving issues that arise, especially those involving conflicts of interest.

Be careful out there.